



The Social and Labour Plan Series
Phase 3: Alternative Models for
Mineral-Based Social Benefit
by the Centre for Applied Legal Studies

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CALS
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I. Executive summary

The mining sector in South Africa is in turmoil; low commodity prices, policy and legislative uncertainty, political power struggles and mine-community discontent are driving the general disillusionment with the sector. As these events unfold the State's response is being driven by a transformative agenda, yet communities are still without tangible and meaningful benefits. Community and worker benefit, as encapsulated in the Mining Charter and the Social and Labour Plan (SLP) System, contain direct obligations to contribute meaningfully to the economic and social development of mine-affected communities. The SLP system, in particular, is meant to channel benefits into mine-affected communities to ensure that impacted areas are not left destitute and impoverished by mining.

The Centre for Applied Legal Studies (CALs) has, for this reason, conducted research into the SLP system. Its previous two reports in the series uncovered flaws both in how the system is designed and in how it is implemented in practice. The findings were sufficient to justify a conclusion that the SLP system is fundamentally flawed. The purpose of this report is to set out possible alternative models for a more transparent and democratic system that would position communities as central stakeholders. The report will also suggest some amendments to the present system that can be pursued pending any thorough going revision of the mining regulatory regime.

The report begins by introducing the aims of the project and delves into the context of the complex area of extractive-based social benefit. The chapter further explores the questions that we seek to address and the legislative basis for SLPs. The report then moves to briefly summarise the findings of the previous two research reports, on design and implementation respectively. The body of the report commences with the proposed immediate and short-term recommendations for an improved SLP system. The immediate recommendations mostly consist of provisions that are required for the SLP system to work, but which are not included in the present legislative instruments. The full list of such provisions will be provided in the body of the report, but some of these include access to information, gender equality and specified requirements for community participation. The penultimate chapter contains model legislative clauses which are designed to be inserted into the existing law. The final chapter looks beyond the current SLP system to propose fundamental changes that are vital to ensuring a democratic system rooted in principles of community-centred development.

II. Introduction

The Centre for Applied Legal Studies (CALS) is a civil society organisation based at the School of Law at the University of the Witwatersrand, Johannesburg. CALS is also a law clinic, registered with the Law Society of the Northern Provinces. CALS connects the worlds of academia and social justice. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS practices human rights law and social justice work with a specific focus on five intersecting programmatic areas, namely Basic Services, Business and Human Rights, Environmental Justice, Gender, and the Rule of Law. CALS strives to make creative use of the tools of research, advocacy and litigation, adopting an intersectional and gendered understanding of human rights violations.

The SLP Project is located in CALS' Environmental Justice Programme, which works towards making the environmental right contained in Section 24 of the Constitution a tangible reality for all who live in South Africa. The Programme adopts as the basic premise of its work that a healthy environment is critical for the development of all people, especially poor and marginalised communities who have limited options in choosing the environment in which they live. The work of the Programme is driven by the need to facilitate access for affected communities to the processes available to combat unacceptable environmental degradation, with a primary focus on the extractives industry.

The SLP Project is informed by CALS' engagement with communities on three distinct phases of the SLP life-cycle, namely, design; implementation; and closure phases. CALS has been involved in each phase in a variety of capacities which range from assisting as experts in SLP design litigation, providing training around companies' obligations, and assisting communities to access redress during the decommissioning and closure of mining operations. CALS has produced two previous reports that focus on the design and implementation of SLPs respectively.¹

These experiences have unearthed the need for this broader SLP project, laying a foundation for examining the SLP system at a holistic level. To our knowledge, this is the first in-depth analysis of the South African SLP system from a legal and compliance perspective.

1. Context: Overcoming the legacy of inequality

The South African mining industry was both a beneficiary and a driver of colonialism and apartheid in their economic, social and legal manifestations. The mining sector perpetuated and strengthened the apartheid state through ill treatment and economic exploitation of workers from the Southern Africa sub-region.² These inequalities were engineered through means which include land dispossession to make way for the mining operations, forced relocation from ancestral lands, and the birth of Bantustans that became

the catalyst of today's rural urban migration.³ An underlying driver of these injustices was an economic model built on profits derived from cheap black, an often migrant, labour.⁴

The experience of mining was therefore one of intergenerational wealth for a white minority and dispossession, poverty and environmental degradation for the black majority. The legacy was a monopoly of economic, political, cultural and military power. Transformation of the sector and the entire national economic structure is, therefore, a seminal imperative to the founding constitutional value of equality. This type of structural equality has to be realised so that all people have full benefit and enjoyment of socio-economic rights and an environment that is conducive to health and well-being.⁵

The constitution envisages the equitable distribution of wealth and an equal opportunity to participate in the economy.⁶ Overcoming the legacy of mining in South Africa will not be achieved by mental reconciliation alone. It will also require the active creation of conditions that will enable mining work to be dignified and will encourage a rapid deconstruction of group exclusiveness based on race, class and gender within the mining sector. The Mineral and Petroleum Resources Development Act (MPRDA) contains several provisions and mechanisms with the stated purpose of transforming a mining sector characterised by severe inequality.⁷ The creation of the Social and Labour Plan System is geared towards harnessing the state's power as custodian of mineral resources to ensure that companies offer opportunities for mine workers and communities to meaningfully benefit from the resources in their area. These include, among other components, human resources development and contributing to the realisation of infrastructural and developmental needs of impacted areas. The programmes are meant to stimulate the local economy and ensure mine-affected communities are left better off by mining. This is unfortunately not the current reality.

2. Aims of this report

Through previous phases, it has been established and supported through reasoned conclusions that both the SLP design and implementation are fatally flawed and do not promote meaningful social and economic advancement of communities. Additionally, SLPs have failed to achieve their intended objectives of advancing the social and economic welfare of mine-affected communities. This report shall propose remedies to the defects uncovered in the two prior reports. This report has proposed both immediate and longer term recommendations to ensure that SLPs are implemented in a manner responsive to communities and workers as core stakeholders.

The immediate recommendations are designed to be implemented instantly as they operate within the current legal framework. If implemented, these recommendations would bring about a significant change within a short period of time. At the same time, fundamental changes in the social beneficiation model are required to ensure communities and workers are given the power and resources to have a meaningful and decisive role in determining and achieving their chosen developmental objectives. The longer term recommendations propose reforms in SLPs that are aimed at bringing about significant shifts in power dynamics which will entail multi-

stakeholder negotiations and a fundamental shift in the legal framework. As this is likely to require more time, we have classified these as longer term recommendations.

3. Limitations

The proposals in this report are comprised of both recommendations and model legislation. Where work has already been done by other organisations/researchers that are consistent with CALS' approach to mining development, we have adopted those and acknowledged the authors. Other recommendations are based upon CALS' views, albeit informed by conversations with role players – including communities, local government, mining companies, consultants, researchers and trade unions. As with any piece of legislation, a robust and inclusive process of public participation, as required by the Constitution and the rules of parliament would need to occur. For this process to be meaningful, mine-affected communities, both at the grassroots level and national networks, would need to be included as a key negotiating role player.

The focus of the recommendations contained in this report is on the aspect of Social and Labour Plans that pertain to local economic development, though other aspects will be discussed at different points.

III. Findings on the key trends in the design of SLPs: Summaries from report 1

1. Overview

In the Phase 1: System Design and Trends Analysis Report, CALS interrogated whether the SLP system's failures can be attributed to deficiencies in the way both the legal framework and individual plans are designed. To obtain a systemic understanding, a sample of 50 SLPs was analysed. The first report aimed to:

1. Identify trends in the design flaws of SLPs;
2. Illustrate the links between the deficiencies in the legislative system and deficiencies in the design of SLPs; and
3. Propose initial suggestions for reform to the legislative system and the design of SLPs to attenuate such design flaws.

The key findings indicate that the current design of the SLP system does not contribute to the relevant objectives of the MPRDA. These include the promotion of the social and economic welfare of all South Africans, contributing to the transformation of the mining industry, and to ensure that mining right holders contribute to the social and economic development of areas in which they mine.⁸ These deficiencies will now be summarised.

2. Key Findings

2.1 Inadequate engagement with the reality of communities

The SLPs examined completely failed to provide information on the history of the local and labour sending communities, including on vital issues such as land rights and previous experiences of mining. Our analysis also suggested reliance exclusively on desktop analysis with 96% of the SLPs displaying no evidence that field research took place.⁹

2.2 Design, implementation, monitoring and review participation

There was a common failure to provide sufficient information on whether there was direct community consultation, the form that consultation took, and how it influenced the final selection of programmes. For example only 8% of the SLPs referred to community structures consulted and the mandate of the structure.¹⁰ Only 4% of the SLPs, in explaining the reasons for particular projects, referred to the expressed needs of the community beyond the government and traditional leadership.¹¹ None of the SLPs provided a plan to consult with communities throughout the life cycle of the SLP.

2.3 Failure to address gender inequality

Mining can entrench gender inequality in several respects. First, in a rural setting, the loss of access to communal land as a result of mining typically reduces the economic power of women who are often invested with the role of providing food.¹² Second, women face significant barriers to participating in the mining sector and which include gender-violence and safety concerns, gender-sensitive allocation of work, and the availability of appropriately designed equipment.¹³ The SLPs analysed universally failed to address the former issue and there was often little clarity on how the impediments in the workplace would be addressed. Further, only 14% of SLPs provided for LED projects with women as primary beneficiaries.¹⁴

2.4 Failure to provide SLPs to beneficiaries

It is crucial that workers and communities, who are intended beneficiaries, are able to easily access a company's SLPs. At the time of CALS' first research report, only 2% of the SLPs analysed were available online.¹⁵ None of the SLPs in the sample contained a comprehensive dissemination plan and no reference was made to the translation of SLPs to the predominant languages spoken by beneficiaries.¹⁶

2.5 Protracted and inaccessible PAIA process

The Promotion of Access to Information Act (PAIA) requests were submitted to DMR and private mining companies.¹⁷ PAIA requests submitted to DMR ultimately proved to be successful. However, this success was dependent on time-consuming and constant engagement. Substantial time and resources were invested in travelling to DMR headquarters for lodging the requests and regional offices for physical collection.¹⁸ Obtaining SLPs through PAIA can therefore be very inaccessible, time-consuming and resource intensive for communities who will not always have access to legal expertise, established relationships with DMR, and the funds to support the submitting of PAIA requests.

2.6 Failure to plan local economic development projects

Prior feasibility studies are important for ensuring LED projects, in particular, are viable. If projects are found non-viable within the project cycle, benefits to communities are delayed. Feasibility studies should identify deliverables, timeframes, partners, service providers, beneficiaries, expenditure, and exit strategies. Our analysis of the sample SLPs suggests that prior feasibility studies are the exception rather than the norm. Some of these findings are that 14% of the SLPs provide feasibility studies on all programmes, 20% of the SLPs contain an undertaking to conduct feasibility studies in the project cycle while 56% of the SLPs make no mention of a feasibility analysis.¹⁹

2.7 No clear breakdown on roles and responsibilities

The success of LED projects depends on good working relationships and their alignment with LED frameworks such as municipal integrated development

plans (IDPs).²⁰ Also vital are clear, written agreements delineating the responsibilities of each entity and how these will be discharged. Clarity of responsibilities also ensures that communities seeking accountability are not sent from pillar to post. None of the SLPs in the sample evidenced the conclusion of binding agreements with the municipality.²¹ 22% displayed no evidence of engagement with the municipality at all and 12% provided evidence of engagement with the municipality and written evidence of support and correspondence.²²

2.8 Lack of clarity on how companies will facilitate housing for workers and communities

Housing programmes, both for mine workers and the broader community, are a critical component of SLPs for the following reasons. First, there has been the imperative of replacing the overcrowded hostels, which were an assault on the dignity of black workers during the apartheid era, with single and family units. Second, demand for housing rises significantly in mine-operated areas where there is an influx of migrant workers into an area that may already have a large community in need of housing. Furthermore, the viability of SLP housing initiatives is contingent on their alignment with government housing frameworks. The study has highlighted the gap between workers' housing needs, the backlog stemming from government initiated housing plans and the housing plans provided by the mining company. 72% of the SLPs studied did not provide for any housing plan for the community and only 22% of SLPs mention and engage with government housing plans for the mining community.²³

IV. Findings on the key trends in the implementation of SLPs: Summaries from report 2

1. Overview

In Phase 2: Implementation Operation Analysis Report, we examined whether the manner in which SLPs were implemented promoted the achievement of the objectives set out in the MPRDA. More specifically, we aimed to interrogate whether:

1. The SLP system is achieving its core objectives and, if not, whether it is capable of achieving these objectives through reforms.
2. SLPs incorporate the perspectives of the various stakeholders

We sought to answer these questions through direct engagements with important stakeholders including communities, companies, consultants and the regulatory agency. These took the form of semi-structured interviews but also field visits to five mine-affected areas to assess the quality of general implementation.

The findings point to a fundamental and fatal deficiency of the SLP system. In practice, it is an undemocratic development process in which the main beneficiaries are not consulted on what projects are to occur and not updated on the status of their implementation. This represents a perpetuation of the same inequalities in the mining sector that it is the stated purpose of the MPRDA to address.²⁴

2. Key Findings

2.1 Undemocratic approach to development

The findings that follow present the picture of a system in which communities are not able to influence, access or monitor SLPs. Programmes are agreed on between the company and the regulator on their behalf and the lack of community voice persists throughout the life-cycle of the SLP. This is a profoundly undemocratic approach to development, contrary to the people-centred approach envisaged in international and regional human rights law, including the African Charter on Human and Peoples' Rights.²⁵

2.2 No access to SLPs and related information

Research studies in five communities has shown that a vast majority of community members participating in the study have reported that they have never been involved in the development of SLPs.²⁶ We also found that the community members did not know how SLPs function and of the duties

it imposes on mining companies.²⁷ Some mining companies and government officials still view SLPs as confidential.²⁸ In addition, while the DMR PAIA manual lists SLPs as among documents not requiring PAIA requests, this is qualified by the exclusion of confidential and commercial information.²⁹

2.3 Participation in the design and implementation of SLPs

A resounding majority of participants from five communities reported that they had never participated nor even been invited to attend a meeting to discuss proposed contents of the SLP and/or the current status of implementation by the company.³⁰

2.4 Weak co-operative governance and responsibility shifting

The general impression gained from interviews with various levels of government and mining companies was of a lack of effective co-operation and communication. Municipal officials interviewed reported that national departments such as DMR either do not consult them or do not do so meaningfully, in key decisions related to mining, including the approval of SLPs.³¹ There was also a tendency for each role player to blame others rather than acknowledge their share of responsibility for the lack of meaningful change at a community level.³² DMR officials seem to view local municipalities as lacking capacity to conduct effective local economic development planning.³³

2.5 No regional alignment of SLP initiatives

The interviews we conducted suggested a number of points of non-alignment and communication between role players. Alignment between SLPs and municipal development frameworks, in particular, is critical to ensure that local economic development policies are not piecemeal but part of a broader, workable development plan. First, while the MPRD regulations require SLPs to be aligned to local government IDPs, some municipal officials interviewed alleged a lack of consultation by mining companies.³⁴ Further, the interviews suggested significant mistrust between the DMR, local government, mining companies and communities.

2.6 Companies' relationship with traditional leaders

In three of the study areas, it was alleged that traditional leaders and mining companies had secretive relationships of mutual benefit to the detriment of communities.³⁵ Increasingly notorious are the secret agreements being concluded between companies and traditional leaders regarding communal land and on vehicles for managing the proceeds of mining on that land.³⁶ In these instances it is alleged that traditional leaders are acting as private property owners rather than as custodians of rights to land. More specifically in relation to SLPs, it was alleged that SLP programmes were improperly benefiting traditional leadership.³⁷

2.7 Exclusion of communities directly impacted by mines

There is no consistent way of determining which communities benefit from SLPs, and the current criteria used includes any combination of municipal

boundaries and radius around operation.³⁸ The informal selection of community beneficiaries might make it more likely that relatively geographically isolated communities will be excluded from SLP benefits. This was evident in one of the communities with whom we conducted research.³⁹ We also know of an instance in which the exclusion of a community was linked to their lack of customary land rights, their formation post-mining, and the informal nature of their settlement.⁴⁰ In this instance, the mining operation relied on the municipality's failure to declare the area a township as its justification for excluding the community.⁴¹

2.8 Systems for approving and monitoring compliance with SLPs

There is evidence that the DMR's systems for monitoring compliance with SLPs are not adequate. Communities reported that the DMR failed to support them during the licensing (and SLP development) process and did not have a presence at a community level to assess progress and compliance.⁴² An interviewee from the trade union sector reported that the DMR assigned a handful of officials to monitor compliance in provinces with hundreds of mining operations.⁴³ Officials at DMR have, themselves, acknowledged that they were not able to conduct on site monitoring of every mining operation in South Africa.⁴⁴ The DMR, in its 2015/2016 annual report, stated that it had conducted 270 SLP verification inspections but what this process entailed and the number of officials is not indicated.⁴⁵ Mining company interviewees have alleged that in determining compliance and the consequences for non-compliance, different officials in the department have followed inconsistent approaches.⁴⁶

V. Immediate recommendations for an improved SLP system

1. Introduction

We understand that a fundamental shift in negotiating power will take some time. Therefore the recommendations are divided into both immediate and longer term sections. These immediate recommendations are of the nature that they can be affected easily as they operate within the current legal framework. The recommendations are relatively simple amendments and additions to the current legislative provisions of the SLP framework. These recommendations can be seen as the low-hanging fruits that can transform the system to be more effective from the moment they are enacted.

2. Laws, regulations and policies developed in a manner that recognises communities as a central role player

The mining law regime of the democratic dispensation, under the MPRDA, was developed through tripartite negotiations between government, mining companies and organised labour. In practice, the interests of industry and government have predominated over community needs. Communities, who, together with workers, are the most directly affected by the negative impacts of mining, have not been included as a distinct interest group. What has changed since the passing of the MPRDA in 2002 is that mine-affected communities today are increasingly organised as a distinct sector at all levels from the individual community scale, to both regionally and nationally. The key co-ordinating networks such as Mining and Environmental Justice Community Network of South Africa (MEJCON-SA), Mining Affected Communities United in Action (MACUA) and Women Affected by Mining United in Action (WAMUA) are campaigning for communities to be recognised as a key role player.

However, this growth in organisation has yet to be translated into communities being included meaningfully in legislation and policy-making. During the lengthy process of amending the MPRDA that commenced on 27 December 2012, and is still ongoing at the time of writing, several communities and their legal representatives made written and oral submissions.⁴⁷ These submissions have, however, not impacted on the drafts of the bills before parliament. Given that SLPs are creatures of the MPRDA, and are designed to benefit workers and communities, the exclusion of communities from the development of this act will severely limit the extent to which SLPs can be a meaningful avenue for community development. To exclude communities from meaningfully participating in decisions which directly impact their health, livelihood and all aspects of their life runs counter to the constitutional principle of participatory democracy as well as rights in the Bill of Rights – which include the rights to an environment not harmful to health and well-being, and to just administrative action.⁴⁸

Possible Solution

Any future legislative process aimed at material changes to the MPRDA and the Mining Charter therefore needs to be tailored towards maximising community participation. First, before a draft bill or policy is prepared, there should be large scale and meaningful deliberations with community members aimed at eliciting what should be in mining legislation. At these deliberations, communities should be able to nominate technical specialists to assist them in making proposals. Public meetings at all stages of the process should be held in places which enable the maximum number of community members to attend and need to be conducted in the predominant language/s spoken in communities. This will likely require that some meetings be held outside of provincial capitals and on occasions, meetings in more than one city/town in a province. Further, the local, regional and national community-based organisations referred to above should be engaged as core role players in any process.

More inclusive and thorough processes of participation may take more time and resources and might mean that the desired legislation, policy and development projects will take longer to be finalised and implemented. This is, however, far outweighed by the benefits of processes that afford communities a meaningful voice. Participation is an intrinsic human right and real community influence is a pre-requisite for legislation, policy and projects that address communities' actual needs.⁴⁹ Meaningful community participation also makes it less likely that the end result will be challenged later. Hence the process may, in fact, end up as being a faster one.

3. Transparency and dissemination of SLPs

Some companies have placed their SLPs online but many communities lack ready access to the internet. Communities still report mining companies refusing requests to access SLPs. Moreover, to our knowledge, no SLPs have been translated into the predominant first languages spoken by communities. SLPs, being a fulfilment of a statutory obligation by mining companies, contain obligations owed to the entire public and communities and workers in particular.

They are therefore public documents. However the lack of a clear statement in the MPRDA, Regulations and Guidelines in relation to their public status and the absence of positive obligations to disseminate SLPs have enabled a gap between legislative intentions and practice. The provision in the 2017 iteration of the Mining Charter (Reviewed Mining Charter, 2017) that SLPs are 'to be published in English and other languages commonly used in the Mine Community' represents an important step forward.⁵⁰

Possible Solution

Greater legislative clarity is required to ensure there are no loopholes to justify a failure to make SLPs accessible to communities. First, the MPRDA should be amended to state unambiguously that Social and Labour Plans and annual compliance reports are public documents in their entirety. Second, mining companies should be required to translate SLPs into the prevailing first language/s spoken in the community and amongst workers. Third, legislation should require companies to put in place a plan to proactively disseminate the SLPs and annual compliance reports to communities.

4. Make DMR's PAIA process more accessible to communities

The typical process for submitting a PAIA request involves travelling to the DMR national headquarters in Pretoria and submitting a hard copy of a PAIA request along with a request fee (though a requestor may request an exemption from the fee). This is not an accessible process for the bulk of mine-affected communities, who live far from Pretoria and for whom the trip to Pretoria is resource and time intensive. While SLPs and annual compliance reports are public documents for which PAIA requests can never be required, it is vital that there is a more accessible process through which communities can access documents held by the DMR.

Possible Solution

The DMR can assist by being responsive to community suggestions on how to process the PAIA request. Options could include the submission of requests via email and the completion of the form by DMR officials as communicated over the phone to them by community members. Similar flexibility can also be shown in the manner access is granted. One example would be sending the SLP in a PDF email attachment.

5. Independent problem solving service

At present, communities do not have an accessible and effective channel for getting grievances addressed. Often they are sent from pillar to post from the mining company to the local municipality, traditional authorities and national government departments. Within mining companies, there is often a lack of clarity regarding who to lodge complaints to. In practice, communities often have to resort to protest or litigation to pressure mining companies to deal with their complaints in a meaningful manner.

Possible Solution

A possible solution lies in the establishment, as proposed by the Bench Marks Foundation, of a central and independent problem solving service for communities with complaints against mining.

The aim of the service would be to facilitate dialogue between communities and mining companies with a view to solving the problems experienced by communities as a result of mining but which can be escalated to mediation or arbitration should dialogue bear no results.⁵¹ Bench Marks Foundation envisages the process to involve several stages. Upon initial consultations diagnosing the problem, a customised process is developed with communities as core participants.⁵² Ordinarily this would be followed by a facilitated dialogue.⁵³ Where dialogue does not resolve the matter, the community would have the opportunity of lodging a formal grievance followed by a grievance hearing.⁵⁴ The next stages would ordinarily be formal mediation and expedited private arbitration.⁵⁵ Critically, communities may opt out of the process at any stage and would not be precluded from concurrent actions. It could be funded jointly by mining companies and by the state in such a manner that allows for its independence.

One of the distinct features of this proposed model is that it contains mechanisms to level the playing fields between mining companies and communities. One way in which it shall do so is through communities having access, free of charge to technical, legal and other expertise. This would be channelled through the community capacitation fund discussed below.

One possible argument against the idea would be the costs involved. However there is the possibility of a joint funding model, by companies and by government, which could share and ease the financial burden. It would need to be carefully designed with respect to scope, powers, funding model, management and skills required of personnel.⁵⁶

6. Establish fund enabling communities to access specialists

Large mining companies have budgets for specialists drawn from a range of disciplines critical for understanding the impact of mining, formulating viable alternative local economic development paths to mining, and planning mining economic development. Communities seldom have access to this expertise which leads to an asymmetry in power.

Possible Solution

A possible solution, recommended by the Bench Marks Foundation, is the establishment of a fund employing specialists in fields such as the law, geology, the environment, sociology economics and anthropology, mining engineers, and local economic development that communities can request in any engagement or negotiations with mining companies.⁵⁷ Roles of these specialists could include assisting communities in the formulation of developmental alternatives prior to the award of a mining right, in assessing the likely impacts on their land, environment and livelihood, and capacitating communities to assess mining companies' compliance. To ensure its viability, the fund would need to be carefully designed with respect to scope, powers, funding model, management and skills required of personnel.⁵⁸

7. Specify requirements for community participation in the design and amendment of SLPs

CALS' research findings clearly point towards community participation in the development of SLPs not being the norm.⁵⁹ This runs contrary to the Constitutional principle of participatory democracy and the right to administrative justice. A component of the right to administrative justice is procedural fairness. As Klaaren and Penfold write:

*"This right entitles persons to participate in the decision-making process in relation to administrative decisions that affect them. It, at a minimum, entrenches the common law rules of natural justice. These rules are embodied in two fundamental principles — the right to be heard (audi alteram partem) and the rule against bias (nemo iudex in sua causa)."*⁶⁰

Given that communities, along with workers are the principle intended beneficiaries of Social and Labour Plans, it follows that they ought to participate meaningfully in the conception and design of SLPs and also their amendment.

Possible Solution

The right of communities to participate in the design and implementation of SLPs needs to be clearly recognised in binding legislation. Direct consultation of communities and workers needs to be mandatory and a clear minimum process, comparable to the National Environmental Management Act Environmental Impact Assessment process needs to be specified in binding legislation or regulations.⁶¹

Certain basic principles for all consultation need to be laid out. The first is that consultation should begin at the most local level possible.⁶² The second is that consultation must be with the full range of interest groups including women and youth, independent civics organisations (including those explicitly formed to tackle environmental justice and mining and land rights), and local SMMEs. Third, a series of initial consultations at the most local level, on envisioning of programmes in the SLP, based on needs and the available budget, should be conducted prior to the development of any drafts. Fourth, for new mining projects, SLP consultations should begin as early as possible (i.e. following the award of a prospecting right).

The legislation should specify robust notice requirements to ensure that as wide a range of community interests as possible are informed of the opportunities for participation. Notice must be sufficiently early to afford a real opportunity to prepare for meetings. Companies and/or the DMR should be required to publish notices in local newspapers in language/s spoken by the majority of community members. Opportunities to participate should also be advertised on the main community radio stations. In the case of communities where word of mouth notification is predominant, the meetings must also be advertised at the meetings of pre-existing community organisations.

The notice must specify the venue, time and date of the meeting, and how the relevant documentation can be accessed. Participation meetings must afford community members an opportunity to meaningfully engage. First, participants must have had an opportunity to read any documents prior to the meeting and these must be provided in at least the primary language spoken by the communities (other than Afrikaans and English). Second, the meeting must be conducted in the primary language/s spoken by community. Third, accurate minutes and recordings should be made of the proceedings of the meeting, including all proposals advanced by community members. Where there have been changes proposed by community participants to a draft SLP/programme, there must be a note made of the proposal, whether it was accepted or rejected and why. Regulations governing public participation must also specify that the signing of attendance forms may not be used as proof of support or approval of the mining project.⁶³

The advantage of this approach would be a greater likelihood of a match between SLPs, LED programmes in particular, and communities' needs. A number of challenges have been raised about the practicality of facilitating broad-based community participation, mostly from the mining industry representatives. Many of them relate to the question of 'who the community' is.⁶⁴ They are correct insofar as there is a multiplicity of interest groups and that community, especially in urban areas, is fluid. However, there are ways in which to address this. This includes power mapping and requiring notice in a number of simultaneous platforms. Most importantly, the involvement of the afore-mentioned national mine-affected community networks is critical.

8. Specify requirements for periodic reporting back to communities

Our research indicated that progress meetings with mine-affected communities for SLPs are rare.⁶⁵ Few communities have seen SLP annual compliance reports or have had an opportunity to provide feedback to companies on the impact of the project on the ground.⁶⁶ Further, amendments may occur to SLP programmes without consulting beneficiaries.⁶⁷

This is a problem that threatens the underlying reason for the existence of the SLP system – namely to achieve transformation in mining, especially in relation to the condition of mine-affected communities. Transformation, in the formulation of Albertyn & Goldblatt, which was endorsed by the former Chief Justice Pius Langa, refers to 'a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines.'⁶⁸ Transformation therefore relates not only to resources but also to power, which would include the power to decide, which, as discussed above, reflects the current state of international law on people-centred development.⁶⁹ This entails that communities are afforded a decisive role in determining not only what development projects are adopted but how they are implemented. In addition it must be remembered that SLPs are public law obligations sourced in legislation. Their implementation therefore needs to comply with the Constitutional right to just administrative action and should reflect the Constitutional value of responsive (participatory)

democracy.⁷⁰ Further, taking into account communities' knowledge of the areas in which they live is a prerequisite for ensuring that SLPs are implemented in a manner that is responsive to their needs.

It is vital, therefore, that there are measures to ensure that communities, whose rights and interests are affected in a negative way by the failure to meaningfully implement SLPs, have an opportunity to regularly hold mining companies to account for the fulfilment of their obligations. This requires periodic reporting back by the company on implementation. This also requires meaningful participation by community members in any amendments to SLP, since amendments approved by the regulator in the absence of community participation can have the effect of diluting the benefits in the SLP.

Possible Solution

Legislation or regulations should specify periodic updating meetings with SLP beneficiaries – communities and workers – on the progress in implementing the projects. These should be multi-stakeholder meetings in which communities, local government, the DMR and other relevant national departments, and mining representatives are present. Further, the specialists paid by the proposed specialists fund should be there to assist communities should they wish. There needs to be agenda items both for company and community report backs. Another standing item should be proposed amendments to the SLP. The requirements regarding adequate notice, access to information and language set above in relation to the development of SLPs should also apply to these meetings.

9. Measures to address gender inequality to be required in SLPs

It was found that few SLPs acknowledge the disproportionate negative impacts of mining on women. This includes the loss of land, livelihood and consequent loss of power in the community, especially given that mining still primarily employs men.⁷¹ Few SLPs contained programmes with gender targets (e.g. for programmes that created employment).⁷²

Possible Solution

A number of measures could assist in amplifying the voices of women. First, facilitators of SLP community consultation could be required to ask questions designed to draw out the social and economic impact of mining on women, and the particular interventions, including LED initiatives that are required to address this. Second, gender researchers should be present at consultations about the content of SLPs. They could be funded by the above mentioned specialists fund. SLPs should also be required to contain a number of measures and targets to assist in combatting gender discrimination and gender-based violence on mine sites. These can draw from the best practice in the industry.

First, the target of 10% women in mining contained in the present MPRD regulations is too low and must be increased to prevent women from being a vulnerable minority.⁷³ Second, a number of proactive and remedial interventions should be mandatory at all mines. These would include adequate equipment designed for women, separate ablution and changing facilities, and a prohibition on the ordering of only one woman in an otherwise male group to go underground.

10. Integrate the development of SLPs into the IDP annual review and require community participation in this process

There are two distinct but interrelated problems. The first of these relates to the need for alignment of SLPs with the broader planning framework applicable to the locality. While the MPRD regulations require the integration of LED programmes in the SLP with the municipalities' IDP, there is evidence that this alignment often does not occur in practice and that local government is often not consulted.⁷⁴ The second problem relates to the evidence that there is a disjuncture between the needs expressed by community members and what is contained in IDPs which shows that alignment by itself is not sufficient to achieve the aims of SLPs.⁷⁵

Possible Solution

A possible solution would be to align the process of the development of the SLP with the annual IDP review. There could be a session devoted to the content of SLPs to be developed in the municipality at which representatives from unions, local community organisations and the DMR should be present.

The advantage is that this is a tangible mechanism to ensure that the content of SLPs is compatible with municipal IDPs and that, especially where communities raise proposals not captured in the municipal IDP, the IDP can be accordingly amended. Given that many municipalities host multiple mining operations and many other matters will need to be addressed at the IDP review, it may be a challenge to complete this task in the time allocated.

11. Quantify the formula for determining required financial provision for each mining operation

For SLPs to be genuinely transformative it is vital that the financial contribution of mining companies to SLPs is commensurate with the amount of mineral wealth generated from the operation and the negative social, economic and environmental impacts experienced by communities. To make sure this is always the case, it is essential that there is a clear formula for determining the minimum contribution of a mining company to a particular SLP. There remains a lack of legal clarity on how to determine what constitutes significant expenditure and commitments in SLPs.⁷⁶ The 2017 Mining Charter does not provide further clarity, merely stating that the contribution to the

SLP must be proportionate to the size of the operation (begging the question as to what is 'proportionate').⁷⁷

Possible Solution

A clear formula for determining the financial provision for SLPs is vital to ensure that the share for workers and community members is commensurate with the negative impacts of the operation and, also, the projected turnover. The formula should be based on the following components. The first is a calculation of the residual negative social and economic impacts on mine-affected communities – i.e. those impacts that are not addressed through other plans such as relocation plans and environmental management programmes. The second component should be a minimum percentage of projected annual turnover, to ensure that the benefits enjoyed by workers and communities are commensurate with the income derived from the project. In this regard, the legislation needs to expressly state that should actual turnover fall below the projected level, downwards revision of SLP expenditure is unlawful. Finally, legislation should be unambiguous and state that low labour intensity (largely mechanised operations that consequently don't require as much spend on human resources development), cannot be a reason for departing from the financial provision formula for the entire SLP. Instead, there should be a greater percentage of the SLP allocated to community projects.

12. Greater regulation on securing financial provision

Lonmin cited the economic climate and company finances as a reason for reduced SLP commitments.⁷⁸ It is important to ensure that the committed money is available for SLPs programmes regardless of the performance of the company.

Possible Solution

This could be addressed by requiring a secured financial provision to be set aside for SLPs, as is already the case for the financial provision for post-closure rehabilitation under the NEMA and the Financial Provision Regulations.⁷⁹ This is in order to ring-fence the money for this specific purpose.

VI. Model legislative provisions for an improved SLP System

1. Introduction

In the preceding section of the report, we outlined some aspects in which the existing SLP system can be strengthened to better serve its intended beneficiaries in the immediate to short term. Many of these involve resolving ambiguities in the existing framework. This report is designed, however, to provide greater specificity on what needs to change and how. At the same time we are mindful that fully-fledged draft legislation would require, amongst other steps, work-shopping with key stakeholders, such as communities, mine workers and trade unions, government and mining companies. The approach we have adopted is therefore of suggesting model legislative and regulatory provisions. This is in order to provide the legislator with ideas that could inform the drafting exercise should it choose to pursue the changes we have recommended.

The model provisions contained in this section relate to the following issues: definition of mine-affected communities; objectives of SLPs, access to information, public participation, gender responsiveness, alignment between SLPs and integrated development plans, and the financial provision.

2. Definition for mine-affected communities

Insert new definition into Section 1 of the MPRDA (Definitions).

***'Mine-affected community'** means communities where mining takes place, major Labour Sending Areas, adjacent communities within a district municipality, and any communities impacted by mining.'*

3. Objectives of SLPs

To be included in the MPRDA and not regulations:⁸⁰

- a) The objectives of the Social and Labour Plan are to:
 - i) ensure that holders of mining rights contribute towards the socio-economic development of mine-affected communities;
 - ii) ensure that holders of mining rights contribute towards the socio-economic development of employees;
 - iii) contribute to the transformation of the mining industry;
 - iv) address the gendered impacts of mining and the impediments to gender equality in the mining sector; and
 - v) promote employment and advance the social and economic welfare of all who live in South Africa.

4. Access to information and the dissemination of SLPs and annual compliance reports to communities

- a) all Social and Labour Plans, as well as annual compliance reports as required by Section 25 (2) (h) of this Act, must be available to the public;
- b) the holder of a mining right and the department responsible for mineral resources must provide access to any person requesting Social and Labour Plans as well as annual compliance reports as required by under Section 25 (2) (h) of this Act;
- c) the holder of a mining right must put in place measures to disseminate the Social and Labour Plan and all annual compliance reports to employees and to mine-affected communities, which must include:
 - i) each Social and Labour Plan and annual compliance report as required by Section 25 (2) (h) of this Act shall be translated into the predominant first languages spoken by intended beneficiaries of the Social and Labour Plan;
 - ii) each Social and Labour Plan shall be summarised into a plain language document in the predominant first languages spoken by intended beneficiaries of the Social and Labour Plan;
 - iii) each Social and Labour Plan, annual compliance report as required by Section 25 (2) (h) of this Act, and all translations and summaries of said documents, shall be available on the website of the company rights holder and of the competent regulatory authority;
 - iv) hard copies of each Social and Labour Plan and annual compliance report as required by Section 25 (2) (h) of this Act, and all translations and summaries of said documents, must be distributed at venues frequented by the intended beneficiaries of the Social and Labour Plan such as libraries, town halls, and municipal office; and
 - v) hard copies of each Social and Labour Plan, annual compliance report, and all translations and summaries of said documents, shall be distributed to the offices of those trade unions which represent the employees of the holder of a mining right.
- d) the holder of a mining right must notify mine-affected communities and employees of any amendments to Social and Labour Plans in terms of Section 102 (1) of the Act and Regulation 44 of the Mineral and Petroleum Resources Development Regulations which may include but not limited to:
 - i) notification via electronic mail;
 - ii) posting on the company website of the holder of the mining right;
 - iii) advertisement in local newspapers;
 - iv) announcement on community radio stations; and
 - v) all forms of communication referred to in subsections (i) to (iv) must be in the predominant language/s spoken by mine-affected communities and employees.

5. Participation by mine-affected communities and employees in the conception, design, implementation, monitoring and review of SLPs

- a) mine-affected communities and employees must be afforded the opportunity to meaningfully participate in the conception, design, implementation, monitoring, review, amendment and replacement of Social and Labour Plans.
- b) meaningful participation in terms of subsection (a) shall conform to the following principles:
 - i) consultation shall be inclusive and shall encompass the range of interests amongst communities and workers to whom the particular Social and Labour Plan applies, and which may include trade unions, civics and land buyers' associations, women, and youth, and traditional authorities;⁸¹
 - ii) in particular, measures to facilitate the participation of women and other specific groups shall be taken, including:
 - aa) requiring a gender specialist be present during public consultations;
 - bb) organising additional and separate meetings for marginalised groups where circumstances require;
 - iii) public participation processes shall proceed from the most local level possible (whether the Kgoro, village, township, informal settlement, depending on the context);⁸²
 - iv) the forms of notice followed for all public participation processes must be designed to reach the broadest range of beneficiaries of the Social and Labour Plan as informed by the following considerations amongst others:
 - aa) The predominant first languages spoken by potential beneficiaries of the Social and Labour Plan;
 - bb) The media (i.e. print, radio etc) commonly consumed by beneficiaries or potential beneficiaries of the Social and Labour Plan;
 - cc) Literacy rates amongst beneficiaries or potential beneficiaries of the Social and Labour Plan; and
 - dd) The amount of time needed to adequately prepare for meetings.
 - v) when eliciting written comments the time period for comments must be adequate for communities and workers to:
 - aa) study the content of the documents;
 - bb) enlist specialist expertise if needed; and
 - cc) draft written comments.
 - vi) all (written and oral) public participation processes must be conducted in the predominant first languages spoken by communities and employees;
 - vii) complete minutes shall be taken of any meetings and be made available to all those who attended on request;

- viii) all comments by beneficiaries or potential beneficiaries of the Social and Labour Plan shall be meaningfully responded to at, or subsequent to, the meeting;
- ix) the organisation of public participation meetings must include concrete measures to address the barriers to attending the meetings by beneficiaries or intended beneficiaries of the Social and Labour Plan such as:
 - aa) facilitation of transport where necessary; and
 - bb) measures to cater for members of communities living with disabilities.
- x) While the public participation process may vary according to the needs of communities and employees, it should at a minimum encompass the following:
 - aa) initial public consultations that take place no later than 6 months following the grant of the prospecting right;
 - bb) public meetings with the purpose of determining the content of the Social and Labour Plan;
 - cc) public meetings to elicit feedback on the draft Social and Labour Plan;
 - dd) a process of eliciting written comments on the draft Social and Labour Plan;
 - ee) public meetings to make the final Social and Labour Plan known to communities and employees;
 - ff) periodic meetings, held biannually or more frequently, to discuss the implementation of Social and Labour Plans, the state of compliance, any proposed amendments, and the SLP for the next five year cycle.

6. SLPs to address gender

Insert Reg 46 (c):

'A minimum of 50% of the total opportunities in the Income generating/ poverty eradication projects in each Social and Labor Plan must be reserved for women.'

Insert Reg 46 (b) (vi):

'Measures to address barriers experienced by women in the workplace, including but not limited to:

- aa) ensuring clothes and equipment are adapted to women specifically where appropriate;
- bb) separate changing rooms and ablution facilities;
- cc) managing underground shifts so women are never isolated;
- dd) concrete and independent processes for addressing allegations of sexual harassment and gender-based violence; and

- ee) gender-sensitivity training to facilitate a non-sexist workplace culture.

7. Alignment between SLPs and IDPs

Insert new definition into Section 1 of the MPRDA (Definitions):

'Alignment, in relation to Social and Labour Plans and other development plans, such as Integrated Development Plans, means the following: harmonising Social and Labour Plans and other development plans, such as Integrated Development Plans, through either introducing new projects in line with the objectives of the relevant development plan; including projects in the Social and Labour Plans that are already proposed in the relevant plan but are not funded; or through providing for the inclusion in the Social and Labour Plan of projects already contained in the relevant development plan.'

Insert:

Alignment of Social and Labour Plans and government development frameworks.

- a) where the required content of a Social and Labour Plan falls within national or provincial competencies, as determined in the Constitution and statute, alignment with national or provincial frameworks is required;
- b) for the purposes of aligning a Social and Labour Plan and an Integrated Development Plan, the annual Integrated Development Plan review of municipalities in which mining takes place shall include a line item on aligning mining the Social and Labour Plan and Integrated Development Plan;
- c) during the line item discussed in subsection (b) the following stakeholders must be present:
 - i) representatives of trade unions operating in the mine-affected area;
 - ii) representatives of independent community-based organisations operating in the mine-affected area;
 - iii) all mining companies operating in the mining-affected area that are in the process of preparing a new Social and Labour Plan;
 - iv) representatives of the local municipality with decision-making power;
 - v) representatives of the Department responsible for mineral resources with decision-making power
 - vi) specialists appointed by communities
- d) at these meetings, municipal officials must:
 - i) give meaningful consideration to proposals for amendments to the Integrated Development Plan provided by community representatives; and

- ii) make reasonable efforts to incorporate these, insofar as they concern initiatives within the municipality's constitutional and statutory competencies.

8. Financial provision for the Social and Labour Plans

- a) all holders of mining rights shall contribute a sum to be held in trust for the purposes of financially providing for the company's Social and Labour Plan as required in terms of Section 25 (2) (f) of the Act;
- b) such financial provision shall be calculated on the following basis:
 - i) 2% of the projected annual turnover of the mining operation for the five year Social and Labour Plan period;
 - ii) any residual social and economic impacts on host and labour sending communities in the event that the sum stated in subsection (i) is insufficient to address this;
 - iii) the human resources development needs of all employees in the event the funds stated in subsection (i) is insufficient to address this; and
 - iv) in the event that the company turnover is less than projected, the company may not reduce the expenditure on the Social and Labour Plan.

VII. Long-Term Recommendations for a People-Centred Mining Social Beneficiation System

1. Introduction

The above section shows that there is considerable scope for immediate interventions that can make the existing system more responsive and accountable to communities - and therefore more likely to achieve its stated objectives. These changes can, however, only go so far. As we have shown in the previous report, the existing SLP model itself suffers from severe deficiencies that limit its ability to fundamentally transform relations between mining companies on the one hand, and communities and workers on the other.

It is for this reason that this report also contains proposals for more fundamental changes to the system. In so doing, we acknowledge that the systemic nature of many of these proposed changes, including to the architecture of the MPRDA system would entail a full legislative process including white papers and extensive consultation of stakeholders proceeding parliamentary processes.

The recommendations contained in this section are numerous and diverse in nature, and it is for this reason we have distinguished them into two sets. The first set are those recommendations that represent a fundamental departure from the existing system but that are applicable and vital regardless of the particular benefit model chosen. These recommendations pertain to issues such Free Prior and Informed Consent (FPIC), land rights, transparency and gender equity. The second set pertains to three possible alternative social benefits models to the present SLP system. These recommendations have been shaped by our engagements with participants comprising a number of role players such as civil society partners, trade unions, academics, companies and communities. Where we draw on recommendations from other role players, this will be indicated and credited.

2. Recommendations applicable to all alternative models for benefit sharing

2.1 *Respecting communities' land rights, to free prior & informed consent and compensation for loss*

2.1.1 *Recognise right to Free Prior and Informed Consent*

The present minerals regime under the MPRDA does not make consent by directly affected local community members a pre-requisite to authorising mining licenses. There is increasing documentation that the lack of legal

protection of the rights of community to say 'no' to mining is enabling the continuation of the dispossession of rural Black South Africans. This often occurs through agreements concluded between traditional authorities and mining companies.⁸³

The right to Free Prior and Informed Consent (FPIC) is an emerging principle of international human rights law. This is evidenced by The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 32 (2) of the Declaration provides that:

States shall consult and co-operate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free prior and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The African Commission on Human and Peoples' Rights considered the principle of FPIC in the *Endorois* case.⁸⁴

FPIC honours a longstanding principle of African Customary Law. This is recognised in the Interim Protection of Informal Land Rights Act (IPILRA), enacted to give effect to Section 25 of the Constitution of South Africa, pending the establishment of a permanent legislative framework for recognising previously unrecognised forms of tenure of Black South Africans. IPILRA provides that people cannot be deprived of rights to land in terms of the act unless they consent to being deprived of the land, or the land is expropriated by the government and suitable compensation is paid.⁸⁵

For mining and minerals legislation to be genuinely transformative, it must expressly recognise and protect the right of communities to say 'no' to mining if they wish. Legislation must provide clear principles for a valid consent process.

Some of the principles of a truly transformed and community centred social benefit system could include the following. First, it must be clearly stated that consent of the traditional leader and council does not suffice to be meet the standard of FPIC. Second, consent should be sought at the appropriate level in the living customary law of communities. Some rights are generally controlled at the individual or household level (such as control over arable land) and others at the communal level (such as use grazing land).⁸⁶ Third, special attention needs to be provided to the rights of women with respect to communal land. Fourth, in order to ensure the right people and units are approached, an audit of land rights should be required in any area subject to applications for mining activity. Fifth, notice must be adequate and this means direct, door to door, notice to all the individuals with customary land rights. Sixth, rights holders should have access to accurate information and expertise to ascertain the likely negative and positive consequences of allowing the project to go ahead. Seventh, should it emerge in the course of impact assessments find that additional people stand to be directly affected by the operation, these people's consent will also be required. Eighth, consent can be revoked at any point. Finally, substantial changes to the mining project that alter the footprint of mining necessitate seeking consent over and above the initial consent granted to the project.

Fundamentally FPIC constitutes a different approach to development, one that affords a central role to the sectors of society who are most directly impacted by the development and, in particular, poor and working class people. It allows communities to exercise the agency to decide which form of development they would like. The veto right over a development also provides those communities who support a proposed mining development in principle, to negotiate terms of the development that maximise community benefit and minimise the negative impacts. As consent under FPIC is always revocable, there is a disincentive against mining companies negotiating in bad faith.

The first challenge relates to determining whose consent is required. This is a vital issue that must be tackled to ensure consent doesn't in practice become consent of traditional leaders. This difficulty can be addressed through a proper application of the principles of customary ownership. In fact, as demonstrated by a body of research and the testimony of communities, treating the Chief as landowner with the right to parcel out land is a distortion imposed by colonial and apartheid governments in order to control land and labour indirectly through the person of the Chief.⁸⁷ In relation to mining this should follow the customary decision-making processes of the particular community. Some rights are generally controlled at the individual or household level (such as control over arable land) and others at the communal level (such as use of grazing land).⁸⁸

Each individual, for example, who stands to lose a home if mining proceeds, must consent for a mining project to be valid. While there will be a range of groups negatively affected by mining that are more difficult to pinpoint, communities, families and individuals who stand to suffer likely or inevitable losses to their rights to land can be located. Consent for people within this class should be sought door to door.

2.2 Establish a framework regulating compensation for loss of land and other direct negative impacts of mining

2.2.1 Adequate lifetime compensation for loss of land

Currently compensation for loss of land and livelihoods by mine-affected communities is often in the form of grossly inadequate once-off payments which are often not even adequate for one year's sustenance.⁸⁹ This represents a regressive action in relation to communities' right to food and water in Section 27 (2) of the Constitution of South Africa. Further, the Constitution provides for just and equitable compensation for those deprived of property due to expropriation. Given that the Bill of Rights also binds private actors it can be argued that just and equitable compensation is also required in relation to mining on communal land.⁹⁰

Possible Solution

The first principle is that where there is irreversible loss of land, the members of communities who are directly affected shall have the election to choose either once-off payments or ongoing payments.

This is because the loss of food security, and income derived from the land is one that will have a significant impact throughout the life of those who have suffered the loss. Community members should have a choice of assessing the financial implications and coming to an informed decision about how to structure repayments. Second, present and future use value should be factored into the evaluation.⁹¹ Third, communities should have access to legal and other expertise both to assess value of loss and in order to ensure an equitable formula for compensation is obtained.

2.2.2 Relocation plans must be clearly regulated

While relocations of communities should be the exception and cannot occur without FPIC, there is still a need for a framework to ensure fairness in the event consent to relocation does occur. At present relocations often occur in a manner that results in a deterioration of standard of living whether with regard to disruption of community settlement patterns, quality of housing, food and water, and access to economic opportunities.

Possible Solution

A binding set of standards, codified in regulations, is required to ensure that relocation is adequate and that all costs are born by the developer. The first principle flows from FPIC, namely that affected community members should be afforded a formal role and a veto right in the development, adoption and implementation of a relocation plan. Second, there must be full transparency with regard to information used to formulate the plan, the text of the plan, and measures undertaken to implement the plan. Third, as stated in the Model Law on Mining on Community Land in Africa prepared by the International Alliance on Natural Resources in Africa (IANRA), the replacement land and living conditions should be at least equally good or better in terms of quality and size.⁹²

Communities should have the option to choose the process by which land is identified. One option would be for communities to identify the land themselves with the assistance, should they wish, of independent specialists. This option would primarily cater to the circumstance in which communities have a particular piece of land in mind already. Another option that must be available to communities is for the companies to identify the land but to organise a site visit for communities to inspect the land accompanied by independent specialists of communities' choosing.

The standards of the land quality laid down by the regulations should include, but not be limited to the following. First, the land to which communities would be relocated would, at a minimum, need to be capable of yielding the same or better benefits as their land prior to relocation. Housing must be of the same standard or better as previously and respect the community's customary living arrangement. The replacement land must not be far from services and livelihood opportunities.

2.2.3 Regulation of blasting and addressing impacts of blasting

Communities living in close proximity to mining operations frequently report cracking of their houses which, in some instances, entails structural damage.⁹³ There have been instances in which walls have caved in.⁹⁴ This damage to intimate living spaces constitutes a violation of the Constitutional rights to dignity, to housing and even life.⁹⁵ The standards contained in the blasting regulations must be changed from the overly lenient standards which permit mining companies to cause severe damage to occur to community members' homes without clear and certain legal recourse for communities.

Possible Solution

It is imperative that the present South African legal framework governing blasting, including the limits governing blasting activities, be reviewed and amended to take account of local conditions and the types of housing that are common. Second, the regulations should impose positive obligations on mining companies to take measures, in consultation with affected persons, to fix the structural damage from blasting. In accordance with the Constitutional Court's jurisprudence on causation, in the case of *Dudley Lee v Minister of Correctional Services*, the standard for causation triggering the positive obligation must be that the excess of the blasting standards must be a probable cause of the damage, not that a specific incident of blasting contributed to the specific loss.⁹⁶ In addition the proposed independent problem solving service would be a potential forum for community members to find a solution to the damage they have suffered as a result of blasting.

2.2.4 Plan for addressing the direct and broader health impacts of mining

Section 24 of the Constitution guarantees the right of all to an environment not harmful to health or well-being. While there is enough legislation to rehabilitate the physical footprint of mining at its source there is no legislation addressing measures to be taken to address chronic illness as a result to exposure of communities. The Occupational Diseases in Mines and Works Act does not cover the broader community but instead applies only to mine workers.⁹⁷ The regulations pertaining to environmental impact assessments require all impacts to be assessed and responded to but there are no specific requirements that tangible and budgeted-for programmes be put in place to address the health impacts of mining experienced by the broader community.⁹⁸ The result is that communities suffer severe health impacts without obvious recourse.

Possible Solution

The polluter pays principle, enshrined in the National Environmental Management Act (NEMA) extends not only to damage to the physical environment but also the resulting harms to people's health.⁹⁹ Legislation must therefore require that programmes with budgets and time frames be put in place for the prevention, treatment and compensation of negative health impacts of mining.

2.2.5 Share of ownership in operation by directly affected community

The most directly affected communities on whose land mining occurs disproportionately experience the burdens of mining while receiving a minimal proportion of the benefits at best. There needs to be a mechanism by which a significant proportion of mineral wealth is shared by the directly affected community.

Possible Solution

Following from the principle of free prior and informed consent, communities who are directly impacted should have the opportunity, should they wish, to be co-owners of the mining project from its inception both in respect of share ownership and in terms of their preferences having weight in decision-making. There also need to be parameters regarding any trust or financial vehicle set up to manage the community share of a mining project.

The process of determining the allocation of the fund needs to follow the principles of meaningful community participation. First, participation must begin at the most grassroots level possible. There should be a community assembly consisting of representatives of all villages, kgoros, settlements etc. which in turn elects an executive of 8-10 members. At every stage in the budgeting process, mandates must be obtained regarding developmental needs and priorities.¹⁰⁰

The executive organ of any such financial vehicle needs to consist of an appropriate mixture of knowledge and expertise to ensure that it is managed optimally. The executive should therefore consist of community members, qualified financial managers, local economic development specialists, and legal specialists. Members of the management should be jointly appointed by independent community-based organisations, government, mining companies and other key role players.

There must be periodic reporting to the community members on the expenditure and actions taken by the executive body to implement the projects budgeted for. These meetings must be transparent and should also involve community representatives conveying the views of the intended beneficiaries as to whether the project is satisfactory.

The main risks relate to a failure to carefully and appropriately design the institutions which will manage this share. For large scale mining projects large amounts of money will be involved and a poorly designed and opaque vehicle could lead to a few gaining, many losing and resultant conflicts over resources. Currently there are many problems commonly associated with community ownership schemes. These trusts and other vehicles are often associated with claims benefits are only flowing to traditional leaders and conflicts over who are the rightful beneficiaries. These institutions are often opaque with regard to their rules and processes, decisions taken by trustees and their expenditure.¹⁰¹ There are few mechanisms available to owners to hold trustees accountable.

Even in relation to a well-managed ownership scheme, there is the risk that given the fluidity of membership of communities, there may be people not recognised as beneficiaries who subsequently claim a right to benefit. To manage this risk, it is critical that there is an adequate and effective mechanism for benefiting the broader community – i.e. the role currently assigned to Social and Labour Plans.

Therefore there needs to be two complementary systems. A consent, compensation, restitution and ownership system for communities living on and/or with rights to the land before mining arrives. The second system must be a social beneficiation mechanism for all the diversity of communities living in mineral complexes, including communities that do not live on or have direct rights to the land on which mining takes place. This broader community includes more recent arrivals formed as a result of people seeking work in a mining-centred economy. The present SLP system is primarily a mechanism for this latter, broader class of people. Subsequently in the report we shall discuss models for social benefit of the broader community.

2.3 Transparency of all agreements, plans and information pertaining to implementation and compliance with agreements

2.3.1 Transparency of negotiations and agreements between mining companies and traditional leaders

There is increasing documentation of a pattern by which traditional leadership conclude deals in secret with mining companies regarding the sale or ceding of surface rights on communal land, and which allows dispossession.

This is frequently in opposition to the living customary law of mine-affected communities in two respects. First, some rights (such as control over arable land) are generally controlled at the individual or household level rather than the level of the entire community. In such cases negotiations should be with individuals and households. Other rights are often held at the communal level (such as use of grazing land). In such cases, traditional leaders are typically custodians of the land which belongs to the broader community. Traditional leaders, in such circumstances do not have the right to unilaterally dispose of land. In this case there needs to be broad community participation in the decision over use of communal land by mining companies and the form of compensation.

Possible Solution

As stated above, the negotiations regarding the use of communal land must involve the individuals and social units (whether, individuals, households or the community as a whole) who hold rights to the land under a communities' living customary law. The texts of the agreements reached must, further, be publically accessible in the predominant languages spoken by the relevant communities.

The MPRDA must clearly provide that mining companies concluding secret agreements or failing to disseminate agreements are in breach of the Act and subject to penalties.

3. Alternative models for community benefit sharing

3.1 Negotiated Social and Labour Plan

Our research has shown that the SLP system marginalises communities. Most community members interviewed reported that they had no role in the formulation of the SLP and, even worse, had no knowledge of the contents of the SLPs for mining operations in their area.¹⁰²

This outcome, while not inevitable, can be traced, at least in part to the regulatory framework. This does not provide any formal decision-making role, in the design or implementation, or review of SLPs to any parties other than the mining company and the state. Therefore, in effect, an SLP is a contract between the state and the mining company. While the MPRD Regulations require alignment between the SLP and the IDP, our research and submissions made before the Human Rights Commission Hearings on the Socio-economic Challenges of Mine- Affected Communities both suggest that this does not always occur.¹⁰³ Even when it occurs, there is also evidence that IDPs themselves do not reflect the priorities of communities.¹⁰⁴

In other jurisdictions, another approach to mining community beneficiation is followed, namely mine-community benefit agreements. These are often private agreements enforceable via contract law.¹⁰⁵ On the positive side, there is an opportunity for direct community involvement (though whether negotiators are accountable to the broader community is not guaranteed). On the negative side, the literature suggests that agreements are often not implemented due, in part, to the asymmetry of resources and power between communities and mining companies, which includes unequal access to courts.¹⁰⁶

Possible Solution

It is possible to conceive of a model that combines the advantages of a negotiated system (greater opportunity for community and worker participation) and a regulatory system (the potential of the state to ameliorate the asymmetries of power between large companies and communities).

The SLP could, for example, be the product of a negotiation between the community, mining company, trade unions and local government. However, the conclusion of such an agreement would be a legislative requirement for the right to mine. Further, the document would need to be submitted to the national government in order to obtain a mining right and once approved, the obligations would be public law obligations as is the case currently.

The requirements for community consultation in this process, including notice, would need to be robust. One of the basic principles would be that negotiation mandates be sought from the most grassroots level possible. Further, communities would need to have a voice in designing the negotiations process.

In making communities and workers parties to any such agreement, they would be afforded leverage from which to influence the content of the document that is not currently available. It would therefore be less likely that the plans will only reflect the views and interests of the mining company. This represents an advance on the status quo from a participation and influence point of view, without losing the advantage of having government as a regulator.

Like the SLP model, however, there would still be considerable reliance on the regulator, the DMR, to act as a guarantor of community rights by enforcing compliance with the agreement. Community interviewees and the organised mine-community sector more broadly, have expressed very low trust in the department.¹⁰⁷ They view the department as doing very little to assist them, instead, on the contrary, protecting the interests of mining companies and traditional leaders.

3.2 Regional and democratic Social and Labour Plan

Project-based models for social benefits, such as the present SLP system, are suited to addressing the needs of community members who have resided in an area prior to the arrival of a mine and, whose rights stand to be directly and acutely affected by the mine.

Mining, however, has an impact on a far wider range of community stakeholders. Moreover, especially in economic hubs such as minerals complexes, there is and, has always been, a fluid movement of people. Further, where there are a multiplicity of mines, establishing impact nexuses between particular communities and mines, other than those on or adjacent to land marked for mining is very difficult.

The underlying problem – of a highly unequal distribution of the positive and negative consequences of mining – remains. An appropriate solution, which speaks to the regional nature of impacts and the mining economy, but which preserves accountability to communities is needed.

Possible Solution

One alternative would be a single fund, for each minerals complex, or municipality, into which all mining companies would be required to contribute a specified proportion of projected turnover. This fund would be dedicated to local economic development projects for communities in that area. The fund could be run by local government or housed at an inter-governmental level.

The fund would represent a comprehensive response to the developmental needs of mine-affected communities rather than piecemeal initiatives at the level of the individual mining right.

The most fundamental manner in which this fund would differ from existing mechanisms would, however, be the process by which the programmes would be allocated. At present, public participation, in accordance with South Africa's constitutional democracy, is a feature of the legislative process and of local economic development planning, such as municipal IDPs. However, community input in IDPs, for example, do not give rise to mandates, hence the needs, priorities and proposals of community participants are not necessarily reflected in the choice, location and design of development projects.

The process for allocating the fund would be democratic and be based on the needs and preferences of community members. The process would begin at the most local unit, whether the Kgoro, village, informal settlement or location. At these local meetings the following will be decided upon: First, an identification of the gaps and challenges in local services and infrastructure. Second, an envisioning of the form of local development desired. Third, a listing of development projects required locally. Fourth, the election of delegates to carry forward the mandate of the community at the level of the municipal assembly. The specialists fund will be used to fund local economic development specialists who can facilitate a conversation that can draw out the real developmental need such as whether the main problem is a lack of sufficient distribution of clinics to service an area or the staff numbers, facilities or level of service at existing clinics. They can also provide a brief introduction to local economic development and budgeting. The specialist will also explain the budgeting process to delegates as well as the total sum available to projects.

After the local meetings, the regional meetings could be held with the elected delegates. At these meetings the delegates will present the developmental priorities. There will be a process of reconciling the needs of the areas with the available budget. A weighting system might be employed which looks at the order of priorities identified by each community, as well as the population and numbers of facilities in each area. Again at the regional assembly, development specialists will provide induction training on development planning and budgeting, and will be on hand to guide the discussion. They will also be accompanied by public finance specialists. Once the budget is agreed upon, an executive body shall be elected that is tasked with implementing the budget.

Given the significant overlap between this process and the Integrated Development Plan (IDP) process of municipalities, it would be optimal if there would be an alignment between this mine-communities people's budgeting and the broader IDP.

We would therefore also recommend that the IDP process itself be reformed to a system in which directly elected community delegates with mandates given to them by communities negotiate with the municipality on local economic development projects by communities.

The advantages are the following: The model is more democratic, giving greater voice to communities given that the choice of programmes are to emerge out of mandates communities themselves propose. Second, given that the fund operates at the level of mineral complex or municipality rather than single mine, it is more likely to include all communities affected by mining rather than only those communities selected by a mining company. Third, the complex/municipality level of the process makes larger consolidated projects more likely and small piecemeal initiatives less likely.

The first challenge relates to the mandate of local government. For example access to education is a key issue. However, education is not a local government competency under the South African Constitution.¹⁰⁸ Therefore, there is a risk that if the fund is managed at a local government level, there will be mandates emanating from communities that will not be able to be fulfilled, which could result in disappointment and participation fatigue on the part of community participants. One way to address this would be for a mine-community fund to have an implementation committee consisting of local and national government, community representatives, organised labour and mining company representatives whose task is to ensure that the agreed upon budget is translated into concrete activities and that all necessary inter-governmental agreements and collaborations occur.

3.3 State agency for mine-community development

This idea of a government agency to oversee community development is similar to the body set up for the purpose of overseeing community equity trusts in the Reviewed Mining Charter, 2017.¹⁰⁹ While, as outlined below, we are of the view that its formulation in the Reviewed Mining Charter, 2017 is flawed on account of a lack of clarity, although the fact that government wishes to pursue it means the model merits attention.

The developmental needs and priorities of mining-affected communities need a number of spheres of government (local, provincial and national) and departments to address the multifaceted socio-economic issues. For example, education is a concurrent national and provincial legislative competency listed in Schedule 4 Part A of the Constitution. So are health services but in contrast to education, municipalities have authority (under Schedule 4 part B) of municipal health services. It is therefore important that the mechanism for mine-community development promotes integrated governance and makes the shifting of responsibilities less likely. An agency under a government has the potential to facilitate this needed integration.

Possible Solution

In order to be effective a third party structure would need to provide for a specialised agency for mine-community development. The agency would need to have branches in each mining area. At a minimum it would need to be run by a combination of the DMR, the Department responsible for Co-operative governance, the relevant municipalities, community representatives, local economic development specialists and project finances specialists.

What could prove a viable option is having an independent third party which oversees the LED portion of the funds given as part of the SLP. This structure could be comprised of construction and planning specialist who could assist in expediting the finalisation of the projects and get services to those in need more efficiency. This structure could perform a coordinating role between the various role-players including the mining companies, the municipality and the community. There could even be a steering committee that is comprised of representatives from the various groups. This could prove to be a viable alternative, but, yet again, could just create another administrative hurdle and further delay proceedings.

The Reviewed Mining Charter, 2017, has created a new structure, named the Mineral Transformation and Development Agency (MTDA). The Charter states that the role of the MTDA will be to manage the 8% shareholding of the Mine Community held in trust for community benefit and local economic development.¹¹⁰ There is, however, almost no guidance regarding how it will work. Unanswered questions include how members are elected (and recalled), what their fiduciary duties are, who should be on the board (in terms of skills and social sector), how are funds to be allocated (communities' role in deciding in particular) and how they are transparent and accountable to communities. The MTDA, in fact, accounts solely to the Minister.¹¹¹ This absence of clarity is concerning for a body which would administer vast sums of money, and which is entrusted with the fate of mine-affected communities.

An additional contentious point has been the fact that the MTDA would report to the Minister directly, which could be seen as problematic, especially given recent and longstanding allegations regarding state capture and corruption in the department and extractives sector.

What this does indicate is that the regulator is, at present, looking towards Ministerial structures. However to be viable and capable of evaluation as a proposal, any structure set up to spearhead mining community development would need be adequately defined and elucidated.

VIII. Conclusion & summary of recommendations

From the previous two reports of the SLP Series it is clear that there are fundamental flaws in the SLP system which limit it as a tool for community and worker development. This report has sought to address these concerns through, first, proposing immediate interventions to improve the present SLP system and, second, suggesting possible longer term alternative models to inform a broader conversation about addressing the more fundamental defects of the present SLP system.

The immediate interventions can be summarised into 11 proposals that could be accomplished without thorough fundamental changes to the SLP model. These relate to:

- Making the process of requesting information from the DMR under PAIA more accessible to communities;
- Clearer legislative provisions regarding transparency of SLPs and annual compliance reports coupled with positive obligations to translate and disseminate them to communities;
- Mining laws, regulations and policy needs to be developed in a manner that recognises communities as a central role player;
- Pursue Bench Marks Foundation's proposal of a problem solving service to address the grievances of mine-affected communities;
- Pursue Bench Marks Foundation's proposal for a community capacitation fund that is designed to complement the problem solving service;
- Specify requirements for community participation in the design and amendment of SLPs;
- Specify Requirements for periodic reporting back to communities on progress made in SLPs;
- Impose clearer requirements in legislation with regard to addressing gender inequality associated with mining;
- Formally integrate the development of SLPs into the IDP annual review and require community participation in this process;
- Quantify the formula for determining required financial provision for each mining operation; and
- Greater regulation on securing companies' financial commitments with respect to SLPs.

The longer term and more fundamental interventions were divided into two types. First, the changes that we recommend pursuing regardless of the particular model followed. These include amending mining law to give effect to the principle of free prior and informed consent, a more robust framework for addressing the negative social and economic impacts of mining and greater regulation of the trusts and other vehicles held on behalf of the communities on whose land mining takes place.

Second, we set out and discussed three possible alternatives to the present SLP model. The first of these was negotiated SLPs. This entails the retention of the model of SLPs to be implemented by mining companies but requires the content of these to be the product of a formal negotiation between communities, organised labour, mining companies and government. The second model involves the replacement of project-based SLPs by a regional participatory structure. The essence would be a participatory process that moves to a regional forum which is designed to elicit mandates on projects directly from communities. In our view, this is the most promising approach, since it marries direct community involvement with regional multistakeholder co-ordination. The last model we have put forward is for a government agency tasked with overseeing the implementation of local economic development of mine-affected communities, as per the Mining Charter of 2017.

We hope that these recommendations assist civil society and mine-affected communities in their formulation of more democratic alternatives to the SLP system in its present form. We also hope that it provides law makers with possible options for a more just and equitable SLP system which has communities at its core.

Annexure: Acronyms & Glossary

Acronyms

BEE	Black Economic Empowerment
CBO	Community-Based Organisations
DMR	Department of Mineral Resources
HDP	Historically Disadvantaged Person
MC	Mining Charter
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NEMA	National Environmental Management Act 107 of 1998
NGO	Non-Governmental Organisation
NPO	Non-Profit Organisation
NUM	National Union of Mineworkers
PAIA	Promotion of Access to Information Act
SMME	Small, Micro and Medium Enterprise
SIA	Social Impact Assessment
SLP	Social and Labour Plan

Glossary

Community	Individuals and groups who have in common a significant impact from the mining operation whether on account of proximity to mining activity, status as a labour sending community or other links.
Co-operative governance	The doctrine enshrined in the South African Constitution that governs the relations between the national, local and provincial spheres of government, as well as the relationships between different departments within the state. The basic principles of co-operative governance are: first, that one sphere of government should not use its powers in such a way as to undermine the effective functioning of another sphere or organ of state and, second, 'that the functional and institutional integrity of the different spheres of government must... be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution and the countervailing powers of other spheres of government.'

Environmental Justice	A philosophy of environmental governance that is a response to the manner in which negative environmental impacts disproportionately fall on working class and poor black communities. It requires that the harms and benefits of activities impacting on the physical environment be equitably distributed and that vulnerable groups play a central role in decision-making regarding the environment.
Labour sending area	Any area from where company workers are sourced. The local mining area can therefore also be a labour sending area.
Learnerships	Learnerships are courses in skills required for particular roles in the workplace.
Local economic development	Local economic development relates to municipalities' constitutional and legislative mandate to promote the development of communities within their jurisdiction. In SLPs, local economic development programmes must include projects designed to meet the infrastructure needs of communities and projects to promote the growth of local co-operatives and entrepreneurs.
Mine closure	Mine Closure occurs when rehabilitation has occurred and the mining company has successfully applied for a closure certificate which transfers the liability from the mining company to the state.
Mining right	A right to mine granted in terms of Section 23 (1) of the Mineral and Petroleum Resources Development Act (MPRDA).
Rehabilitation	This refers to measures, required under the National Environmental Management Act, to restore the environment either to its natural and pre-determined state (prior to mining) or to a land use compatible with sustainable development.
Spatial planning	This involves mapping and understanding the characteristics of a specified area (municipality, province, country, etc.) and identifying areas where different forms of land use and development should occur. Spatial planning accommodates notions of strategic planning that link land use and spatial development to attaining socio-economic goals.
Stakeholder	In the mining setting, stakeholder refers to any individuals or groups whose rights and/or interests stand to be impacted by a mining operation.

Endnotes

¹ All reports are freely accessible at: <https://www.wits.ac.za/cals/our-programmes/environmental-justice/social-and-labour-plans/>

² For further reading see V Allen *The history of black mineworkers in South Africa: the techniques of resistance 1871-1948* (Volume I); M Legassick 'Capital accumulation and violence' (1974) 3 *Economy and Violence*.

253; H Wolpe 'Capitalism and cheap labour-power in South Africa: From segregation to apartheid' (1972) 1 *Economy and Society* 425.

³ M Legassick 'Capital accumulation and violence' (1974) 3 *Economy and Violence* 253; H Wolpe 'Capitalism and cheap labour-power in South Africa: From segregation to apartheid' (1972) 1 *Economy and Society* 425. .

⁴ *Ibid.*

⁵ These rights are guaranteed in Sections 27 and 24 of the Constitution of the Republic of South Africa, 1996.

⁶ A founding value of the Constitution is the 'achievement of equality.' There are a number of rights in the Bill of Rights which seek to ensure greater equality including the right to equality in Section 9, the right to an environment not harmful to health and well-being in Section 24, the right to housing in Section 26, the right to health care, food, water and social security in Section 27, and the right to education in Section 29.

⁷ Act No. 28 of 2002. The objectives of the Act are contained in Section 2.

⁸ Key mechanisms, in addition to SLPs include: The Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (Mining Charter) in terms of Section 100 (2) of the MPRDA and preferent prospecting or mining rights in terms of Section 104 of the MPRDA.

⁹ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase 1: System Design* (March 2016), 46.

¹⁰ *Ibid* 68.

¹¹ *Ibid* 69.

¹² WoMIN Women, gender and extractivism in Africa, a collection of papers - Paper Three – Land and food sovereignty undermined: impacts on peasant women (2013) 9-10.

¹³ A Benya 'Women in Mining: A Challenge to Occupational Culture in Mines' (2009) A dissertation submitted to the Faculty of Social Science and Humanities of the University of the Witwatersrand, Johannesburg, South Africa, in partial fulfilment of the requirements for the degree of Master of Arts (Industrial Sociology).

¹⁴ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase 1: System Design* (March 2016), 57.

¹⁵ *Ibid* 66.

¹⁶ *Ibid* 67.

¹⁷ CALS' experience utilising the PAIA process is discussed in Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase 1: System Design* at 19-20.

¹⁸ *Ibid* 20.

¹⁹ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase 1: System Design* (March 2016), 82.

²⁰ IDPs are addressed in Chapter 5 of the Local Government: Municipal Systems Act. Act No. 32 of 2000 (Municipal Systems Act).

²¹ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase 1: System Design* (March 2016), 85.

²² *Ibid* 86.

²³ *Ibid* 73.

²⁴ See the Subsection 2 (c), (d), (f) and (i) of the MPRDA in particular.

²⁵ For example Article 38 of the UN Guiding Principles on Poverty and Human Rights was adopted by the Human Rights Council at its 21st session in 2012 Article 38 reads as follows:

'States must ensure the active, free, informed and meaningful participation of persons living in poverty at all stages of the design, implementation, monitoring and evaluation of decisions and policies affecting them.'

In the *Endorois* case, the African Commission on Human and Peoples' Rights interpreted the right to development in the African Charter on Human and Peoples' Rights. They held that the right to development has a procedural as well as a substantive component and that it includes freedom of choice (of those affected by development). *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* para 277 and 278.

²⁶ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase II: Implementation* (March 2017) 33.

²⁷ *Ibid.*

²⁸ *Ibid* 42.

²⁹ Department of Mineral Resources 'Manual issued in terms of the Promotion of Access to Information Act, 2000' (2014) 5.1.4.

³⁰ *Ibid* 33-34.

³¹ *Ibid* 49.

³² *Ibid* 50.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid* 28, 30, 54, 55.

³⁶ S Mswana 'Chief's justice? Mining, accountability and the law in the Bakgatla-ba-Kgafela Traditional Authority Area' (September 2014) 40 *SA Crime Quarterly* 21; S Mswana & G Capps 'No Chief Ever Bought a Piece of Land!' *Struggles over Property, Community and Mining in the Bakgatla-ba-Kgafela Traditional Authority Area*, Working Paper: 3. Society (2015) Work and Development Institute, University of the Witwatersrand; M Phalane 'Kgoshi accepted R175m deal while on Anglo Platinum's dime' *Mail & Guardian* (17 June 2016).

³⁷ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase II: Implementation* (March 2017) 55.

³⁸ *Ibid* 42.

³⁹ *Ibid* 27, 43.

⁴⁰ *Ibid* 24, 43-45.

⁴¹ *Ibid* 44.

⁴² *Ibid* 52.

⁴³ Interview with trade union official, 4 May 2017.

⁴⁴ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase II: Implementation* (March 2017) 52.

⁴⁵ At 45.

⁴⁶ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase II: Implementation* (March 2017) 52.

⁴⁷ Comments of the Mining and Environmental Justice Community Network on the Mineral and Petroleum Resources Development Act Draft Amendment Bill, 2012; Submission to the Honourable Minister of Mineral Resources In re: Draft Mineral and Petroleum Resources Development Amendment Bill 2012 by Legal Resources Centre on behalf of Mr Mmuthi Pilane of Motlhabe Village and others; Submission by the Bafokeng Land Buyers' Association on the Mineral and Petroleum Resources Development Amendment Bill (5 May 2017)

⁴⁸ The leading case on public participation in law making, *Doctors for Life International v Speaker of the National Assembly and Others* and *Matatiele Municipality v President of the Republic of South Africa & Others*, requires that the legislature take steps to ensure that all interested in participating be afforded a real opportunity for their views to be heard and be considered by lawmakers.

⁴⁹ International human rights law is evolving to require that development must occur in a way that involves the active participation of those most affected. For example Article 38 of the UN Guiding Principles on Poverty and Human Rights (which was adopted by the Human Rights Council at its 21st session in 2012 and endorsed by the UN General Assembly) provides that:

'States must ensure the active, free, informed and meaningful participation of persons living in poverty at all stages of the design, implementation, monitoring and evaluation of decisions and policies affecting them.'

In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (276/2003), The African Commission of Human and Peoples' Rights, interpreted the right to Development in the African Charter on Human and Peoples' Rights. It held that process was as important as outcome in the right to development and the beneficiaries of development had to have a choice in how development takes place.

⁵⁰ 2.5 (b) of the Reviewed Broad-Based Black-Economic Empowerment Charter for the South African Mining and Minerals Industry (15 June 2017).

⁵¹ Bench Marks Foundation Independent Problem Solving Service Executive Summary (10 August 2017).

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ The Bench Marks Foundation will implement a pilot project, which represents an opportunity to, through experience; determine what is appropriate in these respects.

⁵⁷ *Ibid.*

⁵⁸ Bench Marks Foundation is presently in the process of launching a pilot and consulting with stakeholders on the precise contours of this fund.

⁵⁹ See discussion above in Chapter III, 17.

⁶⁰ J Klaaren & G Penfold 'Just Administrative Action' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (6 Rev 2014) 63.5 (a).

⁶¹ Chapter 6 of the National Environmental Management Act Environmental Impact Assessment Regulations (NEMA EIA Regulations). 2014 GN. R. 982.

⁶² Interview with civil society organisation, 23 May 2017.

⁶³ This phenomenon is frequently reported by members of mine-affected communities.

⁶⁴ Centre for Applied Legal Studies, The Social and Labour Plan Series – Phase II: Implementation (March 2017) 18.

⁶⁵ Centre for Applied Legal Studies, The Social and Labour Plan Series – Phase II: Implementation (March 2017) 34.

⁶⁶ See chapter III above, 17.

⁶⁷ The MPRDA and regulations contain no express requirement to consult communities or even publicise amendments to SLPs, even in the case of significant changes. The only requirement is to obtain the consent from the Minister in writing. The relevant provisions are Section 102 of the MPRDA and Regulation 44 of the MPRD Regulations.

⁶⁸ C Albertyn & B Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248, 249. Cited with approval in Justice Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch LR* 351, 352.

⁶⁹ See notes 25 and 49 above on the UN Guiding Principles on Human Rights and the jurisprudence on the right to development on the African Charter on Human and Peoples' Rights.

⁷⁰ Sections 33 and 1 (d) of the Constitution, respectively.

⁷¹ WoMIN Women, gender and extractivism in Africa, a collection of papers - Paper Three – Land and food sovereignty undermined: impacts on peasant women (2013) 9-10.

⁷² Centre for Applied Legal Studies, The Social and Labour Plan Series – Phase 1: System Design (March 2016), 57.

⁷³ Regulation 46 (b) (v) of the MPRD Regulations.

⁷⁴ *Ibid* 17.

⁷⁵ T Njenga 'A Critical Analysis of Public Participation in the Integrated Development Plans (IDP) of Selected Municipalities in Some Provinces (Gauteng, Eastern Cape, KwaZulu-Natal and Western Cape) in South Africa.' Submitted in partial fulfilment of the requirements for the degree of Master of Social Sciences (Policy and Development Studies) in the Faculty of Humanities, Development and Social Sciences in the University of KwaZulu-Natal, Pietermaritzburg (2009) 53.

⁷⁶ At present no formula is specified in the MPRDA, MPRD Regulations 40-46, the 2010 SLP Guidelines, or the Mining Charter.

⁷⁷ 2.5 (a) of the Reviewed Mining Charter, 2017.

⁷⁸ The most severe and well-known example is in relation to its commitments to build 5500 houses in its 2006 SLPs. This reason is cited in several annual compliance reports from as early as the Western Platinum Limited Annual Compliance Report submitted in 2009, at 49.

⁷⁹ The Financial Provision is required by Sections 44(aE), (aF), (aG), (aH) read with sections 24(5) (b) (ix), 24(5)(d), 24N, 24P and 24R of NEMA. It is governed by the Financial Provisioning Regulations, 2015. GN. R. 1147.

⁸⁰ The objectives of the SLP system are currently contained in regulation 41 of the MPRD regulations. The failure to specify objectives in empowering legislation represents an abdication of the role of the legislature which is to set the objectives, whereas regulations are designed to effect to them.

⁸¹ IANRA Model Mining Law for Africa 39.1.1.

⁸² This was informed by interview with ActionAid SA on 23 May 2017.

⁸³ S Mswana 'Chief's justice? Mining, accountability and the law in the Bakgatla-ba-Kgafela Traditional Authority Area (2014) *SA Crime Quarterly*.

⁸⁴ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya* para 226.

⁸⁵ Section 2 (1) of the Interim Protection of Informal Land Rights Act No. 31 of 1996.

⁸⁶ B Cousins 'Part four: traditional leaders, power and land rights' in A Claasens & B Cousins *Land, power and custom: controversies generated by South Africa's Communal Land Rights Act (2008)* 284. This was quoted with approval by the High Court in the matter of *Tongaone, Tongoane and Others vs National Minister for Agriculture and Land Affairs and Others* (11678/2006) [2009] ZAGPPHC 127; (30 October 2009)

⁸⁷ *Ibid*; Interview with Researcher, 19 May 2017.

⁸⁸ Cousins (op cit).

⁸⁹ Interview with researcher, 19 May 2017.

⁹⁰ Section 8 (2) of the Constitution, 1996.

⁹¹ This is a demand of mine-affected communities as is reflected the People's Mining Charter which provides that 'Compensation for loss of livelihoods and economic social, environmental, cultural and heritage resources should be based on full cost accounting including future losses of alternative development paths and value loss of minerals.'

⁹² 36.3 of the IANRA Model Law.

⁹³ Damage due to blasting, for example, was raised as an issue by residents in three of the five areas where we conducted research that formed the basis for CALS' Phase II Report. See also Bench Marks Foundation Policy Gap 9 – South African coal mining – corporate grievance mechanisms, community engagement concerns and mining impacts xiii, 26, 35. The issue was also raised by representatives of the community networks MEJCON and MACUA at the South African Human Rights Commission Hearings on the Socio-Economic Challenges of Mine-Affected Communities held in 2016...

⁹⁴ Franz Fuls 'Dairy to Dust.' Accessed at <https://oxpeckers.org/2014/01/dairy-to-dust/> on 5 December 2017.

⁹⁵ Sections 10, 26 and 11 of the Constitution.

⁹⁶ *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) para 63.

⁹⁷ Act No. 78 of 1973.

⁹⁸ See appendices 1 to 5 of the NEMA EIA Regulations, 2014.

⁹⁹ Section 2 (4) (P) of the National Environmental Management Act. No. 107 of 1998.

¹⁰⁰ This was informed by interview with a civil society organisation active in the sector on 23 May 2017.

¹⁰¹ S Mswana 'Chief's justice? Mining, accountability and the law in the Bakgatla-ba-Kgafela Traditional Authority Area' (September 2014) 40 *SA Crime Quarterly*.

¹⁰² Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase II: Implementation* (March 2017) 33-35

¹⁰³ *Ibid* 26, 28.

¹⁰⁴ T Njenga 'A Critical Analysis of Public Participation in the Integrated Development Plans (IDP) of Selected Municipalities in Some Provinces (Gauteng, Eastern Cape, KwaZulu-Natal and Western Cape) in South Africa.' Submitted in partial fulfilment of the requirements for the degree of Master of Social Sciences (Policy and Development Studies) in the Faculty of Humanities, Development and Social Sciences in the University of KwaZulu-Natal, Pietermaritzburg (2009) 53.

¹⁰⁵ See discussion in Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase I: System Design* (March 2016) 30-33.

¹⁰⁶ See, for example C O'Faircheallaigh 'Community development agreements in the mining industry: an emerging global phenomenon' (2013) 44 *Community Development* 222; The World Bank Mining Communities Development Agreements: Practical Experiences and Field Studies (2010).
the Leadership 20 November 2014.

¹⁰⁷ Centre for Applied Legal Studies, *The Social and Labour Plan Series – Phase II: Implementation* (March 2017) 51-52

¹⁰⁸ Education at all levels is listed as areas of concurrent national and provincial competency under Schedule 4 part A and is not listed as a local government matter in Schedule 4 part B.

¹⁰⁹ See definitions section, 2.1.1.9 and 2.1.1.10 of the Reviewed Mining Charter, 2017.

¹¹⁰ 2.1.1.9 of the Reviewed Mining Charter, 2017.

¹¹¹ 2.1.1.10 of the Reviewed Mining Charter, 2017.

