



Centre for Applied  
Legal Studies

DJ Du Plessis Building West Campus Wits Braamfontein  
Private Bag 3 Wits University 2050 South Africa  
Tel + 27 11 717-8600 Fax + 27 11 717 1702  
[www.law.wits.ac.za/cals](http://www.law.wits.ac.za/cals)

## Submission

to the

**Minister for Agriculture, Land Reform and Rural Development**

on the

**Beneficiary Selection and Land Allocation Policy**

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### **Ariella Scher**

Attorney

Centre for Applied Legal Studies

Direct Tel: 011 717 8652

Email: [Ariella.Scher@wits.ac.za](mailto:Ariella.Scher@wits.ac.za)

### **Thandeka Kathi**

Attorney

Centre for Applied Legal Studies

Direct Tel: 011 717 8302

Email: [Thandeka.Kathi@wits.ac.za](mailto:Thandeka.Kathi@wits.ac.za)

### **Sithuthukile Mkhize**

Senior Attorney

Centre for Applied Legal Studies

Direct Tel: 011 717 8607

Email: [Sithuthukile.Mkhize@wits.ac.za](mailto:Sithuthukile.Mkhize@wits.ac.za)



## INTRODUCTION

### About the Centre for Applied Legal Studies

1. The Centre for Applied Legal Studies (“**CALS**”) welcomes the opportunity to submit comments on the Beneficiary Selection and Land Allocation Policy (“**the Policy**”) in response to the call by the Minister for Agriculture, Land Reform and Rural Development (“**the Minister**”). In the event that the Minister hosts public hearings on the Bill, CALS hereby requests that it be placed on the roll to make oral submissions.
2. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.
3. CALS’ vision is a country and continent where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power; the dismantling of systemic harm; and a rigorous dedication to justice. It fulfils this mandate by –
  - challenging and reforming systems within Africa which perpetuate harm, inequality and human rights violations;
  - providing professional legal representation to survivors of human rights abuses; and
  - using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of vulnerable persons and communities.
4. CALS operates across a range of human rights issues, namely basic services, business and human rights, environmental justice, gender justice, and the rule of



law, and adopts a gendered and intersectional approach to interpreting, implementing and – where necessary – promoting the development of the law.

## **BACKGROUND: BRIEF COMMENT ON THE SOUTH AFRICAN LAND REFORM PROGRAMME**

5. It is undisputed that South Africa's colonial and apartheid history served to benefit a white minority, and expressly discriminated against Black persons. This discrimination sought to exclude Black persons from participation in the economy, and in particular to prevent Black persons from benefiting from South Africa's abundant land and resources.
6. The Constitutional Court recognized this in *Agri South Africa v Minister for Minerals & Energy* 2013 (4) SA (CC) para 1 –

*"[T]he architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty."*

7. The Constitution calls upon the State to take positive measures to redress the unfair effects of the past.<sup>1</sup> The State is therefore mandated to take measures to advance and protect historically disadvantaged peoples. This is neither a need nor a privilege, but a constitutional imperative and an obligation.
8. CALS accordingly recognizes the need for legislative measures that facilitate equitable access to land and opportunities to address pervasive gross economic inequality, and supports those measures which are substantive and extensive in nature.

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<sup>1</sup> See Constitution sections 9(2), 23(6), 24(b), 25(5), 26(2), 27(2), 29(1)(b), 32(2), and 33(3).



9. CALS submits that the land regulatory system should address not only the economically exploitative nature of industries such as the agricultural and mining sectors, but the migrant labour system; the abhorrent housing and living conditions of Black persons, the exclusion of Black persons from management and ownership of land-related business; and the disproportionate burden of this impact on sexual minorities and gender non-conforming individuals and communities.
10. CALS nevertheless cautions that the current Land Reform programme, encompassing as it does various relevant legislative and other measures, is inadequately managed and often poorly implemented. CALS encourages the responsible State officials to pursue the Land Reform programme vigorously, to ensure the complete restitution of dignity for all South Africans.

#### **COMMENT ON THE SUBSTANCE OF THE POLICY**

11. CALS seeks to make three discrete comments on the Policy, focusing on (1) the Right to Food; (2) the appointment of members of the Land Allocation and Selection Panel; and (3) persons convicted of crimes being disqualified from being allocated land under the Policy.

#### **The purpose of Land Reform in the context of transforming South African society**

12. Firstly however, CALS submits that the greater purpose of South Africa's Land Reform programme must be the foundation stone on which the Policy is built.
13. Flowing as it does from the Constitution, the Land Reform programme must give effect to the constitutional demand that we "recognize the injustices of our past" and "improve the quality of life of all citizens and free the potential of each person".<sup>2</sup>
14. The systems of colonialism and apartheid which excluded Black persons from owning land have wide-ranging effects in contemporary society, not all of which are

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<sup>2</sup> Preamble to the Constitution of the Republic of South Africa, 1996.



tangible. We must remain cognizant of the devastating denial of Black persons' dignity through these systems, and the extent to which the Land Reform programme seeks to restore this dignity.

15. In restitution thereof, Black South Africans are entitled to benefit from land allocation by virtue of this historical denial of and injury to their dignity. That right is not contingent on their intended use of that land, but rather the restoration of their basic human dignity. The allocation of land is thus not limited to human settlement and the achievement of the narrow forms of productivity which are prioritized in a capitalist economy; the return of land serves a much broader purpose in transforming South African society and redressing past injustices.
16. Despite this, the Policy appears to prioritize applicants for land allocation who are able and/or willing to utilize their allocated land for purposes of agriculture or other recognized forms of economic productivity, or more generally for human settlement by the State, to the exclusion of all other applicants.
17. In the light thereof, CALS submits that the Policy should recognize and give effect to the broader bases on which beneficiaries may justify their claims to the land sought to be allocated, including that the allocation itself serves to recognize and restore their human dignity.

### **The Right to Food and food sustainability**

18. Section 27 of the Constitution enshrines the right *inter alia* of access to sufficient food, and imposes a duty on the State to take reasonable legislative measures to achieve the progressive realization thereof. This obligation is elaborated upon in Article 11 of the International Covenant on Civil and Political Rights,<sup>3</sup> which calls upon States Parties to –

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<sup>3</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.



*“(1) [Recognize] the right of everyone to an adequate standard of living for himself and his family, including adequate food . . . and to the continuous improvement of living conditions . . .*

*(2) [Recognize] the fundamental right of everyone to be free from hunger, [and] take, individually and through international co-operation, the measures, including specific programmes, which are needed:*

*(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;*

*(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”*

19. CALS notes that despite this clear and vital duty resting on the State, and further despite South Africa’s status as a food- and water-scarce country plagued by poverty and hunger, the Policy fails to prioritize the need for food production, security and sustainability in the selection of beneficiaries for land allocation.
20. CALS considers this failure to constitute a violation of the State’s duty in this regard, which violation is unjustifiable in the context of prevailing drought and the ongoing climate crisis. These emergencies make the need for policies that centre training in the production of indigenous food sources, which are resilient and appropriately geared towards our water-scarce climate, increasingly urgent. Such policies will go some way towards ensuring food sustainability, fighting hunger and promoting an agricultural sector that is able to withstand the climate crisis.
21. In the circumstances, CALS recommends that the Policy stipulate a clear preference for applicants for land allocation who are either trained in or willing to undergo training in the production of indigenous food sources to be selected as “beneficiaries”.



## The appointment of members of the independent Land Allocation and Selection Panel

22. At the outset, the Policy notes that –

*“The lack of a credible and transparent process for land allocation and beneficiary selection has resulted in manipulation of the process.”<sup>4</sup>*

23. As a mechanism to remedy this, the Policy proposes the establishment of an independent Land Allocation and Selection Panel (“**the Panel**”).<sup>5</sup>

24. Clause 12.1 then elaborates as follows –

*“A National and Provincial Land Allocation and Selection Panel shall be established and shall be a non-statutory body which shall be multi-disciplinary and diverse with representatives from all relevant stakeholders in the Land and Agrarian Reform sector and the Terms of Reference and the composition shall be determined by the Department.”*

25. While the National Offices of the Department shall compile a preliminary shortlist of beneficiaries, the Panel is tasked with conducting a further shortlisting exercise, after which it will undertake farm inspections and interviews of shortlisted applicants. The Panel then makes recommendations to the relevant Departmental structure for approval.<sup>6</sup> The Panel is also empowered to consider written appeals from applicants aggrieved by the selection, allocation and categorization process.<sup>7</sup>

26. It is clear therefore that the Panel has significant and wide-ranging powers integral to the determination of which applicants ultimately benefit under the Policy. Despite this, and the contents of Clause 12.1 detailed above, the exact appointment procedures for members of the Panel is not outlined in the Policy.

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<sup>4</sup> Policy clause 2.2.

<sup>5</sup> Policy clause 4.1(h).

<sup>6</sup> Policy clause 12.4.

<sup>7</sup> Policy clause 13.1.



27. CALS appreciates the need for such a Panel, and supports an administrative system which ensures that beneficiary selection is both transparent and expeditious. CALS further recognizes the primacy of the Panel to the broader Land Reform programme, given that it is ultimately the Panel which will determine which applicants benefit from that programme.
28. CALS nevertheless submits that the nomination, interview and appointment criteria and processes relevant to the selection of Panel members should be contained in the Policy itself; these processes are integral to ensuring that the Panel indeed meets the envisioned goals of transparency, independence and fairness in beneficiary selection, which will in turn promote the efficiency and legitimacy of the broader Land Reform programme.
29. CALS accordingly recommends that the Policy be amended to include a stipulation of the criteria and processes to be followed in establishing the Panel, including any circumstances in which (1) a nominee is disqualified from being appointed to the Panel, and (2) an existing Panel member may be removed.

### **Persons convicted of crimes being disqualified from being allocated land under the Policy**

30. Clause 14.1.2 of the Policy provides that a provisional allocation of land or selection of a beneficiary shall cease in the event that the beneficiary either holds a criminal record or is convicted of a “serious crime”.<sup>8</sup> This is distinct from clause 7.4 of the Policy, which details who does not qualify to benefit under the Policy, wherein the fact of a criminal conviction is not mentioned.
31. CALS is of the view that Clause 14.1.2 of the Policy (“**the Clause**”) is vague and appears to be *prima facie* irrational.
32. On a first reading of the Clause, the appropriate interpretation is as follows: a beneficiary who was either provisionally selected or is actually selected, becomes

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<sup>8</sup> Notably, the term “serious crime” is not defined in the Policy.





disqualified if they are convicted of a serious crime and consequently incur a criminal record, because such provisional allocation and/or actual selection (whichever is applicable) will cease or be terminated.

- 32.1. The Clause is vague because, on the second reading it is unclear at which stage of the process a criminal record becomes the disqualifying factor for the beneficiary; it could mean disqualification if one incurs a criminal record in the course of the period of provisional or actual allocation, or one could have a prior criminal record which comes to the attention of the Panel, after which one may be disqualified for that reason.
- 32.2. Whichever meaning and interpretation is applicable is problematic. This is because a person with a criminal record is not listed as a person who is not eligible to be a beneficiary in clause 7.4. Secondly, if the former interpretation is applicable, this is problematic because an individual could have ticked all the boxes from the selection criteria and then suddenly be disqualified on an 'unlisted ground'.
- 32.3. CALS accordingly recommends either (1) that the words "criminal records or" should be removed from clause 14.1.2, or (2) that the Clause should be drafted in a manner which clarifies the position with regards to persons with criminal records, in order to remedy this vagueness. In particular, CALS recommends that since a person with a criminal record is not listed as a person who is ineligible to be a beneficiary under the Policy, option (1) above should be followed.
33. Moreover, CALS submits that the Clause is irrational, as the the basis upon which a beneficiary would be disqualified and/or ineligible if they hold a criminal record is unclear.
34. Finally, CALS submits that the Clause is irrational as it directly contradicts the stated objectives of the Policy.



34.1. It appears from the White Paper on South African Land Policy of 1997<sup>9</sup> that –

*“The purpose of the Land Redistribution Programme is to provide the poor with land for residential and productive purposes in order to improve their livelihoods . . . Land redistribution is intended to assist the urban and rural poor, farmworkers, labour tenants, as well as emergent farmers.”*  
(Emphasis added.)

34.2. Furthermore, clause 4 of the Policy, which outlines the Policy Proposals and Principles, states that the Policy is intended to enable poor, landless and previously disadvantaged rural and peri-urban communities to gain access to land. Such categories of persons could very well be holders of criminal records for crimes committed under various circumstances including poverty and lack of access to land and other resources. It is thus irrational to disqualify such persons, not only because this does not speak to the purpose of the Policy, also because criminal records may very well be obtained in an attempt to escape the cycle of poverty, an affliction which mostly affects poor, previously disadvantaged persons.

35. The purpose of a criminal record, and any sanction imposed on the conviction of a crime, is to punish the individual concerned for their unlawful conduct. Such punishment is the sole purview of the criminal justice system, which scope the Department and this Policy necessarily fall outside of. It is submitted therefore, that this exclusionary Clause seeks to further, and unjustifiably, punish such individuals.

36. Moreover, individuals convicted of a crime often struggle to reintegrate into society, making them particularly vulnerable to poverty and unemployment, and thus susceptible to committing further crimes to ensure their livelihood.

36.1. It is trite that a criminal record is a barrier to entry to the formal labour market, with many employers either requesting applicants to confirm that

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<sup>9</sup> As quoted in clause 1.1 of the Policy.



they have not been convicted or seeking consent to conduct a ‘background check’.

36.2. This very issue was one of the factors that influenced the amendment to section 271 of the Criminal Procedure Act 51 of 1973, through the Criminal Procedure Amendment Act 65 of 2008, wherein formerly incarcerated persons were for the first time offered a statutory mechanism and procedure for the expungement of certain criminal convictions.<sup>10</sup> However,

*“[The] process of having a criminal record expunged is not an easy one . . . and may be confusing and intimidating to the lay person. At minimum the applicant has to interact with three entities: the police upon application for a clearance certificate; the Department of Justice and Constitutional Development, and the SAPS Criminal Record Centre.”<sup>11</sup>*

Therefore, persons with criminal records remain constructively excluded from entering the formal labour market.

37. The allocation of land for productive use under the Policy presents an obvious opportunity for the rehabilitation of persons convicted of a crime, allowing them to form a community within and through which they may contribute positively to society and seek the support required to maintain their rehabilitation. This is consistent with our legal system’s approach to rehabilitation, which all State entities should promote.

38. In the circumstances, CALS submits that the Clause is vague, and constitutes an unjust and irrational exclusion of persons who should otherwise qualify as beneficiaries under the Policy, in the event that they meet all other stipulated criteria.

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<sup>10</sup> L Muntingh (2011) *Civil Society Prison Reform Initiative Report on the law and the business of criminal record expungement in South Africa* 4. Accessed from: <https://acjr.org.za/resource-centre/The%20law%20and%20the%20business%20of%20criminal%20record%20expungement%20in%20South%20Africa.pdf>.

<sup>11</sup> *Ibid* at 24.



39. CALS accordingly recommends that clause 14.1.2 be removed from the Policy in its entirety. In the alternative, CALS recommends that the Panel be required to conduct an assessment of the particular crime committed by the beneficiary concerned, in order to determine whether the nature and circumstances thereof warrant a disqualification under the Policy. In doing so, the Panel should be compelled to consider the general Proposals and Principles of the Policy, as well as the greater purpose of the Land Reform programme in the context of transforming South African society, as detailed above.

## **CONCLUSION**

40. In summary, we call on the Minister to amend the Policy as follows:

- To recognize and give content to the potential for land allocation to restore human dignity;
- To recognize and fulfil the State's constitutional duty to ensure access to adequate food;
- To stipulate the criteria for nomination to the Land Allocation and Selection Panel, and outline the processes to be followed in appointing and removing members of the Panel; and
- To remedy the unjust, vague and irrational disqualification of persons convicted of crimes from being allocated land under the Policy.

**ENDS.**

