Submission in reponse to the Communal Land Rights Bill by:

Land Governance Transformation Network of South Africa (LGTN)

20 November 2017.

<u>A note about this submission:</u>

This submission is an exact replica of the original submission that was commissioned and submitted by the Association for Rural Advancement (AFRA) on 21 November, 2017. The AFRA submission is hereby endorsed in its totally by the LGTN, and re-submitted by the LGTN collectively. LTGN partners individually, as well as other civil society organisations, have also been given permission make use of all or parts of this comprehensive response.

The partners of LGTN are:

- Afesis-Corplan;
- The Association for Rural Advancement (AFRA);
- The Social and Economic Rights Institute (SERI);
- Phuhlisani NPC
- Individual Research consultants, Donna Hornby, Rosalie Kingwill and Lauren Royston who also work on contract to AFRA and other partners

LGTN is a recently formed network that has been established to raise awareness in public discourse about property rights and land governance. As a collective and as individual members, the network seeks to inject the national conversation with innovative ideas and concepts about securing tenure rights by drawing from research evidence on the ground as well as models being tried or tested in the country and elsewhere in Africa and the world.

The network aims to:

- expand official and popular understanding of what is required to bring about substantive shifts in the national recognition of property rights for those all whose tenure rights are not fully legally recognised
- promote the development of a common land administration and records system to serve off-register tenure rights in a range of contexts
- engage in continuous learning; training; evaluation of local and international models; design and implementation of pilots projects and trials;
- advocate for government to design and implement sustainable models of land administration to secure tenure rights for all rights holders in South Africa;
- advocate for the design of new curricular on these matters for teaching in tertiary institutions and in the relevant academic departments such as geomatics and law

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A NOTE ABOUT REFERENCES

Throughout this submission we make reference to research findings and examples, but have not provided a detailed reference list in footnotes or a bibliography. There is a vast literature on this subject, and we felt we could not do justice in a submission of this nature to the full scope of the research findings available. We thus decided to focus on the main argument. We are ready to support the research findings and conclusions with a full reference list should this be requested.

1. EXECUTIVE SUMMARY

The submission critiques the key elements of the proposed land tenure legislation categorised according to key themes:

- the Bill's identification of rights within 'communal' contexts;
- the Bill's concept of 'community membership' defining who has rights;
- the Bill's model of community ownership, rights validation, boundary definition and governance.

The analysis represents more than a sum of these individual elements. There is a central theme that runs throughout our analysis, which is a concern about the direction of the Bill which we believe proceeds from the wrong starting point. Each theme in our analysis is thus a critique of the underlying rationale of the Bill. We are concerned that the consequences will be damaging and prevent more viable solutions to tenure inequality in this country.

The submission questions the assumption that 'communities' are appropriate vehicles for owning land, and this problematic model will be compounded by the requirement of professional survey of community owned land. Around this core assumption revolve a number of problematic elements that are directly related: how boundaries are defined, how rights are validated and how rights are governed. All of these sub-elements are inter-connected. Once the point of departure is 'community', then a range of socio-spatial and governance elements kick in, all of which are problematic. The overall problem discussed in this submission is how these elements combine to entrench socio-spatial exclusion and inequality, contrary to the Bill's state intention to deliver constitutional obligations for tenure equality.

The following are the key submissions:

The Bill has major implications for large numbers of people, arguably two thirds of the population, hence the gravity of Bill and the need to set new legislation in the right direction. The land surface area to which the Bill applies is proportionately small, but due to the densities and social reach across these spaces to urban and commercial farmland, the effects are potentially wide-ranging.

The Bill's conceptualisation of tenure as 'communal' is highly problematic. Customary tenure relationships are not necessarily 'communal'. There are strong elements of social co-operation around shared resources, but this should not be conflated with collective land ownership. Understanding the difference between 'customary' and 'communal' is not mere semantics but is important for the focus and direction of any new legislation that aims to strengthen off-register rights. What African tenures have in common is that rights are held, transmitted and controlled at the level of the family, with certain functions reserved for community-level management of common property and shared resources.

The application of the provisions of the Bill to particular geo-spatial zones and entities is a short-sighted approach to land tenure reform. It will potentially trap people in a particularly problematic

ownership configuration that will be difficult to undo given it will result in registration in the Deeds Office. It does not allow for spontaneous and organic processes of change, mobility and accumulation across and within rural and urban spaces. We believe it will not be sustainable in the short or long term. Its application could nevertheless have extremely adverse long-term effects.

The Bill interprets the constitutional obligation to deliver 'equitable' tenure to mean conversion to 'registered' tenure (i.e. to be the 'same as' the current form of ownership), whereas our interpretation of 'equitable' is to find the legal means to validate existing property relationships. This in turn rests on our interpretation of the property clause in the Constitution to refer to all property, not only registered property. We advocate for recognition of existing rights rather than 'conversion'. The rights already exist in law. Creating new forms of registered rights means changing these rights through a process of conversion to 'registered' rights. This submission is concerned with the implications of conversion, which we do not believe have been fully understood by the lawmakers.

The Bill recognises rights by reference to 'community'. Firstly, this is a fundamentally problematic concept from which to create juristic entities. 'Communities' are imprecise, descriptive and indefinable and cannot be rendered into finite entities. Secondly, granting rights on the basis of 'membership' of communities confines the recognition of rights to particular social and personal identities. This would seem to be unconstitutional in view of the fact that the rights already exist in law. Moreover people straddle urban and rural spaces, and hence interaction in communities is fluid and changeable. It is fundamentally problematic to tie rights to group identities when in the rest of the country registered rights are objectively verified. Moreover, the ownership configuration in the Bill does not allow for the diversity that characterises the rights on the ground.

By placing registered ownership in large collective entities, the Bill misplaces the appropriate locale of ownership and rights-holding in large juristic entities that are inappropriate vehicles of ownership, rather than in the rights-bearers who are constituted in households and families. The latter are in reality the basic rights-holding units, i.e. the locale for holding, transmitting and controlling the land while common property management is the domain of particular constellations of households. This configuration, moreover, lends itself to ownership being appropriated by the authority structures that are either created or endorsed (e.g. existing traditional councils) to manage the property, and who see themselves as the ownership structures. This would be further grounds for viewing the CLTB as potentially unconstitutional, since rights do not pertain to authorities but to the individual rights holders, and this distinction is not sufficiently clarified in the Bill.

The provision for a General Plan for layout planning is ambiguous and it is not clear what survey requirements or methodologies are contemplated. If township layout survey and planning standards are contemplated, these are not feasible in most of the rural areas to which the Bill applies.

The main focus of new legislation should be to develop new systems of evidence via an 'Adjudication Act' so that customary forms of evidence ('living law') are admitted into law and can be drawn on for administrative adjudication of rights, or judicial adjudication in courts. New law should determine the principles, processes and rules regarding what evidence will be considered acceptable to determine a 'right' and the legal weight accorded to different kinds of evidence. These needed to be guided by national and constitutional norms and standards.

The Bill will apply disproportionately to areas defined by old apartheid boundaries and thus embolden the system of traditional authorities to gain further control over property and resources, which is a threat to democratic concepts of an individually constituted citizenry. The CLTB's allowance for 'choice' of authority is welcome, but in reality, most people will not have freedom of choice given historic patterns of entrenched authority and associated networks of patronage.

Research has shown that where the requirements of registration do not match the de facto norms of local property management, rights holders do not adhere to the legal requirements of survey, transfer and conveyancing and the Deeds records lose currency fast.

By creating new rights in the form of 'transferred and registered' rights as the first point of rights-creation means that existing rights change their fundamental characteristics and require compliance with new frameworks, for which a plethora of new structures are proposed. These new structures will compete with old and existing structures and develop their own interests in land, thus compounding an already highly contested environment.

The proposed governance structures are created in a top-down and artificial way, rather than building on existing institutional arrangements. These new structures will add to an already over-burdened institutional environment in rural areas, will lead to more institutional competition and contestation, and will potentially develop their own interests in land and further remove rights from the reach of the actual rights holders. Householder Forums will not develop credibility or competency to defend rights. The 'choice' of authority structure based on a 60% voting margin will lead to large numbers of disaffected people (40%) that will ensure continued instability and nullify the supposedly positive associations with 'choice' and 'local democracy'. Elections themselves are likely to be marred by dispute and conflict.

Jurisdictional boundaries in most of the former homeland areas are already multiple, overlapping and conflicting at various levels, and attempts to create new ownership boundaries in will compound them and provoke new conflicts.

Existing off-register rights are protected by a range of laws that have cut down arbitrary evictions, but still have to be defended on a case-by-case basis, often by means of litigation. What they need is an over-arching land management framework for legally defining, recording, adjudicating and administering these rights on an individual basis (including families or households) in the same way as the 'formal' system does, so that the rights may be systematically recognised and administered by the executive, rather than having to be defended in court.

The submission proposes a different point of departure from the one in the Bill where rights recognition will inevitably apply to particular socio-geographical spaces that are deeply associated with the apartheid bantustans. The approach we advocate is to start with existing rights in households and families and building up a national legal-administrative infrastructure that will accommodate all off-register rights in the country. We believe that new tenure legislation should be laws of general application that recognise rights by reference to people in households and families as the basic rights-holding units rather than large collective entities that should only play a governance function. We propose bringing these rights into a recorded system of rights that is able to recognise individuals in families or households. The system should be set up to articulate with the Deeds Registry, which should be modified to allow for new institutional formats.

Our argument is the key focus of new law should be rebuilding an administrative framework across the country. This would involve expanding the existing land administration infrastructure for all off-register rights to allow for recordal of rights in a range of contexts, including:

- the communal land areas;
- farms;
- informal settlements, including those underdoing upgrading;
- occupied buildings;
- Communal Property Associations and Trusts.

2. INTRODUCTION

The submission comprises several sub-sections that analyse the key elements of the proposed land tenure legislation, namely, the implications of the Bill's identification and definition of communal contexts and community membership; the Bill's proposed models of ownership and rights validation; the Bill's identification of social and spatial units; and the Bill's model of governance.

The critique is not, however, a mere sum of all these individual elements. Each of these sub-sections is interlinked by one central argument that runs through all of them. The central theme throughout our entire analysis is our concern with the very point of departure of the entire Bill. We believe the direction of the Bill is problematic, as it proceeds from what we believe to be wrong starting point. Each individual element that we critique refers to this problem, and is hence a critique of the underlying rationale of the Bill, viz. a model of ownership of land by communities. We do not thereby mean to minimise the importance of either 'ownership' or 'communities', but the effects of combining the two. This is the central core argument running throughout the entire submission. This analysis has meant that the submission is long, as each theme needed to be dealt with as one of several angles of a complex configuration. We believe that the consequences of these factors combined will be very negative and have thus spent a considerable time in assembling this submission.

In brief, our argument questions the problematic model of ownership of land by 'communities' that informs the entire trajectory of the Bill. The assumption that communities are appropriate vehicles for owning land is an extension of the legacy of segregated homelands or bantustans where land tenure concepts were manipulated to serve the interests of white colonial and apartheid regimes. In particular, customary relationships that involve social networks of support and control were misinterpreted to mean that land was held communally. It was convenient for these regimes to emphasise large-scale communalism at the expense of individual households and families, or small groups, who are the actual holders and transmitters of property. This interpretation helped to justify white minority governments crowding black people into restricted reserves in order to sanctify the ownership of most of the land by whites, and creating traditional authority structures to manage these entities. The argument in this submission is that instead of moving away from this model, the Bill is further entrenching the model, and at the same time contributing to entrenching spatial inequality in future. The problematic model is further compounded by modernistic ideas about professional surveying of this community land, which we do not believe is feasible, and we predict it will lead to intractable disputes and long term contestation. There are many new technologically advanced tools for measuring complex land configurations that need to be factored in.

The submission recognises the CLTB's response to Constitutional obligations for equitable tenure in South Africa but is concerned about the general approach and direction of the Bill. We argue that the Bill's definitions of 'communal', combined with its scope of application, are narrow, outdated and limiting and do not sufficiently take into account the vibrant mobility and social interlinkages between variable urban and rural social units and spaces. The reality of spatial, social and economic fluidity and changeability have resulted in hybrid forms of tenure that require innovative solutions that are not isolated in application to particular spatial legacies of the past, but instead build on the present and look to the future. New technologies are providing exciting opportunities for innovation, and it is becoming increasingly feasible to accord tenures that are not necessarily registered in the Deeds office with legally recognised tenure on a par with registered tenures.

By way of contrast to the Bill's application to particular geo-spatial zones and entities, we believe new land tenure legislation should be directed at an over-arching land administration framework that will support all existing off-register tenure systems in their diversity across the country, applicable to all urban and rural areas, and not confined to particular spatial and racial categories. We argue that what is missing is not 'rights' but administration and management of rights, and filling this vacuum will help to make rights recognisable to the state and the world at large.

As elaborated in the submission, we propose a legal-administrative infrastructure which does not single out particular geographical legacies and personal identities, but is of general application to all relevant contexts of 'off register' rights. Instead of registering collective rights, we advocate for a system of legal recognition and administration that brings household, family or individual rights into a system of land records that are held at local government level in land administration offices, as a delegated responsibility of the Deeds Registry, and administered by state appointed land administration officers.

This approach is closely aligned to the approach taken when the local government system was reformed by the Municipal Systems Act, Act 32 of 2000 and the Municipal Structures Act, Act 117 of 1998 as amended. The aim was to integrate past fragmented jurisdictions into an integrated local government system as a whole. We believe that the land management system should follow the same logic. The municipal system has revealed major deficiencies in capacity, which is why we propose to introduce a new approach on the basis of trials, piloting and incrementalism, rather than a sudden systemic switch overnight.

In short, we believe the Bill is a regressive space and time-bound piece of legislation that clashes with the precepts of a modern Constitutional democracy. We advocate instead a future-oriented integrated system for the country as a whole, but which is able to recognise diversity of tenure arrangements. We are concerned that the orientation of the Bill will lock up unwieldy ownership structures (and hence, property) within the boundaries of the former homelands.

We believe that reforms should be based on building a sound foundation based on norms and principles drawn from people's actual practical lived experiences of which we now have a great deal of evidence from grounded research. These existing rights should find legal normative expression and validation, rather than having to undergo creation through 'conversion'. We believe it will be possible to gradually introduce new digital systems of recordal and to issue paper-based titles by means of local registers that are digitally linked to the national registry. The approach that we propose would contribute to breaking down the historic socio-spatial divides associated with racial and socio-economic differentiation over the long run, and provide a sustainable long term transformation to bring all people within a recognised property system.

PART ONE: GENERAL ISSUES

3. UNDERSTANDING THE AIMS AND SCOPE OF THE BILL

3.1 Aims of the Bill

The Communal Land Tenure Bill (CLTB) aims at legal security of tenure for 'persons and communities' who already hold some form of right to land, but which is, by implication, unregistered. The Bill is concerned with respecting Constitutional prerogatives, which, at s. 25(6), requires people or communities with insecure tenure as a result of past discriminatory policies to acquire rights that are secure, or for 'comparable redress'.

3.2 Scope of the Bill

The applicability of the bill is to most of the land in the former homelands, as well as land transferred to African communities since 1994, e.g. in Communal Property Associations (CPAs) and Trusts (that hold land as private property but whose members do not), and may now be transferred to 'traditional' structures as well, directly reaching approximately 18 million people in the former homelands plus land reform beneficiaries outside these areas, and indirectly perhaps double this number. The Bill also applies to settlements on land directly owned by the state (i.e. not held in trust) and guarantees rights of use by individual landholders on that state land.

The Bill does not clarify whether the prescribed processes are voluntary or obligatory, in other words if it will be applied systematically or sporadically.

The land surface area to which the Bill applies is proportionately small, but given the historic and current high population densities on this land, and the potential reach of the provisions of this Bill beyond the former homeland areas into urban areas as a result of urban migration, and to kin who live on farmland, the number of people affected is very large. We estimate that if one includes rights in informal settlements and farms, which we believe should be within the scope of any new legislation on property rights, well over 30 million people are potentially affected. The table below indicates that 60% of the country has off-register rights and have reason to believe this figure is an underestimate. The table is drawn from somewhat outdated 2011 data and may not be fully inclusive. We believe these numbers are growing incrementally, rather than shrinking. The reasons for this, we contend, are the lack of a viable legal framework for recognising diverse tenure forms.

Table 1 Categories of the Population with off-register rights in 2011

Location	**Number of people**	**% population (total of 51,8 million in 2011)**
Communal areas	17 million	32,8
Farm workers and dwellers	2 million	3,9
Informal settlements	3,3 million	6,3
Backyard shacks	1,9 million	3,8
Inner city buildings	200 000	0,38
RDP houses—no titles	5 million	9,6
RDP houses—titles inaccurate/outdated	1,5 million	3,0
Total	**30,72 million**	**59,7**

Source: Hornby, D., Kingwill R., Royston, L. & Cousins, B. *Untitled: Securing Land Rights in Urban and Rural South Africa.* Pietermaritzburg, 2017

The statistics in the Table above illustrate the inestimable importance of finding the right common focus for both communal tenure and other off-register rights, rather than isolating 'communal' tenure as a specific focus of tenure reform. While there are legal gaps with regard to tenure categorised as 'communal', the CLTB follows a problematic trajectory that we do not believe is the best and most beneficial way to close this gap.

A key concern in our argument is that the Bill's definition of 'communal' is a stereotype that does not reflect what are in reality complex, fluid and changing social and economic relationships across the rural-urban nexus as well as within rural land use categories such as labour tenant settlements, rural settlements claimed through restitution, former homeland areas with overlapping mixes of private and common property and commercial farms. These relationships draw on local norms and customs, which many scholars refer to as 'living law' to convey the reality of well understood local practices that are akin to local systems of law even though these practices are not codified or officially recognised as 'law'. The relationships are characterised by social and economic mobility, with strong social interlinkages across various landscapes, urban and rural. These movements have resulted in the spontaneous development of hybrid forms of tenure. The CLTB not only fails to capture these realities, but also threatens to arrest organic and spontaneous processes of change, and potentially sets the old stereotypes inherited from the apartheid era into stone.

A cornerstone of our argument is that the CLTB's depiction of 'communal' is an inadequate representation of customary relationships that rely on different levels of familial and community access to and controls over land. The term derives from colonial and apartheid constructions of tenure where successive white minority governments liked to emphasise the fundamental differences between white-owned land and African occupied land. At a deeper level, however, what most African tenures have in common is that rights are held, transmitted and controlled at the level of the family, with certain functions reserved for community-level management of common property and shared resources. This is not strictly 'communal'. By defining it as such, the point of departure of CLTB is problematic from the start. While people use the term colloquially as a result of long usage, an analysis of the relationships quickly dispels the idea that these are primarily 'communal'.

The potential affects of a Bill of this nature are far reaching in time and space, arguably affecting the majority of country's residents, and we appeal for a re-examination of the point of departure of new legislation. It needs to be developed around a more nuanced analysis of the problem, with a resulting more sustainable legal remedy.

4. OBLIGATIONS ON THE STATE TO OVERCOMING PAST INEQUALITIES

4.1 Section 25 of the Constitution: the 'property clause'

The Bill draws on its obligations to the Constitution, specifically section 25 of the Bill of Rights, referred to as the 'property clause', which includes several sections that interpret secure tenure. The most relevant clauses are considered to be sections 25 (6) and (9:

> *25 (6) A person or community whose tenure of land is Iegally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*
>
> *25(9) Parliament must enact the legislation referred to in subsection (6).*

In this submission we are particularly concerned with section 25(1), which states that no one may be deprived of property. This clause has been criticised for protecting prior (mainly white) rights, and there are calls from some quarters to scrap it. There is, however, a different interpretation, which is to emphasise the property of those whose land is not registered. Thus, this clause also potentially protects the property interests of those whose tenure is not registered. In this submission we do not equate property with registered tenure. We emphasise the property rights of all that are recognised in existing laws, and we draw attention to potential alternatives by which other forms of records may be legally elevated to equalise the legal content of unregistered and registered tenures. The Bill, however, seems to equate insecure tenure with unregistered tenure with the implication that only the current national registration system will secure the land and convert it into 'property'.

There is no statement in the Constitution that 'property' means only 'registered property'. Registration in South Africa is an important form of national public recognition, but the absence of registration does not mean an absence of property relations. Furthermore, s. 25 (5) states that the state must take reasonable measures to 'to foster conditions which enable citizens to gain access to land on an equitable basis'. The notion of 'equitable' is also open to different interpretations. The concept enjoins the notions of 'equity, fairness, justice and reasonableness'. It does not mean it has to be 'the same as', but should rather mean that different forms should be elevated to the same level to accommodate more people's rights equitably. Equitable should therefore mean balancing the scales of power and justice and not simply adopting a particular model that may not be culturally or politically meaningful to all.

The approach taken in the Bill seems to adopt the former interpretation, i.e. to equate the idea of 'equitable' with 'the same as' rather than considering elevating new forms to accommodate more people. It is paradoxical that this approach may end up jeopardising people's rights to land. Simply opening up the current system without major modifications to, and re-examination of, the basic the assumptions underlying the present system will not close the gap in tenure recognition, but simply sweep more substantive issues of social and cultural norms under the carpet.

In this submission we argue that an equitable approach will be more effective if it starts with finding legal means to validate existing property relationships. This approach relies on adopting the above interpretations of 'property' and 'equity', both of which are different from those implied in the CLTB.

Property that is not formally registered in the Deeds Office is already subject to protective legislation that was passed in the mid-1990s in response to the Section 25 of the Constitution[1]. All of these laws acknowledge a form of property right in so far they constrain the absolute rights of registered owners to evict or dispossess occupiers or users without following due process that is laid out in law. That means that these rights already exist in law and do not need to be newly created. The crucial

[1] The relevant land reform laws are:

- Land Reform (Labour Tenants) Act (LTA); Act 3 of 1996
- Communal Property Associations Act (CPA), Act 28 of 1996
- Interim Protection of Informal Land Rights Act (IPILRA), Act 31 of 1996
- Extension of Security of Tenure Act (ESTA), Act 62 of 1997
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE), Act 19 of 1998

Relevant laws passed toward the end of apartheid, but still on the statute books:

- Upgrading of Land Rights Act, No 112 of 1991 (ULTRA)
- Land Titles Adjustment Act, No 111 of 1993 (LTAA).

ingredient these rights are lacking is not conversion, but full legal recognition. As proof of the potential strength of these rights, they have frequently been upheld in the courts. The protective laws have thus proved to be relatively effective in defending rights that have been threatened by arbitrary evictions and dispossessions. In theory these laws have expanded tenure security. The problem is that tenure has to be defended on a case-by-case basis, usually by means of litigation, rather than applied systematically by the executive in the same way that the common law and statute do for registered rights. In other words, these laws are not underwritten by an over-arching land management framework for legally defining, recording, adjudicating and administering these rights in the same way as the 'formal' system does. It should be designed to mirror all aspects of a functioning property system and not merely define the rights.

Moving beyond 'protection' to securing positive and active actualisation of these rights is thus indeed the most urgent prerogative of the state. The question is how.

While the Bill appears to be an earnest attempt to fulfil Constitutional imperatives by filling one of the key gaps in legislation so far, i.e. land held in customary forms by means of customary relationships (narrowed down in the Bill to 'communal land'), we do not believe that the approach adopted in the Bill will be effective in strengthening and enforcing constitutionally recognised property rights. Instead, we set out an argument for an alternative approach. We believe that the approach we put forward will satisfy both the spirit of the Constitution, and the specific clauses for tenure equity, by legally recognising *existing* property rights that lack legal recognition.

4.2 Section 33 of the Constitution: Right to accountable administration

Section 33 of the Constitution provides:

- *that everyone has the right to administrative action that is lawful, reasonable and procedurally fair;*
- *that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons; and*
- *that national legislation must be enacted to give effect to these rights, and must*
    - *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
    - *impose a duty on the state to give effect to the rights above; and*
    - *promote an efficient administration.*

We consider section 33 to be highly relevant to the Bill in so far as property rights require explicit and accountable administrative processes and procedures to legally acknowledge and publicise them. Section 33 gave rise the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA) which spells out the state's obligations for promoting administrative justice. We do not believe the Bill in its current form will satisfy Section 33 of the Constitution or PAJA. We believe the Bill proposes an administrative framework that will fail the test of accountability, efficiency and fairness, as we attempt to demonstrate in the remainder of this submission. The way to satisfy this section of the Constitution is in providing an equitable land administration system for all the country's inhabitants.

4.3 The National Development Plan and SPLUMA

It is no surprise that there is increasing emphasis on overcoming spatial inequality in some of the more recent laws and policies, given the persistent hold of historic socio-spatial inequities in South Africa after twenty years of democracy.

The National Development Plan 2030 (NDP) developed by the National Planning Commission and the Spatial Planning and Land Use Management Act, Act 16 of 2013 (SPLUMA), both foreground the need to overcome spatial inequality as a priority in all future policies, laws and plans. These are legal obligations that should be read with Constitutional obligations in the Bill of Rights. We believe the CLTB is not only inconsistent with the obligations on the state to develop policies that promote spatial equality, but we believe it actually promotes spatial inequality.

Instead of adopting an approach that would promote spatial equality, the Bill promotes geo-spatial entities (some of which have ethnic majorities) that have highly unequal power in relation to central, provincial and municipal spheres of government, but have enormous power over the 'members' who fall within their boundaries. This is because the CLTB must be read alongside other pieces of legislation that bolster the power of traditional authority structures. The CLTB fits into a broader framework of traditional governance in the form of the Traditional Leadership Governance Framework Act of 41 or 2003 as amended in 2009 (TLGFA) and the Traditional Courts Bill of 2017 (TLB). The former applies to specific apartheid-created political and spatial entities as legitimate land administration institutions without sufficient means to opt out.

In summary we are concerned that either singly or when read together with the TLGFA and the TLB , the CLTB will collectively (a) promote spatial inequality; (b) encourage accumulation of customarily held property assets by those in powerful positions in the structures created by these laws; and (c) stimulate sectional ethnic identity politics.

We advocate that SPLUMA should be adapted or modified to take into account varied tenure conditions in the country (which it currently does not) and that all tenure legislation should tie in with legal obligations to be to specified in the Act to address spatial inequality.

5. THE LONG-TERM DURABILITY OF THE PROPOSED LEGISLATION

The twin demands on this law are (a) its reach to a potentially a wide range of people, conceivably the majority of the population directly or indirectly, and most of whom are poor; and (b) the cost-benefit ratio of introducing reforms of this nature. We believe the costs will be unjustifiably high, not only financially, but also socially, given we believe the law will have limited effectiveness and longevity but will be difficult to undo if it is legislated on account of its legal consequences. This legislation has been long and costly in the making and design, and will be extremely costly to set up, implement and maintain. The importance of aiming new tenure law in the right direction cannot be overstated.

In our evaluation we find that the Bill's orientation is extremely narrow in *space* and *time.* It harks back to past racially constructed identities, authorities, regions and legal frameworks, and we believe it will have limited durability. If implemented, however, the law could obstruct and damage the

potential for developing an integrated property system for the country as a whole. By tying up people's property in old apartheid institutions, the law will carry huge social costs that endure well past its shelf life.

Any new legislation on property should be regarded as a wide-ranging national issue and not a narrow sectional issue, and should have at least a fifty-year trajectory to give it durability. Tenure law should avoid over-specificity in scope and application. We are deeply concerned that the Bill applies regressively to particular racially defined regional dynamics (with implicit if not explicit ethnic overtones) that are direct legacies of the colonial, segregation and apartheid past. The Bill is tied to particular socio-geographic contexts that are characterised by entrenched poverty, but nevertheless are in reality dynamic and constantly evolving spaces. Under these circumstances, the last thing that legislation should be doing is exacerbating past racial and spatial discrepancies by attempting to concretise them further.

6. HOLISTIC VERSUS SECTIONAL APPROACH TO TENURE INEQUALITY

The argument advanced in the following sections of this submission rests on the basic premise that imbalance in legal recognition of property exacerbates the historic socio-spatial inequality, the corollary being that historical socio-spatial inequality magnifies the need for legal recognition. The processes that led to these inequalities took a long time to emerge, and will take time to undo, since in that process, new systems of authority and control were set up that now resist having their power withdrawn. New law must have a long trajectory to overcome these legacies, and avoid sectional, short-term and costly 'fixes' that will have limited durability in space and time. We believe that new laws should be aimed at establishing an integrated, overarching land administrative system in the country as a whole, which will progressively extinguish South Africa's toxic homeland legacies.

Rebuilding an administrative framework across the country should thus be the key focus of new law. We propose an approach that aims at expanding the existing land administration infrastructure for all off-register rights to allow for recordal of rights in a range of contexts, including:

- the communal land areas;
- commercial farmland;
- informal settlements, including those underdoing upgrading;
- occupied buildings;
- Communal Property Associations and Trusts.

The approach we propose should be based on a common set of principles that may be applied to a range of tenure contexts, arguing that these rights do already exist, but need to be strengthened by means of systems that tie law to administration and other linked services and utilities.

This holistic approach differs from the CLTB that:

- has sectional interests;
- seeks to create new rights through a process of conversion, when rights already exist;
- does not take into account the existing relationships, and how these rights are ordered in families and households;

- creates or endorses multiple new interests in property in the form of new ownership structures and old and new authority structures that will dilute existing rights held by householders;
- requires new and costly institutions with questionable durability and effectiveness to administer them, when the model for a more durable institutional design is already available in existing local institutions, albeit needing strengthening, expansion and adaptation.

The goal of the proposed approach is to build up a durable long-term land administration system that will stand the test of time and link property rights to a range of other services and utilities in society, and which will in turn encourage investment. Expanding a land administration infrastructure may be likened to strengthening the basic underlying framework that will support a common land management system for the country as a whole.

Land Management is defined as the overarching process of decision-making around land resources, including responsibility for the implementation of the decisions. From an institutional perspective it includes the formulation of land policy, the preparation of land development and land use plans, and the sub-systems for the administration of a variety of land related programmes.

Land Administration defines the activities that "actualise" these policies and plans. These include the functions involved in adjudicating and administering tenure arrangements, resolving conflicts concerning the ownership and use of the land, regulating the development and use of the land, gathering revenue from the land (e.g. through taxation, leasing, sale, etc.) and enforcement mechanisms for these. Increasingly, these activities are supported by formal planning processes. Planning and development functions occur in a variety of contexts in support of, or for the purposes of, both land management and land administration, and these functions mostly occur at the local level.

A useful metaphor for distinguishing between land rights and land administration is a road network infrastructure that is designed to support a range of motor vehicles of all sizes, shapes and models. The road infrastructure symbolises the land administration infrastructure that is accessible to all vehicles by means of an inter-connected set of passageways, each of which can be maintained and upgraded according to need. The vehicles symbolise the diversity of rights that can use this common infrastructure. Just as the costs of building a bridge on a highway, or a new ramp, or maintaining or upgrading a rural road is justified over time by the access to opportunities it provides to all who need to use it, for a variety of purposes, over a long period of time, so can a land administration infrastructure provide a similar support system to a diversity of rights. We cannot afford the potentially wasteful extravagance of administration that is confined to a narrowly defined category of rights holders in time and space.

A land administration is a complex system comprising several 'moving parts' that must all articulate with each other in the interests of promoting linkages with other social benefits, services and utilities. For this reason we submit that the starting point should be the drafting of a White Paper on Land Tenure Reform in which each and every part of land administration can be re-conceptualised in order to reconstruct the entire infrastructure for all off-register rights.

PART TWO: SPECIFIC ISSUES

7. THE BILL'S PROBLEMATIC MODEL OF 'OWNERSHIP'

7.1 'Conversion', 'Transfer' and 'Registration'

Our major concern with the Bill is that, in terms of its own definitions, the *starting point* for recognition of rights is 'conversion, transfer and registration'. These are legal concepts that are extremely circumscribed and heavily loaded with assumptions.

The main assumption is that property is only formed (and thus recognised) once it is converted, transferred and registered. Only then is it understood in law to be 'ownership'. In terms of current common law, registration requires that formal recognition of property involves the application of highly specified and particular socio-spatial and technical-legal formats to qualify for registration, that is, to make property 'registerable'. Property can only be registerable by means of individually surveyed and transferrable parcels of land, and these qualities can only be brought into effect by qualified and accredited land surveying, planning and conveyancing professionals.

Research reveals that these characteristics do not fit the current realities of 'living law' practices on the ground. Without major modifications to the legal notion of registerability, the emphasis on these particularities of registration in the Bill, we believe, is a fatal flaw. The focus of new law should be on making other forms of evidence admissible, so that these may also qualify for recognition of 'ownership' and thus allow for an inclusive property system.

Our contention is that the property rights to which the Bill refers *already exist.* Existing rights are acknowledged and protected by a range of laws enacted in the 1990s, as listed in n1 above. New rights should thus not be created *de novo*, but rather supported and recognised by appropriate legal and administrative institutions. We do not believe that the institutions proposed in the Bill reflect living realities, and are administratively complicated and artificially constructed.

The starting point of new legislation should be existing rights that are held at household level in families, often in lineages or inter-generationally extended families as 'family property'. While new smaller family forms are indeed emerging, particularly in urban areas, many retain links to customary family property. New legal forms of recognition of property should mirror the ways in which this property is already understood and transmitted intergenerationally. The point of departure of the Bill, we believe, should be turned on its head. The focus of new legislation should be the regulation and management of existing rights in households, which means accepting into law new evidentiary principles that draw from customary norms (i.e. 'living law'). These certainly need to be scrutinised to ensure that they meet constitutional principles such as gender and cultural rights, and thus should be regulated in terms of national norms and standards.

A second problematic assumption associated with 'conversion' and 'registration' in the Bill is that the procedures laid down by the Deeds Registries Act, Act No 47 of 1937 and Land Survey Act, Act no 8 of 1997 must be followed in order to render the new rights in property registerable. The problem we raise is that the legal conditions in these laws do not match the way householders manage and transmit land as inter-generational family members. While it is quite possible — and from a legal perspective relatively unproblematic — to register large collectively held property by means of

outside boundaries as proposed in the CLRB, this particular paradigm will not take cognisance of the strength of household members' rights associated with family property.

Collective management should not be confused with collective ownership. In so far as there are collective forms of engagement in community or 'communal tenure' situations, these relate to the *co-management* of common property. The latter in most rural, and even some urban, contexts is characterised by flexible (layered) and not linear boundaries. Force-fitting this form of common property management into a fixed ownership structure we believe will compromise individual rights, and create endless sources of disputation on account of the poor match betwen reality and the model presented in the Bill. This is the crux of the problem with which this submission engages.

Registration via the Surveyor General's Office and the Deeds Registry (as they are currently constructed) means that the driver of legal recognition will always be 'conversion' rather than 'recognition'. This means that existing rights and arrangements must be substantially modified to fit the requirements of conversion and transfer, since these institutions were not designed to accommodate these kinds of rights in the first place. Research has shown, however, that even when rights are converted and titles issued, families do not follow the prescripts of the Deeds Registries Act, and continue to hold, manage and transmit property in their own way. Thus traditional forms of property management persist, and owners transact and transmit property using locally recognised processes and procedures 'extra-legally'. These practices do not seem to change in order to fit in with the requirements of deeds registration, thus defying the apparent 'conversion'. Conversion becomes merely a paper and symbolic act with little substantive value.

As already stated, the driver of change should be existing rights based on widely accepted local norms. Institutions should be adapted to fit them, and not the other way around. These need not be created from scratch but existing institutions such as municipalities and the Deeds Office could be adapted to allow for recordal and maintenance of records of rights at the local level, allowing for integration over time. This function should fall under the political leadership of the national government and the executive direction of the relevant departments, in particular, Deeds Registration, supported by Geomatics, Planning and Tenure in the national Department of Rural Development and Land Reform, and other directorates in Local Government as well as Housing departments.

In short, we are concerned that the Bill does not create the capacity to recognise householder rights held in families, which is where rights actually reside and property transacted, but will elevate the rights of various authority and governance structures, including traditional authorities who will confuse their rights of governance with rights of ownership, which will be a violation of the Constitution. Rights holders themselves term their household interests in property 'family property'. Research reveals that family property has considerable traction in and across space and over time, and it is thus an anathema to transfer ownership to the traditional or authority structures. The Bill will result in ownership residing in large collective entities through processes of conversion, rather than rights residing in the relevant social units.

A further argument against the paradigm adopted in the Bill is that it will put a tremendous burden on the Deeds Registry, since it is not geared for registering the kinds of rights that the Bill actually addresses. That means that titles fall prey to almost instant loss of currency of the ownership information on title deeds. It has been found in a number of research sites that people do not

register transfers of sales and inheritance, preferring to follow locally accepted practices that make sense at the local level, but which are an anathema to the national system. This results in bad alignment of information, which will ultimately lead to information failure in the Deeds Offices. This will weaken the integrity of the Registry's information system, which is regarded as one of the most rigorous in the world; and which we believe should be preserved, albeit with the adaptations we propose.

7.2 Community Title: the 'community' as the registered social unit

Research findings indicate that the holders of property rights are householders in variable family formations residing in both rural and urban contexts and who tend to co-exist between the two spaces. These social units are constantly evolving and appear to be getting smaller, but they are less fixed than those registered on a title deed. It is at this level that rights are held and transacted, even where common property comes into play. We are concerned that by formulating the concept of community title, the Bill does not provide the capacity for rights to reside at the level of the family and household. Community *title* will create de jure '*community ownership*' which will elevate the authority structures as owners instead of the rights holders. Apparently the Bill conflates local community land *management* with *ownership*, which upsets the de facto practice of family property.

There is a history in South Africa of individual titles and rights that were granted to individuals (in reality families), for example freehold and quitrent title; various occupational or residential grants such as Deeds of Grant, Permission to Occupy (PTO) rights; and customary recognition. Other tentative 'rights' were not considered legal at all, such as on farms or informal settlements. In all these contexts, whether legal or extra legal, members of families tend to regard these rights as being held within the context of extended family forms which are variable but largely rest on the premise that rights are transmitted inter-generationally, even when the law seldom allowed for inheritance. It is these rights that new legislation should focus on, with particular emphasis on a suitable administrative framework to support them, rather than new forms of collectivisation.

The model of 'communal title' draws from complex entanglements of segregation, apartheid and customary systems in a way that we believe will have the effect (if not stated intention) of empowering local structures, such as Traditional Councils or even elected community structures, whose role should be confined to highly specified public governance functions. They should not become entangled in the ownership of rights that belong to individual householders, and who are the actual bearers and transmitters of property rights. Their establishment will make them interested parties, and thus unable to fulfil objective governance functions in terms of Section 33 of the Constitution.

Furthermore, there is a general problem with the tendency to conflate customary law and customary rights with 'traditional authorities', now officially termed Traditional Councils (TCs). In spite of the 'choice' of ownership structure provided for in the CLTB, the chances are that many rural people will be strongly influenced to select TCs by default on account of their connection to existing lines of power and patronage networks. In this submission, we not conflate our understanding of customary law with authority structures of any kind, and nor to customary law *per se*, but confine customary law to the idea of 'living law' that represents widely-held norms in and across black rural and urban communities but which might not be normatively expressed as law.

In short, we do not believe that a 'community' is the correct 'juristic person' to hold a title deed in terms of the proposed Deed of Communal Land Title. A 'community' is loose description of a collective that shares some common norms or purposes, including cultural norms and issues of management, but is an unsuitable unit for purposes of ownership (see below).

Although Section 13 gives "families" some rights of consultation before sale, the notion of 'family' or 'family rights' is nowhere spelt out in the Bill, and we believe this should be the starting point. The word 'family' is used in a descriptive sense only, rather than rights-bearing term in the Bill. This is a serious problem given the prevalence of family rights among those to whom the Bill is directed.

Paradoxically, the Bill makes provision for 'break-away' titling by individuals, but does not make provision for family ownership or co-ownership in the sense that we understand and define it. As discussed further below, individual subdivision within communal areas is not really feasible, other than for state and public purposes, such as for church, school, clinic, business and trading; as well as other defined and surveyable public or private servitudes, e.g. for electric and telecommunication pylons, roads and so on.

7.3 Definition of 'Community': broad and nebulous

One of the major concerns with property registered in the name of a community relates to the nebulous concept of a 'community'. In the definitions in section 1 of the Bill, ‘community means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such a group regardless of its ethnic, tribal, religious or racial identity and includes a traditional community’. This definition does not rely on ethnic markers, which is positive, and appears to be gender neutral, which means women's ownership cannot be legally compromised in terms of the Bill. However, the law will not protect individual family rights, and this means that all rights, including women's rights, must be defended at highly localised levels, including in families, which has proved problematic due to the unequal power relations at this level. While this level is where transactions occur, they need to be regulated by national principles.

The entire concept of community + ownership is problematic, especially in view of South Africa's longstanding historic exclusion of black property rights. 'Community' is an ***inherently imprecise*** concept. We acknowledge that there are vibrant processes of local 'community' land management (not confined to race) which will endure, but the concept of community 'ownership' should not be confused with management. For the latter, community membership need not necessarily be precisely defined, whereas ownership requires some precision, either in terms of personal or categorical definition.

We believe that the imprecise and manipulable concept of community ownership will lead to ongoing disputation and confusion, and will not advance tenure security as stated in the aims of the Bill. These weaknesses will lead to traditional and potentially other local structures acting as proxy owners to the detriment of legitimate rights holders

7.4 Definition of 'Community': space and authority

If a 'community' is defined by the boundaries that relate to the homeland era, the chances are that historic tribal authorities will be rejuvenated in terms of the Traditional Leadership and Governance

Framework Act (Act 41 of 2003) and these will dominate property relationships despite the existence of new localised structures in the form of 'householder forums' and 'Land Rights Boards'. These new structures are highly unlikely to be able to stand up to the influence of older homeland institutions, such as traditional authority structures with their long established socio-political networks that go back a long way in time.

We are concerned that these new ownership boundaries will lock rights holders into time-bound structures and spatially bounded areas that are negative legacies from the past, and from which it will be hard to escape in future. This trajectory will act as brake on natural flows of land distribution, as well as existing and widely recognised local processes of transferring rights.

7.5 'Community membership': evidence of rights

Very worryingly, the definition of community for the purposes of registerability of community title implies that the people who live in a particular area under 'shared rules' are the relevant 'members'. The problem with this, is that firstly, many people who consider themselves to be members do not live in the area but spend most of their time in urban areas, or live on farms. Most rural dwellers have members of the family who have acquired or rent other dwellings in informal settlements, rural RDP houses or urban buildings. Due to the strong maintenance of rural-urban kinship networks and ties, many continue to consider their rural base as 'home'. Hence we argue that the starting point should be householders and families, and where they live would then not be a problem. In the case of private property, it is not required that owners can only be the people who live in a certain geographic area.

The corollary is that the Bill, rather than recognising individuals as citizens or residents of the country, only recognises individuals in terms of their identity as community members. And how does someone become a 'member' —what evidence will be acceptable for acquisition of membership? The requirement of membership implies that only the assumption of an identity qualifies these citizens or residents for ownership of property, which surely constitutes a serious violation of property rights in terms of the Constitution.

The main focus of new legislation regarding the legality of rights (i.e. in addition to the administration of rights) should be the principles, processes and rules that will determine (a) what evidence will be considered acceptable to determine a 'right' and (b) the legal weight of different kinds of evidence. There are various customary and other local norms that currently influence access and use rights, such as: length of occupation, familial and kinship relationships, succession and inheritance, social or physical investments people make in a property, etc. There are however, no national norms and standards to guide the processes by which this evidence is adjudicated or validated to determine the legal weight associated with each of these (and other) criteria, or the constitutionality of the evidence, e.g. gender equity.

The Bill's focus on 'conversion' of rights sidesteps this very important first step in defining the legal processes of validating rights. Rather, the Bill forces rights into a collective straightjacket which fails to recognise individual householder rights, and imposes new rules, principles and processes that we consider to be unsustainable.

7.6 Community title and proxy ownership

A major concern with property registered in the name of a community relates to the likely effects on property relationships within the collective. Firstly, local power holders will be able to manipulate and control collective rights to their advantage. The Deeds Office will not detect changes in internal relationships within the community ownership structure. The experience with many dysfunctional CPAs and housing co-operatives suggests that one of the problems is the lack of alignment between the powers of individual members (i.e. families) and the powers of the collective entity. In rural contexts, the latter are likely to trump the former. Moreover, the leadership has access to the resources and is more likely to divert property interests into their own hands. On the platinum belt there has been evidence of commercial gains that are highly unequally spread, and similar dynamics apply in the case of tourism ventures and agricultural projects. Even where limited collective commercial interests are involved, there is an uneven distribution of power and control. In housing co-operatives on the other hand, it has been reported that it has been difficult to engage individual property holders in the collective tasks of managing the property (which are indeed arduous) resulting in the neglect of common property management.

Slapping a legal entity (Deed of Communal Right) over a 'community' (which cannot be defined) ignores the reality that most property relations are pertinent to familial units and how these relate to broader levels in the community, but seldom the entire 'the community' as a whole (in so far as it can be defined at all). In other words, access is granted, and rights are held, managed and transmitted at family level, often in consultation with higher levels. The precise family unit varies across different contexts, and is generally not quantifiable.

A legal entity in the name of a community in the Deeds Registry will, among other problems, completely obscure these 'inside' familial property relationships and will to be unable to regulate unequal power relations in these entities. The closest experience with community title so far has been with housing co-operatives, Trusts and CPAs and in all cases the results have been poor and the majority are dysfunctional in various ways. Moreover, in situations where there are mining interests, Traditional Councils have been known to form commercial entities that monopolise the returns. While some of the weaknesses relate to lack of local capacity and state support, a major issue is inadequate recognition property rights at household level.

We do not believe that Household Forums suggested in the Bill (discussed below) will be sufficiently robust to manage and protect these household rights, and will not be equipped to withstand internal and external pressures on family property. It is the responsibility of the state to provide the necessary country-wide administrative framework, as it does for private property, making allowances for local recording of rights (see 'recommendations' for local records below).

7.7 Family Title

Following on from the argument above, the system of individual Deeds registration does not support or admit family-based rights in all their diversity. It is designed for only one particular model of ownership, that is individual persons or corporations who have rights of alienation. There would have to be substantial modifications to allow for the recognition of family property. In its current form it is thus ill-equipped to meet the challenge of tenure inequality.

Family-based rights are thus thrust into joint ownership arrangements in the form of community title that carries the danger of diluting rather than strengthening rights.

Interests in land should mirror actual social and/or co-operative economic links and ties between the rights holders, e.g. ties of kinship or other family relationships, production or marketing. Since rights held in common title are usually not the 'natural' order of things and do not reflect these ties and relationships, they have to be artificially created and maintained. The Bill thus envisages the creation of a plethora of structures precisely to make up for the lack of organic property ties. With limited incentives, the means of sustaining common title will be challenging and unsustainable.

These concerns point yet again to the need to start with householders and families, rather than 'communities', for recognition of land rights. As mentioned, this does not mean ignoring the reality of communities engaging in various forms of common property management, but should not be confused with vehicles of 'ownership'. Nor does it mean that some forms of collective ownership are not viable. Small production units or kinship groupings within smaller village or farm units may well form organic links that are suitable for formalisation in collective land ownership structures or co-operatives.

The *point of departure* for land rights, however, should not be large groups and collectivities. The model advanced in the CLRB potentially allows for title representing between 10000 and 100000 members. The need to defend rights as large collectives arose historically from the threats posed on black land rights by white minority rule, but these circumstances have changed.

The high rates of urbanisation, averaging at about 2.4% per annum[2], and rising to two thirds of the population at present, combined with the *de facto* strong linkages between rural and urban kin across these urban-rural spaces, have major implications for tenure policy. These trends show that (a) land access and tenure trends are dynamic; (b) there is a rapid spread and cross-pollination of ideas and approaches to tenure across urban and rural spaces; and (c) household sizes are falling resulting in increasing residential units and more demand for more housing units, and correspondingly, tenure rights. In all these contexts, rights of access to, and use of land are invariably handled at the level of the family (which are variable in size and composition), while management or regulation continues to reside with civic or community structures of various kinds in both rural and urban contexts. It is these structures that liaise with broader structures around service provision and other matters of common interest to the community, but need not be entangled with the ownership arrangements *per se*. It is the rights of individual householders in family units that we propose should be recorded, rather than ownership by governance structures

[2] Rates of urbanisation vary across regions and provinces due to changing in- and out-migration movements, which in turn affect changing rural and urban densities. KZN used to be the most densely populated province but migration out means that Gauteng now is the most densely populated, and received the highest share of equitable share budget. The statistics show that population movement is very dynamic and that high rates of urbanisation are set to increase, or at least continue.

8. THE BILL'S PROBLEMATIC MODEL FOR VALIDATING RIGHTS

8.1 Clarifying rights enquiries: distinguishing between enumeration and adjudication

'Rights enquiries' are defined in far too vague a way in the Bill. The concept is in reality a combination of two processes. The first is enumeration of rights, which means listing existing rights as they are currently arranged, without judgement as to their validity. The second phase involves adjudication of rights, which involves judgement according to admissible evidence as described in 7.5 above.

Rights adjudication is the detailed process of validation that clarifies ownership and makes it definitive. In order to adjudicate, adjudicators need to be clear on what evidence is acceptable and according to what order of priority. Hence it would be necessary to formulate new forms of acceptable evidence for the legalisation of existing rights. Clearer definition of evidence will make it possible to set up clearly defined functions of 'rights adjudication', which is conceived as a process of validating rights on the basis of legal norms and standards. Examples of evidence are: duration of occupation, certain recognised familial obligations, certain rights of familial access and land use, succession and inheritance practices and other particular relationships of kin, etc.

Rights adjudication (or validation) is not the same as conflict resolution, though in reality the processes may overlap. A systematic process of rights adjudication is proposed to resolve ownership before conflicts set in, or to resolve ambiguities that may later give rise to conflict. Given that conflicts emerge and gain momentum with any processes of land development or creation of records or titles, specific and separate institutons must be developed to (a) adjudicate rights authoritatively and (b) to resolve conflicts in cases where adjudication cannot resolve conflicts, and in fact may even provoke conflict. Conflicts that cannot be resolved locally can be escalated upwards and may result in court proceedings. One of the main purposes of rights adjudication, however, is to limit cases having to go be resolved on a case-by-case basis either by local conflict resolution mechanisms or by the courts. The idea is to introduce a systematic and predictable process that mirrors registration in the Deeds office. This accords with the private property system where detailed checks by conveyancers and Deeds Registry officials 'adjudicate' the rights according to legal standards of evidence. We therefor propose a distinctive process of rights adjudication to be performed by land administration (LA) officers who are trained in rights adjudication according to new rights adjudication legislation. A 'Rights Adjudication Act' would thus need to accompany any new tenure legislation. Only once our property system has accepted new forms of evidence, can the process of rights adjudication begin. New curricula would also have to be designed for use in tertiary institutions to train new sets of land use, administration and planning professionals and officials.

We propose that developing new forms of evidence and processes of adjudication should be conducted as pilots and trials in areas of high urgency first, e.g. informal settlements, areas with high levels of conflict or disputation, farming areas, etc. in order to test the principles, procedures and problems before they are legislated.

A major concern with 'rights enquiries' as currently conceived in the CLRB (and also other land reform cases) is that they are proposed without any guidance as to the legal forms of evidence that is considered acceptable. The agents who perform the rights enquiries lack guidelines regarding (a) what evidence to accept and the priority of different forms of evidence, i.e. the hierarchy of rights that has been made acceptable in law; and (b) the process and methods for collecting the

information and adjudicating the rights. There is thus no uniformity of approach between different agents, particularly if consultants are contracted to perform this function. Hence we prefer the two-stage process comprising enumeration of existing rights and followed by rights adjudication or validation. Some land rights experts have proposed a country-wide systematic process of enumeration, followed by sporadic community-by-community processes of enumeration and adjudication. These processes could become systematic and obligatory over a longer period of time once the system of administration has been tested in pilots, and is up and running.

8.2 The steps involved in rights enquiries

We propose more straightforward processes of enumeration and adjudication that that will dispense with the confusing sequencing of processes and the multiplicity of structures proposed in the Bill, viz. determinations, rights enquiries, registration, rules, household forums, land boards, etc. The starting point will be confirming family rights. The proposed steps in summary are:

1. Enumeration to be conducted either case-by-case, or countrywide, or both. It has been suggested that Stats SA may be capacitated to undertake this function, but there could be problems with politicisation of information gathering. Detailed enumerations should be site-specific, resulting subsequently in adjudication and recordal of rights. Certificates of access, use and occupation could thereupon be issued.
2. Adjudication requires a prior step comprising compilation and adoption of new legal forms of evidence. This involves the admission into law of widely held social norms (referred to as 'living customary' law) to inform a new set of legal evidence. These must be evaluated according to national standards and constitutional principles. This calls for a national 'Rights Adjudication Act'.
3. The development of new forms of evidence requires a process of building up legal principles based on criteria such as length of time and relationships of kin, tenancy etc. Initially at least, this process would include the evaluation of existing oral agreements as well as documentation and old records such as PTO certificates; letters from chief or civic; letters from ward councillor; affidavits witnessed by Police, civics and/or neighbours; municipal water services accounts; Eskom numbers, GIS references; photographs of dwelling in past and present, etc.
4. After enumeration of rights and the acceptance of new forms of evidence, the rights are ready to be validated in processes of rights adjudication using the newly recognised forms of evidence. This stage in the process can be pilot-driven to start with, i.e. community by community starting with greatest need, e.g. informal settlements, areas with high conflict in rural areas, or high insecurity on farms, etc; or determined by other criteria, such as trials in low-conflict areas to build experience.
5. Adjudicated rights to be legally recognised as rights akin to ownership - albeit not 'freehold' - with certification in the form of issuing new forms of 'titles' (certificates).
6. All tenure records should link the relevant social units (family or household forms) and spatial units. These may differ from the current units used in the Deeds office and Surveyor General's office. In some cases it may involve access to land that is not parcelled by survey but by other means of boundary identification such as natural markers or new GIS and GPS methodologies for geo-referencing.
7. Certified rights should be digitally recorded in local record offices. The records are to be maintained by local land administration officers, overseen by the Deeds Registry. The record system should be co-ordinated with the Deeds system, and allowance made for inter-change, so that rights are not locked in either system as 'silos'.

8. The process above requires few entirely novel structures to be built *de novo* but it does mean a significant expansion of existing functions. The new institutions are proposed to be local administration (LA) offices in municipalities, staffed by state or municipal-employed LA officers. There should also be strong local institutions at community level to help guide people in accessing and updating their records.
9. The new databases must articulate with the national Deeds Office. These databases will assist municipalities perform land use planning and management functions as required by SPLUMA, and it can also be linked to the property tax system
10. The compilation of new curricula in tertiary institutions (e.g. Departments of Geomatics, Urban and Regional Planning and Law Departments) for education and training of land professionals and officers in innovative land administration, land information and tenure recordal system, e.g. new methods of boundary identification, tenure adjudication, public administration and planning. This suggestion fits in well with calls for 'decolonised' education in tertiary institutions.

9. THE BILL'S PROBLEMATIC PROPOSALS FOR IDENTIFYING SPATIAL BOUNDARIES

9.1 General Plan

The provision for a "General Plan" and the general reliance on the Land Survey Act for identifying boundaries is a significant obstacle to securing land rights of off-register rights.

The concept of a 'General Plan' in South African law is a specific planning tool that is required for absolute precision needed for township layout planning. It requires separating out individually surveyed parcels of land, each for particular land uses which correspond with a specific identified public or private owner. Every single parcel must be traceable to a legally registerable owner.

Rigid subdivisions are generally not possible or feasible in communal or semi-communal areas, for reasons we have touched on above, and elaborate further below.

If, on the other hand, the term 'General Plan' is meant to mean a more general form of land use planning rather than a layout plan as defined in existing law, then this should be made clear. If the latter, an entirely different approach to land use and village planning should be adopted, and which will require amendment to the Spatial Planning and Land Use Management Act (SPLUMA) and likely the Land Survey Act.

There are well-known socio-spatial obstacles to rigid layout planning in communal and informal settlement contexts where there some flexibility in the spatial arrangements is required to accommodate local management of rights of access, use and occupation, and rights of way. These are prone to seasonal changes (grazing) as well as various social arrangements that are governed by local norms, e.g. around the admission of relatives or new allocations and uses. These cannot be accommodated by existing survey regulations.

9.2 Subdivision

Given the 'elasticity' of boundaries discussed above, how will subdivisions be enabled? Breakaway titling (private subdivision) is neither a solution to this problem, and nor will the existing arrangements easily yield to subdivision.

Apart from family rights to the main plots that are generally fairly clearly defined and known, there are other use rights in rural communities (and in some urban communities) that are not conducive to accurate survey as would be required by the Land Survey Act, e.g.

- rights of way that are subject to local norms;
- certain access rights to grazing and natural resource uses that are influenced by seasonal changes;
- social access to family plots by certain categories of kin (rather than identified individuals);
- a range of other locally negotiated unsurveyed 'servitudes' (rights within rights) of various kinds on individual an community land.

These rights cannot be resolved through the transfer model. In cases of common property the means by which the underlying land should be held is one that needs thorough debate and discussion, and will not be further pursued in this submission, except to venture that common property is known and recognised in rural and urban contexts in the existing formal system, e.g. where the state or municipalities hold land on behalf of the public or certain publics for particular purposes, and hence a solution would be quite possible to find by evaluating existing legal arrangements.

9.3 Jurisdictional boundaries

Multiple jurisdictional boundaries already overlap, intersect and conflict with one another in rural areas. The proposed new governance structures and rigid boundaries will potentially add yet another layer to an already overwhelming complexity of competing local governance, sectoral and jurisdictional boundaries.

Recent history with municipal boundaries, including ward boundaries, have demonstrated that boundary contestation between municipal and traditional authority jurisdictions is rife in many of the former homelands, both in terms of the scope of the their power and the spatial jurisdiction. The former Transkei presents the most glaring example. The new post-apartheid jurisdictional boundaries do not coincide with the boundaries that were used (and even surveyed) for administrative purposes for the previous century. Thus in any given locality there are frequently multiple boundary contestations. Even where there are no burning conflicts, there are several overlapping or contested boundaries both within and between:

- former magisterial districts
- former Administrative Areas (AA's) known as 'locations'
- former Tribal Authorities
- new Traditional Councils
- new Local Municipalities
- new Local Municipality wards
- villages and village neighbourhoods

One should expect that when rights are being recorded, boundary contestations are bound to surface. When the rights are collectivised under a new entity the unresolved contestations may be brushed under the carpet, but will continue to simmer and arise sooner or later. Sometimes the contestations emanate from rights holders themselves using different boundary systems for different purposes, ranging from very loose non-precise physical boundary definitions to more precise

boundary definitions. As already mentioned, physical boundaries can vary depending on the nature of the rights confirmed, e.g. the boundary for the right to have a homestead garden is different from the boundary that is observed for the right to graze cattle. If one escalates these layered use rights up to the level of a collective ownership entity with a governance institution that is itself subject to a higher jurisdiction, one can expect escalation of conflict. Experience suggests that any technical land surveying process that does not deal with the underlying social and political sources of these conflicts e.g. rights that people exercise at family and neighbourhood level, these surveys will exacerbate the tensions and possibly lead to violence.

10. THE BILL'S PROBLAMATIC GOVERNANCE MODEL

10.1 Administration from the top: role of the ministry

As set out above, the Bill seems to be designed from the top down. There is little to no provision for the direct administration of tenure rights of individuals within families, which we maintain should be the starting point. Instead the emphasis is on creating a plethora of new structures. These relate to both ownership and management structures, and the functions differentiating them are likely to become blurred. The laws and procedures governing the Deeds Registry do not accommodate the holding and transmitting rights of use, access and residence by families. The collective model cannot accommodate these either. The Bill attempts to make up these misfits by overloading the management of the rights with layers of administration and multiple structures that are highly unlikely to be effective in managing the actual rights.

The focus of substantial state budgets will go into paying layers of new officials attached to the Department, rather than at the development of national and local systems to record and protect the rights of rightsholders. The Department will thus have to be over-involved in all aspects of administration, but with questionable benefits to householders' rights. This dynamic results in establishing new levels of authority in an already-overburdened domain of contested authority. It is also possible that some of the structures may become politicised.

Rights and authority are mutually constructed, and the more structures of authority that are *created*, the more likely these are to become embedded in the realm of rights. It is worrying that these new structures are likely to evolve into stakeholders with interests in property in their own right, making further intrusions on individually held rights, further big demands on state budgets, and minimal returns to rights holders.

In short, the proposed model seems to create new burdens on the fiscus as well as departmental institutions that will not achieve the stated aim of strengthening rights, but more likely consume both organisational space and costs that should rather be used for establishment and maintenance of rights records. The proposed institutional arrangements, we maintain will multiply the layers of potentially contesting structures and increase the stakeholders who have vested interests in the ownership of property.

10.1 Administration below: local, community and household

Confusing terminology for community-level governance

The bill refers variously to community members, individuals and household for purposes of governance matters, but the relationships between them, and which social unit is pertinent for which function is confusing. For example, the bill requires various percentages of 'households' to agree on certain issues like choosing a name for the community and choosing who will be the land administrator: are these community members?

Plethora of local structures

In addition to the Departmental over-reach from the top down into community affairs, the Bill proposes several additional layers of land administration at a more localised level. These include:

- the land holding structures (the 'community' that owns the land as a juristic person);
- the Land Administration structures (CPAs, TCs, etc);
- the Household Forums;
- Communal Land Boards (Sections 28, 29, 36-9).

Even if these are conceived as a 'right to democratic control' in the administration of land (s. 3(c)), there is a good chance that these new institutions will create conflicts of interest and authority. Simply creating local structures that draw up their own rules does not ensure local democracy. Without an overarching national support structure, the proliferation of local structures may even diminish local democracy and increase local contestation over power and resources, since new structures feed on local resources and compete for national resources.

The Bill proposes two sets of governance structures at the level of community, who will draw on community 'rules' for managing, maintaining and administering the land:

(i) Formalised traditional or community structures or CPAs. If Traditional Councils are chosen, they will have to be constituted in terms of the Framework Act, and if CPAs are chosen, they must be formally constituted in terms of the CPA Act.

(ii) Household Forums of 20 and 30 members to oversee day-to-day management.

It would seem that the Department is drawing from the model of Sectional Title, in terms of which:

- the Body Corporate (BC) in sectional title schemes is mirrored in the CLTB by a governance structure, in theory chosen by the community, such as formal Traditional Councils or CPAs
- the Trustees elected by the BCs in sectional title schemes are mirrored by Householder Forums proposed in the CLTB.

This is a very unfortunate replication of a model that simply does not fit tenure in communal and informal settlements. With Sectional Title, each rights holder has the equivalent of a surveyed property with freehold title, while the common property is also a surveyed parcel of land. The CLRB however, creates a single "Deed of Communal Land" for the all members' with their individual interests highly undefined. There are references to 'households', 'individual' members of the community, families, etc but, unlike sectional title owners, the actual individual shares in the CLTB model are murky.

Section Title owners, on the other hand, are highly secure in their ownership of individual parcels. With this in mind, the distinctions in governance over individual and common property are clear and

rule-bound. Even with this clarity, there are numerous sources of confusion and dispute between owners and administrators in sectional title schemes. Body Corporates invariably contract private sector property managing agents to manage the property on their behalf, given the extremely onerous, meticulous and time-consuming demands made on the Trustees. Sectional Title apartments are geared towards, and largely owned by middle class owners who can afford paying managers and are legally obliged to raise levies for short and long term maintenance. It is very difficult to expect under-resourced 'community' structures to manage both physical maintenance and micro-management and administration, not to mention the internal land relationships and tenure transfers.

The Household Forum members who are to be responsible for day-to-day management of communally owned land, will have to receive and make reports, administer the rules and update the registers. Both the ownership and administrative structures require a certain level of administrative objectivity and training, time, budgets and access to modern communication channels, probably with limited resources and payment (budgets for paying administrators appear to be a discretionary item in the Bill). Experience of CPAs has been that these criteria are not capable of being met.

On the point of objectivity, it is not likely that either the ownership vehicle ('community') nor governance vehicle, in the form of TCs or large CPAs will be able to be disentangled from community public and political affairs.

At a higher level, the general management and administration, including maintaining registers, resolving disputes, facilitating the extension of municipal functions and services and overseeing development are proposed to be undertaken by Communal Land Boards (9-15 paid members), thus creating yet another layer of authority and interest that are likely to come into conflict with the other structures, including Municipalities, Traditional Councils, CPAs, etc at some point. While these are vital functions that we agree should be performed by land administration officers, we believe these functions should rest with existing municipal structures.

What is missing is the development of dedicated conflict resolution institutions. The proliferation of disputes is largely due to the lack of clearly defined legally acceptable evidence of customary or informal rights. This means that there is no means of validating and verifying contested rights outside of the courts. The development of new legal standards for validating rights should reduce conflicts and litigation via the courts, since there will be clear criteria to resolve them outside the courts. There will still be conflicts that are unresolvable at family or community level, for which dedicated resolution institutions need to be designed with highly trained expertise to service them. These institutions will also need to draw on the legally accepted forms of evidence to adjudicate them.

In short, creating a collective body for ownership produces significant problems for decision-making – as is evident in the existing CPAs. We propose that rights should rest with individual/family landholders, regulated and administered by an overarching local administration system which will recognise off register rights, and not only communal rights. This system will require the development of strong local institutons. The administrative institutions, however, should not own collective interests and shared resources.

11. THE BILL'S FAILURE TO APPRECIATE THE CHANGING DYNAMICS IN CUSTOMARY AREAS

One of the basic assumptions underlying this submission is that former homeland or communal areas are highly dynamic socio-geographical zones, as already alluded to. The Bill seems to overlook this. We are concerned about the stereotypical view of 'communal' areas taken by the Bill, and the possibly devastating effect it may have by potentially freezing social and tenure characteristics that are in fact attempting to break out of the past mould. Among several examples of this dynamism is the highly visible phenomenon of emerging middle classes building homes in non-rateable areas under existing Traditional Councils. These sometimes substantial homesteads can be seeing strung out along the main roadways. The government itself is increasingly concerned about the proliferation of building construction outside of building regulations, and the avoidance of planning regulation and, in particular, of taxation.

There has always been, and still is, a robust urban-rural connection caused by outmigration from these areas to cities, and the high rate of urbanisation has already been remarked on. Now the interconnection is being strengthened by a growing in-migration to the rural areas by people who maintain strong urban ties. This socio-demographic dynamism resulting in a growing middle class in the customary areas will begin to make an increasingly exponential impact on the class dynamics of property relations in those areas in the future. It is therefore imperative that new legislation takes into account this dynamism and looks to the future rather than the past.

12. PREDICTIONS OF OUTCOMES

Based on our work on the ground over many decades, we predict the following:

- Family rights (including individual rights within families), which are the *de facto* property owning units, will be by-passed and new interests in property will be created in favour of new community structures.
- Substantive rights held in families or households will continue to lack legal recognition.
- Land registered in the Deeds Registry, and layouts registered in the Surveyors General's Office, will soon fail to reflect the current realities of rights of ownership on the ground.
- It will be increasingly and exponentially difficult to maintain currency of local and national registers.
- There will be potential collusion between collective ownership structures and business and land development interests, including tourism and mining.
- Household Forums will not gain sufficient traction, nor have the administrative resources and expertise to represent the interests of families and households, keep community records up to date and withstand the pressures on property from third parties or business interests.
- Communal Land Boards will be vulnerable to corruption and will struggle to keep on top of the demands of maintaining an up-to-date land information system.
- The complicated layers of new administrative structures and processes will function in 'silo's' and in competition with each other, and struggle to act in concert as an integrated system that articulates with a range of other related institutions, which are basic requirement for effective land administration.
- The newly created structures are likely to become new forms of 'interest' in property and become entangled in contestations over rights.
- The continued murkiness of ownership will adversely affect public and private investment.

- The ineffective reach of the new structures will result in the resumption of *current practices* in communities.

13. RECOMMENDATIONS

13.1 General

While the Bill has attempted to fulfil section 25 of the Constitution, our contention is that the point of departure of the Bill is highly problematic. We propose the development of a White Paper on Land Tenure Reform to reassess the approach adopted in the CLTB, and to provide a forum for wider consultation and more nuanced approaches to modelling tenure reform prior to the drafting of legislation in the form of Bills.

The proposed model for tenure reform is based on flawed assumptions as to where to locate the legal recognition of property rights. Furthermore, the Bill does not accommodate the diversity of tenure practices that exist on the ground. We believe that old assumptions for tenure reform need to be revaluated in a White Paper on Tenure Reform in order to design appropriate legal principles for tenure reform that focuses on the development of an integrated land administration system for the country as a whole.

We suggest that any new legislation on tenure reforms should extend its scope beyond 'communal land' in the former homelands, and include off-register rights on farms and in informal settlements where individual titling has thus far struggled to provide a suitable 'fit' for the practices in all these contexts that draw from 'living law' norms that are not consonant with the current national registration system.

Our responses and recommendations are based on our assessment that the basic theoretical, legal and social assumptions that underlie the Bill are problematic, e.g.

- Land governance institutions in their current form, principally the Deeds Registry, Surveyor General's Office and planning regulations provide an appropriate legal framework for registering off-register rights.

- A law to protect 'communal tenure' is best achieved by means of a law that is only applicable to specific subjects identified by their identity, in other words a law of personal application, rather than a law of general application.

- 'Communities' are appropriate social units for land ownership rather than families.

- Customary arrangements are equivalent to 'communal' property.

- Customary law is equivalent to the official rules and systems of traditional and community authorities, rather than as normative expression of local practices or 'living law';

- Community governance structures (new or existing) are on their own the appropriate vehicles for administering and maintaining collective rights.

The signatories to this submission maintain that the starting point of new legislation should be the consolidation of existing systems of off-register rights, which requires developing systems to recognise them from the ground up. Existing institutions such as the Deeds Office and Surveyor-General's Office need to be adapted to accommodate these rights. An effective design should start with 'what is'.

A 'bottom up' approach does not imply starting from scratch, but adapting and extending existing, institutions that have a proven track record. Any newly created local institutions must be designed to articulate with municipal, provincial and national institutions, including the Deeds Registry and Survey General's office, to ensure checks and balances and minimise the possibility of local corruption.

In contrast to a law of specific application, i.e. 'communal tenure' which rests on personal criteria, our proposal is for laws of general application that covers all off-register tenures and makes allowance for both diversity and commonality. Their characteristics require thorough examination so that they are be better understood and can be legislated for in a long-term and sustainable manner.

Recognising the characteristics of off-register 'social' tenure systems will indeed be challenging, time consuming and require a dedicated and adequate budget. We believe the approach we propose will be cost-effective and sustainable if undertaken judiciously and with the long view in mind, and thereby offer a more durable basis for property rights. The approach we propose to new legislation and administrative systems will thus admittedly have a longer trajectory in both their conceptualisation and implementation. Since the aim is to build a long-term sustainable and durable system, we should not balk at taking time to consult, conceptualise, trial and implement. In the meantime existing land tenure laws that protect rights should be strengthened and made permanent so that while an integrated administrative system is being built, rights are protected and extended and do not need to wait for legalisation.

First up for new legislation should be legal definition of new forms of evidence in order to categorise social and customary norms (what we referred to as 'living law') into a format that is legally recognisable, thus allowing for the adjudication (validation) of these new forms of evidence. This process should be followed by recordal thereof and long-term record maintenance. These processes should all be accompanied by the development of dispute resolution institutions. These institutions will be able to draw from these forms of legally accepted evidence to settle disputes. In cases that cannot be resolved through rights adjudication and dispute resolution processes, the cases may proceed to litigation where the Courts will also be able to draw on this legal evidence.

A national Public Land Protector (similar in concept tot the idea of an 'ombudsman') is strongly recommended as an independent institution to whom the public can turn when official channels are not seen to be serving the interests of the public, and in particular to hold the government's institutions and officers to account.

The focus of this submission thus moves in a very different direction from the Bill. We believe that the driver of legal recognition should a recordal system for existing rights, and not 'conversion'. A major concern with the Bill is that it potentially locks the majority of the country's citizens into a time-bound, backward looking trajectory inherited from the past, even if it the intention is to register communal land in the Deeds office. We believe this registration will signify a nominal rather than

substantial shift in rights of property, since the new ownership will be in the name of a 'community', which is likely to be monopolised by various local and traditional councils, while the *de facto* rights of householders will be severely compromised. We do not believe the 'break-away' option of individual title is feasible given the social enmeshment of local property rights.

13.2 Specific recommendations

- Draft a White Paper on Land Tenure Reform.
- New tenure legislation should apply to all off-register rights, and not be restricted to 'communal rights'.
- The key driver of legalisation of off-register tenures should not be 'conversion' but rather 'recognition' of existing rights through a recordal system.
- Start with enumerating existing rights of households/families
- Legislate a Rights Adjudication Act — allow for the admission of new forms of evidence to validate rights in order to empower rights adjudication/validation processes with the new legal forms of evidence with which to make authoritative and definitive decisions on individual rights.
- Develop conflict resolution institutions and local and rights dispute forums with highly trained personnel.
- Start with pilots and trials, with thorough processes of consultation and learning.
- Develop digital records of enumerated and validated rights, to be held by municipalities at municipal level, but feeding in to a national digital repository maintained by the Deeds Registry.
- Introduce new Curricular and Training modules in tertiary institutions for effective education and training of a large number of skilled land administration personnel to work in government in rights adjudication, dispute resolution, records collection, records maintenance, etc

14. APPENDIX

14.1 Background legislation with which any new land administration system must articulate

Any new legislation must be cognisant of all existing law and institutions that impact on property rights and new laws, and are conversely impacted by new laws.

Spatial Planning and Land Use Management (SPLUMA), Act 16 of 2013
+ Zoning schemes and Municipal bylaws and Ordinances (various)
Traditional Leadership and Governance Framework Act, Act 41 of 2003 to TKLB
Spatial Data Infrastructure Act, Act 54 of 2003
Recognition of Customary Marriages Act, Act 120 of 1998
Land Survey Act, Act 8 of 1997
Interim Protection of Informal Land Rights Act, Act 31 of 1996
Land Titles Adjustment Act, Act 111 of 1993
Law of Succession Amendment Act, Act 43 of 1992
Upgrading of Land Rights Act, Act 34 of 1992
Intestate Succession Act, Act 81 of 1987
Proclamation R188 of 1969
Administration of Estates Act, Act 66 of 1965
Deeds Registry Act, Act 47 of 1937
Proclamation no. 26 of 1936
National Environmental Management Act, Act 107 of 1998
(Environmental Impact Assessment Regulations of 2014)
National Environmental Coastal Management Act, Act 24 of 2008
National Environmental Management- Waste Act, Act 59 of 2008
National Environmental Management- Biodiversity Act, Act 10 of 2004
National Environmental Management - Air Quality Act, Act 39 of 2004
Local Government Municipal Property Rates Act, Act 6 2004
Traditional Leadership and Governance Framework Act, Act 41 of 2003
Provincial Traditional Leadership and Governance Act, Act 4 of 2005 (various provinces have their versions)
Minerals and Petroleum Resources Development Act, Act 28 of 2002 (MPRDA)
Municipal Structures Act, Act 117 of 1998
Municipal Systems Act, Act 32 of 2000
National Heritage Resources Act, Act 25 of 1999
National Forestry Act, Act 84 of 1998
Sea Fishery Act, Act 12 of 1988
Conservation of Agricultural Resources Act, Act 43 of 1983
National Environmental Management Act, Act 46 of 1998
Transkei Environmental Conservation Decree No. 9 of 1992
National Building Regulations and Building Standards Act, Act 103 of 1977
National Roads Act, Act 54 of 1971 - National Roads Amendment Act, Act 24 of 1996.
Subdivision of Agricultural Land Act, No 70 of 1970
Administration of Estates Act, Act 66 1965;
Wills Act, Act 7 of 1953
Advertising on Roads and Ribbon Development Act, Act 21 of 1940