

# Restitution

A review of the findings of the High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change – December 2017

The High Level Panel found that:

*The poor outcomes and slow pace of restitution have been confirmed by numerous government reports. The public hearings testified to the divisions and disappointments restitution has sown on the ground.<sup>1</sup>*

## Key issues at a glance

Core problems	Principal HLP recommendations
<ul style="list-style-type: none"> <li>● Currently there are 7000 unsettled and 19000 unfinalised old order claims which will take 35 years to finalise at current rates of progress.</li> <li>● New order claims lodged to date will take 143 years to settle.</li> <li>● The Commission is overloaded with functions, lacks capacity to settle claims and provide post settlement support.</li> <li>● Institutional systems are in disarray.</li> <li>● Administrative settlement of claims has been vulnerable to corruption.</li> <li>● Overlapping and conflicting claims are complex to resolve.</li> <li>● Claims have been amalgamated and diverse claimants pushed into dysfunctional CPAs.</li> <li>● Settled claims lack adequate support</li> <li>● Economic and developmental outcomes of Restitution very poor.</li> </ul>	<ul style="list-style-type: none"> <li>● Prioritise settlement of old order claims consistent with LAMOSA judgement.</li> <li>● Restore statutory independence of Commission from DRDLR and appoint regional land claims commissioners as per the Act.</li> <li>● Strengthen institutional systems and capacity of the Commission.</li> <li>● Appoint permanent judges to the Land Claims Court.</li> <li>● Urgent amendments to the Act to more tightly define community and prevent appropriation of claims by persons not qualifying for Restitution.</li> <li>● Unbundle dysfunctional CPAs</li> <li>● Require Land Claims Court scrutiny of settlement agreements to ensure just and equitable compensation.</li> <li>● Clarification of the concept of ‘feasibility’</li> <li>● Create strong and enforceable duties on the DRDLR and on other departments and spheres of government to provide a full range of technical, financial, resource, administrative, accounting and other support to claimants who receive restoration of land.</li> </ul>

<sup>1</sup> HLP, 2017: 36

## Problem statement

There are still over 7000 unsettled and over 19000 unfinalised “old order” claims. At the present rate of finalising 560 claims a year, it will take 35 years to finalise all old order claims, new order claims that have already been lodged will take 143 years to settle, and if land claims are re-opened and the expected 397,000 are lodged, it will take 709 years to complete Land Restitution.

The Commission was not set up to deal with the number of claims lodged. The Commission has poor capacity: staff lack the legal and historical skills and knowledge necessary to do their job; the filing systems and digital database of the Land Claims Commission are in disarray; and high staff turnover contributes to poor institutional memory.

In 1999 the Commission was given the capacity to settle claims administratively, out of court, in order to speed up the process of settling claims. This decision had unforeseen consequences. Administrative settlement made the process “personality driven”, ad hoc, and vulnerable to corruption. Many speakers at the public hearings identified corruption as a key concern, with government officials described as “vultures”. Claims were “bunched” together and artificial Communal Property Associations created in the process, thus ignoring the definition of “community” eligible to apply for restitution. CPAs are often dysfunctional, a key issue noted in the public hearings. Furthermore, the Commission has not been effective at researching claims, and has frequently settled claims despite a lack of credible research. Unsurprisingly, there are many unresolved overlapping and conflicting claims, which contribute to ethnic and tribal tension, and xenophobic attitudes. Because of extremely poor information systems, overlapping claims are even discovered *after* claims to the same land have been “settled”. As a result, claimants cannot develop the land and often have to hire their own lawyers to fight the case, which is a significant financial burden. Unable to adequately process claims despite their legal powers, the Commission has referred many cases to court. The Land Claims Court is overwhelmed with cases regarding the validity of claims, the nature of just and equitable compensation and feasibility. Despite the enormity of the task, there are no permanent judges of the Land Claims Court.

The economic and developmental outcomes of restitution have been very poor. However, the focus on “post-settlement support” has not dramatically improved outcomes and places an unreasonable burden on the Commission to perform duties that are in the mandate of other government departments. A fundamental issue identified in numerous reports on the performance of land restitution, is that the Commission has been given, or has taken on, too many responsibilities outside of its remit. (Genesis Analytics, 2014) This further compromises the Commission’s ability to keep up with core tasks, such as records management, communication, and research. It also has budget implications.

Many restitution awards are inconsistent and do not provide real redress, particularly when claimants are compelled to take smaller cash settlements, or the emphasis on keeping land productive compels claimants to enter into strategic partnerships against the wishes of some. Many claimants feel disempowered by the process.

## HLP Recommendations

1. Land claims lodged on or before 31 December 1998 need to be resolved expeditiously, consistent with the order of the Constitutional Court in the LAMOSA judgment.

2. The statutory independence of the Commission from the Department of Rural Development and Land Reform needs to be restored and regional land claims commissioners appointed in terms of section 4(3).
3. The capacity of the Commission needs to be rationalised.
4. The Land Claims Court needs to be stabilised by the appointment of permanent Land Claims Court judges.
5. Create an independent panel within the Commission to research claims.
6. Amendments to the Restitution Act that are urgently required include –
  - 6.1. amendments to the definition of “community” to –
    - Incorporate the principles established in the Kranspoort judgment; and
    - Ensure that the interests of those truly dispossessed are not diluted by piggy-backing on claims by persons not dispossessed of rights in land, including traditional communities or traditional leaders not dispossessed in the manner contemplated in the Constitution and the Restitution Act;
    - Ensure that the definition of community keeps with the initial intention of the Restitution Act, which was not intended for pre-1913 tribal claims.
  - 6.2. re-enactment of the provisions requiring Land Claims Court scrutiny and approval of settlement agreements, with specific criteria for the Court to consider, including criteria for approving –
    - just and equitable compensation paid to current owners; and
    - joint ventures, lease-backs and similar arrangements forming part of settlement agreements;
  - 6.3. ensuring consistency of treatment of claimants and claims;
  - 6.4. substantive provisions to allow decisive and effective intervention where CPAs and trusts have become dysfunctional;
  - 6.5. terminating the role of the Commission following a restoration award or order;
  - 6.6. clarification of the meaning and application of the concept of “feasibility” of restoration as referred to in section 33(cA) of the Restitution Act, including the introduction of clear criteria for the adjudication of feasibility of restoration;
  - 6.7. provisions imposing strong and enforceable duties on the DRDLR and on other departments and spheres of government to provide a full range of technical, financial, resource, administrative, accounting and other support to claimants who receive restoration of land and relieving the Commission of any duties in this regard;
  - 6.8. provisions ensuring the co-ordination of the provision of such support;
7. The question of equitable redress needs to be revisited.
9. Serious consideration should be given to making the restitution process document-based.

10. Serious consideration should be given to bringing the Commission more under the direct control of the Land Claims Court once the issue of the appointment of its judges has been resolved. Alternatively, liaison arrangements between the institutions should be legislated.

11. Where a claimant dies subsequent to the lodging of a claim and without leaving a will, section 2(3)(b) of the Restitution Act is unclear as to whether only the oldest descendant in each line of descent may be substituted as claimant or all living descendants may be so substituted. This needs to be amended to clarify that only the oldest surviving descendant in each line of descent may be substituted.

12. Speculation by persons in government and leadership positions about revisiting the 1913 cut-off date must end as this:

- fails to take into account that it is constitutionally entrenched in section 25(7) of the Constitution;
- raises false expectations; and
- if implemented through a constitutional amendment would flood the Commission with profoundly difficult claims that would prejudice existing claimants.

13. The Act must be amended to provide for formal reporting by the Commission and the Minister to Parliament and to the Judge President of the Land Claims Court at specified intervals on progress in the implementation of the Restitution Act as amended.

## Conclusion

At the current rate of settling claims it will take between 35 and 43 years to finalise old order claims, before land claims can be re-opened. This unacceptable timeline cannot be wished away by setting unrealistic deadlines such as those announced by the Land Claims Commission and the Private Members Draft Bill. Steps need to be put into place urgently to address the fundamental problems causing the poor performance of land restitution so that the process of settling and finalising claims can be sped up. The Commission needs to be made ready to tackle the potentially 397,000 new claims that the RIA estimated it would receive, and avoid perpetuating the dismal performance of the last twenty years, which has sowed discord, disappointed the hopes of claimants, enabled corruption, and wasted significant government resources, with little economic benefit.