

10 August 2016

High Level Panel on the Assessment of Key Legislation
Parliament of South Africa
Committee 2: land reform

Attention: Committee 2 - Land Reform

SUBMISSION OF COMMENTS BY AFESIS-CORPLAN

Thank you for the opportunity to make a submission to the High Level Panel on the Assessment of Key Legislation. This submission is made on behalf of Afesis-corplan (www.afesis.org.za), a development NGO situated in East London whose work in land and sustainable human settlement has a national footprint. We would like to make the following two submissions, each of which is explained in more detail in the next pages:

- Submission 1: Communal land administration
- Submission 2: Managed Land Settlement

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Yours sincerely



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Submission 1: Communal Land Administration

Comments in this section directly relate to the focus area on "tenure security and rural people's capacity to protect and enforce their land rights in the face of countervailing interests."

There is almost no legislation governing land administration in communal areas of South Africa. The Bantu Areas Land Regulations, Proclamation No. R.188 of 1969 (known as R188) have been repealed and no new legislation has been passed to replace it. Government intended (through, for example, the Communal Land Rights Act (CLARA) no.11 of 2004, which was subsequently struck down by a constitutional judgment) and intends (through the new draft Communal Land Tenure Bill (CLTB) 2016) to develop new legislation to govern land tenure and land rights for people living in communal areas. In the interim, while this new legislation was being developed government introduced the Interim Protection of Informal Land Rights Act (IPLIRA) no.31 of 1996 so as to protect people from being evicted from land they are presently occupying.

As can be seen from the legal and constitutional challenges to CLARA and the difficulty in getting agreement on the content of the new draft CLTB, it is likely to take a long time for all stakeholders involved to negotiate and agree on legislation to govern land tenure and land administration in communal areas. One of the main reasons for these disputes over the content of the future communal land tenure policy and legislation is as a result of the differing views on how to deal with land tenure and land administration in communal areas. Some stakeholders want to transfer land to either democratic land holding entities (like Communal Property Associations) or to traditional leadership structures (like Traditional Councils); others want to privatize all communal land; and yet others want to introduce a systems of public land recording that maintains more 'social' forms of tenure¹.

In the mean time, while this debate around appropriate tenure forms plays itself out, it is recommended that:

- i. the IPLIRA legislation be amended so it becomes permanent and does not have to be updated each year.
- ii. IPLIRA regulations be developed:
 - (1) drawing on the United Nations Food and Agricultural organisation's '*Voluntary Guidelines on Responsible Governance of Tenure*'² which South Africa has endorsed; and
 - (2) using the '*Interim procedures governing land development decisions which require the consent of the Minister of Rural Development and Land Reform as the nominal owner of the land*'³ as a guide,

These amendments and regulations should establish a local land records system that gets introduced incrementally across the country. These records should, after following due processes as outlined in the regulations, determine who has what rights to which pieces of land in a way that accommodates 'loose' (physical and social) boundaries associated with more social forms of tenure. This new records system should sit alongside and be compatible with the existing land registration system (that involves the Survey General's office and the deeds registration system).

These recommendations are elaborated on in an as yet unpublished research paper conducted by Afesis-corporation for the Housing Development Agency (HDA) on "Rethinking Communal Land Administration: Unlocking human settlement development in communal land areas". Contact the HDA for copies of this research. When the reports are published they will also be available via: <http://goo.gl/beVt3o>

¹ "Social tenures" is an umbrella term that describes off-register tenure rights protected by the IPLIRA in both communal land areas and various urban contexts.

² see <http://www.fao.org/nr/tenure/voluntary-guidelines/en/> accessed 21 July 2016

³ which were approved by Polcom on 20 November 1997 and amended on 14 January 1998 and also in terms of Section 3(1)(a)(ii) of Act 112 of 1991 as amended by Act 34 of 1996. see: <http://goo.gl/lknkgs> Accessed 21 July 2016

Submission 2: Managed Land Settlement

Comments in this section directly relate to the focus area on "land redistribution and restitution in the context of redressing skewed patterns of land ownership based on the past laws and practices that were racially discriminating".

Despite the South African Government providing 3.7 million housing opportunities between 1994 and 2014, the housing backlog for the country still managed to increase from 2.1 million houses to 2.3 million houses over the same period.⁴ If, as a country, we are to seriously address the challenge of the housing needs of these 2.3 million (and growing) households, we cannot continue with similar strategies and programmes that we have been using up to now. We have to try new approaches.

Managed Land Settlement (MLS) is one such new approach where people are allowed to settle on land in an organised manner, with access to at least basic tenure and basic services. Over time, and with support from government and others, using instruments such as the upgrading of informal settlements and other programmes, they can upgrade their neighbourhoods and houses.

The National Government has identified the upgrading of informal settlements as one of its key programmes within Outcome 8 (on Human Settlements) in the Medium Term Strategic Framework (2014-2019). However the Upgrading of Informal Settlements Programme (UISP) is limited in scope in that it predominantly focuses on the upgrading of settlements only after people have occupied land without the authority of the land owner. What is missing from the set of government programmes is a MLS programme that will pre-empt the need for households to unlawfully occupy land in the first instance.

The MLS approach can be implemented using existing government programmes, like the UISP, which already makes provision for the programme to be implemented on greenfield land in that "the rules of the [UISP] programme will also apply to the development of the relocation areas with the changes relevant to particular contexts."⁵

The anticipated development of a new housing white paper - and the subsequent development of a new Human Settlement Act (to replace the Housing Act no 107 of 1997) and development of a new human settlement code - provides a unique opportunity for such a comprehensive incremental settlement approach to be accommodated in policy and legislation.

These recommendations relating to Managed Land Settlement are elaborated on in an as yet unpublished research paper conducted by Afesis-corporation for the Housing Development Agency (HDA) on "Managing and Curbing Unauthorised Land Occupation". In particular see annexure 3: Managed Land Settlement.⁶ Contact the HDA for copies of this research. When the report is published it will also be available at: <http://goo.gl/I6wNRV>

⁴ Sisulu L, 2014, Speech by Minister of Human Settlements LN Sisulu on the occasion of the Budget Vote of the Ministry of Human Settlements, 15 July 2014. National Assembly Chamber, Parliament.

⁵ section 3.9.C. of the UISP programme in the Housing Code - 2009

⁶ Note that sections of this submission 2 on Managed Land Settlement are extracts from this annexure.