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Photo credits: Centre For Applied Legal Studies, Centre for Law and Society, David Ross for RAITH Foundation and SERI. Many thanks to our colleagues in the sector who made photographs available for this report.
Public Interest Legal Services in South Africa

Project report

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Introduction

section one
What is the nature of the public interest legal services sector in South Africa? In what context does it operate? How can its value and impact best be characterised and measured? How, and to what ends, do organisations, other groupings and individuals within the sector co-ordinate their activities and collaborate with each other? What role do public interest legal services play in expanding access to justice? What obstacles do they face in doing so?

These are the questions that we begin to answer in this study. Commissioned by the Ford Foundation and the RAITH Foundation – two of the biggest donors to public interest legal services in South Africa – this study aims to set out a body of evidence which will form the basis for engagement within the public interest legal service sector itself, and between the sector and the donors which support it. By providing a set of ideas and concepts which can help shape the terms on which public interest legal services – their value, their successes, their limitations – can be clearly discussed, we also hope to contribute to expanding the resource base available to public interest legal services in South Africa.

This is a study by and for the public interest legal services sector. It was implemented by the Socio-Economic Rights Institute of South Africa (SERI), which is one of the nation’s leading public interest law NGOs, with a significant track record of human rights research and collaborative work with a wide array of actors within the sector. The study’s terms of reference, and its aims and objectives, were subject to widespread consultation before the primary research phase commenced. This included scoping interviews with eleven respondents, including advocates, attorneys, donors, and non-lawyers in August 2013. A preliminary scan of the issues those respondents addressed highlighted the need to focus on the value-added by strategic legal services, as understood by the users and providers of such services and by the donors that fund them, and the context in which they are situated This report, and the recommendations attached to it, were presented and discussed at two workshops in which a wide variety of people working within the sector participated.¹

The study’s primary method was to conduct focus groups with engaged communities, and key informant interviews with a wide range of people within, and connected to, the public interest legal services sector: legal practitioners, researchers, advocates for change, NGO managers, social movements, community advice offices, community-based organisations, donors and Judges. In the end, 79 people participated in key informant interviews. A further 52 people participated in focus groups. In sum, therefore, we benefitted from the views of over 129 people working within, and in capacities connected to, the provision of public interest legal services.² We are grateful both for their time, and for the fact that their participation makes this study unusual in the depth and variety of evidence it can draw on.

¹ In early January 2015 all the respondents to the study were invited to consultation workshops in Johannesburg and Cape Town, on 17 and 16 February, respectively, for their input into proposed recommendations.
² See the schedule of respondents, which includes all interviews and focus groups conducted as part of the study.
The primary source of evidence in this study is accordingly what people who work in the sector say about the issues raised in it. However, in addition to this primary data, this study benefits from a wealth of high quality research conducted in South Africa, and beyond. Our investigation into the characterization of the value and impact of public interest legal services, in particular, benefitted from a growing body of literature on the subject, both national \(^3\) and international.\(^4\)

What this study achieves, we hope, is a synthesis of these sources, which recognises that the work being done in the public interest legal services sector is as multidimensional and complex as the social problems it seeks to address, while at the same time offering a characterization of that work which is clear, accessible and useful in setting the terms for future engagement within and about the sector.

The study proceeds in four key stages. First, we examine the context within which public interest legal services are provided. Second, we discuss what the available literature and our informants say about how to characterize the value and impact of work within the sector. We go on to propose a multidimensional approach to characterising the value of public interest legal services – one which focusses on issues and the way that they are framed, and which tries to account for both the direct and indirect material impact as well as the broader political and symbolic value of particular interventions. Third, we address the ways in which people and organisations within the public interest legal services sector work together, and what donors should do, should not do, and can do better, to facilitate co-ordination and collaboration that is appropriate to existing needs and practices. Finally, we identify the unacceptably high cost of legal services as a major obstacle to the public interest legal services sector’s capacity to facilitate access to justice.

In a concluding section, we advance a number of recommendations for donors, for the legal profession and for public interest legal services organisations themselves to consider. These


recommendations received vigorous input from the sector. Some may be uncontroversial, others might require development, others may be unpopular and some may simply be ill-founded. We do not present the recommendations as the only way to proceed on the basis of the evidence gathered in this study. We offer them for interrogation and debate.

Finally, it would be unrealistic if we failed to acknowledge that there may be obvious reservations and concerns about a donor-funded study which includes a focus on the value and impact of donor-funded work. This is not the first time that a donor has commissioned a study which includes an examination of the impact of the work that it funds in the legal services sector. Nor is it the first time that people and organisations within the sector have expressed unease about the purpose of such a study, and the consequences it might have for the way work is funded, and the resources available for that work.

In the end, however, we were surprised by how few of our respondents raised these concerns. The overwhelming attitude to the study was that it was an opportunity to discuss the deep complexity and valuable and far-reaching achievements of a variety of organisations, methods and interventions in the first 20 years of South Africa’s democracy.

Nonetheless, it is perhaps important to say the following: this study will have no direct impact on funding streams to or within the public interest legal services sector. Both the Ford Foundation and the RAITH Foundation fully expect to continue to fund the public interest legal services sector in the future. This study does not arise from skepticism about the value and impact of public interest legal services, but from a clear recognition that, in a still-new Constitutional democracy, such services are essential. Donors and public interest legal services organisations can only benefit from a broader, empirically grounded, and ecumenical body of evidence which discusses the work that we do and the manifold sites of impact in which we are making progress.

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5 Budlender, Marcus and Ferreira *Public interest litigation* (Atlantic Philanthropies, 2014).
6 Dugard and Langford “Art or Science: Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism” *SAJHR* 27 (2011) 64.
Context:
The State of Society and the Public Interest Legal Services Sector

section two
Our terms of reference asked us to characterize South Africa’s current socio-political terrain, together with the main obstacles to achieving transformative social change; to set out the social needs that can be met by public interest legal services, and to suggest how, when and where they are currently being met; to identify the geographic and functional areas in which public interest legal services organisations work and to delineate the sector’s principle achievements to date.

Before we do so, however, it is necessary to consider, at least in outline, why law is accorded such an important role in engineering social change in South Africa, and what the applicable literature says about its prospects of doing so.

Law and transformation

Law and legal services have been assigned a central role in the transformation of South African society, because the primary vehicle for social transformation in South Africa is the Constitution – our supreme law. In this study, we understand “transformation” as the achievement of a society which accords with the vision set out in the South African Constitution, 1996. There are many values and principles set out in the Constitution, and the meaning and application of those values and principles are subject to ongoing contestation and debate. For the purposes of this study, however, we gratefully adopt what Catherine Albertyn and Beth Goldblatt say: that constitutional transformation requires –

- a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines. [And] the eradication of systemic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.

Although we did not specifically seek the views of our respondents on the definition of social transformation, we are satisfied that these conditions accord with what our respondents would characterise as social transformation, based on an overview of their other responses. There will inevitably, however, be reasonable disagreement about what each of these conditions means in practice.

The important point is that the Constitution requires this transformation to be law-bound, and consistent with its terms.

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7 The Constitutional Court has repeatedly emphasised the transformative nature of the Constitution of the Republic of South Africa, 1996 (the Constitution). See, for example, Road Accident Fund v Mdeyide 2011 (2) SA 26 (CC) para 125; Hassam v Jacobs NO 2009 (5) SA 572 (CC) para 28; Biowatch v Registrar, Genetic Resources 2009 (6) SA 232 (CC) para 17; Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) paras 73-74.

Accordingly, if Apartheid oppressed through law, the architects of the post-Apartheid settlement laid great emphasis on law as a vehicle through which to achieve transformation. This double-headed nature of law has long been recognised. Richard Abel, while accepting the overall role law played in the Apartheid system, also emphasised the creative ways in which the anti-Apartheid struggle was waged – in part through litigation to ameliorate its worst effects, in part to turn the contradictions of the Apartheid system in on themselves.9

The hopes invested in law continue to be evident in post-Apartheid politics,10 especially in the arena of socio-economic rights. But, while absolute poverty has reduced slightly in the last 20 years, inequality has increased, and little has been done to redistribute wealth or grow the economy at a pace sufficient to absorb the 41% of the population that is unemployed into secure jobs with a living wage. Economic transformation has been an abject failure, and the ruling alliance – consisting of business, unions representing an aristocracy of labour, and traditional elites in rural areas – has been unwilling or unable to adopt the economic and social policy necessary to make serious inroads into poverty and inequality.11 More recently, the state’s responses to dissent and social mobilisation have become more violent and repressive. The consequences of this for the public interest legal sector were thrown into sharp relief by the Marikana massacre. Several of our respondents also referred to a closing down of the civil and political spaces for mobilisation and public protest that had opened up at the end of Apartheid.

However, some of the worst failures of the state and private sector have been corrected by the courts through public interest litigation, which has itself been accompanied by effective legal activism. Among other efforts, the failure to respond to the HIV/AIDS crisis with effective programmes to provide anti-retroviral medication,12 the failure to address the needs of those

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10 Various respondents agreed with this assertion. In particular Respondent E, a director of a public interest legal services organisation, who stated that “legal organisations [are] able to instigate social change”.

11 Although government’s recently introduced the National Development Plan (NDP) attempts to address these challenges, the Plan does not envisage substantial changes to economic policy and is consequently unlikely to lead to significant social change. This position was also largely affirmed through the respondents in the study. See, for example, Interview with Respondent W, a legal academic; Interview with Respondent HH, director of a civil society organisation. Participants further underscored this point during the Johannesburg Consultation Workshop (23 June 2014).

12 *Minister of Health v Treatment Action Campaign (No. 2) (2002) 5 SA 721 (CC).*
who face homelessness through eviction or disaster, exclusionary and administratively unjust aspects of the social security regime, inadequate provision of water, and unlawful disconnections of electricity, have all been addressed through public interest litigation, as have unfair banking practices. Beyond socio-economic rights, civil society participation in Commissions of Inquiry – most notably after Marikana, in Khayelitsha and in connection with the Arms Deal – has lately underscored the need for the renewed defence of civil and political rights.
Legal services and social change

The debates in South Africa on how to ensure that the use of public interest legal services is more effective in contributing towards social justice and systemic change are neither new nor unique. Much has been written on this topic in the context of the United States, where a wealth of literature has developed that is dedicated to documenting and analysing social justice struggles in that country over the past decades.\(^\text{19}\) The bulk of this literature centres on analysing the opportunities and constraints of public interest legal services, and specifically litigation, in facilitating systemic social change and redistributing power. While earlier literature frequently criticised the potential and effectiveness of public interest legal services, more recently scholars have developed a nuanced, contextual approach to the use of public interest legal services which recognises that these services are “an imperfect but indispensable strategy for social change”.\(^\text{20}\)

The critiques of public interest legal services as a tool to effect systemic change in this international literature are manifold.\(^\text{21}\) The first critique is that litigation is ineffective or inadequate as it cannot significantly reform social institutions in isolation from other strategies.\(^\text{22}\) As Gerald Rosenberg argues, courts can “almost never be effective producers of significant social reform” because they lack the necessary enforcement measures and are dependent on other political institutions.\(^\text{23}\) Some go even further, contending that an over-reliance on legal strategies is


\(^\text{20}\) Cummings and Rhode “Public Interest Litigation” *Fordham Urban Law Journal* (2009) p. 604. Although this argument is made in relation to public interest litigation, it is contended that this statement remains relevant for purposes of this study.


\(^\text{22}\) Cummings and Rhode “Public Interest Litigation: Insights from Theory and Practice” (2009) *Fordham Urban Law Journal* pp. 604 and 607-608. A respondent from a non-litigating NGO agreed with this approach, describing litigation as a “quick and easy” solution to issues, which stands in contradiction to political strategies which usually take a longer time to implement (Interview with Respondent V). Others argued that litigation can sometimes be a “flash in the pan” approach to more systemic issues. See Interview with Respondents A.

potentially detrimental to societal transformation. This line of argument is based on the belief that legal strategies may have the effect of demobilising collective political strategies. At the heart of this concern is the assumption that legal practitioners are “heavily inclined towards litigation” as the preferred means to achieve legal reform and “frequently cultivate an unduly optimistic, even naively romantic view of the law’s transformative potential”. The general attraction to litigation has often been ascribed to the “self-interest and personal aspirations” of legal practitioners. In this respect some critics argue that public interest legal practitioners are often “motivated by glory, status, and prestige”, with a triumph in court viewed as the ultimate victory. The second main critique is that the focus on public interest legal services diverts much needed resources and capacity away from potentially more productive political

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24 Cummings and Rhode “Public Interest Litigation” (2009) Fordham Urban Law Journal pp. 604 and 607; McCann and Silverstein “Rethinking Law’s ‘Allurements’ in Cause Lawyering pp. 262-263. A similar point was raised by a participant in the Cape Town consultation workshop, where it was stated that the law may not always be the best way to facilitate social change and could even have problematic consequences. Cape Town Consultation Workshop (23 June 2014).

25 McCann and Silverstein “Rethinking Law’s ‘Allurements’ in Cause Lawyering p. 262. It is interesting to note that a number of respondents, primarily respondents from NGOs that do not actively participate in litigation, also highlighted the over-reliance on litigation as a characteristic of the South African legal environment. See interviews with Respondent V and Respondent N. Another respondent, an academic, raised a similar point. Interview with Respondent BB.

26 McCann and Silverstein “Rethinking Law’s ‘Allurements’ in Cause Lawyering p. 262. This is linked to what Stuart Scheingold famously referred to as the “myth of rights”. See, generally, Scheingold Politics of Rights (2004).

27 McCann and Silverstein “Rethinking Law’s ‘Allurements’ in Cause Lawyering p. 262.

28 McCann and Silverstein “Rethinking Law’s ‘Allurements’ in Cause Lawyering p. 263.
or social mobilisation strategies. This argument is based on the notion that there is a tradeoff between legal strategies and political mobilisation, and that political mobilisation is more likely to affect long-lasting social change. Although it remains important to critically reflect on these arguments, more recent literature has challenged these critiques as being overly simplistic.

This body of literature recognises that public interest legal services, and particularly litigation, have limits, but emphasises that these services could still be utilised to bring about far-reaching social change. In viewing litigation as a political tool that forms part of a larger arsenal of strategies, the literature develops a more nuanced view of the potential impact of litigation. This nuanced approach to public interest litigation is epitomised by Scott Cummings and Deborah Rhode, who argue that litigation should be measured in the light of various essential claims:

1. litigation is a political tool that, when used strategically, can stimulate meaningful change and complement other political efforts; 
2. whether litigation “works” or not must be judged in relation to available alternatives; and 
3. in order to evaluate the social change potential of litigation in a given circumstance, it is necessary to examine the conditions - political, economic, cultural, and organizational - within which a lawsuit operates.

At core, this approach views the “law as politics by another name, and links court-room battles to political mobilization and community organizing”. Public interest legal services are therefore capable of destabilising entrenched institutional power if these services are deployed strategically and combined with other strategies. Commentators argue that “because lawyers do not view litigation as an exclusive end in itself”, they are inclined to use litigation selectively and supplement legal strategies with alternatives. A participant in the study also highlighted that the litigation is a critical tool that cannot be separated from other strategies. Public interest litigation can also make “seminal contributions to the building of social movements” or community mobilisation. The literature therefore suggests that public interest legal practitioners view the use of legal tactics in a “sceptical, politically sophisticated

34 McCann and Silverstein “Rethinking Law’s ‘Allurements’” in Cause Lawyering p. 269. 
35 These points were made by a participant at the consultation workshop in Cape Town on 26 June 2014. 
36 A Sarat and S Scheingold “What Cause Lawyers Do For, and To, Social Movements: An Introduction” in A Sarat and S Scheingold (eds) Cause Lawyering and Social Movements (2006) p. 10. This point was reiterated by one of the study respondents, who stated that the South African litigation in relation to access to textbooks in Limpopo catalysed “active citizenry” around education in the area. Interview with Respondent LL.
manner”. It may be particularly relevant in a South African context, where legal practitioners are acutely aware of how the law can be subverted for systematic oppression due to the manner in which the apartheid state employed the law.

Cummings and Rhode also point out that any evaluations of the efficacy of public interest litigation as a means to realise social change “always need to consider the risks and feasibility of alternatives”. It may, for example, not always be realistic to pursue longer-term political strategies in a given instance. In this regard, Stuart Scheingold also warns that as practitioners should avoid mythologising rights, so too should they avoid romanticising political activism.

In South Africa, there is an emerging debate between “materialist” assessments of public interest legal services, on the one hand, and “legal mobilisation” theorists on the other. Materialist approaches emphasise that the purpose of public interest litigation is to achieve positive concrete outcomes for particular social groups, that it is necessary (but not a sufficient) condition for such positive outcomes that a court be persuaded to give a favourable judgment, and that the real question is what strategies and tactics are necessary to obtain and properly enforce a favourable judgment. Operating at different levels of abstraction, materialist approaches have sought to identify the conditions necessary for expanding the arsenal of legal rights available to vulnerable social groups.

Legal mobilisation theorists, while acknowledging the importance of positive outcomes in particular cases, have criticised materialist approach for being too narrow, and for lacking the predictive power they sometimes claim. It has been argued that the capacity of public interest legal services to achieve change is far more contingent on judicial temperament and broader uncontrollable social factors than the materialists accept, and that the value of public interest legal services cannot be reduced to a favourable outcomes in court. They urge a more open-ended approach to assessing the effectiveness of method, and the value of public interest legal services. This approach emphasises a range of non-material, sometimes symbolic or political effects of legal interventions which, they suggest have less obvious but profound important political consequences.
Most recently, both the materialist and the legal mobilisation approaches have been criticised for their over-emphasis on litigation, rather than on other methods deployed in public interest legal services; for their failure to consider the role of technical legal skills in achieving positive outcomes; and for the case selection methods employed by particular authors writing in either approach.44

The contours of this debate will be discussed in more detail when we come to consider how public interest legal services providers characterise the impact of their work. However, it is important to emphasise at this stage that both the South African and the international debate on public interest legal services is not on whether they have value, but on how that value is best characterised, understood and maximised.

Therefore, although public interest legal services and particularly litigation may have limits, there is a broad consensus that these services, in some form, and in the right conditions, remain a powerful vehicle to facilitate social change.

Legal services, economy and society in South Africa

Based on our informants’ views, and the available literature, our study identifies the following basic features of South Africa’s economic and social context, and describes how the provision of public interest legal services has interacted with them. We address the key economic issues South Africa presently faces, before going on to address a range of fundamental social needs which have given rise to important work within the public interest legal services sector. We then consider the needs of a range of vulnerable groups, and the manner in which public interest legal services organisations address these needs.

KEY ECONOMIC ISSUES

Poverty

Poverty remains deep and widespread,45 but absolute income poverty46 declined slightly between 1993 and 2012. The available evidence suggests that this is less down to economic growth than it is to a substantial increase in state expenditure on social assistance grants - in the main child support grants and old-age grants.47 This implies that the accessibility of social assistance grants remains vitally important in addressing poverty levels in South

45 A number of respondents stated that poverty was a serious challenge. Interview with Respondent H, a senior advocate; interview with Respondent W, a legal academic; interview with Respondent G, a programme officer at donor-funding organisation.
46 Absolute income poverty refers to a set standard of income which is the same in all countries and which does not change over time, for example, $1 per day.
Africa. In this regard, public interest legal services have played an important role in ensuring a less discriminatory and more procedurally fair social security regime.\(^{48}\) Civil society action, which has included legal action or the threat of it, has played an important role in achieving the expansion of the social security net. Community advice offices also report\(^{49}\) that assisting people to apply for social grants remains an important part of their work.

Of course, income poverty is not the only, or even the best, way of measure poverty levels. There are strong arguments for adopting a multidimensional approach to poverty. Arguing on the basis of what they call a Multidimensional Poverty Index, which embraces access to a range of socio-economic goods beyond income, Leibbrandt and others argue that there has been a significant decline in poverty so-measured since 1993.\(^{50}\) If a multidimensional approach is adopted, then public interest legal services which seek to advance access to a social goods other than grants, education, housing, healthcare and so on, become important in considering the impact of legal services on poverty reduction.

\(^{48}\) See, for example, *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC); *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA).


\(^{50}\) See Leibbrandt *et al* “Trends in South African Income Distribution and Poverty since the Fall of Apartheid” pp. 20-21; A Finn, M Leibbrandt and I Woolard “The Significant Decline in Poverty in its Many Dimensions since 1993” (29 July 2013) *Econ3x3*. 
Inequality

Although poverty levels in South Africa have declined, inequality has significantly worsened. South Africa is becoming an ever more unequal society, exacerbating the inequality of Apartheid. Many respondents underscored the significant challenges posed by growing inequality.\(^{51}\) The country’s Gini coefficient went from 0.66 in 1993 to 0.70 in 2008 and, by all standards, inequality has grown between and within races.\(^{52}\) South Africa has the highest inequality between racial groups in the world.\(^{53}\) Income inequality has grown, not only between races but also intra-race. Wealth is increasingly retained in the hands of a few. Gender is still a clear predictor of wealth, income and social status. Rich men are richer than rich women, poor women are poorer than poor men. Gender-based violence remains rife.

Public interest legal services can address the core structural patterns of inequality by pressing for increased provision of education, healthcare, housing and basic services, although they cannot, in themselves, upend deep-seated patterns of structural disadvantage. Legal services may also be instrumental in addressing more specific (and perhaps even individualised) instances of discrimination or unfair practices. Finally, an important future component of public interest legal services provision may include a more expansive use of right to equality and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). One respondent argued that the Act held significant “scope” for public interest legal work and could facilitate social change, especially in relation to socio-economic rights.\(^{54}\)

\(^{51}\) Interview with Respondent K, an academic, who listed economic inequality and the “inability of the state to overcome it despite its enormous social budget” as the main challenge facing South Africa. Also interview with Respondent W, a legal academic; interview with Respondent G, a programme officer at a donor-funding organisation; interview with Respondents DD, employees at a civil society organisation. Also interview with Respondent HH, director of a civil society organisation, who argued that communities are becoming increasingly marginalised. In fact, although many other respondents did not expressly refer to inequality the issues they identified as pressing implied a concern for the high levels of inequality present in the country.

\(^{52}\) Leibbrandt et al “Trends in South African Income Distribution and Poverty since the Fall of Apartheid” p. 10.


\(^{54}\) Interview with Respondent W, a legal academic.
Unemployment

A significant number of respondents also underscored high levels of unemployment as a serious socio-political challenge. An analysis of unemployment trends shows how the racialised nature of poverty and inequality has not shifted very much in the last 20 years. In 2011, approximately 42.4% of black Africans were unemployed, whereas only 8.2% of whites were unemployed. Coloured, Asian and white workers are consistently more likely to be employed than their black African counterparts. Race remains a strong predictor of unemployment.

In July 2014, official unemployment in South Africa reached its highest level since 2008 – 25.5% in the second quarter of 2014 (in terms of the narrow definition of unemployment). The number of unemployed persons increased by 87 000 over the second quarter of 2014 to 5.2 million. According to Haroon Bhorat and Natasha Mayet, it is “abundantly clear that, faced with a job and unemployment crisis like no other economy in the world, South Africa urgently requires creative and effective policy solutions.” When one considers broad (or expanded) unemployment, as some economists have urged, the picture is even more disconcerting with 7.6 million unemployed people in South Africa. A number of respondents expressed concern over South Africa’s “alarmingly high” levels of unemployment. Many argued that the measures included in the NDP, though well-meaning, would not lead to a significant decrease in the severe unemployment facing the country. Although government has sought to address the issues of unemployment with its Expanded Public Works Programme (EPWP) and various other state-driven infrastructure projects, respondents argued that these interventions were

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55 Interview with Respondent HH, director at a civil society organisation; interview with Respondent W, a legal academic; interview with Respondents DD, employees at a civil society organisation.


58 Ibid p. 298.

59 Posel et al convincingly argue that the “strict” or official measure of unemployment is inadequate for the South African labour market. According to them, the unemployed in South Africa remain unemployed mainly as a result of an oversaturated labour market which is unable to provide sufficient job opportunities. This, they argue, means that those that do not actively pursue job opportunities have actually been discouraged from seeking employment. This leads them to call for StatsSA to include those currently excluded from the official unemployment statistics. See D Posel, D Casale and C Vermaak “The Unemployed in South Africa: Why are So Many Not Counted?” (February 2013) Econ3x3.

60 Statistics South Africa (StatsSA) “Quarterly Labour Force Survey, Quarter 4” (2012). See also Posel et al “The Unemployed in South Africa” (February 2013) Econ3x3.

61 This quote is from the interview with Respondent HH, director at a civil society organisation. Also interview with Respondent W, a legal academic, and the interview with Respondents DD, employees at a civil society organisation.

62 Interview with Respondent HH, director at a civil society organisation; and interview with Respondent W, a legal academic. This was further affirmed by participants during discussion at the Johannesburg Consultation Workshop.
lacking and fail to take account of the “full extent [and] structural nature of” unemployment in South Africa.63 As one respondent argued “job opportunities do not mean a job”.64

Aggregate levels of employment are largely dependent on macro-economic policy choices. Civil society is yet to develop a shared critique of the economic path currently being pursued by the South African state, but there can be little doubt that the South African state is pursuing an orthodox economic policy that places limitations its ability to achieve social transformation. Economic orthodoxy arguably keeps unemployment artificially high, and stifles the growth of labour intensive industry.65 Economic policy critique does not easily lend itself to legal interrogation, but some economic policy constraints, such as those imposed by international trade and patent agreements affecting the price of medicines, have been successfully engaged with by South African health-rights campaigners in the past.66 The relationship between economic policy and social transformation remains an important area for further research and action.

ACCESS TO SOCIAL GOODS

Healthcare

Health systems in Provinces across South Africa are collapsing, leading to unnecessary deaths and other rights violations. The crisis is one of management rather than a shortage of funds and “corruption and nepotism join forces with a lack of accountability and oversight to give most officials apparent de facto tenure in their positions, able to destroy hopes and lives with impunity.”67 Health officials are very rarely held accountable. Nor are interventions launched to stem the crisis. Rampant corruption and mismanagement frequently go unpunished. Further, the Department of Health has no systems for monitoring the quality of its health services, rather than just their quantity.68 While South Africa is slowly beginning to turn the tide against the HIV epidemic – with the new infections rate declining and life expectancy increasing – stock outs of essential medicines, shortages of health workers, corruption and poor budgeting “are threatening to undo much of the progress of recent years.”69 While all provincial departments

In the past, the right to health enshrined in section 27 of the Constitution has been progressively upheld and strengthened in a constitutional challenge to ensure the provision of access to anti-retroviral medicines.

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63 Interview with Respondent HH, director at a civil society organisation. See also the interview with Respondent W, a legal academic.
64 Interview with Respondent HH, director at a civil society organisation.
66 Interview with Respondent TT and Respondent LL.
68 Ibid.
69 Ibid p. 4.
acknowledge the importance of monitoring and evaluation systems, very few departments have robust systems in place.

In the past, the right to health enshrined in section 27 of the Constitution has been progressively upheld and strengthened in a constitutional challenge to ensure the provision of access to anti-retroviral medicines.70 Some respondents also remarked that there have also been a number of victories that have been related to litigation processes (frequently these cases have been settled and have therefore been less public in nature) – some have been individualised and others have had a significant impact on a reduction in the price of medication.71 Health activists, most notably the TAC, continue to campaign more broadly for access to healthcare. These critical interventions have highlighted the importance of the continued work of the public interest legal services sector in relation to healthcare.

Education

Education in South Africa remains highly unequal. According to the 2011 Diagnostic Report of the National Planning Commission (NPC): “Education is perhaps where the apartheid legacy casts the longest shadow, because the performance of schools and the quality of learning are influenced by several historical factors.”72 This point was further underscored by various respondents.73 Former white or ‘model C’ schools have the advantage of decades of financial and infrastructural investment and of being relatively well-resourced with access to qualified teachers, while historically disadvantaged or black African schools are characterised by high teacher-pupil ratios, unqualified and under-qualified teachers, lack of books, libraries and laboratories and other resources.74 The vast majority of schools in the country have insufficient infrastructure. In fact, infrastructure concerns have been at the centre of the crisis in the education system, with many school buildings remaining dilapidated and dangerous.

In November 2013 the Minister of Basic Education, Angie Motshekga, published legally binding Norms and Standards for School Infrastructure. It is now law that every school must have water, electricity, internet, working toilets, safe classrooms with a maximum of 40 learners, security, and thereafter libraries, laboratories and sports facilities. These set a standard for provincial education departments to work towards, and against which to be held accountable. The legally binding standards enable communities to hold government officials accountable.75

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70 Minister of Health v Treatment Action Campaign (No. 2) (2002) 5 SA 721 (CC).
71 Interview with Respondent LL, director of litigation at a public interest services organisation.
73 Interviews with Respondent AA and Respondent Z.
It is important to note that this outcome was the result of an extensive campaign mounted by a variety of public interest law organisations, including a series of legal interventions. These public interest law organisations have also pursued important interventions to build new schools wherever they are needed, to address the needs of “mud schools”, the supply of textbooks, and the provision of a sufficient number of teaching posts in Eastern Cape schools.

Urbanisation, housing and evictions

Approximately 60% of the South African population currently lives in urban areas. This figure will increase as a result of natural population growth and the migration of people to cities in search of economic opportunities. In her recent budget vote speech the Minister of Human Settlements, Lindiwe Sisulu, stated that South Africa is “ill-equipped” to deal with an “alarming rate of urbanisation”. Urbanisation is inevitable, but South Africa is not urbanising exceptionally fast at all. South Africa’s urbanisation rate is 1.21% comparable to Spain’s of 1% and much less than India’s of 2.47%. Still, urbanisation has been fuelled in part by a land tenure crisis in rural areas, with 1 million people being evicted from commercial farmlands between 1994 and 2004. Despite strong statutory protection against eviction approximately 1% of these evictions have followed any legal process.

Despite a public housing construction programme that is relatively successful in statistical terms, there remains a massive shortage of quality housing and secure tenure. At least 7 million people live in informal settlements with insecure tenure and no or inadequate basic services.

The standard government response to poverty associated with urbanisation (existing in backyard shacks, informal settlements and “bad buildings”), has been to focus on improving standards of living in rural areas in order to prevent rural to urban migration. Additionally, the government has criminalised poverty in urban areas by adopting repressive, outdated tenure regimes, evicting people from their shacks and clamping down on

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76 These legal interventions were undertaken by organisations such as Equal Education (EE), Equal Education Law Centre (EELC), the Legal Resources Centre (LRC) and SECTION 27.
79 F Veriava The 2012 Limpopo Textbook Crisis: A Study in Rights-Based Advocacy, the Raising of Rights Consciousness and Governance (SECTION27, 2013).
80 Linkside and Others v Minister of Basic Education and Others [2014] ZAECGH 111.
81 Speech by L N Sisulu, Minister of Human Settlements (15 July 2014).
83 Department of Human Settlements Celebrating 20 Years of Human Settlements: Bringing the Freedom Charter to Life (2014) p. 3.
informal livelihoods.\textsuperscript{84} Property speculation, commercial property development and discourses of urban “regeneration” have increased the vulnerability of urban populations who are unable to pay their way on the property market.

This tension – between powerful propertied interests on the one hand, and the perhaps equally powerful flow of people into urban areas – has made housing and land tenure the most frequently litigated social and economic rights issue in the Constitutional Court, and has led to a rapid legal developments and policy reforms in which a wide variety of public interest legal organisations have played a significant role.\textsuperscript{85} The applicable jurisprudence now outlaws evictions that lead to homelessness.\textsuperscript{86} Policy development has turned to emphasise tenure security and \textit{in situ} upgrading.\textsuperscript{87} Practice, however, has yet to catch up. Although the number of evictions that lead to homelessness may have been reduced, they remain a regular feature of urban life.\textsuperscript{88} There are also few concrete examples of \textit{in situ} upgrading consistent with national housing policy. In addition, as extensive work by public interest legal services organisation in Cape Town and Johannesburg has shown, basic facilities, such as potable water, toilets and other forms of sanitation, remain in short supply, and can require litigation to obtain.\textsuperscript{89}

\section*{THE NEEDS OF VULNERABLE GROUPS}

\subsection*{Foreign nationals in South Africa}

While South Africa has progressive legislation in place protecting the rights of foreign migrants, the laws are ignored in practice on the ground, leaving foreign nationals vulnerable and unable to claim their rights.\textsuperscript{90} Foreign nationals are routinely turned away by hospitals or schools, and frontline service delivery is often severely compromised despite laws and policies in place.\textsuperscript{91} Foreign nationals, particularly Zimbabweans, are also routinely arrested and unlawfully detained by the police, often having to bribe officials if they are not carrying documentation.

\begin{thebibliography}{99}
\expandafter\bibitem\expandafter[\textsuperscript{84}]{\textsuperscript{84}} M Clark and L Royston “Low cost housing not low-cost enough” \textit{Mail and Guardian} (11 April 2014).
\bibitem[\textsuperscript{85}]{\textsuperscript{85}} These organisations include the Legal Resources Centre (LRC), Centre for Applied Legal Studies (CALS), Lawyers for Human Rights (LHR) and SERI.
\bibitem[\textsuperscript{86}]{\textsuperscript{86}} M Clark “Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government” (SERI, 2013).
\bibitem[\textsuperscript{87}]{\textsuperscript{87}} See National Upgrading Support Programme (NUSP): http://www.upgradingsupport.org/content/page/about.
\bibitem[\textsuperscript{89}]{\textsuperscript{89}} See for example, \textit{Beja and Others v Premier of the Western Cape and Others} 2011 (10) BCLR 1077 (WCC); \textit{Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others} 2010 (4) BCLR 312 (CC); and \textit{Mtungwa and Others v Ekurhuleni Metropolitan Municipality} http://www.escr-net.org/node/364788.
\bibitem[\textsuperscript{91}]{\textsuperscript{91}} See, for example \textit{GroundUp} “Need that bullet removed from your arm? Then show us your papers” (22 December 2014): http://groundup.org.za/article/need-bullet-removed-your-arm-then-show-us-your-papers_2568.
\end{thebibliography}
Organisations such as Lawyers for Human Rights have a strong track record of successful litigation on behalf of foreign nationals, especially in the area of immigration law. However, attitudes against foreign nationals appear to be hardening. Social and institutional xenophobia continues to plague South Africa. Violent attacks and looting against businesses run by foreign nationals continue to occur in townships and informal settlements, with the most recent incidents in Soweto in January 2015. There appears to be reluctance by local leaders, police and politicians to acknowledge the xenophobic nature of violence or intervene, either because they share the same attitudes or because this characterisation is politically sensitive.

Gender-based Violence

Gender-based violence (GBV) encompasses not only intimate partner violence and domestic violence, but also the “corrective rape” of lesbians and violence against sex workers. Numerous factors have been cited as contributing to the high levels of sexual abuse in South Africa. Some researchers attribute the pervasiveness of violence, in part, to the South Africa’s legacy of apartheid. As Naeemah Abrahams explains, “State-sponsored violence and reactive community insurrection” associated with apartheid left violence as a “first line strategy for resolving conflict and gaining ascendancy.” There is a direct correlation between the “culture of violence” created by apartheid and South Africa’s current sexual assault rates. Gender inequality in South African society is another contributor to the prevalence of sexual violence. In South Africa, as in other countries throughout the world, patriarchal systems

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92 Interview with Respondent P. See also http://www.lhr.org.za/programme/refugee-and-migrant-rights-programme-rmrp. A number of other organisations are involved in advocacy, policy engagement and research on the legal and constitutional position of refugees, asylum-seekers and migrants. These include the Consortium for Refugees and Migrants in South Africa (CoRMSA) and the African Centre for Migration and Society (ACMS), based at the University of the Witwatersrand.

93 Interview with Respondent P.


97 Interview with Respondent BBB.


99 Ibid.


exist in which men hold “most or all of the power and control.”\textsuperscript{102} The breakdown of these structures in modern times may be another cause of sexual violence.\textsuperscript{103} Following the rise of democracy in South Africa, women’s empowerment movements and non-discrimination policies have challenged patriarchal systems.\textsuperscript{104} Men may view sexual violence as a method of “reasserting masculinity” and controlling women.\textsuperscript{105} Economics also plays a key role in the existence of sexual violence in South Africa. One study has suggested that wealthier men are more likely to rape women because of an “exaggerated sense of sexual entitlement.”\textsuperscript{106}

The supply of public interest legal services does not correspond to the alarming rates of gender-based violence in South Africa, particularly for individual cases. Indeed, one advocate identified individual domestic violence and maintenance cases as the “most burning issues” in need of representation from legal service providers.\textsuperscript{107}

The Women’s Legal Centre, working together with the Department of Justice, has established a helpdesk to train private attorneys to give advice on GBV cases at the Magistrates Court.\textsuperscript{108} Whilst there are great significant judgments in the area of gender rights, implementation has been sparse. Police practice is often not affected by favourable court judgments.\textsuperscript{109} Moreover, a “systemic breakdown in court processes” leads victims to avoid courts, and when do they do turn to litigation, courts are increasingly encouraging alternative dispute resolution for GBV cases, reflecting a “lack of contextual understanding.”\textsuperscript{110} Though some providers recognise the importance of social mobilisation in this sector, they state that it is more difficult to do because of the “hidden” nature of the issues involved.\textsuperscript{111}

Many public interest law centres prioritise impact litigation in their work on GBV, so, as an unintended consequence, the “day-to-day issues” are neglected, particularly those dealing with women obtaining interdicts against their abusers.\textsuperscript{112} Aside from Legal Aid South Africa, it is difficult to recruit private attorneys on a pro bono basis to handle these matters, in part, because of their limited number of pro bono hours.\textsuperscript{113} One respondent stated that in her experience, even Legal Aid South Africa does not assist women or children in maintenance or eviction cases.\textsuperscript{114}

\begin{quote}
One advocate identified individual domestic violence and maintenance cases as the “most burning issues” in need of representation from legal service providers.
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\begin{flushright}
\textsuperscript{103} Ibid p. 90.
\textsuperscript{104} Ibid p. 91.
\textsuperscript{105} Ibid pp. 94.
\textsuperscript{106} Ibid pp. 88.
\textsuperscript{107} Interview with Respondent QQ.
\textsuperscript{108} Interview with Respondent ZZ.
\textsuperscript{109} Interview with Respondent BBB.
\textsuperscript{110} Interview with Respondents ZZ.
\textsuperscript{111} Ibid.
\textsuperscript{112} Ibid; see also interview with Respondent BBB.
\textsuperscript{113} Interview with Respondent BBB.
\textsuperscript{114} Interview with Respondents GG.
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Lesbian, gay, bisexual, transgender and intersex rights

South Africa is regarded as possessing progressive Constitution and policy in terms of the equality and anti-discrimination rights afforded to LGBTI (lesbian, gay, bisexual, transgender and intersex) people. The Constitution outlawed discrimination based on sexual orientation and South Africa was the first country in Africa to legalise same-sex marriage and civil unions. However, while many political and legal gains have been won through the courts on LGBTI rights over the years, there remains social stigma attached to being queer in South Africa. Homophobic violence, including corrective rape and other hate crimes, occurs across the country. In poor and marginalised communities – both rural and urban – acceptance of different sexual orientations is lacking, and LGBTI community members are stigmatised to the point where people choose not to publically disclose their sexual orientation.

At the same time, the South African government has seemingly backtracked on its progressive stance towards LGBTI rights by not conveying strong disapproval of homophobia to other African governments in various international fora. There is fear that this “quiet diplomacy” is sending a message to South Africans that, despite the legal recognition of LGBTI rights, the government is not particularly serious in protecting them.

After a strong run of successful litigation outlawing formal discrimination against gay people and gaining the right to marry, much of the work being conducted on LGBTI rights is aimed at addressing patterns of social prejudice and “embedding [legal and political] victories into communities and society.” This includes the provision of counselling services and community education, online support groups and forums, lobbying for hate crime legislative reform, and awareness-raising through public events. Unfortunately, significant structural and funding challenges facing organisations dedicated to promoting gay and lesbian rights have hampered this work. The LGBTI sector has also seen divisions increase over the years as a result of the perceived “commercialised, racist and classist” organising of events like the Johannesburg Pride parade, which has led to alternative events like the Peoples’ Pride being held.

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115 Budlender, Marcus and Ferreira Public interest litigation pp. iv and 105. In South Africa there is recognition of same-sex marriages, the decriminalisation of sodomy, the right of LGBTI couples to adopt children, access by LGBTI partners to each other’s pension and other benefits, and the right of long-term partners to inherit the assets of the other upon death. Discrimination on the basis of sexual orientation in the workplace has been outlawed and government has passed legislation allowing individuals to register for identity documents in their chosen gender.


117 P Fabricius “Just how serious is South Africa about gay rights?” Politicsweb (27 February 2014).

118 Budlender, Marcus and Ferreira Public interest litigation p. 105.

119 Ibid p. 34.

120 See http://peoplespride.blogspot.com/. 
Rural communities

Although there have been considerable efforts on the part of the state to implement programmes and policies that enhance the lives of rural communities, these have largely failed.\textsuperscript{121} Perhaps the most blatant indication of this failure is the severe inequality between rural and urban dwellers that potentially drives urbanisation.\textsuperscript{122}

A variety of considerable challenges face communities in rural areas. Perhaps one of the most pronounced issues is alarming levels of tenure insecurity in relation to farmworkers and communities living in more remote rural areas. In relation to agrarian land, farm dwellers and workers have been “evicted in their droves despite the Extension of Security of Tenure Act 62 of 1997”.\textsuperscript{123} Hall writes that “[o]nly an estimated 1% of all of these evictions have been legal”.\textsuperscript{124} Farm dwellers and workers are routinely rendered homeless.\textsuperscript{125} In relation to rural land, there have been attempts to transfer significant portions of rural land to traditional authorities. Many have argued that these moves will diminish the tenure security of many rural families and communities and result in the creation of “contexts in which corruption and versions of unaccountable chiefly power flourish”.\textsuperscript{126} Another challenge prevalent in the rural context is high levels of abject poverty, with communities remaining unserviced.\textsuperscript{127} As one respondent states: “The face of poverty for many is an urban one while rural poverty remains hidden.”\textsuperscript{128}

Despite ground-breaking work which has prevented significant reversals, a variety of impediments that prevent rural communities from accessing public interest legal services persist. These include lack of funding which precludes the affordability of private attorneys, a vacuum of public interest law NGOs practicing in rural contexts,\textsuperscript{130} and the fact that municipalities


\textsuperscript{122} Clark and Royston “Low cost housing not low-cost enough” Mail and Guardian (11 April 2014).

\textsuperscript{123} Hall “Extension of Security of Tenure Amendment Bill” PLAAS Position Paper. See also A Claassens and B Cousins Land, Power and Custom: Controversies generated by South Africa’s Communal Land Rights Act (2008).

\textsuperscript{124} Ibid.

\textsuperscript{125} Interview with Respondents EE.

\textsuperscript{126} CLS “Communal Land Tenure Policy” Position Paper.

\textsuperscript{127} This was highlighted by various respondents. Interview with Respondent H and interview with Respondent S.

\textsuperscript{128} Interview with Respondent S.

\textsuperscript{129} Tongoane and Others v National Minister for Agriculture and Land Affairs and Others [2010] ZACC 10. See also http://www.lrg.uct.ac.za/research/focus/tcb/ for more on the advocacy around the Traditional Courts Bill.

\textsuperscript{130} Interview with Respondent S.
in rural areas ensure “conflicts of interest” by contracting with lawyers in peripheral towns and villages thereby prohibiting local attorneys from taking on community issues. In addition to these impediments, rural communities often have to travel great distances to reach legal representatives. In instances where rural communities have managed to obtain legal representation, their lawyers are vastly out-resourced by the state. One respondent even speaks of a community lawyer who was specifically identified as a “trouble maker” for participating in public interest work. She argues that the state effectively bankrupted this attorney by obtaining cost orders against him. In other instances, even where court orders are issued against the state, the state often expends vast number of resources to routinely “plead misery” in the courts, i.e. claiming it does not have the budget or land to fulfil its obligations.

These observations point to a gap in relation to the provision of public interest legal services in rural areas. This gap has been filled to a limited extent with social mobilisation and organisational development, such as the Alliance for Rural Democracy (ARD). ProBono.org has also working to mobilise the resources of small town legal practices to do more pro bono work. There remains, however, a need to consider how, within the limited resources available to public interest legal services organisation, rural communities can more effectively access and benefit from public interest legal services.

THE STATE OF THE STATE

State capacity and corruption

At the national level, there has been a critical failure on the part of the public service to efficiently and effectively deliver on its mandate, especially in relation to the provision of public goods and services to poor and marginalised communities. In popular discourse this failure has been attributed predominantly to the effects of affirmative action in so far as it relates to unqualified or underqualified officials being appointed to important positions in the state apparatus, or to the effects of the majority political party’s (the African National Congress or ANC) policy of “cadre deployment” that envisions the placement of party functionaries to senior positions in the public service. While these factors may play a contributory role,

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131 These points were raised during the Focus Group Interview with Four Informal Settlement Communities.

132 Focus Group Interview with Four Informal Settlement Communities.

133 Interview with Respondent C.

134 Ibid.

135 Interview with Respondents EE.


137 Chipkin “Beyond the Popular Discourse” pp. 1-2.

research into capacity constraints in the public sector suggests that these challenges are significantly more complex.

The Public Affairs Research Institute (PARI) argues that the challenges facing the public service are the result of a number of intersecting reasons. First, the democratic era ushered in a process of “transformation” of the state – in relation to a more racial and gender representative state, but also related to changes in the way in which public service functions are exercised.\(^{139}\) At core, this transformation sought to move away from an outdated, bureaucratic system of public administration to a more modern system of public management (as is envisioned by the New Public Management approach). This move had the effect of creating a multitude of new senior management positions in the public service, which were given “a high degree of autonomy vis-à-vis their ministers”.\(^{140}\) Second, there is an alarmingly high vacancy and turnover rate among senior staff in the public service.\(^{141}\) This suggests that the state is unable to appoint appropriately qualified personnel to crucial positions in the public service. The Auditor-General has also highlighted this concern, referring to incompetent municipal officials as a cause for the dramatic increase in wasteful and irregular expenditure during his financial audit of municipalities in 2011.\(^{142}\) Not only has the state failed to fill senior positions with suitably

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139 Chipkin “Beyond the Popular Discourse” pp 1-2, 4-9; Chipkin and Meny-Gibert “Public sector ‘manages’ to fail” Mail and Guardian (22 March 2013).
140 Chipkin “Beyond the Popular Discourse” p. 7.
141 Chipkin “Beyond the Popular Discourse” pp. 1-2, 9-16; Chipkin and Meny-Gibert “Public sector ‘manages’ to fail” Mail and Guardian (22 March 2013).
qualified individuals, but the high turn-over rate has also led to severe unpredictability, the “juniorisation of the senior management function”\textsuperscript{143} and instability in relation to processes and systems of management in the state. Chipkin argues that this volatility is the “single greatest cause of the failures in state performance”.\textsuperscript{144} Various respondents also noted with concern that there is a grave need to address this issue, including a need to “increase efficiency [in the public sector], and develop the necessary skills and competency”.\textsuperscript{145} In particular, the need for more appropriate training of public officials was underscored.\textsuperscript{146}

This lack of capacity in the public sector has manifested in a number of highly problematic ways. Perhaps the most severe of these, as noted by one of the respondents, is the apparent inability of the state to perform long-term planning especially in relation to the pressing issue of providing public services.\textsuperscript{147} This issue is clearly linked to the incompetence of many public officials, as well as the markedly high vacancy and turn-over rates. In practice, this has meant that the state is compelled to put out fires by resolving crisis after crisis, while remaining largely unable to develop and implement proactive, programmatic responses to the serious governance issues that plague the public sector. One participant remarked that the state has adopted a system of governance that is, at core, “without real substance”.\textsuperscript{148} The state’s inability or failure to govern effectively may also be worsened by what some perceived to be a “lack of political direction”.\textsuperscript{149}

A further significant challenge facing the state is the “widespread ‘misuse’ of public resources” and growing corruption.\textsuperscript{150} Commentators have argued that this phenomenon has developed, at least partially, as a result of the state’s unstable (and sometimes non-existent) organisational processes and systems which are “ripe … for the abuse of public office for private gain”.\textsuperscript{151} These claims are affirmed by the Auditor-General, who acknowledges the presence of corruption in the public services and states (in relation to the financial audit of municipalities):

\begin{quote}
Officials in key positions at more than 70% of the auditees do not have the minimum competencies and skills required to perform their jobs ... At least 73% of the auditees showed signs of a general lack of consequences for poor performance ... The lack of improvement in areas such as SCM, which received much attention from the AGSA, both in the provinces and at national level, however, point to a disregard for laws and regulations.\textsuperscript{152}
\end{quote}


\textsuperscript{144} Chipkin “Beyond the Popular Discourse” p. 16.

\textsuperscript{145} Interview with Respondent W. See also interview with Respondent O, who makes a similar point.

\textsuperscript{146} Interview with Respondent W.

\textsuperscript{147} Interview with Respondent V.

\textsuperscript{148} Ibid.

\textsuperscript{149} Interview with Respondent O.

\textsuperscript{150} Chipkin “The Politics of Corruption” p. 12.

\textsuperscript{151} Chipkin and Meny-Gibert “Public sector ‘manages’ to fail” \textit{Mail and Guardian} (22 March 2013).

This led one respondent to submit that in some respects the state had “lost control”.153 Other respondents argued that litigation may, in certain circumstances, exacerbate the lack of capacity in the public service.154 According to these respondents even potentially progressive and well-meaning public officials are often constrained as a result of litigation, which may prevent these officials from advocating and realising their mandates.155 However, others have argued that litigation may be essential to compel the state to address the issues in relation to capacity and corruption, claiming that litigation has the potential to strengthen the state’s internal systems and processes.156 It seems irrefutable, however, that litigation against the state will continue to mount as it fails – whether through unwillingness or inability – to execute its obligations.

Public interest legal services organisations have done much to highlight and campaign against corruption, to encourage reporting of corruption and to advocate for mechanisms to discourage it.157 Litigation to secure the independence of corruption-fighting structures within the state has also benefitted from intervention by interested civil society organisations.158

Local government

Some 278 municipalities in the country are responsible for the delivery of basic services – including water, electricity, sanitation and refuse removal – and are increasingly taking the lead role in providing housing. Despite a degree of fiscal transfer from the National Treasury, the devolved model relies overwhelmingly on cost-recovery. This puts great pressure on municipalities to view basic services more as a revenue stream, than as a developmental public health programme or poverty eradication strategy. Lack of water, electricity, sanitation and housing, along with corruption, are the most common issues driving mobilised dissent in townships and shack settlements.159

In the local government schema, such issues are meant to be mediated by elected ward councillors and ward committees, consisting of a chair (who is a ward councillor) and up to ten committee members elected by the community. For several reasons, however, the system has failed in practice. This is mainly due to the fact that these forums are inaccessible to

153 Interview with Respondent M. It should be mentioned that this comment is made in relation to local government.
154 Interview with Respondents A and Respondents EE.
155 Ibid.
156 For example interview with Respondent LL.
157 See, for example, the work of Corruption Watch, which is a non-profit organisation encouraging the public to report corruption so as to hold leaders accountable for their actions: http://www.corruptionwatch.org.za/.
158 See, for example, Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC); Helen Suzman Foundation v The Minister of Police and Others 1054/2015) [2015] ZAGPPHC 4.
social movements and marginalised groups. Participatory local democracy has floundered because ward committees have become dominated by political parties so that, instead of representing a diversity of interests, committee members are often from the same party as the ward chairperson leading to the ‘hijacking’ of ward committees by party politics and intra-party factions.\textsuperscript{160} Despite some degree of direct representation at the local level, the party list system (used exclusively at national and provincial level) has resulted in rendering leaders more accountable to political parties than to the citizenry.\textsuperscript{161}

Further, municipalities are often overly technocratic and non-participatory in operating style, preferring to pursue top-down management rather than including local communities. In most cases, community “consultation” takes place long after decisions have been made and is more like a public relations exercise than genuine participatory democracy. While elite interests are accommodated within municipal development planning, poor communities and especially residents of informal settlements are typically shut out from meaningful participation in the formal processes. For these groups, direct action, social movement mobilisation and public protest are increasingly more relevant forms of democratic expression than formal political involvement.

The work done by public interest legal services organisations in ensuring access to basic services, the protection of livelihoods and defending against evictions and displacement all address these local government failings. In addition, public interest legal services organisations have also had to devise new ways to hold local government accountable, by, for example, holding local government office bearers individually responsible for the implementation of court orders.\textsuperscript{162}

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\textsuperscript{162} See, for example, \textit{Mchunu v Executive Mayor, eThekwini Municipality} 2013 (1) SA 555 (KZD); \textit{Hlophe and Others v City of Johannesburg and Others} 2013 (4) SA 212 (GSJ).
\end{flushright}
SUPPRESSION OF DISSENT

Partly as a result of the deficits in local government performance identified above, South Africa has seen a significant surge in protest in poor urban areas. This has led some commentators to suggest that South Africa is experiencing a “rebellion of the poor”. Although these protests have been highly localised events that often occur outside of any coherent social mobilisation strategy, they have undoubtedly had a significant impact on the current socio-political terrain.

These popular protests have been referred to as ‘service delivery protests’ as they are frequently related to the inadequate socio-economic conditions of poor communities, including a lack of basic services and social amenities. In many respects, the wave of local protests can therefore be viewed as a claim for the realisation of socio-economic rights by poor communities. While local protests are undoubtedly related to failures of service delivery, they have also been linked to growing dissatisfaction and frustration within communities as they struggle to engage an increasingly remote state. In this sense, it has become apparent that communities are compelled to resort to informal and more direct or visible means of engagement, such as protest, in instances where formal participatory avenues have been closed down. Protests are therefore often symptomatic of various unsuccessful attempts by local communities to engage authorities through more traditional means and expose a failure in formal democratic processes.

This wave of protests has resulted in the police playing a significant role in managing community dissatisfaction and frustration. The South African government, through the police, has responded to the surge in protests with growing intolerance.

Public interest legal services organisations have experienced growing demand for criminal defence services, including bail applications.

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ranging from overtly brutal repression, including the use of disproportionate and sometimes lethal force, to suppression through less visible means. The more subtle instances of suppression include unduly restrictive interpretation of the legislative framework governing protests to prohibit or restrict collective mobilisation through protest, increased police brutality, specifically targeting local community activists and the abuse of the criminal justice system.\(^{169}\) It further seems that the state is increasingly utilising the criminal justice system not so much for the genuine prosecution of criminal activity, but rather to deter, intimidate and suppress popular dissent.\(^{170}\) Although many of the challenges that plague the policing system in South Africa relate to systemic issues of corruption, maladministration and incompetence,\(^{171}\) there also seems to be a clamp-down of visible expressions of popular dissent.

These claims were substantiated by various respondents, who argue that there is been a marked increase in the “political repression of [popular] discontent”.\(^{172}\) One respondent\(^{173}\) stated that the forceful repression by the state has been epitomised in a number of high-profile matters including the Marikana massacre,\(^{174}\) the killing of Andries Tatane\(^{175}\) and the ongoing abuses in the policing of public protests. Other respondents underscored the growing intolerance of the state toward protests in general, describing this development as a “push back” on the part of the state.\(^{176}\) Recently, there have been attempts to enforce ‘blanket prohibitions’ of protests organised by certain groups,\(^{177}\) as well as the large-scale arrest and detention of peaceful protestors.\(^{178}\)

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172 Interview with Respondent W. Also interviews with Respondent V, Respondent KK and Respondent G.

173 Interview with Respondent W.

174 The Marikana massacre refers to the killing, by police, of 34 striking mineworkers on 16 August 2012 near Rustenburg.

175 Community activist, Andries Tatane, was brutally beaten and killed in April 2011, during a protest for access to water in Ficksburg, Free State. Following the televised broadcast of footage showing the police attacking Tatane, who collapsed and died with multiple bruises and two rubber bullets in his chest, six police officers were charged with assault and murder. All six were found not guilty on the basis that the identity of the officers could not be confirmed as they were wearing riot gear. For more see Dugard “Urban Basic Services” in Socio-Economic Rights (2014) p. 291.

176 Interview with Respondent V.

177 See J Isaac “City Goes to Court to Stop Ses’khona Protests” GroundUp (9 September 2014).

178 Over 100 peaceful healthcare workers, who were affiliated to the Treatment Action Campaign (TAC) were arrested on 10 July 2014 on charges of “unlawfully gathering”. The protestors were arrested despite the fact that they had provided notice of their intention to gather simply because they extended their peaceful sit-in. See M Malan “TAC community healthcare workers arrested in Free State” Mail and Guardian (10 July 2014).
Public interest legal services organisations have experienced growing demand for criminal defence services, including bail applications. They have also publicised systemic failings in policing, including police partiality and brutality. The Marikana Commission of Inquiry also became a key site for civil society engagement with police repression and brutality.

THE PRIVATE SECTOR

Holding the private sector to account

The South African Constitution seeks to address the issue of unconstrained private power by providing that the provisions of the Bill of Rights are applicable to corporate entities and private parties. These provisions were included to ensure that private law was progressively infused with public law norms, as well to provide vital accountability measures with which to hold the private sector to account. However, despite these progressive constitutional measures, there is a perception among some respondents that public interest legal service organisations have not fully utilised existing accountability measures to curb the severe abuses of private power. One respondent therefore refers to private sector accountability as a “frontier area.”

A number of respondents in this study confirmed that the private sector plays a significant role in maintaining and entrenching inequality in South Africa. Indeed, in 2015, the private sector in South Africa is much stronger than the state. Many suggested that the private sector in South Africa is “playing a very dirty game.” In this respect, respondents pointed out that the private sector, and big corporates in particular, are often unwilling to fulfil their constitutional or human rights obligations. This occurs on various fronts. One respondent observed that business frequently leverages its power against the state and feeds off the polarised political nature of the state. She further suggests that the state has, in many respects, become integrally linked to corporate power rendering it largely dependent on ‘big business’. There is a recognition that corporate South Africa has failed to re-invest into

179 Interviews with Respondent S and Respondent G. Also the Focus Group Interview with Four Informal Settlement Communities.
181 See section 8(2) and 8(3) of the Constitution.
183 See Interview with Respondents A.
184 Interview with Respondent XX.
185 Interview with Respondent XX.
186 This quote is from the interview with Respondent HH. Also interviews with Respondent S, Respondent O, Respondent W, Respondent II and Respondent D.
188 Interview with Respondent O.
189 Interviews with Respondent O and Respondent W.
the South African economy, thereby potentially diminishing economic growth. The private sector has further sought to prevent more radical amendments in the South African labour regime, preferring instead to uphold existing labour relations which, in many respects, remain favourable to the interests of business and the political elite.

A large number of public interest legal service organisations have embarked on measures to curb the more severe abuses of private power through public interest litigation. Some examples of work in the sector include work in relation to sales in execution of homes or bank repossessions, addressing unfair landlord-tenant relationships, challenging the harmful environmental and social impact of extractive industries, challenging unfair microlending practices of banks and garnishee orders, and challenging the excessive pricing regimes and exclusive patent laws pertaining to live-saving pharmaceuticals.

**PUBLIC INTEREST LEGAL SERVICES ORGANISATIONS, THE STATE AND THE JUDICIARY**

As part of our contextual examination, we now turn to consider who the sector interacts with the state and the judiciary.

**RELATIONSHIP BETWEEN THE PUBLIC INTEREST LEGAL SERVICES SECTOR AND THE STATE**

The existing relationship between the state and the public interest legal services sector is evidently of critical importance to this study. Clear patterns emerge when examining the different interactions that various public interest legal services organisations have had with the state.

We were told a few positive stories during our research. By establishing relationships with receptive political leaders, and with sympathetic officials, public interest legal services have

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190 Interview with Respondent HH.
191 For example the interview with Respondent HH who touches on this issue.
192 See, for example, SERI’s work in relation to sales in execution of homes: http://www.seri-sa.org/index.php/litigation-9/cases.
193 See, for example, SERI’s work in on landlord-tenant relations: http://www.seri-sa.org/index.php/litigation-9/cases.
194 See, for example, the work done by LRC (http://www.lrc.org.za/focus-areas/environment), CER (http://cer.org.za/programmes/mining) and the Centre for Applied Legal Studies (CALS) (http://www.wits.ac.za/academic/clm/law/cals/newcalssite/16867/environment.html).
195 See, in particular, the work done by the LRC in relation to the silicosis class action, a case involving a large number of mineworkers who contracted silicosis while working in a gold mine in the Free State: http://www.leighday.co.uk/News/2012/April-2012/SA-miners-suffering-lung-disease-bring-their-demands.
196 Interview with Respondents EE.
197 In this regard the work of SECTION27 and the Treatment Action Campaign (TAC) have been crucial. See, for example, TAC “TAC intervention leads to important legal advance: Public interest concerns relevant in determining interim interdict in patent cases” Press Release (31 July 2012); A Berner-Roderero “‘Big Pharma’ trying to impede South Africa’s overdue patent law reform” Brot für die Welt (20 March 2014).
organisations have been able to secure the reallocation of resources in healthcare systems, obtain access to emergency and permanent accommodation for poor communities under threat of eviction, obtain valuable information held by the state that, while technically in the public domain, would take lengthy periods to obtain through formal channels, ensure the construction of temporary educational facilities and ensure the provision of school transport facilities.\textsuperscript{198}

However, the overwhelming picture painted of the state in our research is that it is “unresponsive” and “recalcitrant”,\textsuperscript{199} indicating an apparent unwillingness, inability or refusal on the part of the state to fulfil its legal obligations. Whether this is as a result of incapacity or recalcitrance remains unclear.\textsuperscript{200} Others suggested that the state’s attitude to civil society, and dissenting communities more generally, has become characterised with rising levels of hostility and defensiveness.\textsuperscript{201} In a more sinister vein, a number of respondents refer to a trend towards more “authoritarian” measures and a gradual “securitisation” of the state,\textsuperscript{202} as the state has become more intent on the “political repression of discontent”.\textsuperscript{203} However, others

\textsuperscript{198} S Wilson, Out of Site, Out of Mind: Relocation and Access to Schools in Sol Plaatje (CALS, 2003).
\textsuperscript{199} Interviews with Respondent F, Respondent N and Respondent G.
\textsuperscript{200} One respondent suggest that the defensive attitude may stem from a profound incapacity or from a lack of political direction. See the interview with Respondent O.
\textsuperscript{201} Interviews with Respondent O, Respondent KK, Respondent H and Respondent V.
\textsuperscript{202} Interview with Respondents KK and Respondent N.
\textsuperscript{203} Interview with Respondent W. For more on the state’s suppression of popular dissent see the subsection dealing with this issue above.
The relationship between civil society organisations and the state is further problematised by the rising instances of non-compliance or “malicious compliance” with court orders.

argue that the state has considerable “capacity to frustrate you” through a variety of measures other than force.204

In this context, it seems unsurprising that interactions between civil society organisations and the state have become politically charged.205 It has become commonplace for state officials to claim that civil society organisations (and even Chapter 9 institutions such as the South African Human Rights Commission or the Public Protector) are politically aligned seemingly in attempts to either delegitimise the concerns raised by these organisations or obfuscate the real issues. This phenomenon often extends to interactions with social movements, community-based organisations and even individual community members. As one respondent claims, engagement with the state is “highly politicised” with “everything being dragged into party politics”.206 Moreover, similar claims have been levelled against civil society, claiming that civil society organisations are serving “foreign agents”.207 One respondent warns that these claims signal a growing intolerance on the part of the state towards foreign funding in civil society organisations.208 This apparent intolerance may have potentially far-reaching consequences for the feasibility and sustainability of the public interest legal services sector if the state were to take steps to restrict the levels of foreign donor funding in the country.209 One respondent suggested that the South African government allegedly has approximately R8 billion that is supposed to be allocated annually to civil society, but this money is earmarked for arts and culture, health, sports and education initiatives – not for human rights and governance work which is seen as challenging the state.210

The relationship between civil society organisations and the state is further problematised by the rising instances of non-compliance211 or “malicious compliance” with court orders.212 Some respondents argued that this has raised considerable doubts about whether a court victory

204 Interview with Respondent U.
205 Specifically the interview with Respondent V. Also interviews with Respondent O and Respondent H.
206 Interview with Respondent V, who, in reference to their engagements with the City of Cape Town and the Western Cape Province, argues that interactions with the state have become “highly politicised”. Focus Group Interview with Four Informal Settlement Communities; and the Focus Group Interview with a Social Movement.
207 Interview with Respondent O. See also the interview with Respondent H.
208 Interview with Respondent H.
209 Interview with Respondent H, who argues that this intolerance has frequently forewarned more restrictive enforcement of foreign donor funding in other countries.
210 Interview with Respondent XX.
211 An alarming number of respondents raised the issue of non-compliance with court orders, indicating that this is a serious concern in the South African context. Interviews with Respondent F, Respondent D, Respondent CC, Respondent KK, Respondent E, Respondent P, Respondent M and Respondents A.
212 Malicious compliance is a term used by Respondent E to describe the situation where government officials (or private parties) read court orders as restrictively as possible in an attempt to frustrate the objectives of the litigating organisation while simultaneously complying with the court order.
will necessarily translate into the relief sought by the client group. As they state, sometimes: “A court order may not be worth the paper it is written on”. Moreover, such flagrant disregard for the judiciary has significant implications for the rule of law and the perceived legitimacy of the courts’ system. An inevitable consequence of state non-compliance or malicious compliance is a need for more enforcement litigation or contempt of court proceedings on the part of civil society organisations, which many deem undesirable, unnecessarily costly and lengthy. In fact, these measures have been increasingly invoked by public interest legal service organisations in recent years. Some have argued that these types of proceedings may result in a strained relationship with government officials in future, stating that contempt of court proceedings in particular alter how government officials respond to civil society organisations in particular. One respondent argued that this is primarily as a result of the fact that these proceedings are criminal in nature and relate to the official in their personal capacity. He states: “[Y]ou can expect that the target [of contempt of court proceedings] to fight [these proceedings] far more personally and with greater vigour”. It has also been argued that this political environment is “not [necessarily] conducive to engagement”.

Despite the rising disobedience of court orders, respondents concurred that the looming threat of litigation was an invaluable tool that ensured responsiveness on the part of the state. One participant remarked that the “spectre of litigation” opened up spaces for increased participation and engagement with state entities. Another argued that although the threat of litigation played an important role in unlocking more responsive behaviour for the state, the power of this threat stemmed from the political leverage and legitimacy of the judiciary. She further claims that in the absence of the political leverage of litigation, civil society should seek to build enduring relationships with public officials which may hold similar political leverage. This approach was partially substantiated by other respondents who indicate that continued relationships with key government officials may be crucial not

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213 Interview with Respondents A.
214 Interview with Respondent N. Also interviews with Respondent HH and Respondent BB.
215 Interview with Respondent BB.
216 See, for example, J Dugard “Beyond Blue Moonlight: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing” Constitutional Court Review 5 (2014) pp. 265-279; Veriava “Draft Position Paper” (2013) p. 50; Hlophe and Others v City of Johannesburg and Others; Mchunu and Others v Executive Mayor of eThekwini and Others. A recent example includes the attachment of the Minister of Basic Education, Angie Motshekga, and her Director-General’s luxury motor vehicles after a failure to pay teacher’s wages in terms of a court order. See S Stone and K Gernetzky “Motshekga’s car seized over teachers’ pay” Business Day (1 October 2014).
217 Interview with Respondent H.
218 Ibid.
219 Ibid.
220 Interview with Respondent BB.
221 Interview with Respondent C and Respondent HH. This view was also articulated by a number of participants during the Johannesburg Consultation Workshop.
222 Interview with Respondent C.
223 Interview with Respondent HH.
224 Ibid.
225 Interviews with Respondents A and Respondent II.
only to understanding the political environment and capacity constraints that characterise the public service,226 but also to “unlocking blockages”.227

A further concern raised by various respondents is a growing trend on the part of the state towards an attitude of increased secrecy, with the state frequently failing, or actively refusing, to provide access to state-held information.228 Some even claimed that the state was utilising the Promotion of Access to Information Act 2 of 2000 (PAIA) not so much to facilitate access to state-held information, but rather as a “defensive” measure to frustrate, stall or prevent access to state-held information.229 This has a significant impact on the processes of engagement and litigation with the state, as public interest legal service organisations are frequently compelled to litigate in order to obtain information (without even being able to become involved in the substance of the matter).230 The applicant succeeds in almost all PAIA litigation, revealing the wasteful resources expended by the state in defending against such cases.231 This is particularly ironic, given that a significant number of civil society organisations indicated that litigation should ideally be an action of last resort.

THE JUDICIARY

Over the years the courts, and particularly the Constitutional Court, have in certain instances, developed potentially progressive and transformative judgments. As one participant at the Johannesburg Consultation Workshop argued, the South African courts’ jurisprudence has predominantly benefitted the socially marginalised and excluded (or, to use the phrase of the participant, “outsiders”).232 The strength of the courts therefore lie in their ability to be “an institution of contestation”, which ameliorates the effects of social exclusion by enabling a principled ‘conversation’ between “insiders” and “outsiders.233 In this respect, litigation (and public interest legal service provision more generally) could be viewed as a potentially empowering tool that could facilitate greater participation for vulnerable groups.234 This has led some to argue that the courts have an “aspirational impulse” which does not necessarily become realised in practice.235 Despite the progressive impulse of the courts, many scholars have pointed to a number of critical failings in the jurisprudence of the South African courts that limit the transformative potential of the Constitution or fail to interpret the law in a more expansive manner.

226 Interview with Respondents A.
227 Interview with Respondent II.
228 Interviews with Respondent D, Respondents A, Respondent T and Respondent N.
229 Interview with Respondent T.
230 Interviews with Respondent D, Respondent N and Respondents A.
231 Interview with Respondent XX.
232 These points were raised during the Johannesburg Consultation Workshop in 2014. It should be noted that the participant says that the court may still be criticised in many respects for not fulfilling this mandate consistently.
233 These points were raised during the Johannesburg Consultation Workshop in 2014.
234 See interviews with Respondents A and Respondent E.
Despite the progressive impulse of the courts, many scholars have pointed to a number of critical failings in the jurisprudence of the South African courts that limit the transformative potential of the Constitution.

Many respondents also signalled that there was a growing concern that South Africa’s judiciary seems to have become increasingly reticent and restrained in realising its transformative mandate. One respondent described it as a “closing of space in the judiciary”. Some have attributed this to the changing composition and perceived attitude of the Constitutional Court, which some believe has been inclined to deliver judgments of a more technical or conservative nature. However, others disagree. Respondent W, a legal academic, says that in so far as these concerns relate to a more conservative or “executive minded” Constitutional Court, she does not believe that we are capable of making definitive declarations at this stage. She further notes that the Court was never meant to be “front and centre” in addressing these frequently complex structural challenges. She does, however, acknowledge that it is becoming increasingly clear that “you can’t just go and get a big win in the Constitutional Court”. One concern that she does underscore, is the fact that the Constitutional Court’s more reflective examination of its transformative mandate has “all but dried up”. If this is an indication that the Court has lost its transformative vision, this may be highly disconcerting. However, the respondent argues that perhaps this is inevitable as the Court becomes involved in issues that may not immediately present pressing constitutional challenges.

More recently, a variety of new and complex legal challenges have arisen in a public interest litigation context. Chief among these are the challenges of an increasingly evasive state that seeks to circumvent the protections laid down in jurisprudence and the rising number of court decisions that the state fails or refuses to implement. These challenges have meant that

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236 For example interviews with Respondent BB, Respondent JJ, Respondent M and Respondent O.
237 Interview with Respondent M.
238 Interviews with Respondent JJ and Respondent O. This was also raised during discussion at the Johannesburg Consultation Workshop in 2014.
239 Interview with Respondent W.
240 Ibid.
241 Ibid.
242 Ibid.
243 Ibid.
244 In this regard one could refer to recent eviction cases, where state authorities have attempted to circumvent the legal protections enshrined in the Constitution and the Prevention of Illegal Evictions from, and Unlawful Occupation of, Land Act 19 of 1998 (the PIE Act). These cases include cases before the Constitutional Court and Supreme Court of Appeal at the time of writing, including Zulu and 389 Others v eThekwini Municipality and Others and Fischer and City of Cape Town v Ramahlele and 46 Others.
245 See Dugard “Beyond Blue Moonlight: The Implications of Judicial Avoidance in Relation to the Provision of Alternative Housing” (2014) 5 Constitutional Court Review.
there has been a significant increase in enforcement litigation, which has become increasingly “lengthy, convoluted and expensive.”

A further concern noted by respondents is the apparent increase in government commissions or tribunals established by the president in terms of section 84(2) of the Constitution and the Commissions Act of 1947 or provincial premiers. Although commissions of inquiry have arguably always been a prevalent feature of South Africa, in recent years there seem to have been a proliferation of commissions including the Arms Procurement Commission, the Marikana Commission of Inquiry, the Khayelitsha Commission and the Lwandle Commission of Inquiry. Commissions of inquiry have been criticised by some, who argue that “commissions … have traditionally become places to park a hot potato until it gets cold”. In fact, commissions have frequently been used to circumvent legal scrutiny and accountability in various ways. While this is not always the case, these concerns highlight the need for representation for vulnerable persons at commissions of inquiry that affect them. Some respondents stated that an increase in commissions of inquiry may be a concerning development that could hold significant implications for the matter and nature of the work of public interest legal service organisations. Involvement in such commissions may therefore become an increasingly important consideration in future.

**Conclusion**

It is clear from the survey set out above that South Africa faces a range of deep and complex social and economic changes: chiefly inequality, poverty, joblessness, discrimination against, or the exclusion of, a range of vulnerable social groups, state incapacity, recalcitrance and corruption, and abuse of private power.

The public interest legal services sector is involved in a wide variety of work across multiple fronts. Virtually every major area of social concern is the subject of some form of public interest legal work, which, is often met with real success, including the expansion of access to housing, healthcare services, particularly essential medicines, widened access to social grants, challenging xenophobia, racism and gender-based violence, enhancing youth and educational opportunity, protecting the environment and so on.

The sector has a critical but productive relationship with the state and the judiciary. It is sophisticated, self-critical and well-informed. It is keenly aware of the challenges it faces in achieving social transformation through the provision of legal services and has a nuanced understanding of the strengths and weaknesses of its approaches.

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246 Dugard “Beyond Blue Moonlight” (2014) Constitutional Court Review. For examples, see Veriava “Draft Position Paper (2013) p. 50; Hlophe and Others v City of Johannesburg and Others; Mchunu and Others v Executive Mayor of eThekwini and Others.

247 In particular interview with Respondent JJ.


249 Macleod “Parking a hot potato” eNCA Africa (16 August 2013).

250 Interview with Respondents A.
Understanding Value and Impact in the Public Interest Legal Services Sector

section three
Our terms of reference for this project asked us to explore ways in which the value of public interest legal services can be assessed. This exploration was broken down, in our terms of reference, into a number of subsidiary issues, including: how the relevant literature defines success; what objectives people in the public interest legal services sector set for themselves; what kind of achievements can reasonably be expected from public interest legal services work in the short, medium and long terms. We were also asked to characterise the relationship between “proactive” and “reactive” strategies employed by the public interest legal services sector. Critically, we were asked to find out how a range of actors within, and connected with, the public interest legal services sector assessed the value of public interest legal services work. We were also asked to consider what donors should be looking for when making decisions about supporting public interest legal services.

We address these questions, by considering the methods deployed by the public interest legal services sector, and the way the sector understands the value and impact of its work, in light of the contextual analysis provided in the previous section. We discuss an emerging debate about the value and impact of public interest legal services in South Africa. We note that this debate has often shaped the terms on which those active in the public interest legal services sector characterise the value and impact of their work. However, we also argue that crucial aspects of this characterisation have yet to be captured in the literature. For example, people active in the sector tend to discuss their work in terms of issues and controversies rather than in terms of particular legal cases. They also emphasise a wider range of methods and sites of impact than have traditionally been considered. After setting out what our respondents said about the value and impact of their work, we offer a very preliminary, multidimensional, approach to considering the value and impact of the work being done in the sector.

Current South African debates

We have already discussed, in outline, the emerging South African debate between what we have called “materialist” and “legal mobilisation” approaches to public interest legal services. These approaches are heavily influenced by international debates between evaluations of public interest litigation. Materialist authors tend to cite international literature that emphasises the need for public interest legal services, and litigation in particular, to show measurable influence on concrete social phenomena in order to demonstrate impact.251

Gerald Rosenberg is a particularly good example of the materialist approach. In his Hollow Hope? Can Courts Bring About Social Change?, Rosenberg argues that courts have neither the political authority nor the normative resources necessary to bring about social change. First, he says, the nature and

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content of constitutional rights in the US Constitution narrows the range of socially relevant issues the Court can hear or decide on. Second, the US Supreme Court does not have sufficient independence from the executive or legislative branches of the US political system to effect significant reform. Third, in the development of policy options and the implementation of programmes, the Court relies for its efficacy on the budgetary resource allocations made by the legislature and the administrative capacity of the executive. Rosenberg buttresses his claims with empirical data which, he suggests, show that many “landmark” decisions of the US Supreme Court did not, in themselves, affect significant change. For example, Brown v Board of Education\(^\text{252}\) did not in itself lead to school desegregation, which only happened (to the extent that it did) in the aftermath of the Civil Rights Act of 1964. Rosenberg further argues that Roe v Wade\(^\text{253}\) has had little impact on the number of legal abortions in the US. In the second edition of his book, Rosenberg suggests that litigation to legalise gay marriage may have done more to provoke a backlash against gay rights than it has to ensure more gay people can get married.\(^\text{254}\)

South African materialist approaches have tended to reject Rosenberg’s pessimism by drawing attention to the unique features of South Africa’s constitutional and legal settlement, which, they say, make it easier for litigation to achieve greater impact in South Africa.\(^\text{255}\) However, they


\(^{253}\) Roe v Wade 410 U.S. 113 (1973).


have nevertheless tended to adopt Rosenberg’s method of measuring social change, and his insistence that there are fairly tightly circumscribed positive conditions in which litigation can make a difference. Accordingly, materialists have offered a list of contextual factors which they argue are important in considering whether public interest legal services can achieve concrete social change. These factors have included: the level of organisation of one’s clients, the existence of a long-term jurisprudential strategy, the quality of co-ordination and information sharing between rights-claiming groups, the timing of a legal intervention, access to research resources, the quality of post-judgment follow-up, the resources available to rights-claiming groups and the capabilities of the state and the willingness of the judiciary to participate in a long-term programme of jurisprudential evaluation.256

In the legal mobilization tradition, Michael McCann,257 while accepting Rosenberg’s skepticism on the direct efficacy of litigation, points out that litigation can indirectly effect social change through the mobilization catalysed in preparation for it, and in its aftermath. McCann’s work, and that of Stuart Scheingold258 amounts to a qualified endorsement of rights as instruments of progressive change. Rights are less “established social facts” than potentially useful “political resources”.259 Constitutional rights and progressive jurisprudence provide authoritative statements of public policy goals. But their articulation and assertion is never the end, and often comes at an early stage, of more wide-ranging social struggles. They signal that political claims have achieved a partial and often insecure official recognition. Declarations of rights must be made real by other forms of political action, such as lobbying bureaucrats and legislators, or campaigning for public support, or protest and other forms of direct action. While textual formulations of constitutional rights may be fairly immutable, concrete interpretations are always contingent. The “politics of rights” refers to the manifold forms of political action through which declarations of rights (whether or not they are made by courts) are pursued as sometimes useful tools of lobbying and protest, while nonetheless recognising this contingency and plotting out political strategies accordingly.260

One of the aims of a politics of rights could be to develop what Michael McCann has called a ‘jurisprudence from below’, in which constitutional rights are defined and internalized through an assessment of their meaning and import to a particular social struggle, by people directly engaged in that struggle. The interests of the rights-claiming group are thereby transformed and universalised into statements of entitlement, rather than expressions of interests or preferences.261 Whether or not these claims secure recognition depends on the outcome of a broader social struggle, which may or may not employ litigation.

257 McCann Rights at Work: Pay Equity and the Politics of Legal Mobilisation (1994).
259 Ibid pp. 84-85.
261 This process may be akin to what Sally Engle Merry calls “naming” injustice in S Engle Merry Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans (1990).
In line with this approach, legal mobilization theorists in South Africa have tended to emphasise the indirect material, non-material and politically symbolic effects of litigation. They have tended to downplay the meaning of the contextual factors listed by materialist approaches, emphasising the broader contingent and political factors which are harder to observe but no less important, in their view. They urge an approach to public interest litigation which considers a wide range of inputs and outputs of the process, including, the extent to which litigation galvanises social action and creates new social coalitions, raises public awareness, “politicises” social problems which may before have been considered of a technical or scientific nature (such as how to supply water to a township), educates the judiciary and the extent to which litigation – whether or not it is successful – extracts political concessions from the state.

Materialist and legal mobilisation approaches do share some common ground. They agree that concrete benefits matter. They also agree that the methods and resources deployed in public interest legal work can predict the success or failure of a particular intervention. Where they differ is what counts as “success”, and which legal, rather than political, methods and resources are capable of predicting favourable judicial outcomes.

What our respondents said

Although the debate between the materialist and legal mobilisation approaches set out above clearly influenced how people within the sector characterise their work, our study revealed a much broader range of influences. We present these in two parts. We first address the key features of the way in which our respondents characterised the sector of a whole. We than move on to discuss how our respondents characterised the value and impact of the work done within the sector.

HOW OUR RESPONDENTS CHARACTERISED THE PUBLIC INTEREST LEGAL SERVICES SECTOR

During our research and interviews with respondents a number of key features or characteristics of the public interest legal services sector were identified.

Plurality

The public interest legal services sector is a site of great variety and experimentation. Our respondents identified two broad kinds of public interest law centres: generalist and specialist. While the Legal Resources Centre and Lawyers for Human Rights have continued to act as generalist organisations, most new organisations, such as SERI, SECTION27, and some older institutions, like the Centre for Applied Legal Studies have chosen to specialise on specific issues or “niche areas”, as one respondent put it. There appears to be general consensus that there is a need for both kinds of organisations, and each has their pros and cons.

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262 Dugard and Langford “Art or Science” SAJHR (2011) pp. 57-60.
263 Ibid.
264 Ibid.
265 Interview with Respondent XX.
266 Interview with Respondent CCC.
According to one lawyer working for a generalist public interest organisation, there are even different strategies and approaches to litigation undertaken by different departments within his organisation. According to him, this diversity of strategies and approaches is dependent on a number of factors including: historical reasons for certain approaches, the nature of the issues, existence of networks and campaigns, the nature of the policy engagement required, relationship with relevant leadership in government departments, political will to deal with the issue, caseload and the number of urgent matters, capacity constraints and ability to do strategic litigation or research, levels of funding and donor support, personalities involved and ability to work with others.267 This points to the diversity of strategies and approaches, not only between organisations, but within organisations as well.268

There was clearly an understanding that social change requires the employment of a wide variety of complementary methods.

All of the public interest legal services organisations we approached employ a wide variety of methods, including advisory work, research, public education, scrutinising legislation, policy analysis and advocacy in partnership with the state, and engaging in media campaigns. There was clearly an understanding that social change requires the employment of a wide variety of complementary methods.

267 Interview with Respondent P.
268 Interview with Respondent P.
Focus on litigation

The use of litigation, though, was by far the most controversial and discussed topic. Those engaged in litigation defended its value and impact, while those not directly engaged in it worried that “running to court too quickly can be problematic”. Another respondent worried “that people litigate without seeing other alternatives.”269 The need for more “creativity” in the sector was raised by a number of respondents, in reference to the limits of the law and litigation, as well as the need to look elsewhere for solutions, partnerships and different types of mobilisation.270

Even those who litigate regularly engaged in critiques of litigation and appear aware of the limits and potential of litigation as one the prized “tools of their trade”. According to one respondent, “talking about litigation tends to polarise people. People tend to talk about the value of litigation in the abstract, which is counter-productive. Litigation is not an ideology. It is a tool.”271 According to him, whether to use litigation to tackle a particular social problem is an entirely instrumental judgement: “to get a tumour out of someone’s head often requires surgery. That doesn’t mean that surgery is a good thing always and everywhere. It is what is necessary in the circumstances. It’s the same with litigation. The question is: with this problem, under these circumstances, is litigation required? And if it is, how can we do it so as to mitigate against the potential risks involved”.272

Strategic and clinical legal services

Most respondents acknowledged that there is a clear conceptual and theoretical distinction between strategic and clinical legal services.273 Clinical litigation aims to serve a particular client’s needs. Strategic legal services aim to have an impact far beyond the immediate parties to a case, usually by changing policy or law, or influencing the behaviour of the state or private sector institutions.

However, “there is not always a clear practical divide.”274 One respondent described how distinguishing between the two as “quite an esoteric exercise”275 It was often argued that there is no bright line between clinical and strategic legal services. For example –

269 Interviews with Respondent A, Respondent N, Respondent V, Respondent BB and Respondent QQ.
270 Interviews with Respondents BB, Respondent HH and Respondent TT.
271 Interview with Respondent DDD.
272 Interview with Respondent DDD.
273 Interviews with Respondents D, Respondent H and Respondent HH.
274 Interview with Respondent BB.
275 Interview with Respondent I.
1. High impact litigation can often flow from extensive clinical work. One respondent commented that the *Joseph* case,276 which established a constitutional right to electricity, started out as a walk-in case at a law clinic.277 In addition, Lawyers for Human Rights (LHR) has relied on a large volume of individual cases dealing with the detention of asylum seekers in order to establish a pattern to support the grant of wider-ranging structural relief to prevent unlawful detention of asylum seekers.278

2. Running a strategic legal practice often requires a certain degree of clinical work, both to ensure that practitioners remain effective and engaged in a wide variety of practice, and because high impact cases often arise from a broader pool of clinical work.

3. “Strategic” work can be strategic in a variety of senses. A former Black Sash attorney,279 for example, remembers working closely with the Centre for Applied Legal Studies (CALS) both to develop a broad understanding of how the pass laws were implemented, and to find effective ways of challenging that implementation. This required access to a wide variety of “clinical” cases, and a great deal of high-level strategic thinking.

4. In addition, a wide variety of work in criminal defence and anti-eviction work might not be inherently strategic, in the sense that it will lead directly to changes in the law, but might be necessary to support important grass-roots organisations that are under attack, or to help them help their members.280 This enhances the ability of human rights defenders to be vocal. Without access to affordable and quality legal representation, individuals are often unable to take risks to advance their causes. One respondent explained that an activist may not be able to access representation for bail proceedings if bail was denied, and could end up in jail for participating or organising a protest. For her, the “ability of people to take risks is greatly reduced by cost and quality of legal representation”.281 She says that access to justice and the pursuit of structural change cannot be divorced from one another.

5. Strategic work in new areas of the law may have to be preceded by clinic work in order for practitioners to become familiar with the issues at play. As a number of respondents noted, taking on the “smaller daily cases” can help to identify trends and systemic challenges.282

6. Consistent presence of direct representation improves the way bureaucratic institutions and systems operate. The presence of skilled lawyers taking cases automatically forces systems to be improved and institutions to “step up their

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276 *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC).
277 Interview with Respondent DDD
279 Interview with Respondent VV.
280 Interview with Respondent AA.
281 Interview with Respondent HH.
282 Interviews with Respondents EE and Respondent NNN.
game”, which has the all-round effect of “raising the bar”. She cites litigation in maintenance courts as one example of where this has been an important and successful strategy.283

However, a number of respondents stressed the importance of clinical legal services for their own sake.284 One respondent argued that direct legal services have been neglected in the past and are waning; however the importance of this legal service “cannot be overstated”, particularly in eviction, gender violence and child maintenance cases.285 The provision of direct legal services can empower and enable individuals and communities to better organize for structural change.

One respondent working on education rights provided a vivid illustration of the point. He differentiates the organisation’s work into “responsive actions” (individual campaigns in schools) and “campaign actions” (aimed at undoing systemic issues). According to him, the organisation’s school-based work is fundamentally important in a number of respects, perhaps the most important being “the need for students to see change.” When members (students or parents) join the organisation, they want to be part of a movement that is helping to improve their schools and to make the education system more equal. If organisations “don’t respond to issues that people are experiencing in their individual capacities, [they are] going to lose their involvement in the broader campaigns”.286

Our respondents generally felt that clinical legal services were undervalued. They gave three broad reasons for this view. The first is the assumption that Legal Aid SA provides free legal assistance. However, in reality, it only provides assistance in criminal cases and provides very limited assistance for civil litigation. According to some respondents, Legal Aid SA does not assist women and children in maintenance cases or assist people defend themselves against evictions.287 The second reason cited for the neglect of clinical legal services is the reported tendency of donors to see this work as “unglamorous” and “unsexy”.288 A third reason cited is the assumption, described by one respondent as “fundamentally untrue”, that clinical legal services do not contribute to social change.289

Nonetheless, a minority of respondents had a less positive view on the provision of clinical legal services. One respondent stated that she believes this type of work, however necessary, is

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283 Interview with Respondents GG.
284 Interviews with Respondent D, Respondent GG and Respondent V.
285 Interviews with Respondents GG, Respondent QQ and Respondent BBB.
286 Interview with Respondent AA
287 This was raised at the Johannesburg Consultation Workshop in 2014. Also in interview with Respondents GG and in Budlender, Marcus and Ferreira Public interest litigation p. 11.
289 Interview with Respondents GG.
“more a band aid” and questioned whether an organisation can undertake a critical number of responsive cases and really say that there has been structural change.\(^{290}\) Another respondent argued that assisting clients on a day-to-day basis can “reinforce their reliance on the legal issues” and shift their energy away from other non-legal solutions.\(^{291}\)

**HOW OUR RESPONDENTS CHARACTERISED THE VALUE AND IMPACT OF PUBLIC INTEREST LEGAL SERVICES**

Most of our respondents characterised the value and impact of public interest legal services by talking about litigation. Other methods, such as advisory work, research, public education, scrutinising legislation, policy analysis and advocacy in partnership with the state, and engaging in media campaigns, were discussed and are employed extensively by public interest legal services organisations. They were considered to be simple, obviously valuable and uncontroversial.

Despite this, litigation was only ever accorded instrumental value, and was discussed as part of a process that involved a variety of methods. A number of respondents stated that public interest legal services, should not be viewed as “an event” but instead as “processes” that have value.\(^{292}\) According to one respondent, a successful process does not end when a judgment is handed down; and value consists of the litigation process and outcome as well as the follow-up work or “post litigation advocacy”.\(^{293}\) Therefore when the value of public interest litigation is assessed, these aspects must be included.\(^{294}\) Another respondent described how court victories often need to be “guarded” and “advanced” to a new victory.\(^{295}\) One respondent from a donor organisation criticised other donors who think litigation is “a silver bullet” and who therefore do not fund the other necessary elements to promote “law in the public interest”, which is much broader than litigation.\(^{296}\)

Our respondents discussed the value of litigation across a number of dimensions. The value of “getting good precedent” and “changing the law” was emphasised, but always supplemented by an analysis of the other ways in which public interest litigation is important. A number of respondents even chose to discuss the value that flows from cases that never make it to court, or in which there has been an adverse decision.\(^{297}\)

One attorney described how it is important in cases where clients accept settlements instead of obtaining a judgment to strategically leverage the settlement and hold it up as a victory.

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\(^{290}\) Interview with Respondent HH.
\(^{291}\) Interview with Respondent C.
\(^{292}\) Interviews with Respondents EEE and ZZ.
\(^{293}\) Interview with Respondent ZZ.
\(^{294}\) Interviews with Respondents EEE and ZZ.
\(^{295}\) Interview with Respondent LL.
\(^{296}\) Interview with Respondent QQQ.
\(^{297}\) Interview with Respondent ZZ.

**The role of a court in vindicating a community to some extent, after years of frustration, is very powerful.**
Many respondents stressed the non-material value in litigation, including ventilation of disputes in a forum that raises public awareness, mobilises communities and facilitates a broader, holistic response to a specific issue. As an academic who has been involved in housing-related litigation stated, the “day in court effect” should not be underestimated. The role of a court in vindicating a community to some extent, after years of frustration, is very powerful. According to her, “from shack to Constitutional Court” is an empowering exercise. Referring to informal settlement cases, she states how “it is amazing for a community to have an ear in court,” which has the effect of vindicating the community to some extent, at last, as they are finally told “they were right in their frustration.” She states that it is important to understand how litigation emerges out of a political context, which can be changed, either for better or worse. According to her, if you look at the bigger picture, whatever you do has implications that can be measured. This sentiment is echoed to some extent by another respondent, who believes “the rule is that whenever you utilise public interest legal services, there has to be an element which involves some transfer of power to the people you are providing those services to, otherwise you are not changing the context.”

Respondents in a focus group of client communities stressed the way in which litigation and working with lawyers can promote unity between groups that may have had differences in the past. An example given was the informal trade litigation undertaken in 2012 in the inner city of Johannesburg. According to a respondent in a focus group, this litigation highlighted the weaknesses and differences that existed within and between trader organisations, because lawyers had to first deal with these differences before they were able to deal with legal issues. A number of respondents noted that they mobilise better when they have lawyers and that after legal victories government officials were, for the first time, willing to engage with them. As one respondent in the focus group stated, litigation or the threat of litigation “unsettles government” which is a good thing.

Another important by-product of litigation is that it entails research that can be useful in itself. As one respondent working for a litigating NGO mentioned, in some cases they have been collecting affidavits for a long time in preparation for possible litigation, some of which ended up being used in research reports and was also crucial to “raising public awareness” on issues. A number of respondents mentioned “raising public awareness” as an important measure of value, referring to how public interest litigation creates “public discourse” and “raises the

298 Interview with Respondent G.
299 Interview with Respondent K.
301 Interview with Respondent K.
302 Interviews with Respondent E and Respondent C.
303 Focus Group 1.
304 Ibid.
305 Ibid.
level of debate” on issues, which in turn helps give organisations and movements power when engaging decision-makers.306

While winning a case is obviously important, many respondents interviewed agreed that “there is value in embarking on litigation regardless of whether it is won or lost”,307 with one respondent describing how “a loss can also have an important impact” as taking part in the litigation process can be “a very empowering process” for communities or clients.308 According to another respondent, “you can’t judge the success of a matter depending on whether you win or lose in court” as it might be that the community support brings about the change you want.309 Indeed, another respondent described how important it is for there to be support of a movement or group behind litigation; however this is not always possible. According to him “maintaining the critical consciousness of the masses allows for legal losses but moral victories.”310

Finally, even the “spectre of litigation” can catalyse change, as government (and the private sector) are “very alive to the threat of litigation” and there is much that can be achieved in the “shadow of that threat”.311

It should by now be apparent that, within the sector, there is a wide variety of approaches to characterising the value and impact of public interest legal services. These make use of and extend beyond the materialist and legal mobilisation approaches exhibited in the available literature. They acknowledge the value of concrete outputs: changing the law and obtaining benefits for individual clients. They also stress the political drivers and impacts of litigation, such as mobilisation and consciousness raising. Few respondents demonstrate a clearly materialist or legal mobilisation approach, however. They instead tend to emphasise the potential of public interest legal services to influence and create power in a range of facets of social life, to emancipate individuals and communities, and to progress change across multiple dimensions.
Value and impact: A multidimensional approach

Three notable features emerge from the way in which our respondents discussed value and impact within the sector. First, they focussed on issues rather than specific cases. Second, they emphasised the need to measure impact over the longer term. Third, their attitude to impact was heterodox. Rather than emphasising a consistent theory of social change, they discussed a large number of what we will refer to as “sites” of impact.

FOCUS ON ISSUES

Our respondents preferred to engage with the impact of public interest legal services on issues, rather than cases. It is accordingly important to understand the key systemic issues being dealt with by different organisations - including the political, social, institutional, financial context in which the issue is located - as well as the approach of the organisations themselves. This is the approach we have adopted in the first part of this report.

Providers of public interest legal services tend to analyse their work in terms of how a number of interdisciplinary approaches bear on particular social and political issues. Public interest work itself often involves delineating and framing these issues, before intervening to address them.

Our respondents tended not to think of the overall direction and efficacy of their work by considering whether a particular case resulted in a positive legal outcome. Rather, they tend to consider how the totality of their work has affected the form and dynamics of particular social phenomena, including how those phenomena affect public consciousness.

For example, although obtaining positive outcomes for particular clients is obviously important to them, people working on housing rights will not necessarily evaluate their work only on the basis of whether particular legal cases were successful, or even the total number of clients for which direct positive outcomes have been achieved. They will, in addition, consider whether their work has influenced the behaviour of government departments in implementing housing policy, the attitude of private property developers to people with insecure tenure, and prevailing public attitudes to the housing crisis and how to address it. If, for example, changes to the law have influenced the speed and alacrity with which the state and private property developers obtain eviction orders against poor people, if it results in poor people being engaged or negotiated with, and offered alternatives to eviction without the direct intervention of housing rights lawyers, or if it results in greater public sympathy for those with insecure tenure, then public interest legal services providers will incorporate those developments into their self-evaluation, into the way they frame housing rights issues to themselves and to the public at large, and into future strategies for change.

Our respondents preferred to engage with the impact of public interest legal services on issues, rather than cases.
Similarly, people engaged in health rights work will not only consider whether, for example, a particular case resulted in a policy shift towards the provision of essential medicines. They will consider whether the healthcare system itself is able to distribute those medicines once provided, whether social stigma about disease prevents people in need of medication from accessing it, whether, once they do access it, people are in need of nutritional support to benefit from the medicines and whether they are aware of, and prepared for, any side effects of taking the medicines. The answers to all of these questions will affect how health rights workers evaluate their success and formulate future strategies.

Issue-based considerations are manifold and open-ended. The point is, though, that these kinds of considerations go far beyond whether particular cases have had particular outcomes.

As described above, it is clear that public interest litigation forms part of a much more complex and nuanced set of methods, processes, strategies and approaches to specific challenges facing South Africa. Often a court judgment comes in the middle of a much longer campaigns and processes, so that examining the impact of a judgment alone is not always particularly helpful in terms of understanding and measuring the impact of public interest legal services work more broadly. To do that, an issue-based approach is necessary.

As set out earlier, public interest legal organisations are working on a very broad range of issues. These include: basic services, corruption, education and schools, environmental justice (including mining, climate change, pollution), gender (including gender-based violence, discrimination, sexual violence), health care (including public health systems, HIV/AIDS), housing and land, public accountability, access to information and open governance, refugee
and migrant rights, rural justice (traditional leaders, land), policing and the criminal justice system, security of farm workers and social security.

Public interest organisations use a range of tools to address these issues. These include: litigation, advisory work, research, public education, scrutinising legislation, policy analysis and advocacy in partnership with the state and engaging in media campaigns. Understanding the value of legal services means understanding how all of these methods work together. We suggest that this is only possible if one focuses on issues rather than cases.

Discussing cases often means adopting litigation as a lens through which to evaluate success, which leaves out a great deal of important work being done outside the litigious process. While examining an issue through the facts and legal principles raised in a particular case can be useful, it will not capture the full complexity of a particular social issue.

MEASURING LONG TERM IMPACT

A discussion on issues and tools, rather than cases and litigation, necessitates a different approach to measurement. Many respondents interviewed stressed the importance of developing appropriate measures for long-term results and impact, stressing how difficult it is to attribute outcomes to an intervention or interventions by a single organisation. In relation to the impact of advocacy, one respondent stated that donors do not always understand the “long-haul nature of advocacy” and get frustrated by the length of advocacy campaigns conducted by organisations.\(^{312}\)

According to one respondent, expectations of donors for grantees to have a “credible outcome” within one grant period can encourage “a short-term view of legal struggles.”\(^{313}\) This is not helpful. According to him, donors need to have a better understanding of how things move slowly and have the stamina to fund public interest legal services because “there is no instant gratification in this regard.”\(^{314}\)

Although it is important to recognise that public interest legal work often has immediate, measurable impact, the issue-based approach we have identified above directs our attention to the complex interactions between public interest legal work and social change over time. These interactions often develop over several years. As well as obtaining immediate benefits, interventions which are successful in the short term can also change the opportunity structure for public interest legal work so as to obtain even greater benefits in the longer term. Sometimes interventions which appear to have “failed” in the short term can also reshape opportunities for future work which may yield benefits in the

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\(^{312}\) Interview with Respondent XX.  
\(^{313}\) Interview with Respondent OO.  
\(^{314}\) Interview with Respondent P.
longer term. However, short-term success is not a guarantee of long-term change; without ongoing support, the immediate gains of a court victory, for example, may be ignored or eroded. Donors should be alive to the need to build and support public interest legal services institutions over the long term. Without this, long term impact becomes difficult to achieve.

**TAKING ACCOUNT OF A RANGE OF DIFFERENT SITES OF IMPACT**

Given the myriad approaches and issues being dealt by organisations, it is virtually impossible to produce a static model which is capable of characterising the value and impact of public interest legal services in all contexts. New issues, new interventions and new organisations will generate new social phenomena and change the way value and impact is to be assessed.

However, during the course of our research, we identified multiple “sites” of impact in respect of which our respondents discussed their work. These are -

1. Obtaining a positive outcome for particular individuals and groups
2. Changes to law and policy
3. Institutional changes
4. Symbolic and discursive changes
5. Expanding democratic space
6. Strengthening the public interest law sector

We address each, in turn, below. In describing each site, we offer an example of how impact can be measured in relation to a particular issue. We intend the examples to be purely illustrative. We do not offer a complete analysis of each issue in relation to a particular site of impact. Nor do we suggest that the particular example chosen can only be measured in relation to one site of impact. All of the examples we have chosen are capable of analysis in relation to all sites of impact.

**Obtaining positive material outcomes for particular clients**

Measuring impact in terms of material gains relates to the actual concrete change to the lives of clients, individuals and communities. This could be access to specific social goods, such as HIV/AIDS medication, access to housing, textbooks in a school classroom or hundreds of households being provided with alternative accommodation, as opposed to being evicted onto the street. It could also refer to the lived experiences of people, which are more difficult to measure than material gains. One respondent mentioned the importance of people becoming
aware of their rights, an enhanced legal understanding by organisations and individuals of their legal entitlements, and by duty bearers of their responsibilities.\textsuperscript{315}

At the core of the TAC’s strategy in the early 2000s was the goal of widening access to antiretroviral treatment for people living with HIV/AIDS, by bringing down the cost of medication and enjoining the state to provide medication through the public health system. The TAC also sought to address the stigma attached to people living with HIV/AIDS, and to improve access to healthcare services for them. The TAC also sought to mobilise people living with HIV/AIDS as a group, and its work was often allied with social coalitions seeking to mobilise people who were particularly affected by HIV/AIDS, including women, lesbian, gay, bisexual, transgender and intersex people, and campaign against forms of stigma and social exclusion experienced by those groups.

On behalf of the TAC, the Aids Law Project at the Centre for Applied Legal Studies used a variety of methods regularly deployed by public interest legal services organisations to achieve wider access to antiretroviral drugs, including research on the efficacy and mechanisms of action of the drugs, the barriers to bringing the cost of drugs down, and the way in which the drugs were distributed and interacted with other drugs. It helped the TAC run an effective and high-profile media and public information strategy to raise consciousness of the need for access to treatment, the consequences of being denied treatment, the irrationality of the government’s attitude to the need to roll out anti-retroviral medication. It also, most famously, litigated to lift the restrictions placed on access to nevirapine for pregnant and nursing HIV-positive women.\textsuperscript{316}

The positive outcome sought in that campaign was healthy life for people living with HIV/AIDS, for as many people as possible, for as long as possible. The achievement of the TAC can be, and has been, measured in terms of the number of people who are alive today because they are able to access anti-retroviral medicines through the state. But it can also be measured in the overall level of health enjoyed by people who are living with HIV/AIDS, especially by focussing on particularly vulnerable groups, such as women and the poor. It can also be measured by considering the extent to which the social stigma of people living with HIV/AIDS has been addressed through its campaigns.

There are potentially many other ways in which to define a “positive material outcome” for public interest legal services on behalf of people living with HIV/AIDS, but we offer these illustrations as a way of emphasising that concrete improvements to the conditions under which a particular person or group of people live is obviously an important site of impact.

\textsuperscript{315} Interview with Respondent QQQ.

Changes to law and policy

Measuring impact in terms of policy reform refers to changes in policy that have occurred as a result of an intervention. Public interest legal services can force changes to policy, lead to new policy being developed, or ensure that current policy is consistently clarified and implemented. The provision of public interest legal services led to the adoption of the Emergency Housing Programme. This programme is currently being used in advocacy and litigation by public interest legal services organisations working on urban land, housing and evictions. This policy has, in turn, been used to campaign against, and develop legal strategies to prevent, evictions which lead to homelessness. It has also stimulated new advocacy on the provision of public rental housing. Similarly advocacy and the threat of litigation have compelled the adoption of Norms and Standards for School Infrastructure, which provide an important basis on which to push for better learning conditions in schools.

Public interest legal services on access to housing can be, and often are, measured by reference to the number of people adequately housing as a result of it. However, just as important has been the manner in which it has led to a range of positive changes in policy and law applicable to land tenure and housing. Many authors have traced the path from the Grootboom decision, in 2001, which provided for a right to a policy to provide emergency housing for those in desperate need, through the adoption of the emergency housing policy, in 2004, to a series of decisions which have essentially outlawed the evictions that would lead to homelessness, culminating in the Blue Moonlight decision in 2009. Public interest legal services on housing have also stimulated a new policy focus on in situ upgrade of informal settlements (as opposed to evicting and relocating them), and have helped address inhumane conditions in temporary shelters provided for people evicted from their homes, developing legal requirements that such shelters must respect their occupiers’ rights to dignity.

Through research into the lived reality of people living in slum properties and informal settlements, paralegal training and public education partnerships with grassroots organisations such as Abahlali baseMjondolo and the Informal Settlement Network, policy advocacy and advice to government, and litigation, public interest legal services on housing and land tenure has played critical role in constructing a range of tenure protections for poor people living in urban areas, and developing and implementing upgrading policies that are appropriate to the needs of inadequately housed people. Most recently, the major law and policy developments achieved in the area of land tenure were set out and endorsed in the ministerial inquiry into the Lwandle eviction in Cape Town.

317 Interview with Respondent QQQ.
318 Budlender, Marcus and Ferreira Public interest litigation p. 45.
Institutional impact

Institutional change refers to changes to the way particular institutions work or organise themselves. It can also refer to a shift in values and attitudes of government or other power-holders in society around an issue or intervention. It refers to the enhanced ability for groups to engage or negotiate with power-holders.

For example, challenges to unfair debt collection have changed banking practices, meaning that large banks are now much more likely to negotiate repayment plans before seeking to execute against property. Starting with the *Jaftha* decision, it is possible to trace a line of public interest legal work – predominantly high-impact litigation – which has influenced in the behaviour of major lending institutions. The *Jaftha* decision introduced the concept of proportionality into debt execution proceedings. It developed a rule against disproportionate execution against residential property. A creditor would not be permitted to deprive a home owner of his or her property for a trifling debt. A Court has to exercise its discretion in determining whether the execution of a particular debt against property is fair, even if a person has defaulted on his or her payment obligations.

The *Jaftha* decision only applied to Magistrates’ Court. In response to the *Jaftha* decision, many banks chose to pursue debt execution proceedings in the High Court, where the proportionality requirement did not apply, even though many debt execution cases could, and would normally be pursued in the Magistrates’ Court. This obvious attempt to evade the proportionality principle was remedied in the *Gundwana* decision, in which the rule against disproportionate execution was extended to the High Court. The result was that, in addition to that fact that a debtor has fallen behind with his or her repayments, banks now have to show that, executing against residential property is fair.

The passage of the National Credit Act 34 of 2005, with its onerous notification rules – which require that credit providers must invite a debtor to make proposals on restructuring their payments before executing against them – also gave rise to public interest litigation to set the legal standards for what a credit provider must do to draw the relevant notices to a debtor’s attention. This has led to changes in how credit providers communicate with consumers.

The result of both the proportionality requirements established in *Jaftha* and *Gundwana*, and the notification requirements established through National Credit Act litigation, is that Courts are much less likely to grant easy execution on a secured debt, and credit providers, especially banks, are much less likely to rush to court to levy execution. This has allowed individual debtors much greater space in which to engage and bargain with large institutions.

322 *Jaftha v Schoeman* 2005 (1) BCLR 78 (CC).
323 *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC).
324 *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC).
325 See in particular *ABSA v Lekuku* [2014] ZAGPJHC 244.
Symbolic and discursive changes

Symbolic and discursive impact refer to changes in how an issue is understood and discussed, in the public domain. This would include the way in which the media takes up an issue, increased visibility of an issue and greater voice being afforded to an issue. An example is providing public interest legal services to and in informal settlements, which can change attitudes to people living there. One respondent arguing that the cases helped enormously to change the discourse around the “eradication” of informal settlements.\(^{326}\) Public interest legal services provided to HIV-positive people helped change attitudes to people living with HIV/AIDS.

In addition to a string of litigious success, public interest legal services focussing on education have raised consciousness of the profound inequalities in the South African education system. Activists and legal practitioners have made effective use of vivid examples of poor educational conditions: the existence of mud schools, poor sanitation in schools, leading to tragic deaths in pit toilets, the failure of the education department to fulfil basic functions such as delivering textbooks and employing teachers. They have drawn attention to the need to substantively re-imagine the provision of education in South Africa and its ability to challenge patterns of long-term structural disadvantage.

The work of Equal Education has also enable communities in Cape Town to re-conceptualise poor school conditions as rights violations, and to mobilise around them. Examples of this mobilisation include Equal Education’s school library campaign, and its campaign to press for the adoption of national norms and standards for school infrastructure.

Expanding democratic space

Measuring the impact of democratic space refers to the impact of an intervention on the opening or closing of spaces of democratic participation and the impact on active citizenry and social mobilisation. Examples include working with human rights defenders and community activists who have been arrested during protests in criminal case, and advocacy in relation to the Traditional Courts Bill in Parliament to ensure that democratic participation in rural areas is protected.

Action to protect human rights defenders against the use of the criminal justice system to silence dissent, and public interest legal work around public gatherings is are particularly important examples of public interest legal work that expands democratic space. Many different public interest law organisations have recently participated in Commissions of

\(^{326}\) Interview with Respondent K.
Inquiry into policing in Khayelitsha, defence procurement, and the Marikana massacre. Their work of these organizations has challenged police and military impunity, sought to actively shape the political response to state violence and corruption, and have, to a greater or lesser degree, used the Commissions themselves as expanded spaces for democratic participation.

Strengthening the public interest law sector

Organisational and sector impact refers to the ways in which interventions enhance the way the sector works and serve to strengthen organisations and create new alliances or networks. An example of this impact was described by a client respondent in relation to informal trade litigation undertaken in 2012 in the inner city of Johannesburg. According to him, the litigation highlighted the weaknesses and differences that existed within and between trader organisations, because lawyers had to first deal with these differences before they were able to deal with legal issues. Many of our respondents also noted how undertaking multidisciplinary public interest legal services work can attract a range of skills and perspectives to an organisation, thereby strengthening its capacity.

A particularly good example of public interest legal services strengthening the sector is recent litigation brought by the South African Human Rights Commission with the assistance of the Legal Resources Centre. Having engaged for several years, together with Lawyers for Human Rights, in challenging the extended and unlawful detention of refugees and asylum seekers, the Human Rights Commission brought an application to declare the ongoing practice of detaining refugees and asylum seekers for longer than the periods permitted by statute. The Human Rights Commission sought structural relief to ensure that it can access and monitor the Lindela Repatriation Centre to ensure that administrative practices that result in unlawful detention are addressed and changed.

The collaborative approach followed by the Legal Resources Centre and the Human Rights Commission, building also on work done by Lawyers for Human Rights, has real potential to strengthen the capacity of sector. The remedy granted by the Court may strengthen the role of the Human Rights Commission in monitoring and enforcement of constitutional rights, and enhance long-term collaboration on this issue.

Organisational and sector impact refer to the ways in which interventions enhance the way the sector works and serve to strengthen organisations and create new alliances or networks.

327 Focus Group 1.
328 South African Human Rights Commission and Others v Pandor and Others [2014] ZAGPJHC 192
Conclusion: Thinking about sites of impact

We now return to the questions raised in our terms of reference. There is an ongoing debate in the international and South African literature between what we have called “materialist” and “legal mobilisation” approaches to measuring the value and impact of public interest legal services. Materialist approaches tend to emphasise the extent to which public interest legal services directly influence concrete social phenomena and provide direct material benefits for identified individuals or groups of people. They seek to identify a linear cause-effect relationship between a particular intervention, whether that intervention achieved the objectives set for it, and what measurable direct benefits can be attributed to that particular intervention. A public interest legal service is valuable when it achieves a result which would demonstrably not have been achieved without it. It is possible to isolate specific methods and circumstances that make a particular outcome more or less likely.

The legal mobilisation approach casts the net wider, and emphasises the indirect, symbolic and political impact of public interest legal services, including the extent to which they result in greater social mobilisation and consciousness-raising, which may themselves lead to more widespread political effects. Public interest legal services can strengthen grassroots movements, focus campaigns for change, and amplify hitherto unheard voices. The extent to which this is achieved is a measure of their value. It is not always possible to attribute particular effects to a given intervention, but there is a looser connection between the provision of public interest legal services and the expansion of political possibility.
Public interest legal services organisations seldom think about their work in terms of “proactive” and “reactive” interventions. In a sense everything public interest legal services organisations do is “proactive”, even if it is responding to a crisis or providing a service which must be activated by outside users. Rather, they tend to consider the relative uses of clinical and strategic approaches to providing legal services, and they emphasise that there is no sharp distinction between the two.

Public interest legal services organisations set themselves a wide range of goals and objectives. These include the material, political, mobilising and symbolic effects that materialists and legal mobilisation theorists emphasise, but they also include a range of other goals, such as changing the way state institutions and powerful private institutions operate, influencing social practice, and strengthening their own institutions, and other institutions operating within, and connected with, the sector. We have tried to capture these objectives in the “sites of impact” we have delineated above.

The sites of impact approach also, we hope, captures the way that our respondents characterised the value of their work. Measuring the impact of public interest legal services organisations across multiple sites of impact in relation to particular issues helps emphasise the multidimensional value of the work done in the sector. It helps us understand how the work done in the sector continually reshapes the terms on which pressing social issues are discussed, while at the same time measuring the extent to which real change takes place on the ground. It helps us chart the institutional reforms achieved, and those still necessary in relation to a particular issue, while at the same characterising the democratic spaces with which those reforms must interact.

In short, in our view, it captures the complexity of the public interest legal sector, while at the same time allowing for a meaningful discussion of progress.

It is therefore not for this report to suggest what the public interest legal services sector can reasonably be expected to achieve in the short, medium and long term. Rather, we offer the multidimensional approach set out above as a way for people working in public interest legal services organisations to think about impact for themselves. We do not suggest that the sites of impact we have delineated are necessarily the only possible sites. Nor do we pretend to have fully described all the extensions of each particular site. What is important about the sites of impact we have identified is that they are derived from what our respondents themselves have said about the value and impact of their work.

The multidimensional approach sketched out above will need to be applied, tested, added to and reshaped by public interest legal services organisations as they proceed with their work, encountering new situations and expanding the range of work that they do. It is a tool of self-analysis and a way to focus discussion. It is far from all that needs to be said about measuring the value and impact of public interest legal services.

We now consider the extent to which public interest law organisations co-operate with each other to bring about the multidimensional changes they achieve, and what the donor sector can do to enhance this co-operation.
### Understanding Value and Impact in the Public Interest Legal Services Sector

**Methods**

Public interest legal services organisations use a range of methods to address these issues. Understanding the value of legal services means understanding how all of these methods work together. This is only possible if one focuses on issues rather than cases.

- **Litigation**
- **Scrutinising legislation**
- **Research**
- **Policy analysis and advocacy in partnership with the state**
- **Advisory work**
- **Engaging in media campaigns**

**Organisations**

Public interest legal organisations are working on a very broad range of issues. These include:

- Basic services
- Corruption
- Education and schools
- Children’s rights
- Environmental justice (including mining, climate change, pollution)
- Gender (including gender-based violence, discrimination, sexual violence, LGBTQ)
- Health care (including public health systems, HIV/AIDS)
- Housing and land
- Public accountability
- Access to information and open governance
- Refugee and migrant rights
- Rural justice (traditional leaders, land)
- Policing and the criminal justice system
- Security of farm workers
- Social security

**Issue**

Rather than emphasising a consistent theory of social change, our respondents discussed a large number of what we refer to as sites of impact:

- **Obtaining a positive outcome for particular individuals and groups**: actual concrete change to the lives of clients, individuals and communities.
- **Changes to law and policy**: changes in policy that have occurred as a result of an intervention.
- **Institutional changes**: a shift in values and attitudes of government or the way that institutions work or organize themselves.
- **Symbolic and discursive changes**: how an issue is understood and discussed, in the public domain.
- **Expanding democratic space**: access to spaces of democratic participation and the impact on active citizenry and social mobilisation.
- **Strengthening the public interest law sector**: the ways in which interventions enhance the way sector works, strengthen organisations and create new alliances or networks.

**Sites of Impact**

- **Expanding democratic space**
- **Changes to law and policy**
- **Symbolic and discursive changes**
- **Obtaining a positive outcome for particular individuals and groups**
- **Institutional changes**
- **Expanding democratic space**

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The Multidimensional Approach

ISSUE

METHODS

ORGANISATIONS

SITES OF IMPACT
Co-ordination and Collaboration in the Public Interest Legal Services Sector

section four
Our terms of reference asked us to consider a range of questions relating to coordination and collaboration within the public interest legal services sector. These questions included: when does it make sense for organisations to coordinate and collaborate with each other; and what forms of funding arrangements facilitate the most effective working practices within the sector. The terms of reference also sought examples of successful partnership-based work within the sector.

Traditionally, the legal profession is premised on the individual provision of legal services tailored to a client’s individual interests. As a result, legal service providers tend to work alone. Opportunities for collaboration and coordination within the profession tend to be limited to strategic alliances between individual clients with converging interests. The dominant mode of teaching “lawyering” in law schools and in post-graduate legal training is for students and graduates to problem-solve on their own.

In the realm of public interest legal services, however, several incentives exist to explore the opportunities to structure greater collaboration and coordination. First, the pursuit of social justice on behalf of communities often requires a collective or, at a minimum, a coordinated response. Public interest law organisations frequently work in tandem, through a well-structured coordination, or in collaboration to achieve optimal results using a shared strategy. Second, with limited resources to support public interest legal services work, there is an incentive to co-ordinate activities in a way that promotes the most efficient use of resources. Third, the issues on which players in this sector work are multi-faceted and complex, and if we are to truly search for effective results we need to value the unique and diverse contributions that different players in this sector bring to the pursuit of social justice. Fourth, recently, in the wake of moments of political and legal crisis in South Africa, such as the Marikana massacre, the need for a unified response, or at least a shared understanding, within the sector has become more important.329

Our respondents stressed, however, that effective coordination and collaboration has to be voluntary and organic.330 Donors have an important role to play in creating and fostering spaces in which public interest law organisations can come together to discuss matters of mutual concern. However, donors should not adopt an acontextual approach to coordination and collaboration, or attempt to force it where it is not warranted by the context. There is a wealth of experience within the sector. Organisations and individuals can generally be trusted to know when a collective approach to an issue is required. Donors should do what they can to ensure that opportunities to collaborate exist and that the sector is properly resourced to meet the range of different challenges it articulates.

Public interest law organisations frequently work in tandem, through a well-structured coordination, or in collaboration, to achieve optimal results using a shared strategy.

329 Interview with Respondent VV.
330 For example, interviews with Respondent O, Respondent XX, and Respondent CCC.
Regardless, this study encourages public interest legal practitioners to continue to use, and where possible, to amplify, collaboration as a way to organise joint work “by promoting the conscious use of cooperative structures.”\textsuperscript{331}

Accordingly, to encourage a culture of collaboration and coordination within the public interest legal services sector, there needs to be a broad recognition that public interest legal practitioners must be prepared to create and facilitate such structures as part-and-parcel of their work. They must approach their work with an understanding of the value and the limits of collaboration.\textsuperscript{332}

Further, public interest legal practitioners need to be guided to rethink the traditional paradigm of “hierarchical structures” within the legal profession that often inhibit collaborative exchange.\textsuperscript{333}

In addition to these general remarks, our respondents stressed three important practices of coordination and collaboration. These are: collaboration within the sector, collaboration with other civil society organisations outside the public interest legal services sector, and collaboration with donor organisations.

**Collaboration within the Sector**

There is a wide range of collaborative activities currently underway among different organisations within the public interest legal services sector.

**REFERRAL NETWORKS**

Referral networks within the public interest legal services sector provide a prominent and important example of a well-structured coordination of services. In this system, organisations communicate with one another to identify the best placement of cases and other matters. An effective referral system has the organisational and technological capacity to manage and publicize its own work, and to refer cases to the most suitable organisations.

A representative of Pro-Bono.Org, the most prominent referral network in the sector, described their practice of referring matters to various public interest legal organisations based on areas of expertise – family law matters to LRC, impact work to SERI, gender-based violence matters to CALS, and police action matters to Wits Law Clinic. Legal Aid SA also coordinates with pro bono attorneys as they “do not always have the [in-house] capacity to help everybody.”\textsuperscript{334} Legal Aid SA also works with “cooperation partners,” in cases in which the organisation does not have a particular expertise while the partner has specialist skills.\textsuperscript{335} This includes


\textsuperscript{332} Ibid p. 485.

\textsuperscript{333} Ibid p. 489.

\textsuperscript{334} Interview with Respondent II.

\textsuperscript{335} Ibid.
collaborations with community-based advice offices. Legal Aid SA also tries to ensure that legal advice is provided to as many people as possible, both through providing nationwide call centres (which are subject to quality control checks) and paralegal advisors at each of Legal Aid’s offices to give advice and help clients “navigate the processes”.

Other institutions also seek to build referral networks. One respondent described a Memorandum of Understanding that her organisation has concluded with the Department of Justice to set up a helpdesk at a local magistrate’s court with private attorneys who give advice and source cases for the organisation to pursue. Rule 40 of the Uniform Rules of Court also permits the High Court to refer unrepresented litigants to providers of public interest legal services. One respondent in the private sector stated that she was currently seeing an increase in these Rule 40 referrals to her firm. In general, she suggests that registrars are demanding that private firms (as well as public interest legal services organisations) take on pro bono matters.

These referral networks are important because they demonstrate the extent of existing practices of collaboration and coordination within the sector.

336 Ibid.
337 Ibid.
338 Interview with Respondents ZZ.
339 Interview with Respondent F.
340 Ibid.
within the sector. They also speak to the importance of collaboration in shaping the ways in which communities and individuals enter into their initial engagement with providers of public interest legal services. Without effective collaboration, many of those who require these services may fail to access appropriate support.

COLLABORATION WITH COMMUNITY ADVICE OFFICES

It is important, however, not to restrict attention to the engagement between high-profile clearing houses, such as Pro-Bono.Org or Legal Aid SA, and prominent public interest legal services organisations based in South Africa’s metropoles. Community-based advice offices (CAOs) also play a crucial role in the provision of legal services to poor and marginalised communities across the country. They are often the sole provider of such services in rural areas.

The men and women who work in these offices are often physically and practically separated from other actors in the public interest legal services sector. Collaboration between metropolitan organisations and CAOs is thus an important aspect of broader coordination within the sector. One respondent, who works with community-based workers, described an optimally structured public interest legal services sector that is structured as a “value chain,” with different legal services being offered that build upon and reinforce each other.341 Collectively, these services would provide a “holistic” approach to legal services to address individual and communities’ needs.342 Without necessarily adopting this approach, a large number of our respondents agreed these community-based advice services, including CAOs – which are almost inevitably staffed by paralegals – have played, and continue to play, an important role.343

A number of respondents spoke about the historic importance of CAOs in South Africa in providing access to justice.344 One respondent mentioned how the trade union movement also had its origins in its advice offices.345

At present, CAOs self-define as a critical “first port of call” for individuals and communities in need of legal advice in dispute resolution services, and according to a funder of CAOs, present a very important first point of entry for public interest legal services.346 Paralegals based at these CAOs connect people to local resources to resolve their problems, and help them to sift through multiple strategies of legal engagement, including – but not limited to – embarking upon litigation.347 As previous analyses of public interest legal services have stressed, community advice services can enable to claim their rights through giving advice to individuals, directing them to appropriate institutions, assisting them with the formulation

341 Interview with Respondent U.
342 Interview with Respondent U.
343 For example interviews with Respondent S, Respondent LL, and Respondent TT.
344 For example interviews with Respondent AAA and Respondent PPP.
345 Interview with Respondent N.
346 Interview with Respondent G.
347 Ibid.
of their claims, and taking matters up on their behalf – all of which can be done successfully without necessarily engaging in litigation.348

The work of CAOs need not be limited to offering support in individual cases. By taking a large volume of cases, advice centres can also play an important role in identifying core issues that affect large numbers of ordinary persons. According to one respondent, by recording the trends from their consultations, paralegals at community advice centres “help us to see the bigger picture”.349

Community-based advice services also play an important role in ensuring that public interest legal services are responsive and legitimate. They can provide a continuing link between metropolitan practitioners and local communities. One respondent, who works closely with CAOs, suggests that the mandate of community-based paralegal is to engage directly with community members, and to brief attorneys and advocates when a matter cannot be resolved within the community and needs to be escalated to court.350 She queried the mandate of public interest lawyers who purport to speak on behalf of communities, with little direct engagement, when their role should be to facilitate the ability of communities to speak for themselves.351 She suggests that the sector should be doing more to continue to support dual strategies of engagement and litigation, using paralegals based at CAOs to interface with communities.352

Unfortunately, however, the community-based advice service sector is substantially underfunded and often overlooked as a provider of effective public interest legal services. Partly for this reason, it is hard to characterise the quality and effectiveness of CAOs. One respondent says that despite community-based paralegals being a “crucial, crucial resource,” their value is difficult to “unlock” in practice.353 He went on to identify the “internal weaknesses in the CAO models,” including that some offices are only open over the weekend over a cellphone and there seemed to be a lack of accountability in this regard.354 These limitations may be linked to the uneven funding of this part of the public interest legal services sector.

However, there are also criticisms of the services provided by CAOs. One respondent criticised the services provided by CAOs, questioning the accuracy of the advice being provided to community.355 A private sector respondent was similarly “skeptical” about community-based paralegals and CAOs because: “you don’t know where this legal advice is coming from.

By taking a large volume of cases, advice centres can also play an important role in identifying core issues that affect large numbers of ordinary persons.

348 Budlender, Marcus and Ferreira Public interest litigation p. 99.
349 Interview with Respondent LL.
350 Interview with Respondent U.
351 Ibid.
352 Ibid.
353 Interview with Respondent S.
354 Ibid.
355 Interview with Respondents GG.
and you don’t know what knowledge is being transferred.” An advocate also indicated doubts about the quality of the advice offered by CAOs, and the ability of community-based paralegals to explain to attorneys the basis of the advice that they have given. This respondent suggested that NGOs must play an important role in “skilling” up community-based paralegals, arguing that improved coordination between the two would facilitate the ability of CAOs to explain to attorneys why they provide the advice they do.

Some CAOs have certain concerns about NGOs as well. A major complaint is that little to no feedback is ordinarily received from public interest legal services NGOs after a case has been referred to them. CAOs are also critical of blockages in the system of referrals, particularly where these involve issues that are not reflected in those being actively prosecuted by NGOs. For some respondents there is currently “an ‘us’ and ‘them’ dichotomy” between community-based offices and metropolitan legal services NGOs.

However, despite these occasions of tension, there are several existing models of collaboration and cooperation between providers of community based advice services and other providers of public interest legal services.

For example -

- Black Sash works extensively with CAOs. Through Black Sash’s Community Monitoring and Advocacy Programme, it engages thirty CAOs per province. Of these thirty CAOs, Black Sash closely mentors 10 per province, meaning that 90 CAOs receive close mentorship. In addition, Black Sash visits all 270 CAOs each quarter. Beyond this, Black Sash runs intensive multi-day training workshops with community paralegals, in which over one hundred participants from across the country engage top officials on the systemic issues they routinely encounter in communities, including labour law, social grants, evictions, and other socio-economic rights.

- The National Alliance for the Development of Community Advice Offices (NADCAO) has partnered with the LRC over many years. There is “constant engagement” between the organisations.

- SERI has worked closely with Abahali baseMjondolo to provide paralegal training to members of the movement, and strategic legal services to a range of informal settlement communities in Durban.

- Legal Aid SA maintains a relationship with CAOs through partnering agreements aimed at ensuring that clients who need legal assistance can obtain such assistance

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356 Interview with Respondent F.
357 Interviews with Respondent QQ and Respondent ZZ.
358 Interview with Respondent R.
359 Interview with Respondent G.
360 Ibid.
362 Interview withRespondent U.
from local CAOs when it is not feasible to directly access LASA’s offices.\textsuperscript{363} One respondent, however, noted that this model of partnership agreements ran the risk of creating weak interactions between Legal Aid SA, CAOs, and paralegals.\textsuperscript{364}

These examples suggest that successful collaborations between community-based advice offices, community-based paralegals, and metropolitan providers of public interest legal services requires regular interactions between the partners. Occasional interventions are unlikely to be successful, as are purely instrumental briefing relationships. Indeed, these are likely to give rise to tensions between organisations in the sector as community-based practitioners may come to believe that local interests are sublimated to metropolitan struggles, and that communities are excluded from their cases.

INFORMATION SHARING AND STRATEGIC REFLECTION

One respondent highlighted the importance of “knowledge management,” both within organisations and across the sector.\textsuperscript{365} Information sharing is also useful for “self-help capacity development.”\textsuperscript{366} Many respondents cited the Public Interest Law Gathering (PILG), hosted by the University of the Witwatersrand, as an active site of such information-sharing and knowledge management.\textsuperscript{367}

One of the organisers of PILG describes the gathering as now having “unstoppable momentum” that provides an annual space for veterans to discuss their experiences, while also providing opportunities to energise new voices in the sector.\textsuperscript{368} What appealed to many of our respondents about the PILG was the voluntary nature of attendance.\textsuperscript{369} They also valued the opportunity to hear about and discuss developments in the sector that had taken during the past year.\textsuperscript{370} However, the format of a two-day meeting, structured as a series of parallel panels, may not allow for much more than a “showcasing” of what each organisation is doing in a particular area.\textsuperscript{371} Nonetheless, the predictable scheduling of the gathering meant that creative efforts to enhance the opportunities for collaboration between groups in the sector can be effective. The efforts of the refugee rights community to structure strategic discussions around the timetable of PILG – including setting aside time immediately before the official start of the gathering – was praised as providing a potential model for other groups within the sector.\textsuperscript{372}

One respondent suggested that another example of good coordination was Ndifuna Ukwazi’s recent Urban Land Question workshop, which aimed to share information about who was

\textsuperscript{363} Interview with Respondent II.
\textsuperscript{364} Interview with Respondent J.
\textsuperscript{365} Interview with Respondent II.
\textsuperscript{366} Ibid.
\textsuperscript{367} For example interviews with Respondent CC, Respondent PP, Respondent V, and Respondent S.
\textsuperscript{368} Interview with Respondent CC.
\textsuperscript{369} For example interviews with Respondent CC and Respondent YY.
\textsuperscript{370} Ibid.
\textsuperscript{371} For example interview with Respondent PP.
\textsuperscript{372} Ibid.
doing what in respect of urban land issues.373 A further example of similarly helpful information-sharing were the weekly meetings held between organisations in Cape Town that gave birth to the idea for the Khayelitsha Commission.374 These provide several different models on which future information sharing events could be structured.

The utility of such information-sharing events, according to one respondent, is their potential to allow for strategising.375 A regular convening - such as PILG, or the meetings in Cape Town - allows for planning, and provides opportunities to develop what one respondent characterised as “collegiality in the sector”.376 This, she believes, could avoid “territoriality” in the sector, and could foster the development of opportunities for collegial collaboration.377

DEVELOPING COLLABORATIVE STRATEGIES

In the past, these events have had a significant influence on the development of collaborative strategies between public interest legal services organisations. One respondent, a judge, recalled the important historical role played by convenings for developing strategies around focused issues.378

At present, some of our respondents suggested that there is an increasing degree of collaboration between organisations in the sector, as well as between litigating and non-litigating organisations.379 Not all respondents agreed, however, and some cautioned that the continuing lack of coordination between organisations could put public interest work at risk in some cases.380

The work by a large number of public interest legal services organisations on the right to education was used by several respondents to provide examples of both effective collaboration,381 and the tensions that may arise from ineffective coordination.382 The last several years have seen an increasing number of public interest legal organisations working on this issue. One respondent suggested that, in the first phase of activity, there were many partnerships and collaboration established, in part because the range of issues was not yet demarcated.383 As organisations began to specialise, however, he suggested that there was a dip in collaboration and organisations now draw “clear lines in the sand.” 384 A donor also expressed concern about the apparent lack of consultation between organisations addressing this issue.385

372 Interview with Respondent V.
373 Interview with Respondent DD.
374 Interview with Respondent V.
375 Interview with Respondent O.
376 Ibid.
377 Interview with Respondent OO.
378 Interview with Respondent E.
379 For example interviews with Respondent C, Respondent QQ and Respondent HHH.
380 For example interviews with Respondent AA, Respondent PP and Respondent CCC.
381 For example interviews with Respondent PP and Respondent GGG.
382 Interview with Respondent PP.
383 Ibid.
384 Interview with Respondent G.
She was not alone, as another respondent agreed about the lack of consultation, stating that in her experience some of the education rights organisations do not respond to calls to collaborate on particular issues and/or cases.386

These critical reflections, however, do not capture all experiences of organisations working in the field of education rights. Collaboration between the community-based organisation, Equal Education (EE), and the Equal Education Law Centre (EELC) is regular, and a conscious part of their practice. This has been described by many respondents as being highly effective.387 EE works very closely with youth and parent groups, including providing a degree of legal education - which includes the right to education and enabling rights, as well as education policy.388 EELC examines policy and law, and aids EE in reformatting the information into more digestible products.389 EELC has “distilled [legal information] in a way that members can know, understand and use in their organising, advocacy and campaign work”.390

Several respondents cited other examples of collaborations in the sector:

- SERI’s convenings around land and housing provide the opportunities for community-based activists and organisations to set sectoral strategies on an equal footing with representatives of the public interest legal services sector, including NGOs and lawyers.391

- Several respondents identified good collaborations with the Centre for Child Law.392 The Centre often convenes meetings with a wide cross-section of civil society representatives to engage in policy analysis around their focus issue. A judge also mentioned that the Centre collaborates well in respect of thinking through problems and solutions.393 Finally, an advocate referred to the Centre as being “enormously strategic” in being able to work with government.394

- A donor cited the collaboration within the Centre for Environmental Right’s (CER) Working Group on Mining, referred to as MECA.395 In particular, the donor liked how CER set up a working group to develop a litigation strategy about mining

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386 Interview with Respondent GGG.
387 Interviews with Respondents AA and PP.
388 Interview with Respondent AA.
389 Ibid.
390 Ibid.
391 Interview with Respondent OO.
392 For example interviews with Respondent P and Respondent PP.
393 Interview with Respondent NN.
394 Interview with Respondent Q.
395 Interview with Respondents A.
Public Interest Legal Services in South Africa

and environmental issues, with LHR, CALS and LRC. This was not necessarily because it was a smooth collaboration: there were challenges in terms of convening meetings, and the burden fell on one organisation to coordinate, but there was a clear delineation about who did what. Nonetheless, the end result was a productive collaboration. CER has also been involved with assisting a network of CBOs and community members, the Mining and Environmental Justice Community Network of South Africa (MEJCON-SA), to develop in its own right.

- Another respondent cited a number of effective collaborations within the refugee sector with the Coalition for Refugee and Migrants in South Africa (CoRMSA), that has served to bring different refugee organisations together; with the African Centre for Migration Studies (ACMS), which assists in setting research agendas and thinking more broadly about migration; with the LRC in Cape Town, on joint cases and strategy in respect of the closure of the Cape Town Refugee Office; with the Centre for Child Law, as an institutional applicant, or for providing research or other legal support depending on who has expertise; with SECTION27 on migrant health issues; with university law clinics on various refugee litigation; and with CALS on prisons and migrants. These collaborations have allowed several organisations to coordinate their efforts around refugee law in the recent past.

It is clear that, although there remains some scepticism about the possibility of effectively coordinating the provision of public interest legal services on specific issues, nonetheless a wide range of collaborative efforts are being undertaken by most organisations in the public interest legal services sector.

A PATTERN OF AD HOC COLLABORATIONS

It is striking that many of these collaborations emerged in an organic fashion. Many organisations expressed comfort with existing, organic, collaborations and coordination they enjoy within the sector, and feel strongly that these ad-hoc relationship-based interactions be able to continue. One respondent described the “the push” from funders to try to get people to forcefully partner and collaborate a couple of years ago, and is grateful that this is no longer the case. She says that there now seems to be a recognition that if there are natural synergies then that will emerge. For example, her organisation attempted to establish a collaboration with other organisations working on social security. She was struck by how the effect of top-down coordination was to sow divisions between the different organisations. Another group of respondents agreed, citing the benefit of collaborations outside of official structures.

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396 Ibid.
397 Interview with Respondent GG.
399 Interview with Respondent P.
400 Interview with Respondent HH.
401 Ibid.
402 Interview with Respondents DD.
Another respondent is not sure that it would be realistic to require formal coordination and collaboration beyond that which is already required in terms of donor funding agreements.\footnote{Interview with Respondent S.} In his opinion, organisations are already doing this and there are often good reasons why they do or do not. He explained that collaboration is dependent on the nature of the specific case, taking into account whether it benefits clients, and if the client wanted to pursue certain interests outside of the advocacy from the sector.\footnote{Ibid.} Another respondent agreed that formalisation and “strict guidelines” could obstruct the work of organisations, particularly those CBOs that need to be able to be responsive to changing contexts.\footnote{Interview with Respondent V.} Just having formal agreements in place would allow organisations to work together on particular issues without becoming too formal.\footnote{Ibid.} Another respondent spoke of the danger of formal collaboration leading to “emulating ideas” rather than sharing ideas.\footnote{Interview with Respondent CC.}

**COLLABORATION IN LITIGATION**

Despite these cautions, one respondent noted the marked increase in recent years in coordinated efforts in the sector, explicitly manifest by the number of amicus curiae interventions coming out of the sector.\footnote{Interview with Respondent Q.} Another respondent stated that amicus interventions are critical because they provide relevant, different and useful perspectives.\footnote{Interview with Respondent LL.} A different respondent said that when donors are upset about the fact that there are multiple amici to a case, they fail to realise that organisations must apply to the court to be admitted as an amicus curiae.\footnote{For example interview with Respondent G.} A former judge stated that prospective amici must have “something fresh” to say before they will be admitted.\footnote{Interview with Respondent NN.} She also highlighted that with the limitations of length of briefs in the Constitutional Court and the limitations of time of argumentation, amicus briefs will become incredibly important in complicated cases, as they will allow organisations to “divide up the argument” through the different submissions.\footnote{Ibid.}

Amicus coordination allows organisations to start thinking together about the pressure points available in the Constitutional Court’s jurisprudence.\footnote{Interview with Respondent OO.} Increased participation and coordination of these efforts encourage the development of clear guides in the application of the law. This guidance is particularly important to influence judges who may not have the most progressive vision of the Constitution. One academic respondent suggested that amicus interventions are particularly useful in a litigious context because amici are more likely to present interdisciplinary work than the representatives of the litigating parties themselves.\footnote{Interview with Respondent W.}
For example, one respondent spoke about the *Krejcir* case, in which two organisations appeared as amici.\textsuperscript{415} At first, the organisations agreed on the principle that confidentiality should be maintained in the granting of an asylum application. Later, they diverged on the issue of whether an exception to this principle should be made where the asylum-seeking applicant is accused of committing a war crime. The two organisations ended up making conflicting representations in separate amicus submissions, but they shared a mutual recognition of the value of presenting both perspectives to the court.\textsuperscript{416}

Another respondent cited *Lee v Minister of Correctional Services* as an example of a case with effective amicus coordination.\textsuperscript{417} Getting this case to the Constitutional Court involved a lot of behind-the-scenes advice to the private attorneys involved after they obtained an adverse SCA judgment. This was an informal coordination, but once the decision had been made to take it to the Court, there was far greater collaboration through *amici* interventions. This respondent believes that the *amici* submissions undoubtedly shaped the judgment. In addition, she suggests that the judgment also opened up new avenues for further collaboration, as several institutions, including the Wits Justice Project, and Sonke Gender Justice, among others, have continued to follow-up on it by monitoring post-judgment compliance.\textsuperscript{418}

It is evident from these examples that most respondents in the sector believe *amicus* interventions can play an important role in ensuring that key constitutional and/or international law issues are raised in court, and in broadening the social horizon of a particular dispute.

A further respondent cited the *ukuthwala* case undertaken by the LRC that showcased seven amicus interventions.\textsuperscript{419} Each of these interventions brought a different perspective: the international, the community, customary law, the impact on children, and other perspectives. This meant that the court was able to draw upon a wide range of perspectives in formulating its findings.

It is evident from these examples that most respondents in the sector believe *amicus* interventions can play an important role in ensuring that key constitutional and/or international law issues are raised in court, and in broadening the social horizon of a particular dispute.\textsuperscript{420} On the other hand, one donor expressed frustration when reading different grantee reports – each organisation “claims the magic on one particular issue.”\textsuperscript{421} She says the desire to claim

\textsuperscript{415} Interview with Respondent I, who was referencing *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others* 2013 (6) SA 367 (CC).

\textsuperscript{416} Ibid.

\textsuperscript{417} Interview with Respondent E, who was referencing *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC).

\textsuperscript{418} Ibid.

\textsuperscript{419} Interview with Respondents ZZ, who were referencing the ongoing case of *Jezile v State* (Western Cape High Court).

\textsuperscript{420} See also *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* 2014 (6) SA 516 (G.J), in which CALS’ amicus submission on the application of regional instruments was deemed by the court to be “most valuable and of assistance” (para 44).

\textsuperscript{421} Interview with Respondent G.
complete responsibility for the case at hand exhibits a lack of thinking through the strategy, and a desire to attribute the success of the case to itself. She would recommend that when writing reports, grantees write about their particular value added vis-à-vis the contributions of other organisations.\footnote{Ibid.}

\section*{COMMISSIONS OF INQUIRY}

Given the timing of this research, it was inevitable that the Marikana Commission of Inquiry would be discussed and used as an illustrative example. Donors expressed concern that too many public interest legal services organisations were pulled into the Inquiry at too great a cost. While one or two organisations were able to articulate clear objectives for their intervention, others, according to donors, were less clear about the reason for their involvement. This led to concerns about wasted resources and insufficient attempts to keep costs down.\footnote{Interview with Respondents A.}

Public interest legal organisations who had participated in the inquiry put forward a different view. They emphasised that the Inquiry was virtually unique, both in its scale and the speed with which it was set up. While, to begin with, there may have been some replication of purpose, and perhaps a degree of tension between civil society organisations, public interest legal services organisations very quickly learned to resolve their differences and assume complementary roles. In the end, a strong civil society presence at the Commission was very important, both to hold the Commission to account, and to ensure that victims’ voices were heard. Most of the cost associated with the Commission, they argue, was run up by the Commission’s extraordinary slow pace. To a very large extent, this was beyond the control of public interest law organisations, who did their best to speed the Commission’s work up – in the end working with evidence leaders to develop rules to curtail proceedings. It was further argued that, within these constraints, public interest legal services organisations offered very good value for money, often straining relationships with counsel in an effort to keep costs within budget.\footnote{Interviews with Respondent Y and Respondent CCC.}

Whilst most respondents felt that Marikana was an exception to the normal course of public interest legal issues today in South Africa,\footnote{For example interview with Respondent NN.} one respondent,\footnote{Interview with Respondent VV.} a judge, queried how exceptional Marikana truly is. In the new South Africa, with the increasing number of service delivery protests or party politicisation of issues, it is entirely possible there could be another issue of crisis proportions that would trigger the need for another commission of inquiry.\footnote{Ibid.}

Commissions of inquiry, in this way, represent something bigger than an individual case that could have significant systemic impact. Anticipating this, the public interest legal services sector needs to strategise well in advance so that they can “leap into action” in a coordinated
manner.\textsuperscript{428} The best teams should be planned in advance, shared amongst organisations, and assigned a division of labour, and donors could assist with this kind of “crisis planning.”\textsuperscript{429}

From the perspective of one CBO, the Khayelitsha Commission represented something significant because it was led by community-based organisations, and because the Commission dealt with numerous individual cases in a systemic fashion.\textsuperscript{430} This allows the organisation to access an increased amount of information it would not have been able to access through other processes, and provided “a crucial evidence base” for novel research.\textsuperscript{431} One donor contrasted this process with the Marikana Commission, stating that the former revealed “well-coordinated organisational efforts,” while the latter was not at all “well-managed” and had “far too many lawyers involved.”\textsuperscript{432}

**OPPORTUNITIES FOR FURTHER COLLABORATION**

Almost all respondents emphasised the need for continuing and further collaboration within the sector. The need for developing paralegal training structures and for continuing engagement with community-based advice offices loomed large in these responses. Several respondents made detailed suggestions as how these might be developed, which we summarise here.

Being responsive to the need for community-based advice office services requires an appropriate framework for regulation and training. Currently there is no regulation of paralegals in South Africa. One respondent who works with commercial paralegals in South Africa emphasised the importance of regulation of paralegals to protect the public and to raise awareness about the importance and limitation of paralegals.\textsuperscript{433} Another respondent criticises the failure of the recently signed Legal Practice Act 28 of 2014 to make provision for professional recognition, as well as career progression, training, and role, for paralegals.\textsuperscript{434} Rather, the Act states that the newly formed South African Legal Practice Council must investigate and make recommendations to the Minister on the statutory recognition of paralegals within five years from enactment.\textsuperscript{435}

\begin{itemize}
\item \textsuperscript{428} Ibid.
\item \textsuperscript{429} Ibid; also interview with Respondent JJ.
\item \textsuperscript{430} Interview with Respondent V.
\item \textsuperscript{431} Ibid.
\item \textsuperscript{432} Interview with Respondent JJ.
\item \textsuperscript{433} Interview with Respondent X.
\item \textsuperscript{434} Interview with Respondent S.
\item \textsuperscript{435} Section 34(9)(b) of the Legal Practice Act of 2014, enacted on 22 September 2014.
\end{itemize}
At a gathering in 2013, a wide cross-section of stakeholders in the criminal justice system discussed the role of community paralegals, in particular the question of regulation. Challenges in regulation were identified, including the fact that there is a wide range of types of paralegals, a wide spectrum of candidates in respect of their qualifications, and a broad menu of services provided by paralegals. Another important concern raised is the fact that there is currently no clear line between information and advice.

Respondents had a variety of suggestions for provisions that should be included in the regulations that will be drafted to cover the paralegal profession. NADCAO would like to see regulations for paralegals cover the following ground: (1) that the state will provide a certain and reliable set of resources for CAOs, (2) a clear mandate for community paralegals in specifying what they can and cannot do, and (3) a link between the mandatory community service provisions of the Legal Practice Act and CAOs. Another respondent believes mandatory community service has the potential to “change the culture of practice” if the emphasis is put on providing these services where the needs are greatest, and with proper support and rotation amongst students/graduates. A further respondent, who identified himself as a paralegal, believes that paralegals should enjoy a right of appearance in certain circumstances, which would help tremendously in reducing costs. Public interest law firms should be able to register as training organisations for paralegals, with a standard examination set by an external paralegal board. Additionally, there needs to be provisions set for those with little formal education but who can give good advice. In regulating paralegals, there should be recognition of prior learning.

Challenges notwithstanding, it is important for the public interest legal services sector to assist with crafting regulations for paralegals. Indeed, stakeholders generally agree that the community paralegal profession in South Africa “has a long and noble history and that the profession is very resilient. Community paralegals can play an important part in ensuring access to justice for all.” As one respondent states, paralegals have the potential to play a very importance role in the delivery of public interest legal services.

Unsurprisingly, then, several organisations appear interested in further coordinating with CAOs. According to one respondent, paralegals and CAOs have a crucial role to play in rural

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437 Ibid.
438 Ibid.
439 Interview with Respondent U.
440 Interview with Respondent SS.
441 Interview with Respondent TT.
442 Ibid.
443 Ibid.
445 Interview with Respondent S. Indeed, in the United States, they are used as an important resource to provide essential litigation support.
446 For example interviews with Respondent D, Respondent M, Respondent LL, and Respondent PPP.
areas. She believes that paralegals can play an important role in acting as community liaisons and building relationships with communities. Lawyers need to take instructions and are not always well-placed to “drive” cases i.e. mobilise communities.447

Some organisations who undertake public interest litigation already employ their own trained paralegals “to employ paralegals to work at the frontline of community relations as the initial client contact and subsequently in support of the NGO’s attorneys as cases progress.”448 These models may serve as examples of good practice in some respects for the future of CAOs. The LRC employs its own paralegals who play a useful role in the front office system.449 Legal Aid SA is the largest employer of paralegals in the country, with 185 paralegals working across its various branches.450 Until 2012, Black Sash used to employ 15 paralegals, two in each regional office, except for Johannesburg where there were three.451 The Women’s Legal Centre (WLC) employs commercial sex workers to serve as paralegals for the organisation in order to build trust amongst prospective sex worker clients.452 One respondent who is a director in a commercial legal practice described his firm’s very positive work with paralegals.453 His firm has worked with Jubilee South Africa and trained hundreds of community-based paralegals on the specifics of silicosis litigation so that they can liaise directly and more effectively with former mineworkers all around southern Africa.454

Overall there was a concern that the insular nature of the legal establishment has encouraged lawyers to turn away from working with paralegals, which is a missed opportunity.455 It also means that many public interest legal organisations miss the opportunity to work on systemic issues that affect the poor, for example consumer-related matters such as burial insurance.456 Some donors agree. One donor states that consumer protection matters never “see the light of day.”457 Another donor described an important case on micro-lending practices, which despite having a lot of value for the sector, was not followed through and therefore the impact of the

447 Interview with Respondent D.
449 Interview with Respondent S.
450 Ibid; also Interview with Respondent II.
451 Dugard and Drage “To Whom Do People Take Their Issues?” (2013) p. 11.
452 Interview with Respondents ZZ.
453 Interview with Respondent MM.
454 Ibid.
455 Ibid.
456 Ibid.
457 Interview with Respondents A.
judgment “had no strength.”458 An academic respondent also spoke about the importance of pursuing such matters such as private sector sales in executions, mortgage bonds and rental housing cases. Though these types of case don’t always capture the imagination of the public, they have “great value” for the poor.459 Developing further collaborative projects with CAOs could thus provide the basis for a new focus within the public interest legal services sector.

Finally, some respondents argued that representatives of the sector should engage the structures of the legal profession more, such as the Law Society of South Africa, the General Council of the Bar, and the courts.460 NGOs are not currently involved with providing judicial training461 or training to court clerks.462 One director described a request her organisation received from a magistrate’s court on gender-based violence cases.463 Neither party to the gender based violence cases ends up having legal counsel, which means that battered women have to cross-examine their own husbands. As a result, many applications for restraining orders are withdrawn or not completed due to intimidation.464 Her organisation has also been asked to play the role of expert witness and judicial researcher on certain cases.465 This is a space that goes to the heart of transformation of the sector.466 Respondents emphasised that the sector needs to think more critically about how to influence the thinking within the established structures of the legal profession.467

Another set of important players in the realm of capacity-building are Chapter 9 institutions, whose unique position vis-à-vis government allows them to play this role. For example, in the Marikana Commission of Inquiry, the South African Human Rights Commission (SAHRC) partnered with CALS.468

These provide important sites of potential future efforts for collaboration and coordination, largely within the sector and between the key institutions providing legal services in South Africa.

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458 Interview with Respondent R. Interestingly, though the Cape Town pro bono office of Webber Wentzel has yet to be firmly established, it has initially accepted a range of cases, including attachment orders (collaborating with the Stellenbosch Law Clinic), agri-business work post land restitution (collaborating with the Legal Resources Centre), the rights of the mentally disabled, and a constitutional challenge to the Criminal Procedure Act. Interview with Respondent Z.

459 Interview with Respondent W.
460 Interview with Respondent O.
461 Ibid.
462 Interview with Respondents ZZ.
463 Ibid.
464 Ibid.
465 Interview with Respondents ZZ.
466 Interview with Respondent O.
467 Interview with Respondents ZZ.
468 Interview with Respondent Y.
Collaboration between the Sector and Civil Society Organisations

Collaboration within the sector, however, only represents one part of the picture. Almost all public interest legal services organisations also seek to collaborate with other players outside the sector, including academic institutions, civil society organisations, and private companies. In the following pages, we survey the most common such collaborations.

COLLABORATION WITH ACADEMIC INSTITUTIONS

As with any collaboration, there are clear benefits and drawbacks to partnerships established between NGOs and academic institutions. In terms of benefits, one director feels that operating within a university space offers a lot of credibility to the work of her organisation – its work is seen as “impartial, measured.”469 There are also opportunities to draw upon the vast academic resources located within the university framework.470 On the other hand, NGOs located within universities have to obtain approval from the university registrar if they seek to litigate in their own name.471

Some serious problems have arisen in partnerships between academic research centres and litigating NGOs. For example, on a particular case involving the Communal Land Rights Act,

469 Interview with Respondent GGG.
470 Interview with Respondent W.
471 Interview with Respondent GGG.
a senior researcher called as an expert witness stated that academic researchers are often “not dealt with properly [by legal NGOs], particularly when it comes to deposing expert affidavits.” He cites four main tensions between legal NGOs and academic research units: first, the imperatives and timeframes of legal work are quite different to academic researchers; second, legal NGOs instrumentalise the knowledge that takes years for academic research units to develop; third, academic researchers are often thrust into a “brokering role” between legal NGOs and the communities with which they have worked long to build trust; and fourth the adversarial nature of the legal process places academic researchers under enormous pressure when their work comes under scrutiny on cross-examination. Researchers often want to be more integrally involved in a legal case because lawyers do not always understand the complexity of the issues involved, or understand how dynamics will unfold at the community level. Sometimes legal NGOs use the “client attorney relationship” to support their right to enter communities, relegating academic researchers to serving as the “experts.”

One advocate practicing in a public interest law centre said that lawyers need more humility when dealing with academic experts. Legal training imparts one particularly powerful, but narrow, form of reasoning, which often leads lawyers to behave as if they know more than they do. It is necessary both to explain the role of expert evidence in a case carefully to an academic expert, listen carefully to the way in which they express their views, and build a rapport with the expert, so that it is possible to debate finer points of evidence and the law, while at the same time being open to the expert’s concerns.

COLLABORATION WITH COMMUNITY-BASED ORGANISATIONS AND SOCIAL MOVEMENTS

One of our respondents thinks there is not enough collaboration between legal services and community based organizations (CBOs). However, several other respondents discussed relationships between NGOs and community-based organisations in depth.

One respondent provided an example of a particularly effective collaboration between an NGO and a CBO. In Adelaide, a rural town in the Eastern Cape, the South African Social Security Agency (SASSA) closed one of its offices. The community was up in arms because a disabled person was burdened by having to travel to another town for social security services. The Minister ordered the reopening of the office. This victory was largely because of the community’s resourceful use of the Integrated Development Plan, which stated that social services should remain in the municipality. In this manner, the NGO, working together with the community, found an argument that pre-empted the arguments of SASSA, and therefore averted the need for litigation.

472 Ibid.
473 Ibid.
474 Ibid.
475 Ibid; also Interviews with Respondent C.
476 Interview with Respondent DDD.
477 Ibid.
478 Interview with Respondent SS.
Many collaborations between public interest legal services organisations take the form of the provisions of legal services to CBOs and social movements. CBOs and social movements are the “clients” in these situations. They raised concerns about how attorneys deal with cases once the court process is complete.\footnote{Interview with Focus Group 2.} They stated that generally contact with clients dwindles after judgment and leaves them unable to deal with the issues that may follow from these cases. Lawyers must realise that court work “is one piece of the puzzle” and that an attorney-client relationship requires ongoing contact.\footnote{Ibid.} A director of a CBO agrees that NGOs need to maintain their relationships with communities beyond litigation.\footnote{Interview with Respondent AA.} People need to be informed about what is occurring with litigation, where it is drawn out, and consulted about other developments or advocacy opportunities around the issues in their case. Indeed, another respondent, a director of a public interest law clinic, stated the importance of ensuring that information is shared from the outset of a relationship in order to build trust in this kind of collaborative arrangement.\footnote{Interview with Respondent PP.} The director of a children’s rights organisation highlighted the strong relationship her law clinic has with children’s rights CBOs, which she attributes to frequent convenings of workshops for the sector and constant communication and dialogue.\footnote{Interview with Respondent GGG.}

Community representatives also raised three additional suggestions. First, NGOs must recognise the importance of protecting human rights defenders in social movements, those individuals who are at the forefront of cases.\footnote{Interview with Focus Group 2.} They often are victimised and threatened, not only by authorities but also by some community members with differing views. Second, NGOs have to provide more guidance to community leaders about how they can guide communities to support litigation. Third, NGOs should facilitate training about clients’ roles before and after litigation. They would like rights-based trainings that provide them with further information about the role and limits of litigation in assisting them. For example, some communities have learned how to engage with housing authorities through their lawyer’s engagements with them.\footnote{Ibid; see also CALS “Community Engagement Policy” (May 2014) p. 17.}

On the other hand, unity of purpose generated by litigation can sometimes dissipate in the longer term. Where a group of clients is not cohesive, this lack of cohesion itself can adversely affect the ability of the legal services providers to collaborate.\footnote{Focus Group 2.} A group of informal traders
highlighted that, in the recent informal trading case in the Constitutional Court, lawyers at SERI and Hogan Lovells first had to address political differences between the informal traders’ organisations before they could “get to the legal issues because of the lack of unity amongst the client groups in Johannesburg.”

However, where a community is organised, either locally or through a broader social movement, continuing collaborative relationships with community-based organisation can mitigate the danger of centrifugal drift.

**PUBLIC/PRIVATE PARTNERSHIPS**

A director of a small commercial law firm highlighted the “lopsided nature” of the legal profession with big law firms and small firms with little in between which, he believes, creates anomalies. Not all large firms will want to be in a position to undertake the type of public interest litigation his firm takes on. This type of litigation requires experience in the field, and many firms have not developed this core of expertise sufficiently. Nor can the sector only rely on legal NGOs. For many attorneys, public interest alone is not a sufficient focus, there also has to be a financial incentive. A director of a pro bono department at a large law firm also believes that it is important for private firms to coordinate with social justice NGOs, and with each other. One of his colleagues had an idea to start a forum centred on private law firm collaboration on PIL matters, which has yet to get off the ground.

These comments emphasise the importance of collaboration and coordination between private legal firms, and other bodies, and public interest legal services organization.

An example of a good private-public collaboration is the Legal Services Project, a component of the Land Rights Management Facility. The Department of Rural Development and Land Reform facilitates the provision of specialised legal services to communities and individuals facing eviction or the threat of eviction from land they occupy. The project is managed by Cheadle Thompson and Haysom, and since 2008 has established and maintained a national panel of specialist lawyers in the area of land tenure reform, both in private and NGO practice. Many of these firms are small firms, and employ black lawyers, so it is an example

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487 See *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others 2014 (4) SA 371 (CC).*

488 Interview with Focus Group 2.

489 Interview with Respondent MM.

490 Ibid.

491 Interview with Respondent M.

492 Ibid.

493 Ukuhlala Kulomhlaba I(1) (Department of Land Affairs 2009) p. 2; see also interview with Respondent MM.

494 Ibid.
of collaboration between private and public sectors that does not only involve the “Big Five” law firms.\footnote{495}{Interview with Respondent C.}

A director of an organisation spoke of the possibility of collaborating with a large firm to conduct training around compliance with anti-corruption legislation in which the organisation would conduct training around the social content around corruption, and the firm would cover legal compliance.\footnote{496}{Interview with Respondent N.}

**CONSTRUCTING INCLUSIVE CAMPAIGNS**

One respondent, a director of a public interest legal organisation, felt that the time had come to build coalitions - that “this is a time when we all need to be bigger than our individual organisations.”\footnote{497}{Interview with Respondent E.} He stated that not only did this enable a spreading of responsibility, but it also creates a more powerful front. He applauds the fact that collaboration has increased, not only between public interest legal services organisations but also between these organisations and other organisations that do not necessarily have legal capacity.

Respondents in a community-based social movement spoke about the need for different organisations to “complement” each other but to also give each other space.\footnote{498}{Interview with Focus Group 3.} Respondents expressed their desire to partner with organisations without having to “shed [their] own identity”, so that they speak and understand the “language and dynamics” of the issues.\footnote{499}{Ibid.} Thus, whether an organisation is organic and more grassroots, or more of a middle-class formation, “Democracy needs all formations, no one has the answer.”\footnote{500}{Ibid.} Further, as respondents stated, “If we fight in our own corners then we could compromise our own power”.\footnote{501}{Ibid.} Respondents cited a few examples of what they believed to be good examples of building coalitions around key issues:

- **Traditional Courts Bill:** The creation of the Alliance for Rural Democracy (ARD) to challenge the Traditional Courts Bill was applauded for reflecting the almost impossible, i.e. social mobilisation involving parliamentary processes. A respondent described at how she was amazed by how the coalition mobilised individuals to respond, but she further reflected that the success in that example was that the ARD was based on old relationships in communities, so that it was not seen as an outsider that appeared simply to push its own agenda around the Traditional Courts Bill.\footnote{502}{Interview with Respondent T.}

Another respondent noted that organisations do have an important convening role...
to play, as this case demonstrates, even if it is with a “light touch.”\(^{503}\) “The way in which you convene has a massive impact on getting that voice.”\(^{504}\)

- **Budget Expenditure Monitoring Forum (BEMF):** This collaboration arose out of a crisis in the Free State where the provincial department of health ran out of money and so stopped providing money for anti-retroviral medication. This was a wake-up call for NGOs to the issue of budgeting and its relationship to the right. As such, they decided that they needed to develop capacity on this issue, and to get this budgeting issue into the public domain. Initially, this involved several organisations with different skills – academic organisations, for example, as well as legal organisations. This created oversight on the issue where one was able to have a broad, valuable overview of the entire issue. The BEMF now has many more organisations starting to look at other issues, i.e. education and food. The collaboration is advantageous because it is a low-cost collaboration, and has not involved incorporating a new organisation. It works between the convening of meetings, and on the basis that people carry out what they commit to at meetings. Keeping overheads to a minimum is important, and so it is important to rely on a variety of organisations.\(^{505}\)

- **Local Government Action:** This coalition started with an activist resource guide on local government and its processes. This inspired other collaborations on local government action in general. The Local Government Action coalition now plays a valuable role in this regard, using the Constitution and legislation as its framework, and conducting workshops around the country.\(^{506}\)

- **Alliance for Justice:** One respondent cited this as an example of good collaboration on judicial nominations. Several organisations came together to provide joint statements on nominations. Another respondent, however, identified the same example as an instance of poor collaboration because of the reluctance of other organisations to take a public stance on judicial appointees.\(^{507}\)

- **Mining and Environment Justice Community Organising Network (MEJCON):** MEJCON grew out of MECA. The clients of these CSOs started to attend MECA meetings, and after coming together, decided to form another structure that would directly represent the communities affected by mining and environmental violations. CER assisted MEJCON with forming and drafting a constitution. MEJCON is a member of MECA, along with CSOs, and reports bi-annually on its activities. MEJCON functions as a network, with a steering committee and representatives from communities in 5-6 provinces in South Africa. MEJCON was the only coalition of voices directly from mine-affected communities that made submissions on the Mineral Resources and Petroleum Development Act Amendment Bill.\(^{508}\)

\(^{503}\) Interview with Respondent C.
\(^{504}\) Ibid.
\(^{505}\) Interview with Respondent E.
\(^{506}\) Ibid.
\(^{507}\) Cape Town Consultation Workshop (26 June 2014).
\(^{508}\) CALS “Community Engagement Policy” (May 2014) p. 48.
CREATING CAMPAIGNS

The need to work collaboratively with social movements, particularly in a manner that empowers and does not disempower communities is often emphasised. Several respondents pointed to the success of the campaign to mobilise and create broad public participation in the Khayelitsha Commission.\textsuperscript{509} Here, the Social Justice Coalition (SJC), Ndifuna Ukwazi, LRC, and EE collaborated in an informal manner, strategising around how they would participate.\textsuperscript{510} They ended up doing a lot of mobilisation, drafting affidavits, preparing evidence and legal argument for the attorneys on the case.\textsuperscript{511} The SJC had a productive relationship with attorneys because the campaign was aligned to its political goals as an organisation.\textsuperscript{512}

However, a respondent who was involved with this Commission work said that donors could not differentiate between whom was doing what, and were therefore frustrated.\textsuperscript{513} Another respondent points to this as the problem: that donors assume that for every issue that gets taken up in the sector, one funder should fund one salary.\textsuperscript{514} She said that a campaign “is a sum of many different parts” and work done under the same rubric does not necessarily amount to duplication.\textsuperscript{515}

Another respondent whose organisation is working on the recognition of Muslim marriages highlighted the importance of building a social movement around the issue with the Muslim youth movement, the Commission for Gender Equality, and other stakeholders.\textsuperscript{516} There has been no impetus from government to mobilise around the issue because it claims communities do not want this recognition.\textsuperscript{517} Therefore, the NGO must play a role in fostering this social mobilisation to obtain buy-in from communities.\textsuperscript{518}

\textsuperscript{509} Interviews with Respondents DD, Respondent TT, Respondent T and Respondent V.
\textsuperscript{510} Ibid.
\textsuperscript{511} Ibid.
\textsuperscript{512} Ibid.
\textsuperscript{513} Ibid.
\textsuperscript{514} Interview with Respondent HH.
\textsuperscript{515} Ibid.
\textsuperscript{516} Interview with Respondents ZZ.
\textsuperscript{517} Ibid.
\textsuperscript{518} Ibid.
Working with the state

The majority of public interest legal work is centred on the state, as the government is the primary duty-bearer in giving effect to the rights contained in the Constitution. It has the primary responsibility for ensuring access to healthcare, education, housing, basic services, safety and security etc.\(^{519}\) According to a respondent, there has been a shift in the way public interest legal services organisations position themselves vis-à-vis the state, due to increasing threats to civil society and a general distrust of the ruling party.

During our research we found there were many different views about the best strategies to engage the state and hold it accountable. This was most often related to how people interacted with and viewed the state.

A number of respondents mentioned that the type of engagement that organisations have with the state is an important part of their collaborative work. They emphasised, however, that the need for and types of engagement that are possible must be considered on a case by case basis.

Most respondents acknowledged the adversarial and antagonistic nature of litigation and how this impacts on organisations’ relationships with government officials and politicians.\(^{520}\) This was mentioned particularly by the practicing lawyers interviewed, with one stating that “everyone is very conscious of the negative dynamics of being quick to litigate and to

\(^{519}\) Interview with Respondent Z.

\(^{520}\) Interviews with Respondents BB, HH, LL, GG and K.
engage in too adversarial a process”.\textsuperscript{521} According to a lawyer working on children’s rights, “the sector needs to work more closely with government to encourage them to see civil society as collaborators. At present, there is hostility between the children’s rights sector and government, and often litigation can make it worse.”\textsuperscript{522}

Dislike of litigation against the state may be linked to a prevailing attitude in government that officials should be “omnipotent” in relation to their work and that it is problematic to get a “foreign body” (the judiciary) to “get me to do my job”.\textsuperscript{523} Indeed, according to another respondent there is a pervasive view that courts are illegitimate structures which means that the “old-guard” and more traditional civil society structures, which are invested in the patronage channels and are often gate-keepers, will complain but will never litigate. According to her, they would rather believe that you should try to find political solutions and compromise so that “nobody looks bad and nothing actually changes.”\textsuperscript{524}

Litigation against the state does not always damage relationships however. A number of respondents stated that in the current socio-political context, progressive officials whose hands are tied as a result of political will use litigation as a justification for pushing more progressive developments, and sometimes encourage public interest legal organisations to litigate.

Others saw the dangers of “collaboration” with the state. This can mean being passive and accepting the state’s agenda, even when it is inappropriate. An activist involved in the Khayelitsha Commission has found the implementation of the recommendations of the Commission’s report as being “the hardest phase” of the entire process. Nonetheless, it is still important to maintain independence and avoid being “co-opted”.\textsuperscript{525}

Most respondents emphasised the need for a balanced approach. One lawyer explained that the “best way to solve a problem is not always to fight” and that it is important to remember that “you need to work with these people afterwards”. According to her, they will litigate against a Minister but also “sit with him and do opinions” and help him develop strategies. She echoed the importance of “showing that you tried” to engage government first, before resorting to litigation, but also highlights another important reason for engaging, namely, to understand the “complexities that officials face” because we “don’t always know this and need to understand”.\textsuperscript{526} According to her, “court intervention is not because we hate the officials” but rather because we “need an intervention to fix what is not working”. She further argued that legal interventions are useful to define obligations to officials, and this is a fundamental component of the sector.\textsuperscript{527}

\textsuperscript{521} Interviews with Respondents I and XX.
\textsuperscript{522} Interview with Respondent GGG.
\textsuperscript{523} Interview with Respondent HH.
\textsuperscript{524} Interview with Respondent HH.
\textsuperscript{525} Interview with Respondent TT.
\textsuperscript{526} Interview with Respondent LL.
\textsuperscript{527} Interview with Respondent LL.
According to another respondent, nurturing a positive relationship with government is important, but that “you can’t possibly say that because a negative relationship between the organisation and government exists, organisations should stop” doing their work.\textsuperscript{528} Rather, there should be a willingness to try to engage with the government where possible, and a willingness to confront where necessary.

Others emphasised that there is great importance in follow-up litigation but that it is necessary to analyse the state and what “the most effective levers are to follow up on.”\textsuperscript{529} As one respondent advised, when involved in litigation with government departments, there is often a disjuncture between the state attorney’s position, and what the instructions are, therefore it is very important for public interest lawyers to engage with the person responsible for policy, not just the lawyer or state attorney.\textsuperscript{530}

A number of respondents made the point that it is important to distinguish between a weak state that has capacity issues, and one that simply lacks political will. As one respondent noted, civil society has not yet quite determined whether its work is about “fixing a failed state or regressive ideologies”. According to her, while in some cases the state genuinely lacks capacity to do certain things, in other cases it just does not care, and lines of patronage mean that it is not in people’s interests to fix certain problems.\textsuperscript{531} Another challenge raised is the extent to which people simply accept mediocrity within the state.\textsuperscript{532} The reality however, as one respondent stated, is that the dire consequences for people are the same for both the “cannot” and “will not” diagnoses of the state.\textsuperscript{533} According to another respondent, on the issue of capacity and ability to comply with court orders, he attributes this by in large to political accountability and “middle management incompetence” and an evasion of responsibilities, particularly in local government and provinces. He states that “there is no real distinction between ‘cannot’ and ‘will not’” i.e. between political will and capacity, and believes that courts have a role to enunciate this principle.\textsuperscript{534} To the extent that the state “cannot”, the public interest legal services sector may have a role to play in building technical capacity.

Regardless, there was a general recognition that public interest legal services organisations are sophisticated enough to work out when to take an adversarial posture and when to engage. They do not, generally, take a dogmatic approach. As a donor put it: “what makes the public interest legal services sector so interesting is how it “navigates adversarial relationships . .

\textsuperscript{528} Interview with Respondent Q.
\textsuperscript{529} Interview with Respondent NN.
\textsuperscript{530} Interview with Respondent Y.
\textsuperscript{531} Interview with Respondent HH.
\textsuperscript{532} Interview with Respondent HH.
\textsuperscript{533} Interview with Respondent NN.
\textsuperscript{534} Interview with Respondent UU.
. if [an organisation] can phone the Minister to get a solution by all means it should do so” but this is not always possible and “one should always weigh up whether it’s in the client’s best interests to go to court, or whether it’s worth engaging the state.” In any case, the most important factor is that organisations consider these issues. Donors should not interfere with these judgements because they do not interact with communities. To do so would be “treading on dangerous ground.”535

Collaboration between the sector and donor organisations

Donor perspectives in this study emphasized the desire for effective results with minimal duplication of efforts. One donor identified multiple amici in cases, suggesting that one organisation should be charged with taking the lead.536 She indicated that grantees seldom, if ever, write about collaborations in their reports and proposals.537 Her view was that it takes maturity to identify one’s own value, arguing that if it does not make sense to get involved in a matter, then organisations should limit themselves and invite others to get involved.538 Another donor suggested the creation of “a technical facility” that would be able to identify the issues

535 Interview with Respondent G.
536 Interview with Respondent G.
537 Ibid.
538 Ibid.
needing representation, with funds that have been reserved on a generic basis being allocated to particular NGOs for specific outcomes.\textsuperscript{539} Respondents have many views about the role of donors. Many feel that donors “influence” or even “entrench” competitive relationships between organisations in the sector and that these create difficult “power relations” to manage.\textsuperscript{540}

Another common refrain amongst respondents was that the donors’ position regarding core funding is hampering collaboration.\textsuperscript{541} Donors need to accept that a plurality of approaches to similar issues adds depth to the debate and that core funding, not project funding, should be provided to NGOs.\textsuperscript{542} One example cited was how, in the debate about the right to information, both the South African National Editors Forum and the Right to Know Campaign can bring different perspectives to the debate.\textsuperscript{543}

One respondent phrased it as ironic that donors “ask for collaboration” and then consider the collaboration to be duplicative.\textsuperscript{544} She suggested that donors speak to individual organisations when they feel there is duplication and allow the organisations to respond to their concerns. Another organisation described collaboration as “messy” and as not fitting into “nice conceptual boundaries.”\textsuperscript{545} Staff members at this organisation were clear in their view that the donor concern about duplication “is not a movement concern.”\textsuperscript{546}

Some respondents felt donors could use their convening power more effectively to bring organisations together on a periodic basis to share information and discuss strategy,\textsuperscript{547} as well as to coordinate where there is overlap.\textsuperscript{548} Donors should keep in mind, however, that “forced marriages” do not work, and while they can encourage a convening or a meeting, they should not influence a particular outcome or agenda.\textsuperscript{549} Otherwise, forced collaborations could become more of a box-ticking exercise for donors\textsuperscript{550} and NGOs must find the solutions for themselves.\textsuperscript{551} Donors should also be cautious to avoid guiding partnerships or coordination between organisations without understanding the dynamics of partnerships.\textsuperscript{552} As one respondent stated, there are often “many interests at stake,” and organisations may have legitimate concerns about sharing their strategies.\textsuperscript{553} One director also cautioned against

\textsuperscript{539} Interview with Respondents A.
\textsuperscript{540} Interview with Respondents A, Respondent C and Respondent T.
\textsuperscript{541} Interview with Respondent NN.
\textsuperscript{542} Ibid; also interviews with Respondents XX and Respondent YY.
\textsuperscript{543} Cape Town Consultation Workshop (26 June 2014).
\textsuperscript{544} Interview with Respondent LL.
\textsuperscript{545} Interview with Respondent DD.
\textsuperscript{546} Ibid.
\textsuperscript{547} Interview with Respondents GG, Respondent BB, Respondent I and Respondent XX.
\textsuperscript{548} Interviews with Respondents TT and Respondent H.
\textsuperscript{549} Interviews with Respondents LL, Respondent PP and Respondent XX.
\textsuperscript{550} Interview with Respondent CC.
\textsuperscript{551} Interview with Respondent NN.
\textsuperscript{552} Interview with Respondent T.
\textsuperscript{553} Interview with Respondent V.
bringing grantees together for the purpose of putting together a joint funding proposal, something she has seen happen.554

Some respondents believe that donors could have used their convening power at the outset of the Marikana massacre to plan for a more effective division of labour and to avoid some of the coordination issues that have ensued.555 One respondent believed that organisations that are resistant to this kind of “interference” from donors should accept it as a condition of receiving funding, and that “interventionist” donors are not necessarily interfering with strategy.556

Other respondents welcomed donor input on areas of substantive expertise so long as donors do not co-opt organisational agendas or determine the narrative of organisational approaches. One director felt there may be space for more interaction between donors and the organisations that work on the ground.557 He warns that there is sometimes a disconnect between funders’ perspectives and what is taking place on the ground, however, and therefore said that although this expertise is useful and can feed into the work that organisations do, it does depend on the context.558 Another director of an advocacy organisation felt donors are “not understanding” what is needed when organisations work primarily in law reform and advocacy.559 One director of an NGO warned that if donors reach out too much, and shape the narrative, it can sometimes push organisations into strategies that may not have been envisaged in the first place.560 Otherwise, it could lead to donors “coercing” organisations into shifting their areas of work or reallocating their funds to please donors, and this would be “problematic.”561

As well-intentioned as donors may be about collaboration, several respondents felt that it was the donors, and not the grantees, who need to collaborate far more.562 A director of an NGO feels the donor side “is more fragmented,” and donors have different priorities.”563 It appears that some donors agree; one donor respondent noted the lack of a forum for donors to engage with each other on issues of coordination and collaboration.564 Another donor felt that they should work better together to reflect and arrive at a consensus.566 One donor felt that

This mapping and modeling should consider the strengths of different organisations, as well as the different methodologies used, and then brainstorm ways to plan coordination and collaboration over a longer time period.

554 Interview with Respondent I.
555 Interviews with Respondents VV and Respondent JJ.
556 Interview with Respondent JJ.
557 Interview with Respondent S.
558 Ibid.
559 Interview with Respondent XX.
560 Interview with Respondent E.
561 Interview with Respondent C.
562 Interview with Respondent CC.
563 Interview with Respondent E.
564 Interview with Respondent R.
565 Interview with Respondent ZZ.
566 Interview with Respondent G.
donors also need clarity of their own vision of the work in order to work better together.\textsuperscript{567} Other respondents agreed, feeling that donors need to have “a theory of NGOs” before making funding decisions.\textsuperscript{568}

Ultimately, as one respondent bluntly stated, what is required is “really a bigger picture from both donors and recipients, and the problem is becoming more acute as monetary resources are diminishing, particularly with the departure of Atlantic.”\textsuperscript{569} Describing her organisation’s bad experiences with the National Lottery Fund, which involved a long delay in the disbursement of funding and then a very short turnaround time to deliver outputs, one respondent agreed about the continuing need for foreign funding.\textsuperscript{570} To achieve this “bigger picture,” one director of an advocacy organisation felt that donors should come together in a PILG-style gathering, as grantees do, and then there could also be a third gathering with both donors and grantees.\textsuperscript{571} Another director suggested that the sector undertake more mapping and modeling, and that the results could perhaps be studied by donors in respect of identifying those factors that often lead to effective collaborations.\textsuperscript{572} This mapping and modeling should consider the strengths of different organisations, as well as the different methodologies used, and then brainstorm ways to plan coordination and collaboration over a longer time period.\textsuperscript{573}

**Conclusion**

There is a wide variety of views and practices on the way in which public interest legal services organisations work together with each other, and with people and organisations outside the sector. Public interest legal services organisations make finely balanced judgments about when collaboration and coordination should take place, and what form it should take. Donors have a bigger role to play in supporting these decisions, and providing more spaces in which they can be discussed and reflected on.

There is, however, a clear need for community based legal services to be taken more seriously. This means both providing greater support to them, and working towards quality assurance, capacity building and regulatory frameworks that will assist them to standardize their work, and collaborate with other public interest legal services organisations.

Finally, there is a consensus that effective, planned, long-term coordination and collaboration within the sector works best when organisations feel financially secure, and are able to rely on long-term donor support.

\textsuperscript{567} Ibid.
\textsuperscript{568} Interview with Respondent NN.
\textsuperscript{569} Interview with Respondent H.
\textsuperscript{570} Interview with Respondent D.
\textsuperscript{571} Interview with Respondent YY.
\textsuperscript{572} Interview with Respondents GG.
\textsuperscript{573} Ibid.
This does not mean that donors have to write blank cheques. However, it does mean that the way in which donors relate to organisations within the sector, how they structure their application processes and what form their financial support takes, has a direct impact on the ability and willingness of public interest legal organisations to work with each other, and with actors outside the sector. Small value, short-term grants, distributed through competitive programmes against inflexible line items, leads to low-value, short-term work, which is unlikely to include fully thought-out collaborative intervention. Generous, multi-year general support, however, reduces organisations’ financial insecurity, and makes them more likely to work together towards long-term strategies to sustainably address a range of social problems.

Small value, short-term grants, distributed through competitive programmes against inflexible line items, leads to low-value, short-term work, which is unlikely to include fully thought-out collaborative intervention.

Beyond the financial pressures inherent in coordination and collaboration, public interest legal services organisations also face resource pressures when purchasing legal services on behalf of their clients. We now turn to consider how they respond to those pressures.
Public Interest Legal Services and the Legal Profession

section five
Our terms of reference included a range of questions about the cost of legal services, and the structures and strategies used to influence and meet those costs. These questions included: Whether the donor sector should set a fee guideline for public interest legal services; under what circumstances does it make sense to have in-house attorneys and advocates to pursue legal work, in light of the costs of retaining these professionals on the open market.

Public interest legal services organisations facilitate access to justice in two principal ways. First, public interest legal services organisations provide specialised legal services that are not generally available on the commercial legal services market. Second, they do so free of charge to the beneficiaries of those services. The ordinary commercial bar, and most law firms tailor their operations to paying clients. Very often, these clients are organs of state or large or medium-sized companies engaged in claims that have a monetary basis. Some commercial law practices also cater to niche markets, such as personal injury claimants, who, while not normally able to afford legal services, will be able to pay for them out of monetary awards obtained by participating in legal processes.

Public interest legal services organisations, however, are unique in providing services free of charge, with no real expectation of monetary benefit from any of the cases they take. Almost by definition, they represent the vulnerable and the excluded, because inability to afford legal representation is itself a hallmark of social exclusion. This has consequences for the way in which they work. Public interest legal services organisations provide longer-term, issue driven support to a wide variety of social groups. Their work goes beyond the case-based resolution of specific commercial disputes. They seek specific changes to law and policy that favour large groups of people, rather than individual clients. They provide services that go beyond legal advice and representation. These services include, public education, research, policy advocacy, capacity building and social campaign planning.

They are staffed by qualified legal professionals who are prepared to work for a fraction of the income they could attract in the private sector, thus making the provision of free legal services at scale financially viable within donor funded budgets. Public interest legal services organisations also provide an institutional base from which to negotiate free or cut-price legal services from the bar or larger commercial law firms. Their very existence therefore represents a substantial saving on the ordinary price of legal services.

These features of public interest legal services organisations differentiate them from the rest of the legal profession, and often place their interests at odds with those of the rest of the profession. In relation to fees, public interest legal services organisations have no interest in raising legal fees, as most commercial law firms do, both because they are users of commercial legal services (and so want to keep the cost of those services down), and because whatever

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Public interest legal services organisations also provide an institutional base from which to negotiate free or cut-price legal services from the bar or larger commercial law firms.
the cost of legal services on the open market – public interest practitioners’ income is largely determined by the availability of donor funds.

These key features of public interest practice mean that public interest legal services organisations have the most to gain from, and are uniquely place to press for, the regulation of legal fees and the transformation of the legal profession. In this section, we consider the attitude of public interest legal service organisations to the cost of legal services and the transformation of the legal profession. We examine the strategies they employ as users of legal services, to keep costs down. We highlight the various options open to public interest legal services organisations in managing legal costs, and in helping to regulate and control the cost of legal services. Most of our respondents found it difficult to separate the issues of the cost of legal services from issues of transformation. Accordingly, we address to the extent necessary, the ways in which public interest legal services organisations can facilitate the transformation of the legal profession.

The cost of legal services

After salaries, and some organisational costs, the biggest single line item for most public interest legal services organisations is often counsel’s fees. In theory, counsel’s fees are regulated by Rule 7 of the Uniform Rules of Professional Conduct of the General Council of the Bar, which directs advocates to charge “reasonable fees” for their services that do not “over-estimate the value of their advice and services,” Rule 7.1.1 states that “[i]n fixing fees, it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.”

In 2012 the Constitutional Court had this to say about the cost of counsel’s fees –

We feel obliged to express our disquiet at how counsel’s fees have burgeoned in recent years. To say that they have skyrocketed is no loose metaphor. No matter the complexity of the issues, we can find no justification, in a country where disparities are gross and poverty is rife, to countenance appellate advocates charging hundreds of thousands of rands to argue an appeal. No doubt skilled professional work deserves reasonable remuneration, and no doubt many clients are willing to pay market rates to secure the best services. But in our country the legal profession owes a duty of diffidence in charging fees that goes beyond what the market can bear.574

Those of our respondents who were not privately practicing advocates generally agreed that the cost of legal services, and particularly counsel’s fees, were simply too high. Yet, as Judge Malcolm Wallis of the SCA bemoans, many of the existing interventions and proposals for

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574 Camps Bay Ratepayers’ And Residents’ Association and Another v Harrison and Another [2012] ZACC 17 at 10-11.
Many organisations employ in-house counsel. Counsel’s fees are sometimes capped in order to stay within budget. Many public interest law organisations enter into contingency fee arrangements with counsel.

interventions to address the fees issue “seem like placing a small sticking plaster over a gaping wound.”

As far as we are aware, there is no publically available tariff or illustration of counsel’s fees. However, a proposed amendment to Rule 69 of the Uniform Rules of Court sets the maximum allowable limits at which a winning party can reclaim their costs from a losing party. The Rule sets its lowest daily rate at R6600 per day for advocates with between one and three years’ experience. At the highest end, counsel with over 20 years’ experience are allowed to claim for up to R22 000 per day. Legal Aid South Africa tariffs cap counsel’s fees at R17 000 for top-level senior counsel.

In practice, however, market forces largely prevail. Commercial rates are significantly higher than these guides might suggest. Counsel interviewed for this study estimated that, at the very lowest end, a first year junior advocate charges from approximately R550 per hour or

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576 Department of Justice, Proposed Amendment to Uniform Rule 69: Tariff of Maximum Fees for Advocates on a Party and Party Basis in Certain Civil Matters, 16 October 2014.
577 See specifically Annexure F of the Legal Aid Guide 2014 p. 289.
R5500 per day\(^{578}\) Counsel of ten years’ standing can charge between R1500 and R2400 per hour (or between R15000 and R24000 per day). Senior counsel, who have been given “silk” status by the President, charge between R25 000 and R35 000 per day, with some counsel rumored to charge up to R60 000 per day in high-value commercial matters.\(^{579}\)

Although it was never suggested that these commercial rates would be levied against public interest law centres, they tend to constitute the “default position” from which fees are negotiated. Public interest legal services organisations have accordingly been forced to develop a number of strategies to keep the cost of legal services down. Clearly, they cannot afford the going rate. Many organisations employ in-house counsel. One organisation reported setting a maximum tariff of Senior Counsel’s fees at R10 000 per day, save in exceptional circumstances.\(^{580}\) Another organisation reported an annual budget of R300 000 for counsel’s fees, and an active caseload of well over 100 matters.\(^{581}\) Counsel’s fees are sometimes capped in order to stay within budget. The director of the organisation recounted negotiating a Senior Counsel’s fee down from R33 000 to R18 000 per day. In the end, even that fee was too low, and the advocate concerned withdrew from the brief.\(^{582}\) Many public interest law organisations enter into contingency fee arrangements with counsel, which limit counsel’s fees to the amount of taxed costs recovered in the event that costs are awarded in favour of the party represented by that counsel.

In what follows, we discuss some of the principal strategies public interest legal services organisations use to keep costs down.

**EMPLOYING IN-HOUSE COUNSEL**

Rule 4.1 of the Local Rules of the Johannesburg Bar permit members to be employed at a public interest law centre, and to earn a salary from that centre, subject to a number of conditions designed to ensure that counsel maintain their independence. The few organisations that employ in-house counsel stated that in-house counsel have a number of benefits.

The first benefit appears to be a savings in costs Legal Aid SA used to rely exclusively on external counsel, and in 1994 transitioned to a salaried model for in-house counsel. This has proven to be more cost-effective, as well as effective in controlling delay, time, and systems.\(^{583}\) Other NGOs report similar savings. As one respondent who serves as in-house counsel states that the in-house counsel model “saves millions”.\(^{584}\) Another respondent reported that in-house counsel cost, at most, one third of what similar counsel in private practice would cost.\(^{585}\)

\(^{578}\) There are 10 hours in an advocate’s fee-earning day.

\(^{579}\) Respondent DDD.

\(^{580}\) Interview with Respondent DDD.

\(^{581}\) Ibid.

\(^{582}\) Ibid.

\(^{583}\) Interview with Respondent II.

\(^{584}\) Interview with Respondent LL.

\(^{585}\) Interview with Respondent S.
Another in-house advocate refers to the savings as “massive,” noting that three in-house counsel handle about 60% of the NGO’s approximate 150 cases.\(^{586}\)

A second benefit is in respect to strategy. One respondent, who is a director of an NGO with in-house counsel, stated that his organisation has 32 active cases, which require one person “with a bird’s eye view” of every piece of litigation.\(^{587}\) Another director stated that in-house counsel “instinctively” understand the context, and understand the broader strategies about how to litigate on a case.\(^{588}\) Another respondent agreed that in-house counsel are invaluable to strategic litigation.\(^{589}\) She cited the Limpopo textbooks case as an example of where in-house counsel was thinking about the textbooks issue even before it became a major issue, precisely because of an intimate familiarity with the importance of the right to education within the organisation.\(^{590}\) In this way, in-house counsel develop expertise in public interest areas because they are constantly exposed to the issues, and this can serve as “compensation” for the lower salary they receive.\(^{591}\) An in-house advocate spoke of the “institutional benefit” of in-house counsel because they understand the context, tone and style of the organisation.\(^{592}\) A private sector respondent felt that in-house counsel have an advantage of understanding “the political dynamics involved” and know “what happens on the ground.”\(^{593}\) She also pointed out that in-house counsel are critical when urgent applications are required in a matter and external counsel would be difficult to recruit.\(^{594}\)

A third potential benefit is in creating a bilateral transfer of skills and opportunities between the sector and the bar. One respondent described the additional benefits of in-house counsel transferring skills into the organisation and back into the bar.\(^{595}\) A respondent who is a judge believed that there are a lot of “hungry youngsters at the Bar” who would be glad to get the work of serving as in-house counsel.\(^{596}\) One in-house advocate stressed the wide variety of high profile, complex work available to in-house counsel, and the opportunity to practice regularly with very senior and experienced colleagues.\(^{597}\)

However, other respondents raised concerns about in-house counsel. One respondent highlighted that in-house counsel would not “make sense” for certain CBOs because of the volume of work they do.\(^{598}\) Another respondent also felt there would be some resistance from advocates who do not want to be “typecast” as being affiliated to a particular organisation.\(^{599}\)

\(^{586}\) Interview with Respondent CCC.

\(^{587}\) Interview with Respondent E.

\(^{588}\) Interview with Respondent P.

\(^{589}\) Interview with Respondent LL.

\(^{590}\) Ibid.

\(^{591}\) Interview with Respondent N.

\(^{592}\) Interview with Respondent CCC.

\(^{593}\) Interview with Respondent F.

\(^{594}\) Ibid.

\(^{595}\) Interview with Respondent Q.

\(^{596}\) Interview with Respondent UU.

\(^{597}\) Interview with Respondent DDD.

\(^{598}\) Interview with Respondent LL.

\(^{599}\) Interview with Respondent OO.
One director said they recently turned away an advocate for a position because there was not enough litigation to keep her busy.600 This particular organisation had an alternative arrangement to meet weekly with counsel for 1.5 hours to discuss possible cases.601 Another respondent identified the challenge of getting the right people to serve as in-house counsel within public interest legal organisations, particularly to work part-time.602

In addition, some respondents noted that although there is obviously scope for expanding employed practice, one organisations should conduct a “cost-benefit analysis” of hiring in-house counsel, examining the infrastructure costs of employing counsel versus outsourcing litigation needs.603 Although employing in-house counsel may have more predictable costs than briefing external counsel, these savings may not always be as significant as expected.

The most common caution against the use of in-house counsel was raised by a senior advocate in private practice, who contrasted the benefit of having in-house counsel with “ingrained knowledge of day-to-day issues” to the potential danger of these in-house counsel losing objectivity and possibly thereby harming their clients’ interests by “being seduced by their own propaganda.”604 Another advocate agreed that people who only do in-house work may end up being “too close” to a particular issue.605 This advocate therefore approaches colleagues outside the organisation because it is important to get external opinion and “where appropriate bring in outside counsel”.606 This advocate did not feel that there is a way to escape this reality – “sometimes you just need a silk to take things forward in a way you are unable to”.607 A former director of an organisation discussed the value of in-house counsel knowing “when to step away.”608 Another respondent agreed that outsourced advocates lend the NGO “some objectivity,” which could be a benefit.609

Others felt that these views were born of a myth that somehow in-house counsel are less capable of being objective than counsel in private practice. They argued that there is no necessary reason why this should be so. Every environment brings with it its own subjectivities, and there is no basis on which to suggest that advocates in private practice are “objective”. They just have different subjectivities. Good counsel will always know when to get a second opinion – whether or not they are in-house. What really matters is having a good variety of work. If in-house counsel are always doing the same types of cases, their intellectual approach can become staid and blinkered. Our respondents emphasised that this risk is also present in private practice, where many counsel specialise in one particular type of case. One advocate employed as in-house counsel thought that there may be a degree of snobbery prevalent.

600 Interview with Respondent PP.
601 Ibid.
602 Interview with Respondent P.
603 Interview with Respondent UU.
604 Interview with Respondent H.
605 Interview with Respondent LL.
606 Ibid.
607 Ibid.
608 Interview with Respondent BB.
609 Interview with Respondent D.
at the private bar, and shaping these discussions, which will have to be overcome if public interest practice is to become a realistic option for new counsel, or counsel looking for a career change.\footnote{Interview with Respondent DDD.}

Another in-house advocate agreed, stating that the perspective of independent counsel is important, but can be obtained equally through “fierce debates,” “having a sounding board outside the case,” or by calling upon academics to identify risks.\footnote{Ibid.} He urged that the split bar tradition, with its claim to be necessary to maintain the independence and objectivity of counsel is “a bit archaic” and should not be “overstated.”\footnote{Ibid.} Also in agreement, one respondent highlighted the example of Arthur Chaskalson serving as in-house counsel at the LRC for 25 years, probably the longest in-house counsel stint in South Africa to date.\footnote{Interview with Respondent H.} Yet, Chaskalson did not grow deficient in the law because he was in-house counsel.\footnote{Ibid.} Ultimately, the question of objectivity, this respondent stated, depends on the person involved and is not a danger inherent to the position of in-house counsel.\footnote{Ibid.}

A partial alternative was suggested by this respondent, who cited a handful of advocates working on a “mixed-model”: serving half as in-house counsel at an organization and half as out-sourced counsel at the bar.\footnote{Ibid.} He described this model as the best possible model because counsel then have expertise in the widest disciplines of the law, and are not siloed into a comfort zone or within the particular agenda at their organization.\footnote{Ibid.} However, it is important to make sure that counsel practicing on the mixed model allocate enough time to their public interest work. Private fee-paying briefs have been known to “crowd out” work from public interest law centres, for which counsel is paid a fixed salary irrespective of volume of work done.\footnote{Interview with Respondent DDD.}

This does not exhaust the possibilities of interaction between in-house counsel and counsel in private-practice. One organisation spoke of its long-term goal of grooming in-house counsel to become advocates by paying for their pupillage.\footnote{Interview with Respondents GG.} One director of a litigating organisation stated that the former director, who left to undertake pupillage, will soon be returning as in-house counsel to the organisation.\footnote{Interview with Respondents ZZ.} In this way, the organisation, even if it uses external counsel, can drive the legal strategy and ensure a consistent approach to the legal arguments.\footnote{Ibid.} One in-house advocate also points out that being a junior advocate herself and learning from senior counsel is in itself a form of transformation – she in turn is capable of imparting knowledge to her team.\footnote{Interview with Respondent LL.} Another NGO is starting a pupillage fellowship, whereby
pupils will receive a stipend. While they will not be guaranteed a job at the NGO following pupillage, the possibility is there if there are vacant positions.623

Another respondent stressed that it should, in principle, be possible for an advocate to do pupillage at public interest law centres. This would make public interest legal practice a viable career path for many aspirant counsel who want an alternative to private practice. However, there is resistance to this idea at the bar, partly because of entrenched attitudes that see public interest practice as inauthentic. These attitudes are in need of transformation.624

The attorneys’ profession already accredits public interest law centres to train candidate attorneys.625 Any law centre that wishes to train candidate attorneys must be accredited to do so by the relevant Law Society, and must renew its accreditation every year. The centre in question must show, amongst other things, that it has a sufficiently busy and wide-ranging practice to expose trainee attorneys and that there are sufficiently senior attorneys employed at the centre, to give the necessary guidance and professional support to trainee attorneys. There appears to be no reason in principle why a similar set of accreditation criteria could not be developed by the advocates’ profession, preferably with input from the public interest legal services sector.

SETTING OF LEGAL FEES: CAP OR GUIDELINES?

Respondents engaged in a robust discussion about whether a fee guideline or a cap on fees would assist with spreading limited resources more widely whilst also encouraging important public interest litigation to occur. Several respondents provided examples of existing guidelines being used in the legal services sector, or guidelines and models developed in the past. These will be discussed in more detail below, before we turn to the current debate.

International Defence and Aid Fund

A respondent, now a judge, who was a public interest lawyer in the 1980s, recalled the International Defence and Aid Fund (IDAF) from the 1980s, which created a “grid” allocating the rates that public interest lawyers would be paid.626 Indeed, many respondents referenced the IDAF,627 which was established in Canon John Collins in 1956 “to work towards a peaceful solution to the problem of apartheid through raising and distributing funding to victims of apartheid laws, especially political prisoners and their families.”628 Initial funds came from Canon Collins himself, as well as from a UN Trust Fund established pursuant to a UN General Assembly resolution for humanitarian assistance to South Africa’s political prisoners.629 IDAF’s stated goals for credible leadership were UN accreditation, a regional approach and

623 Interview with Respondent CCC.
624 Interview with Respondent GGG.
625 Section 3 of Attorneys Act 53 (1979), amended by Section 18(a) of No. 66 of 2008: Judicial Matters Amendment Act, 2008.; see also Interview with Respondent J.
626 Interview with Respondent UU.
627 Interview with Respondents NN, CC, and VV.
629 Ibid.
securing access to lawyers. \(^{630}\) IDAF financed the legal costs of cases emanating from the Sharpeville Massacre, the Treason Trial, the passage of the Sabotage Act, the Rivonia Trial, the Soweto unrest, the Black Consciousness movement, the persecution of emerging trade union activists, the emergencies of the 1980s, and the Delmas Trial, among other important trials. \(^{631}\) IDAF’s funds were split between three programmes: (1) funding the legal defence of political prisoners’ trials, (2) supporting the families of political prisoners, and (3) supporting a research and publications department for the fund. \(^{632}\) During the Rivonia Trial, lawyers agreed to work for 20 percent of their normal fees, and IDAF covered the rest of the costs for the defence and support for the families of the accused. As time went on, however, the resources of IDAF could not match the mounting need for legal representation under extreme state repression in South Africa, and IDAF convinced lawyers to accept lower fees for trials, and began using smaller law firms, including black law firms, to represent detainees. \(^{633}\) The IDAF was formally dissolved in May 1991, handing over its resources to the South African Legal Defence Fund, the South African Council of Churches and the Association of Ex-Political Prisoners, the Mayibue Centre and the SAHRC. \(^{634}\)

Apparently, in terms of the IDAF, all public interest lawyers agreed informally to be bound by the tariff set by the IDAF, as it represented what the funders of legal work in London were willing to pay for this work at the time. \(^{635}\) This respondent himself felt ‘I don’t need the money, but if there is, I’ll take it.’ \(^{636}\) At the time, it was R1 800 a day for silks, and R3 000 to R4 000 per month for advocates at CALS. What the Bar has lost, these respondents continued, is that “culture of decency” \(^{637}\) that encourages ethical reflection and action; a moral/political/social “ethos in the law.” \(^{638}\) In the judge’s estimation, a tariff would fill in these gaps. \(^{639}\)

Other respondents agree that the IDAF model was a good one. \(^{640}\) A donor felt that at the time IDAF was in effect, it was “politically incorrect to not collaborate,” because there was more of a sense of collegiality around a common enemy. \(^{641}\) A judge said it was not possible for attorneys and advocates to make more money, because the donors were in “cahoots” about capping the rate and making it clear to the sector that this was the “going rate.” \(^{642}\) She noted, however, that it would be important to consider how counsel taking on private work could subsidise their public interest legal work, and thereby undercut other counsel competing for public interest legal work. \(^{643}\) Developing a tariff/guideline, therefore, would take collegiality, but the benefit

\(^{630}\) Ibid.
\(^{631}\) Ibid.
\(^{632}\) Ibid.
\(^{633}\) Ibid.
\(^{634}\) Ibid.
\(^{635}\) Interview with Respondent VV.
\(^{636}\) Interview with Respondent UU.
\(^{637}\) Ibid.
\(^{638}\) Interview with Respondent UU and FFF.
\(^{639}\) Interview with Respondent UU.
\(^{640}\) Interviews with Respondents VV and A.
\(^{641}\) Interviews with Respondents A and CC.
\(^{642}\) Interview with Respondent VV.
\(^{643}\) Ibid.
would be that the Bar would have to learn how to work together."644 One donor suggested that a resuscitation of the IDAF model may be in order today.645

Legal Aid SA

A former attorney who worked under the IDAF model highlighted Legal Aid SA’s structure as providing a model similar to IDAF in that there is also a tariff and it also attracts new attorneys and advocates.646

Legal Aid SA receives mostly state funding and some private funding to help indigent clients access legal services. Legal Aid SA is compelled to annually publish the Legal Aid Guide that sets out fee structures and procedures for its Judicare model—i.e., matters for which external legal practitioners are retained.647 A respondent from Legal Aid SA considers this useful as it means that there is a process and uniform procedure in which matters are handled.648

Legal practitioners apply to be funded as counsel, set up a budget, which is reviewed by the Board, and amended as necessary.649 The organisations or staff members that are retained by Legal Aid SA perform the work and then are required to account to Legal Aid SA on what has been achieved.650 Only thereafter does Legal Aid SA make payment based on the prior agreement in which fees were set out and the time period within which the case was to be completed.651

Their fees are useful to ensuring certainty. In the beginning of a matter Legal Aid SA sets the rates for each counsel within the designated bracket (may not exceed the particular bracket of the case).652 These brackets are determined based on the years a practitioner has worked in the legal profession. Coupled with seniority are factors such as the nature of the matter being handled, and in which forum, as well as the category of task involved. For example, hourly rates can range between R284 and R642, depending on the level of experience and the forum for the matter.653 In another example, a legal practitioner can earn from R239 per hour in the Magistrate’s Court to R642 per hour in the Regional Court for undertaking an instruction to sue/defend or to counter claim or defend a counterclaim.654 In contrast, the practitioner would earn only R182 per hour for appearing in court for a postponement of a matter.655

644 Ibid.
645 Cape Town Consultative Workshop, 26 June 2014.
646 Interview with Respondent FFF.
647 A Judicare model is one in which legal aid assistance is provided by private legal practitioners paid on a lower scale on a case by case basis to clients fulfilling certain eligibility criteria. Kemp & Pleasance, “Targeting Civil Legal Needs: Matching Services to Needs,” 2005 Obiter 286.
648 Interview with Respondent II.
649 Ibid.
650 Ibid.
651 Ibid.
653 Ibid. at 287.
654 Ibid.
655 Ibid. at 288.
However, Legal Aid SA “understand[s] that litigation is unpredictable” so they are not entirely inflexible. A respondent from Legal Aid SA gave the example of the silicosis case, which was partially run by the LRC. The case, brought by 23 miners, and their widows and children, who worked on Free State mines against Anglo American, took 9 years and cost R11 million. The LRC and Legal Aid SA are in the process of recovering the costs at present. The fact that the case resulted in settlement, however, underlines the importance of Legal Aid SA providing funds for the case to the LRC. Had the case been accepted on a contingency fee arrangement (see below), for example, it may have been more difficult for counsel to justify the expenditure of as much time and resources in the litigation.

It is important to note that Legal Aid SA considers impact litigation cases in a higher bracket than other cases (in other words, the fee structure applicable for impact litigation cases is higher than the fees structure applicable to other types of cases). For example, the hourly rate for senior counsel and specialist attorneys in an impact litigation matter ranges from between R1 192 to R1 788, with junior counsel earning not more than two thirds of the rates paid to senior counsel. When asked why a higher fee structure is applicable to impact litigation, a respondent from Legal Aid SA argued that impact cases often involve constitutional issues or socio-economic rights. This means that it is sometimes difficult to convince private practitioners to take on these matters at standard rates, as per the Judicare model. It is recognised that these cases are exceptional and give content to the Constitution. They should therefore require greater investment.

When asked whether he believed that Legal Aid SA’s fee guidelines affect the quality of the legal practitioners that would do work for them, the respondent disagreed. He admits that “quality is always an issue” but states that this is why they have instituted quality measuring and improvement mechanisms. This has been extended to their Judicare practitioners (in criminal cases), and has been agreed to by the professional councils in the legal profession.

According to the respondent, he also does not believe that there should be guidelines for the entire sector, as a one size fits all model will not be helpful. As it is, the Legal Aid SA guidelines are pegged according to different brackets, and it is not authorised to go beyond this. He says that this creates certainty with the legal practitioners or organisations as to how much they are entitled to. He is not opposed to people getting additional funding to run cases from other sources, but he is strongly opposed to “double funding”; he believes that this will not be to the “benefit of the sector” as there is such a broad spread of work to be done.

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656 Interview with Respondent II.
658 Interview with Respondent II.
660 Interview with Respondent II.
661 Ibid.
662 Ibid.
663 Ibid.
664 Ibid.
665 Ibid.
The Rural Legal Trust and Legal Services Project

The Rural Legal Trust (RLT) was established in 2000 as an interim arrangement to provide free legal services for farm workers, farm dwellers and labour tenants, whilst various government entities sought parliamentary approval to take on such matters. During the interim period, a pilot model was established whereby paralegals and attorneys were employed and trained to serve the envisaged clientele. The pilot was later extended to all nine provinces, where paralegals, attorneys and fieldworkers were employed and supported through a re-granting facility. As of 2010, the RLT continued to provide legal services to the indigent, enhanced by “people-driven advocacy work.”

Presumably, thereafter, the RLT morphed into the Legal Services Project (LSP), which another respondent cites as a positive example of a fees guideline. Through the LSP, a component of the Land Rights Management Facility, the Department of Rural Development and Land Reform (DRDLR) facilitates the provision of specialised legal services to communities and individuals facing eviction or the threat of eviction from land they occupy. The project is managed by the private firm Cheadle Thompson and Haysom, and since 2008 has established and maintained a national panel of specialist lawyers in the area of land tenure reform, both in private and NGO practice.

The project has already dealt with hundreds of cases nationally. The DRDLR sets tariffs for the panel of lawyers on a reduced scale, and the lawyers must be selected through a tender system and must submit their budget in advance. According to this respondent, the LSP has made incredible strides in ensuring access to justice for thousands who otherwise would be out of luck in an area of law that remains an unfunded mandate of Legal Aid SA. Another respondent who does a lot of customary law work also praised this model, as it allows smaller firms to take on more land and public law work and it often brings in black lawyers.

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666 Rural Legal Trust Cause Profile at www.givengain.com/cause/2048/
667 Ibid.
668 Ibid.
669 Ibid.
670 Interview with Respondent MM.
672 Ibid.
673 This project appears to have been facilitated by the judgment in Nkuzi Development Association v Government of the Republic of South Africa and Another, 2002 (2) SA 733 (LCC), which charted the way for the funding of civil litigation in South Africa.
674 Interview with Respondent MM.
675 Interview with Respondent C.
Foundation for Human Rights

The Foundation for Human Rights (FHR) used to have a public interest litigation fund, which capped fees provided to organisations or firms to take on proactive impact litigation. Mostly these were smaller to medium sized private attorney firms, who had a sense of social justice, and who approached FHR looking for funding support to take on a particular case that had come to their attention. Knowledge about this fund spread through word-of-mouth, as well as through legal publications, such as De Rebus. The administration of this fund took a lot of effort, however. Also, litigation was often a stand-alone exercise without engagement of other tools, such as advocacy, media and community engagement.

A respondent from FHR remarked that ideally, a fund like this should be flexible and adaptable to changing needs. Most important, though, is that there is a mechanism in place to track the implementation of cases that go through the system.

Competition Commission

In 2004, the Law Society of South Africa (LSSA) applied to the Competition Commission for an exemption from the provisions of Chapter 2 of the Competition Act in respect of the disciplinary rules of the four provincial law societies relating to professional fees, reserved work, organisational forms and multidisciplinary practices, and advertising, marketing and touting. Specifically, the LSSA’s rules on professional fees prohibited attorneys from accepting remuneration for professional services other than that at the tariff prescribed by law.

The LSSA and the Commission entered into a process of engagement and consultation, which included extensive submissions made by the LSSA. In March 2011, the Commission gazetted a notice rejecting the LSSA’s application, finding that the rule in respect of professional fees was “tantamount to price fixing” by disallowing legal practitioners to discount below the set fees, thus inhibiting price competition. In April 2012, both parties committed themselves to resolving all matters that would ensure continued professionalism whilst ensuring that

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676 Interview with Respondent R.
677 Ibid.
678 Ibid.
679 Ibid.
681 Ibid.
Several respondents discussed the idea of ‘fees caps’, meaning an absolute limit placed on the amount that could be charged for a particular case, or in a particular period. It was reported that such caps were extremely unpopular with counsel, and generated conflict between those counsel and the organisation.

The competition law concerns raised by the Commission are addressed. The LSSA’s rules on professional fees therefore no longer allow for minimum attorney tariffs to be enforced. This decision of the Commission is significant for the contemporary debate over the desirability of a cap on fees or a fees guideline. One respondent alluded to this Commission decision and concluded that because of this experience, fees guidelines would be unlikely to withstand scrutiny under competition law. However, in its press release, the Commission explicitly suggested that “one mechanism to protect the public from exorbitant legal fees might include setting of price caps or ceilings.” Furthermore, competition law appears to have been applied differently to the attorneys’ profession as distinct from the advocates’ profession. In 2002, the Competition Commission approved an exemption of General Council of the Bar rules that prohibited advocates from accepting briefs from anyone other than attorneys Although its decision insulated the advocates’ profession, the Commission nevertheless found in favour of the General Council of the Bar.

Therefore, it appears to remain an open question whether the Commission’s analysis in respect of minimum tariffs would apply with equal force to a challenge to fees guidelines, particularly if the guideline is not a cap and is capable of flexibility to individual circumstances. It is also unclear whether the General Council of the Bar will proactively address the challenges that competition law poses to it, or whether it will continue with “business as usual.”

CAPPING FEES

Several respondents discussed the idea of ‘fees caps’, meaning an absolute limit placed on the amount that could be charged for a particular case, or in a particular period. One organisation said that it imposes weekly or monthly caps on what can be charged by counsel in particularly long-running matters, including lengthy trials and commissions of inquiry. It was reported that such caps were extremely unpopular with counsel, and generated conflict between those counsel and the organisation. One organisation justified its stance on the basis

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683 Ibid.
684 Interview with Respondent II.
685 14 March 2011 Media Release.
687 Judge Wallis, Advocate April 2012 at 35. It is also interesting to note that while the Uniform Rules prescribe an attorney tariff (but which is routinely overridden through agreement), they do not deal, with isolated exceptions, with what advocates may charge. Justice Dunstan Mlambo, Judge President of the South and North Gauteng High Courts, “The reform of the costs regime in South Africa Part 2” Advocate August 2012 p.22.
that participation in lengthy trials has the capacity to double or triple its litigation budgets. Participation in a Commission of Inquiry reportedly doubled its entire organizational budget – even with a fee cap imposed. However, this organisation acknowledged that a fee cap is a severe measure, which should only be introduced where necessary, and, as far as possible, with the full knowledge and advance consent of counsel involved.688

Several respondents agreed that a cap on fees might be an important tool in the arsenal of organisations in the public interest legal services sector. One director of an organisation felt that a fees cap would be particularly useful if a particular litigation is lengthy and complex.689 A cap would assist the organisation in being “circumspect” about how much they are being charged for the matter.690 Another director cited the Khayelitsha Commission as a recent example of the need for such a fees cap, but believes such a cap should traverse the entire legal profession.691 Another respondent agreed that a cap on fees should not just be specific for the public interest legal services sector, but across the legal profession as a whole.692

However, several individuals felt that a cap was unreasonable because it is often impossible to predict the duration of a case, or more recently, of ad-hoc commissions of inquiry.693 One private practitioner stated that a cap on fees would further strain profit margins, thereby further discouraging counsel from accepting public interest litigation matters.694 In the long run, he believes, a fees cap would “inhibit growth of the legal profession.”695 Moreover, as a group of junior advocates argued, caps may work counterproductively for NGOs, if advocates prioritise fee-paying matters to those public interest litigation matters in which the cap has already been reached.696

Another respondent warned that the “top brains won’t operate in the sector as freely.”697 She says that in practice, even if you have the best intention, the pro bono matters “are always the ones you do at 7 pm and you’re just that much more tired.”698 Finally, another respondent stated, a cap for public interest litigation may perpetuate the perception, already widespread at the bar, that public interest litigation is somehow less valuable work.699

FEE GUIDELINES

A potential alternative to a ‘hard’ cap on fees may be the promulgation of a set of relatively flexible fee guidelines. Many of the individuals who opposed the cap on counsel fees supported

688 Interview with Respondent DDD
689 Interview with Respondent N.
690 Ibid.
691 Interview with Respondent PP.
692 Interview with Respondent HH.
693 Interview with Respondent JJ.
694 Interview with Respondent M.
695 Ibid.
696 Interview with Respondents FF.
697 Interview with Respondent HH.
698 Ibid.
699 Interview with Respondents GG.
or at least were not opposed to the idea of a fee guideline that is flexible to the particular circumstances of a matter, not “prescriptive.” indeed, one respondent pointed out that such a guideline would assist in creating consistency between organisations in respect of what they are paying counsel. This might help to address the practice identified by some of our respondents, of some advocates refusing to take public interest work because it pays too little, or too slowly. Another respondent noted that the guideline would provide clarity, which would actually encourage counsel to take on public interest litigation matters and would offer a better understanding of value.

One director in a commercial law firm believed it is very important to set a guideline or tariff for counsel handling public interest matters, as senior counsel are already inaccessible and not overly eager to take on this work. His firm has not had difficulty in retaining junior counsel, but he admitted that it is also probably because of the novelty of the public interest litigation with which they have been involved. An advocate pointed out that a guideline could also attract counsel to public interest litigation who cannot afford to do matters on contingency. Another respondent pointed out that guidelines may mean that it will be “easier to negotiate with counsel” about fees. Although her organisation has not had a problem negotiating fees with counsel, she recognised that some attorneys may feel “uncomfortable” doing this and a guideline may be helpful in this regard.

By contrast, one respondent, who directs the pro bono unit at a commercial law firm, thinks general fee guidelines would be “very problematic” because in the long run people would claim they are busy and turn down the work. Another respondent was skeptical about the value of a fee guideline and stated that it may end up being a “blunt instrument” with unintended consequences. He urged, however, that organisations should come together in informal but structured gatherings to discuss strategies to contest high fees generally. Another respondent seemed to agree that more thinking would have to occur before such a guideline could be instituted. He warned against donors policing organisations which have already pay counsel above a particular tariff. Moreover, this respondent pointed out that such a guideline would be difficult to apply fairly across the sector, and therefore difficult to

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700 Interviews with Respondent CC, Respondent DD, FF.
701 Interview with Respondents GG.
702 Interview with Respondent EE.
703 Interview with Respondent CC.
704 Interview with Respondent MM.
705 Ibid.
706 Interview with Respondent EE; interview with Respondent F.
707 Interview with Respondent LL.
708 Ibid.
709 Interview with Respondent Z.
710 Interview with Respondent E.
711 Ibid.
712 Interview with Respondent S.
713 Ibid.
enforce.\textsuperscript{714} That said, however, his organisation does use its own internal guideline to guide the payment of counsel fees, which “chases the Legal Aid rate.”\textsuperscript{715}

None of these latter respondents seemed outright opposed to the idea of a guideline, however. Their concerns appear to be around the operationalising of such a guideline. One respondent identified a risk that the guideline figure “becomes the minimum” fee, in effect, that counsel working on public interest litigation will charge organisations.\textsuperscript{716} Another respondent saw this as a leveraging opportunity – the guideline could be set lower if it would serve as a negotiating tool organisations could use at the outset of a long trial or commission.\textsuperscript{717} A second issue is that fees are charged according to seniority – which depends on whether counsel is junior or senior as well as the years worked.\textsuperscript{718} According to respondents, this leads to a situation in which a 10-year junior therefore is considered to be “golden” as she has good experience but is still relatively affordable.\textsuperscript{719} Any guideline would have to be able to accommodate this. Another respondent supported the idea of a tariff, and pointed to particular examples from the United Kingdom.\textsuperscript{720} She agreed with the earlier respondent that the tariff would have to be flexible and accommodate counsel at different levels of seniority.\textsuperscript{721} Yet another respondent agreed that a guideline would only be helpful if there is “some flexibility in the approach”.\textsuperscript{722} An advocate agreed, also adding factors such as the race and gender of the particular counsel, as well as the duration of the matter, to the variables requiring flexibility.\textsuperscript{723} A director agreed that the guideline’s reasonableness would also depend on what advocates can currently charge and what NGOs can reasonably expect donors to provide in respect of a litigating budget.\textsuperscript{724} Another respondent, a director, stressed that funders understand, however, that any fee guideline cannot be mandatory.\textsuperscript{725}

Some individuals advocated more broadly for a fee guideline to be applied to the legal profession as a whole, and not just to the public interest sector. A donor felt that it is not fair to “put too much pressure on the public interest sector to absorb all [legal] costs;”\textsuperscript{726} it is important to ensure “an equality of arms.”\textsuperscript{727} One respondent said that even well-meaning advocates who do a lot of work pro bono for the public interest sector contribute to the issue of fees being pushed up – for example, senior counsel work at a discounted rate within the public interest sector and then “make up the money elsewhere.”\textsuperscript{728} This “elsewhere” is usually

\textsuperscript{714} Ibid.
\textsuperscript{715} Ibid.
\textsuperscript{716} Interview with Respondent LL.
\textsuperscript{717} Interview with Respondent DDD.
\textsuperscript{718} Interview with Respondent LL.
\textsuperscript{719} Ibid.
\textsuperscript{720} Interview with Respondent NN.
\textsuperscript{721} Ibid.
\textsuperscript{722} Interview with Respondent D.
\textsuperscript{723} Interview with Respondent Q.
\textsuperscript{724} Interview with Respondent DDD.
\textsuperscript{725} Interview with Respondent I.
\textsuperscript{726} Interview with Respondent JJ.
\textsuperscript{727} Ibid.
\textsuperscript{728} Interview with Respondent HH.
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in the commercial or government sector, which effectively cross-subsidise public interest litigation.\(^{729}\) In fact, this is how one NGO was able to attract long-term counsel during the Marikana Commission.\(^{730}\) Finally, a private practitioner noted other ways of incentivising \textit{pro bono} work, such as making it tax deductible.\(^{731}\)

**ALTERNATIVE MODELS**

The strict imposition of a cap on fees, or the agreement of a relatively flexible guideline for fees within the sector, however, do not represent the only possible models for managing the expanding costs of private counsel. Several organisations brief counsel on a ‘contingency’ arrangement, while others encourage attorneys with High Court appearance rights to substitute for counsel in certain circumstances. Beyond this, mandatory \textit{pro bono} agreements and joint legal funds also provide alternate models for funding public interest litigation. These alternative models are discussed below.

**Contingency fee arrangements**

Contingency fee arrangements allow for counsel to take on a matter with the understanding that if the client loses, no costs will be recovered, and if she wins, costs will be recovered from the other party. Counsel generally agree that they will only recover the client’s taxed costs allowed by the Taxing Master for counsel’s fees, and will only expect payment once those fees have been collected from the losing party.\(^{732}\) This arrangement therefore involves the implicit acceptance of the taxing tariffs set in terms of Rule 69 referred to above. While such an arrangement appears to be a win-win situation for all involved, the truth of how these arrangements work in practice eclipses some of the benefits.

In order to accept a matter on a contingency basis, counsel must cover his or her capital overheads, and be able and willing to wait for possible cost recovery in one, two or multiple years. This requires counsel to have a reliable cash flow from other work, and therefore may often exclude many junior counsel at an early stage in their career. As Judge Mlambo indicates, advocates entering into contingency fee arrangements need to charge approximately 15% more than their colleagues to be remunerated at the same rate in real terms, taking into account the duration of such matters, the risk of non-recovery, a prime rate of interest in South Africa of 10% per annum.\(^{733}\) Some silks, including one respondent, are able to enter into contingency fee arrangements for almost all of their public interest cases.\(^{734}\) Another advocate also is able to enter into contingency fee arrangements on many of the cases he handles, also

\(^{729}\) Interview with Respondent XX.
\(^{730}\) Interview with Respondent DDD.
\(^{731}\) Interview with Respondent F.
\(^{732}\) Interview with Respondent Q posits this as his view, but otherwise there are no official findings in the interview record that this is a generally agreed upon position amongst counsel.
\(^{733}\) Judge Mlambo, \textit{Advocate} August 2012 p.24.
\(^{734}\) Interview with Respondent H.
facilitated by the newer class action mechanism available in South Africa.\(^{735}\) Not every counsel is so able to enter into such fee arrangements, however, particularly junior counsel.

An advocate respondent, who is also the director of an organisation, stated that contingency fee arrangements are impractical if NGOs are required to pay the advocate following a successful judgment, even though they have not yet recovered the costs from government or private individuals, which often takes a long time.\(^{736}\) One advocate points out that many organisations are bad at recovering costs because they just have “too many pots boiling.”\(^{737}\) Another advocate notes a further concern that if the case settles, the possibility of counsel recovering costs also disappears.\(^{738}\)

Attorneys exercising right of appearance

Attorneys have a limited right of appearance in courts, but many public interest legal services attorneys do not exercise this right. Two litigating NGOs interviewed have a robust practice of requiring their attorneys to routinely exercise their rights of appearance in the High Court, even to argue \textit{amicus} matters.\(^{739}\) One director (who is also an independent advocate) stated that her attorneys were not initially confident to make court appearances, but over time and by observing her in court, they gradually developed these skills. She feels that this opportunity for growth and exposure to court processes also encourages staff retention. One attorney decided to do his pupillage, and the respondent allowed it as a retention strategy, but generally she disfavours retaining in-house counsel because these individuals are more valuable to the organisation as attorneys exercising their right of appearance.\(^{740}\)

In many instances, however, attorneys are performing a lot of the “leg work” required for counsel, and according to one donor, should be compensated for the quasi-counsel work they often perform.\(^{741}\) It may also assist in attracting advocates to matters if attorneys would assume more of a proactive role towards litigation.\(^{742}\) For example, one non-litigating NGO highlighted that it performs a lot of the research for document preparation internally in order

\(^{735}\) Interview with Respondent MM. Professor Klaaren identifies the “relatively narrow ambit” of the South African doctrine of class action as one of the barriers to access to justice. J. Klaaren, “The Cost of Justice,” Briefing Paper for Public Positions Theme Event, 24 March 2014, WiSER, History Workshop & Wits Political Studies Department.  
\(^{736}\) Interview with Respondent P.  
\(^{737}\) Interview with Respondent Q.  
\(^{738}\) Interview with Respondent LL.  
\(^{739}\) Interviews with Respondents GGG.  
\(^{740}\) Ibid. The respondent stated that the in-house advocate will only be able to continue working at the organisation under an exception to the bar council rule, which will allow him to spend three days at the organisation and two days at chambers.  
\(^{741}\) Interview with Respondent G.  
\(^{742}\) Ibid.
to keep counsel fees down.\textsuperscript{743} A director of a non-litigating organisation described a case in which, although counsel and a law firm were retained, his staff did all the work the attorneys would have done, “and then some more.”\textsuperscript{744}

One respondent believes the “culture of the legal profession” serves as an institutional barrier to attorneys exercising this right more frequently.\textsuperscript{745} As an advocate stated, counsel is not needed “to settle everything” – for this adds up in costs.\textsuperscript{746} They feel like attorneys need training, and they would be willing to help with this.\textsuperscript{747} Another respondent agrees that it is essential to have “smart, socially conscious lawyers that can manage pro bono resources, and that can do a lot of schlep work that is necessary to be done in-house.”\textsuperscript{748} He believes that by playing this role, attorneys facilitate the likelihood that advocates will support a matter pro bono or at relatively low cost.\textsuperscript{749} It also has the advantage of rooting risk in the organisation, as opposed to in counsel’s advice.\textsuperscript{750}

Indeed, in respect of the preparatory work before the Khayelitsha Commission, a CBO, who has hired attorneys to serve as researchers, ended up gathering most of the affidavits from community members and even drafted many documents, including the heads of argument.\textsuperscript{751} As one respondent stated, this crossing of boundaries between attorneys and counsel reveals that attorneys in public interest legal services organisations are not paid nearly enough, particularly senior attorneys.\textsuperscript{752} Another consequence of attorneys assuming more of counsel’s role, however, has been positive according to one respondent: it has changed the relationship between the CBO and counsel in an empowering way in that the organisation “has more control over the legal process.”\textsuperscript{753}

Recently the Rules Board for Courts of Law in South Africa released a proposed amendment to Uniform Rule of Court 69, which relates to a tariff of fees for advocates.\textsuperscript{754} It aims to synchronise the tariff of fees for appearances in High Court for attorneys with right of appearance for advocates. The rules also acknowledge that allowing advocates to charge a higher rate for legal work is arbitrary, and aim to ensure that the manner in which hours are calculated is a realistic reflection of the actual time spent in court and not unfairly inflated.\textsuperscript{755}

Others, however, do not believe that attorneys should exercise their rights of appearance. One respondent does not believe attorneys exercising their right of appearance would assist

\textsuperscript{743} Interview with Respondents DD.
\textsuperscript{744} Interview with Respondent N.
\textsuperscript{745} Interview with Respondent V.
\textsuperscript{746} Interview with Respondents FF.
\textsuperscript{747} Ibid.
\textsuperscript{748} Interview with Respondent N.
\textsuperscript{749} Ibid.
\textsuperscript{750} Ibid.
\textsuperscript{751} Interview with Respondent V.
\textsuperscript{752} Interview with Respondent N.
\textsuperscript{753} Interview with Respondent V.
\textsuperscript{754} Department of Justice, Proposed Amendment to Uniform Rule 69: Tariff of Maximum Fees for Advocates on a Party and Party Basis in Certain Civil Matters, 16 October 2014.
\textsuperscript{755} Ibid.
matters.\textsuperscript{756} As they run a law firm it is important for attorneys to perform the obligations that are supposed to, namely to “run practices”.\textsuperscript{757} This, she argues, “allows us to develop a specific set of skills”.\textsuperscript{758} Advocates have a different set of skills, namely doing appearances in court. If attorneys were to do this, it would amount to a disservice to clients. She says that it is difficult to get both of these skills in the same person as the skills set is so markedly different - “there will be compromises”.\textsuperscript{759}

Another respondent sees the value in having attorneys exercise their right of appearance, but described the practical difficulties for them to do so in light of the number of cases they routinely handle.\textsuperscript{760} Moreover, it is not clear from a purely financial point of view that it is cheaper to brief counsel given the amount of time it takes to prepare to litigate.\textsuperscript{761}

Other organisations have a difficult time even retaining in-house attorneys because they are competing with the private sector and can only offer attorneys a highly specialised area of work.\textsuperscript{762} A tension thus emerges between an attorney’s desire for breadth of experience and the critical, albeit narrow, gap for legal services often filled by specialised NGOs.\textsuperscript{763}

Mandatory \textit{pro bono} requirements

Although the South African legal profession has affirmed mandatory minimum requirements for the provision of \textit{pro bono} legal services by most legal practitioners (both attorneys and advocates), these services are unable to adequately provide the level and extent of legal services required by the majority of South Africans. This is, in part, due to the fact that the minimum number of hours that private practitioners are obliged to utilise for the performance of \textit{pro bono} legal services is very low.\textsuperscript{764} There also seems to be a lack of monitoring and enforcement mechanisms to ensure that the legal profession performs these obligations. The majority of \textit{pro bono} work is therefore done on an unregulated and voluntary basis.

In addition, even in instances where \textit{pro bono} units are created in larger law firms, the public interest work that is conducted is often conducted in a largely uncoordinated manner, without sufficient strategic direction. These units also undoubtedly have to navigate potential conflicts of interests on a regular basis and may, as a result, be constrained in the public interest legal services that they do provide. \textit{Pro bono} legal services by private practitioners are therefore unlikely to address the systemic and structural challenges that face the majority of poor communities. Moreover, mandatory \textit{pro bono} for advocates does not go far enough in instilling

\textsuperscript{756} Interview with Respondent D.
\textsuperscript{757} Ibid.
\textsuperscript{758} Ibid.
\textsuperscript{759} Ibid.; also Interview with Respondent S.
\textsuperscript{760} Interview with Respondent MM.
\textsuperscript{761} Interview with Respondent S.
\textsuperscript{762} Interview with Respondent XX.
\textsuperscript{763} Ibid.
\textsuperscript{764} See, for example, L Williams and N Van’t Riet “Access to justice for the poor: The role of the legal profession” Without Prejudice (June 2012) pp. 10-11, where the authors refer to the fact that members of the Northern Cape Law Society are required to perform only 24 hours of \textit{pro bono} work per calendar year to persons or organisations that qualify for such relief.
an ethos of social consciousness. As one respondent stated, she finds many counsel exhibiting a “this is beneath me” attitude towards their pro bono cases.765

At present the various law societies and Bars require a certain amount of hours pro bono per attorney or advocate in a given year.766 One director of a university law clinic has an arrangement with the Bridge Group of Advocates, which commits itself to 20 hours per year doing pro bono work for the clinic, which she describes as “quite a lot” for access to justice work.767 One respondent, an advocate, however, believes that mandatory pro bono is an insufficient means by which to provide greater access to justice because the low requirement – for example, 20 hours per advocate at the Cape Bar - is an “unrealistic” amount of time to be able to effectively handle a pro bono matter.768 Another respondent agrees, stating that value cannot be measured simply by adding up the number of pro bono hours undertaken.769 She says practitioners do the “bare minimum” when accepting a case pro bono, and do not query whether their handling of the matter was strategic or effective.770 Indeed, she believes the only manner in which mandatory pro bono can be effective is to cumulatively aggregate individual pro bono hours, as is the case with the Law Society of the Northern Provinces.771 The director of a pro bono department at a large firm agrees that aggregation is “critical” for strategic litigation.772 An alternate suggestion was made that law societies should require firms to dedicate a percentage of their annual turnover to pro bono instead of an annual number of hours.773

Judge Wallis similarly critiques compulsory pro bono as a solution to the much more complex issue of legal fees. He states that it would probably be more beneficial to take four days of the income tax and VAT paid by advocates and use it to pay for legal services for the poor than to devote it to pro bono work.774 Moreover, the administration costs involved with administering four days of pro bono per advocate would probably exceed the value of the scheme altogether.775

On the other hand, another director of an NGO believes it is important for civil society to launch a campaign to shame commercial law firms into doing pro bono work, and doing it

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765 Interview with Respondent F.
766 See, for example, GUIDELINES IN RELATION TO THE APPOINTMENT OF COUNSEL TO ACT IN FORMA PAUPERIS, PRO BONO AND AS AMICUS CURIAE, adopted by the Cape Bar Council on 22 September 2011 and amended by the Cape Bar Council on 29 August 2013. In 2004, the Cape Bar introduced a formal pro bono scheme in terms of which members of the Cape Bar of more than three years’ standing are required to render a minimum of 20 hours pro bono service each calendar year and to certify that they have done so, or to provide reasons why they have not done so.
767 Interview with Respondent J.
768 Interview with Respondent QQ; also Interview with Respondent ZZ.
769 Interview with Respondent F.
770 Ibid.
771 Ibid.
772 Interview with Respondent M.
773 Interview with Respondent F.
774 Justice Wallis, Advocate April 2012 p.35.
775 Ibid.
properly. He cited an example of a law firm, which had volunteered to do a case *pro bono* for his organisation - and despite acting only as a correspondent, the firm charged the organisation R20 000 for photocopying. In his view, negotiating *pro bono* services should imply that CBOs should not have to pay for costs. Another director of an advocacy organisation spoke about the *pro bono* arrangement it had with a major law firm on a whistleblower case. The firm later abandoned the client, who was then returned to the organisation to pursue her case, though the organisation did not have the right legal resources available to be of assistance.

In response to these views, ProBono.Org, an organisation that coordinates *pro bono* legal services, stated that the head of *pro bono* at the General Council of the Bar has complained that the sector is not generating enough *pro bono* legal work for advocates. ProBono.org is currently trying to push this initiative of generating additional *pro bono* work within the public interest legal sector, whereby NGOs can receive good value for money with advocates undertaking matters *pro bono*, and after the mandatory hours have been reached, continuing the matter on a tariff basis. Such an initiative could provide great intellectual capacity for NGOs and critical training for advocates. Another respondent agrees with this approach, that it should be obligatory for counsel to accept matters *pro bono*, and thereafter on a reduced tariff. A former Constitutional Court judge agrees that although the *pro bono* work of advocates is seen as a contribution to the public interest law sector, more advocates need to be attracted to the cause to create “a social consciousness.” However, as one respondent noted, there should be a mechanism to enforce this obligation through reporting of counsel who fail to undertake their *pro bono* requirement.

Although the South African legal profession has affirmed mandatory minimum requirements for the provision of *pro bono* legal services by most legal practitioners (both attorneys and advocates), these services are unable to adequately provide the level and extent of legal services required by the majority of South Africans.
memorialise the legacy of the late Pius Langa or Arthur Chaskalson. In fact, in 2014 ProBono.org hosted its first annual *pro bono* awards in South Africa. At least one respondent felt, however, that such awards present *pro bono* work as extraordinary acts of charity: “The reality is that private legal practitioners have a regulatory monopoly on legal work. Given how high legal fees are, a competent practitioner has a licence to print money. We should not be falling over ourselves to laud those who give away some of their time for free, when they are overcompensated for the rest of it. That is the least they should do.”

**Opportunities for developing alternative funding methods**

A donor suggests that perhaps legal resources should be concentrated, either in a fund or a law centre, to support organisations involved in policy research and advocacy who periodically need to litigate. The advantage of creating a special vehicle for this purpose is that litigation can thus be understood as “a very specialised instrument that would be used in a particular context, whilst embedding the tool in an institutional framework that recognises this limited utility.” A judge agreed that a centralised pool of accessible resources, similar to the old fund maintained by the Foundation for Human Rights, was necessary to ensure that important constitutional issues are properly litigated. On the bench, she has seen organisations such as Solidarity being able to fund the litigation of multiple constitutional issues through its access to a similarly constituted fund.

On the issue of the creation of a dedicated law centre within all or many organisations, one director feels that organisations should be able to more liberally register as law centres. This would assist the organisation from both a financial and transformative perspective to see cases through from beginning to end. It would also allow organisations engaged in law, advocacy and research to utilise extra-legal capacity effectively to learn and “plug [their] campaigns into every day cases.” Such organisations would strategically pursue cases that would focus their advocacy work, with a focus on “winnable campaigns.” This allows such organisations to guide the “framing” of the legal arguments, and ensure that they reflect their organisational and political goals. Another possibility cited by staff members of a non-litigating organisation is to open up the legal space for legal researchers to frame law

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787 Ibid.
788 See www.probono.org.za.
789 Interview with Respondent DDD.
790 Interview with Respondents A.
791 Ibid.
792 Interview with Respondent AAA.
793 Ibid.
794 Interview with Respondent TT.
795 Ibid.
796 Interview with Respondents DD.
797 Ibid.
798 Ibid.
and policy arguments. They highlighted how valuable this role has been for their organisation in an “every day sense.”

In contrast, another director feels that not every organisation needs a law centre. He believes this furthers the perception that litigation is the most important response. Rather, having in-house counsel or partnership arrangements would be beneficial for these organisations. Unless a dedicated law centre within a CBO has a nuanced approach, it often will litigate just to provide its utility. In this respect, his organisation has been a unique example where donors have not questioned staff about the number of litigation matters they take on. He admits, though, that sometimes funding imperatives militate in favour of pursuing litigation.

The director does feel, however, that it is important that organisations receiving funding for litigation be allowed to negotiate the accumulation of funds within reserves. That way, if one year they have less litigation, they should be able to accumulate reserves and not feel pressure to institute litigation. For organisations without such a litigation fund, another respondent suggested that perhaps it could fall within the mandate of the legal aid board to create a fund for counsel that would be supported by funders. Another respondent agreed, asking rather whether the bar itself could support such a fund, particularly for junior, black female advocates.

Another respondent pointed out a unique problem in which organisations require additional funding for litigation. She motivated for an insurance fund to be established to cover adverse cost orders in unsuccessful cases. Her organisation retained a young black advocate in a rural area for accountability work, and he represented a number of clients in relation to a series of orders that they tried to obtain. However, they lost all the orders and R30 million worth of cost orders were awarded against all of the clients. The authority has essentially used these cost orders to “silence dissent” by issuing all of the orders against this same attorney. The respondent raised the point that it would be useful if donors could address the issue of paying cost orders in failed cases as they do not do so at present. She also noted that an insurance fund would allow people to litigate under these circumstances, particularly in rural contexts.

Separate funds are also needed to support burgeoning litigation from the public interest sector against the private sector. An issue with private firms and private lawyers, as the foregoing respondent pointed out, is that there is often a conflict of interest. In this regard mining is

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799 Ibid.
800 Ibid.
801 Interview with Respondent PP.
802 Ibid.
803 Ibid.
804 Interview with Respondent MM.
805 Interview with Respondents EE.
806 Interview with Respondent C.
807 Ibid.
808 Ibid.
always a massive conflict of interest concern. Moreover, two directors of organisations warned that while it is easier to attract counsel to work pro bono or at a reduced rate on rule of law issues and other issues that have a lot of support from the liberal legal establishment, it is more difficult to attract counsel on other issues of social transformation. The director of the pro bono department at a large law firm confirmed this, saying that his colleagues are more concerned about the rule of law than about social and economic issues, the latter of which they view through a lens of “business development.”

Finally, there is the issue of special funding needed for unpredictable litigation. One of these areas is before ad-hoc commissions of inquiry. As staff members from one organisation stated, the establishment and operations of commissions of inquiry by nature are unpredictable and do not rest squarely within funding cycles. The Marikana Commission of Inquiry, for example, was notoriously expensive. One donor described the tension that exists between wanting to ensure the effectiveness of commissions of inquiry and that their findings are arrived at through rigorous contestation by civil society with their “huge expense.” She suggested the possibility of advocating with government to subsidise indigent citizen participation in commissions of inquiry, since these commissions are ostensibly established in the public interest. This donor did not feel state subsidies would compromise the independence of such commissions of inquiry, citing an example of the public purpose fund in Australia which is established from the interest on client trust accounts and is distributed to civil society for funding criminal defence and public interest advocacy.

Another area for special funding is criminal cases. Currently, there is a climate in South Africa where the poor are being criminalised, where the police are responding abusively to their claims for various rights. For example, in the Angie Peters case that emerged from the Khayelitsha Commission, the legal fees and costs accumulated rapidly.

**Organisational briefing policies**

Many of our respondents found it difficult to separate the issue of fees from the issue of organisational briefing policy in facilitating transformation. The director of legal services at a Chapter 9 institution highlighted the important role his organisation should be playing to “lead” the way in respect of transformation by creating a guideline to brief young, black female counsel. Another director emphasised that the sector itself must challenge patterns of behaviour and has a real opportunity “to drive transformation.”

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809 Ibid.
810 Interviews with Respondents N and P.
811 Interview with Respondent M.
812 Interview with Respondent JJ.
813 Ibid.
814 Ibid.
815 Interview with Respondent G.
816 Interview with Respondent DD.
817 Interview with Respondent Y.
818 Interview with Respondent ZZ.
amount of money the sector invests in counsel fees should result in greater accountability from the Bar. She insists, for example, that the sector should question donors about what their role has been in pushing gender equality in the legal profession. A judge described that when she headed a NGO, she imposed an organisational requirement to maintain a table indicating briefing patterns. She believes that funders should make funding contingent on whether NGOs demonstrate transformational imperatives in their briefing practices.

In 2006, the Cape Bar promulgated a “model policy on fair and equitable briefing patterns”, which acknowledges explicitly the “discriminatory briefing patterns at the Cape Bar”, and for adoption by briefing entities. The policy aims to “build up a pool of experienced black and women candidates for appointment to the bench,” It calls for regular monitoring, review, and internal reporting, but does not specify who is entrusted with these duties of oversight.

Clearly, from the responses given to use during this study, the objectives of this policy have not been realised. Perhaps it is because “briefing entities” have not heeded the call in the policy to

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819 Ibid. Angie Peters is a social justice activist critical of policing in and around Khayelitsha. She was arrested, charged and convicted of murder for her alleged involvement in a vigilante killing. Many believe that the prosecution was an attempt to prevent her from continuing with her work on police accountability in the township.

820 Ibid.

821 Interview with Respondent AAA.

822 Ibid.


824 Ibid. at section 4.

825 Ibid. at section 5(c).
transform their own briefing patterns, which is why this represents an important opportunity for the public interest legal services sector. One respondent stated that the transformative aspect depends in large measure on the NGO itself, and it depends on who is brought in as co-counsel and so on. An advocate agreed that “strict internal policies” are important to reversing “horrible” briefing patterns. Another respondent stated that many organisations already have an internal policy, which may not be written, but is discussed within the organisation. For example, at his organisation, wherever possible, the organisation obtains pro bono services from senior counsel, and pays junior counsel, particularly black junior counsel. He admits, however, that it is more difficult to use this arrangement in Cape Town, which as he describes it, is a “white paradise” for counsel. In contrast, an NGO in Johannesburg has a “sweetheart” relationship with one group of advocates. Another Johannesburg-based organisation has a policy that where possible, black women counsel should be used, but the default position is to fall back on white male counsel. Another director suggests that NGOs have briefing sessions with counsel once or twice a year.

One director of an organisation believes that the sector has yet to internalise contextualised thinking about race and gender in respect of briefing patterns – “lip service is paid, but not much more.” This is true, he believes, because NGOs know that certain white male advocates, who have been extensively involved in public interest litigation, know the dynamics well and will perform. Finally, another policy mentioned in Johannesburg is an arrangement where silks work for free and allow juniors to charge their full rate, referring to a specific silk as an example. The pro bono director of a commercial law firm also stated that her firm tends to bring on silks only for the purpose of dispensing advice or to brainstorm strategy. A judge cautioned, however, that when juniors are briefed, that public interest legal services organisations do a better job of having clear conversations with them at the outset of a case to “lay down the law” and “lay out their vision” for the case. One respondent suggests speaking to the Legal Aid SA about how they brief advocates at the Independent Bar as a way of training young people who otherwise would not receive proper mentoring and exposure to different areas of the law.

826 Interview with Respondent H.
827 Interview with Respondent P.
828 Interview with Respondent PP.
829 Ibid.
830 Interview with Respondents GG.
831 Interview with Respondent E.
832 Interview with Respondent ZZ.
833 Interview with Respondent E.
834 Ibid.
835 Interview with Respondents FF. Respondents GG also agreed with this policy.
836 Interview with Respondent Z.
837 Interview with Respondent OO.
838 Interview with Respondent VV.
On the other hand, one respondent felt that an organisational guideline of this sort may make inclusion and exclusion in briefing patterns more transparent, but may not lead to transformation.\footnote{Interview with Respondent CC.}\footnote{Interview with Respondent LL.}\footnote{Interview with Respondent P.}

An advocate proposed that one option to contribute to transformative briefing policies would be to pay to bring in junior black advocates.\footnote{Ibid.}\footnote{Interview with Respondent JJ.} One director described the fees that advocates have to pay in respect of bar council rules as prohibitive, and thus restricting the ability of junior advocates to work for reduced fees in the sector.\footnote{Ibid.}\footnote{Ibid.}\footnote{Ibid.} She argues that if donors are serious about addressing the transformation issue, they must make sure the increase the litigation budgets of public interest legal services organisations. She says that organisations do not always need the extra capacity but that her organisation would be willing to participate if donors were interested in pushing this developmental project.\footnote{Interview with Respondent P.} She says it is important to remember that “we try to contain costs for donors” – but if we want to have a bigger conversation about how to make sure that the “pool” of advocates is bigger, then we have to think strategically about how to achieve this.\footnote{Ibid.}

Growing a cadre of transformed counsel implies a heavy investment in people. One donor uses a model of funding people and not only projects or litigation because it believes in training young people to contribute to transformation of the legal profession.\footnote{Interview with Respondent JJ.} Properly remunerating organisations for training and supervision, as well as young lawyers’ salaries, is “critical.”\footnote{Ibid.} This model of funding, the donor finds, “improve(s) the capacity of people themselves and in the longer term to organisations as well.”\footnote{Ibid.} This donor, which works in 15 countries, finds the lack of human capacity to be a particularly acute problem in South Africa compared to the rest of the world.\footnote{Ibid.} An attorney agrees with this approach: she thinks that there is an important role to be played by advocates in this regard (and in relation to transformation) where there needs to be a growth of counsel who do public interest work. She mentions that standard arrangements could be, for example, to pay silks less or not at all and pay junior advocates full fees.\footnote{Interview with Respondent D.}\footnote{Interview with Respondent CCC.} One group of advocates has a Junior Fund whereby junior advocates can apply and if there is room on a case for a second or third junior, they can be paid from the fund.\footnote{Ibid.} The fund is capped at R200 per hour for a maximum of four days of work.\footnote{Ibid.} Consistent with this suggestion, a director of a small commercial law firm informed counsel upfront in a high profile case that it did not have money, but his firm was still able to attract both senior and junior counsel to the case, and only paid junior counsel. He suggested the possibility of Legal Aid SA establishing a fund solely to support counsel’s fees.\footnote{Interview with Respondent MM.}
Advocacy opportunities

Our respondents identified two advocacy\(^{852}\) opportunities to influence the cost of legal services and the transformation of the legal profession more generally.

LEGAL PRACTICE ACT 28 OF 2014

One respondent mentioned that problems with not having someone from the public interest legal services sector on the board to be established in terms of the Legal Practice Act, newly enacted on 22 September 2014.\(^{853}\) Donors should convene public interest legal services organisations to devise a collective strategy to make the sector’s voice heard on the Legal Practice Council that will be established under the Act to examine the issue of tariffs and fees. Moreover, the Act’s provisions on mandatory community service provide an opportunity to consider the creation of a long-term strategy within the profession, as a donor points out, to build a pipeline from pupillage to community service for advocates.\(^{854}\) This would have the impact, potentially, of encouraging advocates for social justice. Of course, another respondent points out, community service would only be effective with proper supervision and training, but this is precisely why the sector needs a representative voice on the Legal Practice Council.\(^{855}\)

\(^{852}\) We use the word “advocacy” here to denote opportunities to influence policy, rather than argue in court.
\(^{853}\) Interview with Respondent LL.
\(^{854}\) Interview with Respondents A.
\(^{855}\) Interview with Respondent FFF.
Another respondent, an advocate, spoke about the need for the Legal Practice Council to play a greater legislative role in supervising transformation at the bar. At present, he suggested, it is a *laissez faire* situation because of the lack of regulation. There should be government incentives to change briefing patterns in the legal profession. For example, if a particular company does not brief black counsel, it should not be eligible to receive a government contract.

**GENERAL COUNCIL OF THE BAR**

A donor described how difficult it would be for donors to set a fees guideline, particularly insofar as foreign donors are concerned. The change, she believes, has to come from the public interest legal services sector itself advocating with the General Council of the Bar (GCB) and possibly with receptive senior counsel. One director of an NGO believes it would be a good idea to have strong recommendations to the GCB and to counsel that (1) existing bar council rules must be changed to accommodate in-house counsel at public interest legal services organisations, and (2) in doing public interest legal services, it should be done at a vastly reduced rate, but not capped. Another director agrees that the solution lies in examining a broader range of fee structuring arrangements. For example, Rule 4 of the Local Rules and Practice of the Johannesburg Bar spell out how advocates can practice at law clinics. This bar practice rule, and others, should be examined to determine to what extent fee regulations can be maintained or have to be changed to expand the pool of advocates to conduct public interest litigation. Another respondent agrees that the public interest legal services sector should work through the Bar Council and Law Societies by putting together proposals about how to make the legal system more accessible in concrete ways.

One director felt that in addition to negotiating a sectoral position on legal fees, donors also should push for more advocacy training for attorneys. The bars run the only decent training programmes. It is therefore important for the public interest legal services sector to consider opening negotiations with the General Council of the Bar to expand the possibilities for professional advocacy training.

856 Interview with Respondent QQ.
857 Consultative Workshop (23 June 2014).
858 Ibid.
859 Interview with Respondent P.
860 Johannesburg Consultative Workshop (23 June 2014).
861 Ibid.
862 Ibid.
863 Interview with Respondent FFF.
864 Interview with Respondent DDD.
865 Ibid.
Conclusion

Legal services in South Africa cost far too much. In the absence of state intervention, public interest legal services organisations have adopted a range of strategies to keep their costs down. These include: negotiating fees on an individual bases, placing caps on the amount of money they are prepared to pay for legal services, employing in-house counsel, encouraging attorneys to do more advocacy, establishing flexible fees guidelines and relying on mandatory pro bono work prescribed for private legal practitioners. All of these strategies are already employed by public interest legal services organisations, and donors should support these with appropriately directed funding. A flexible fee guideline, developed between donors and the public interest legal services sector, might also establish a useful bargaining position for public interest legal services organisations to engage with the legal profession.

However, these strategies have been developed to cope with a more general failure on the part of the state, and the legal profession, to develop a consistent and fair approach to the regulation of legal fees, and entrenched practices within legal professions that tend to prevent public interest legal services organisations from developing their own capacity to train and retain in-house capacity. In the struggle to contain the burgeoning cost of legal services, other important considerations bearing on the purchase of legal services, such as
racial transformation, have sometimes been overlooked.

Public interest legal services organisations should carefully consider advocating for a tougher regulatory approach to legal fees, and making much more effort to expand their capacity to train and retain legal practitioners.
Recommendations

section six
In this final section of the report we propose a series of recommendations for the consideration of the RAITH Foundation and the Ford Foundation. These recommendations were developed on the basis of the study findings as the outcome of the research process which included:

- A first round of research in 2013, including interviews with sector stakeholders, to explore the public interest legal services issue and identify questions for research. This phase led to the development of the Terms of Reference for the study.
- Two consultation workshops with grantees, in Johannesburg and Cape Town, in 2014 on the study Terms of Reference and the context of public interest legal services.
- Primary research including interviews and focus groups with 130 people within and connected to the public interest legal services sector over a period of seven months in 2014.
- Secondary research reviewing recent literature in South Africa and internationally.
- Two consultation workshops with grantees, in Johannesburg and Cape Town, in February 2015 on the proposed approach to value and impact and the preliminary recommendations which we proposed for interrogation and debate.
- Ongoing engagement between SERI, RAITH Foundation and Ford Foundation via a project steering committee throughout the project in 2014 and early 2015.

The recommendations attempt to strike a balance between concerns from the sector about donors being too interventionist and views that donors should take the lead, perceptions which often co-existed in the findings. We organise the recommendations according to each of the key research themes.

### A multidimensional approach to value and impact

The objective of the value and impact component of the research was to contribute to a better understanding of the value of strategic legal services in the current South African context. Our key finding concerns the way the sector characterises value and impact: issues rather than cases; a wide range of methods including but not limited to litigation; and diverse sites of impact which include obtaining a positive outcome for clients, expanding democratic space and shifting symbolic and discursive narratives. This led us to conclude with a multidimensional approach to the value and impact of the work being done in the sector. This approach was well received in the workshops: some people commented that it reflected the manner in which they approach their work already; others found it organisationally useful for internal dialogue and strategizing about the work; and the approach was seen as a useful framework for not only assessing value and impact of interventions already made but also for up-front planning.
Public interest legal services organisations tended to confirm the usefulness of a multidimensional approach to characterising the work in our consultations, including the emphasis on issues; the variety of tools or methods being used; and the proposed sites of impact. We propose, therefore, that donors should consider long term support and investment in recognition of a multidimensional approach to impact and to direct support at the development of sustainable organisations in the sector. The organisational focus follows from the emphasis we propose on issues and methods, rather than cases.

A clear and uncontroversial research finding is that community based advice organisations tend to be overlooked and under-funded. The multidimensional approach proposed here reinforces the need for a broad definition of public interest legal services organisations and should encourage donors to take the under-funded community based advice organisations more into account.
Coordination and collaboration

Concerning coordination and collaboration within the sector, the study found that a wide range of collaboration already exists, especially among litigating NGOs. Public interest legal services organisations should continue to grow and develop existing initiatives further and donors should recognise the existing networks of communication and collaboration within the sector. The message from the sector in the workshops reinforced the need for donors to recognise the existing collaborations within the sector; however grantees are clear that the onus for recognition should not be placed on them by, for example, adding to donor reporting requirements.

However, a significant critique also emerged in the research about the relationships of law centres to others in the sector. Community advices offices and some academic organisations advanced this view. An apparent hierarchy, with lawyers at the top, appears to exist. As a result, we propose that more needs to be done to improve coordination and collaboration with community based organisations and relationships with academic researchers.

A sector mapping exercise should be undertaken by donors in collaboration with public interest legal services organisations to better define the roles and inter-relationships of the full range of legal services organisations. This may contribute to better understanding the role of non-litigating organisations and thereby better valuing them. The exercise should assist with
A key finding of the research is that a tougher regulatory approach to fees is required.

Understanding the public interest legal services ‘pipeline’ of issues between community advice offices, CBOs, NGOs and others in the sector.

It should be noted that the critique flowed both ways, with some NGOs reporting concerns about the advice provided by community based advice offices in some instances. Community based paralegals themselves identify a training need. We therefore propose that donors should support community based legal training; especially case-referral systems, training programmes, and the provision of legal supervision. NGOs could play a role in providing to these training needs.

On deeper analysis the coordination and collaboration critique is also linked to a more fundamental problem about access to legal services, especially in urgent or unexpected circumstances. For some of the research organisations in particular, it is clear that the pool of attorneys on which to draw is quite simply limited. It is under these circumstances that relationships can become strained. Increasing capacity in the public interest legal services sector, addressed below, is only part of the solution and a more medium term one at that. As a result we propose that donors should consider a special fund for reactive or urgent litigation that would enable quicker and paid access to attorneys in private practice.

By and large the sector is against a coordination and collaboration requirement that is imposed by donors. However, some donors are in support of improved coordination and collaboration and a more assertive role in ensuring it. The coordination and collaboration issue is complex and although this study has achieved a fairly nuanced view of it, it can only be seen as a contribution. Further discussion and honest reflection may be required to identify what more can be done.

Public interest legal services and the legal profession

Concerning public interest legal services and the legal profession, a key finding of the research is that a tougher regulatory approach to fees is required. One concrete way to achieve this would be for donors to develop flexible fee guidelines in consultation with grantees to address concerns about high legal fees in the sector. Many respondents in the sector support the idea of a guideline and most are opposed to a cap on fees. The fee guideline should be informed by the existing practices of Legal Aid South Africa, the land reform sector and the historical examples cited in this report in section 5 - such as the Defence and Aid Fund. The consultations make it clear that the application of these guidelines should be discretionary.

Another key conclusion concerns expanding sector capacity to train and retain legal practitioners. Earlier we proposed a special litigation fund as a response to insufficient skilled capacity within the public interest legal services sector. In addition to this, and to specifically address growing and retaining capacity in the sector, we propose that donors should consider the provision of funding for:
> Training and developing the advocacy skills of attorneys in the public interest legal services sector.

> Increasing the employment of in-house advocates in those organisations that deem it appropriate.

> Providing pupillage bursaries or sabbaticals.

> Developing human resourcing plans to address internal racial and gender transformation.

Further constraints to training and retaining staff concern perceptions about public interest law centres at the bar, the requirement that NGOs have to pay costly door membership at some of the individual bars for in-house advocates and constraints to training advocates at public interest law centres. As a result we propose that donors and public interest legal service organisations should jointly lobby the general council of the bar, and individual bars, to develop public interest law centres as sites for both training and long term careers and to waive, or at least reduce, door membership fees for in-house advocates in public interest law centres.

Many respondents spoke about the lack of racial transformation in the public interest legal services sector. We propose that public interest legal services organisations should be encouraged to develop and adopt approaches in their briefing patterns that promote racial transformation, where they do not already do so. The development and exposure of junior black counsel should be central to these approaches. Donors and grantees should be willing to
jointly consider the funding implications that arise. The previous recommendation concerning transformation plans applies here too.

Finally, the study identifies the Legal Practices Act as a meaningful opportunity for strategic reform of the legal profession. Donors should provide a platform for grantees to advocate to the bars and the law societies on the following issues:

» Representation from the PILS sector on the Legal Practice Council, as selected through an internal process followed by an appointment by the Minister of Justice;
» Creation of a long-term strategy for mandatory community service;
» Reform of bar council and law society rules inhibiting effective public interest legal services work;
» Development of government incentives to encourage transformation of the legal profession including the development of training programmes for junior counsel and attorneys; and
» A common strategy on counsel fees.
In summary, the recommendations from the study are as follows:

1. To assess value, measure impact and strategically plan interventions donors and public interest legal services organisations should, where they are not already doing so, make use of and further develop the multidimensional approach to value and impact proposed in the study.

2. To strengthen coordination and collaboration and to deepen partnerships within the sector and in relation to civil society there are several interlinked proposals. The first is that donors should, in the short to medium term, undertake a sector mapping exercise in consultation with grantees in order to identify and locate the full range of public interest legal services organisations in South Africa in relation to each other. Another is to increase focus on and support to community based advice organisations with a view to enhancing their role in a ‘pipeline’ of public interest legal services in the medium to long term. One concrete way of doing this is for donors to fund community based legal training and for NGOs to participate as training providers. Another could be for donors to ring-fence funding to NGOs to forge specific partnerships of support to identified CBOs. A final proposal is that NGOs should grow and develop existing coordination and collaboration initiatives and donors should recognise those that already exist. Practically, this could mean extending the public interest law gathering, which currently takes place at Wits University in Johannesburg, to Cape Town.

3. In order to increase access to public interest legal services donors should develop a flexible fees guideline in consultation with grantees in the medium term.

4. To increase capacity in the public interest legal services sector, and to address racial transformation, public interest legal services organisations should develop human resource strategies (where they have not already done so) for training and retaining staff. These strategies could address training and developing the advocacy skills of attorneys in the sector, the employment of in-house counsel on a full-time or mixed model basis and pupillage bursaries and sabbaticals. These strategies should also address the promotion of racial and gender transformation in briefing patterns. Donors should encourage the development of such strategies and support their implementation in the medium term.

5. In order to address the problem of access to legal services in the context of capacity shortfalls, donors should also consider establishing a special litigation fund in the short to medium term for urgent or unforeseen issues that arise in the sector. The fund should be supplementary to existing funding arrangements.

6. In order to address reform in the legal profession, donors and grantees should advocate together to law societies and the bars on the Legal Practices Act. A further issue for a shared advocacy agenda in the medium term is the perception of public interest law centres at the bars. Here, the advocacy issues are to enable public interest law centres to train advocates, to reduce or waive bar and group membership fees for advocates in public interest law centres and to counter perceptions that hinder public interest law centres being sites for long term careers.
List of Respondents

section seven
## List of Respondents

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Institution</th>
<th>Date of Interview</th>
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<tbody>
<tr>
<td>Adila Hassim</td>
<td>Director of Litigation and Advocate</td>
<td>SECTION27 and The Johannesburg Bar</td>
<td>17 September 2014</td>
</tr>
<tr>
<td>Aninka Claassens</td>
<td>Senior Researcher</td>
<td>Centre for Law and Society (CLS)</td>
<td>7 August 2014</td>
</tr>
<tr>
<td>Ann Skelton</td>
<td>Director and Advocate</td>
<td>Centre for Child Law, University of Pretoria</td>
<td>9 December 2014</td>
</tr>
<tr>
<td>Anelie du Plessis</td>
<td>Attorney</td>
<td>ProBono.Org</td>
<td>1 September 2014</td>
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<tr>
<td>Audrey Elster</td>
<td>Director</td>
<td>RAITH Foundation</td>
<td>17 July 2014</td>
</tr>
<tr>
<td>Bonita Meyersfeld</td>
<td>Director and Professor</td>
<td>Centre for Applied Legal Studies (CALS)</td>
<td>5 September 2014</td>
</tr>
<tr>
<td>Brad Brockman</td>
<td>General Secretary</td>
<td>Equal Education</td>
<td>28 August 2014</td>
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<tr>
<td>Brian Kearney-Grieve</td>
<td>Programme Executive</td>
<td>Atlantic Philanthropies, Ireland</td>
<td>17 December 2014</td>
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<tr>
<td>Buhle Lekokotla</td>
<td>Advocate</td>
<td>The Johannesburg Bar</td>
<td>4 September 2014</td>
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<tr>
<td>Catherine Horsfield</td>
<td>Senior Attorney</td>
<td>Centre for Environmental Rights (CER)</td>
<td>8 August 2014</td>
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<tr>
<td>Catherine Albertyn</td>
<td>Professor</td>
<td>University of the Witwatersrand, School of Law</td>
<td>28 August 2014</td>
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<tr>
<td>Chantel Fortuin</td>
<td>Judge</td>
<td>Western Cape High Court</td>
<td>18 November 2014</td>
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<tr>
<td>Charles Abrahams</td>
<td>Attorney</td>
<td>Abrahams and Kiewitz Attorneys</td>
<td>23 September 2014</td>
</tr>
<tr>
<td>Cherith Sanger</td>
<td>Human Rights Defense and Advocacy Unit Manager</td>
<td>Sex Workers Education and Advocacy Taskforce (SWEAT)</td>
<td>18 November 2014</td>
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<tr>
<td>Chris Julius</td>
<td>Clinical Attorney</td>
<td>University of Stellenbosch Legal Aid Clinic</td>
<td>3 December 2014</td>
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<tr>
<td>Craig Oosthuizen</td>
<td>Research Coordinator</td>
<td>Ndifuna Ukwazi (NU)</td>
<td>28 August 2014</td>
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<tr>
<td>David Lewis</td>
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<td>Corruption Watch</td>
<td>20 August 2014</td>
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<td>Dennis Davis</td>
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<td>Dmitri Holtzman</td>
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<td>Dugan Fraser</td>
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<tr>
<td>Dumisa Ntsebeza</td>
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<td>The Johannesburg Bar</td>
<td>19 August 2013</td>
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<td>Edwin Cameron</td>
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<td>Ella Scheepers</td>
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<td>Elroy Paulus</td>
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<td>Erica Emdon</td>
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<td>Gareth Rosenberg</td>
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<td>Gavin Capps</td>
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<td>Society, Work and Development Institute (SWOP), University of the Witwatersrand</td>
<td>11 December 2014</td>
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<tr>
<td>Gerald Kraak</td>
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<td>Gilbert Marcus</td>
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<tr>
<td>Hoodah Abrahams</td>
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<td>Ilona Tip</td>
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<td>Isobel Frye</td>
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<td>Studies in Poverty and Inequality Institute (SPII)</td>
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<tr>
<td>Jackie Dugard</td>
<td>Honorary Senior Researcher and Professor</td>
<td>Socio-Economic Rights Institute of South Africa (SERI) and University of the Witwatersrand, School of Law</td>
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<tr>
<td>Jacob van Garderen</td>
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<td>Jonathan Klaaren</td>
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<td>Kate O’Regan</td>
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<td>Kathy Satchwell</td>
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<td>Lawson Naidoo</td>
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<tr>
<td>Lisa Chamberlain</td>
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<td>Lucrecia Seafield</td>
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<td>Mandisa Shandu</td>
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<td>Marie Huchzermeyer</td>
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<td>Marion Hattingh</td>
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<td>Mathilda Rosslee</td>
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<td>Michal Johnson</td>
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<td>Mkhululi Stubbs</td>
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<td>Moray Hathorn</td>
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<td>Mukelani Dimba</td>
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<td>Nicole Fritz</td>
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<td>Nicolette Naylor</td>
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<td>Nomboniso Maqubela</td>
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<td>Nyoko Muvangua</td>
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<td>Odette Geldenhuys</td>
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<tr>
<td>Pandelis Gregoriou</td>
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<td>Patrick Hundermark</td>
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<tr>
<td>Phillipa Kruger</td>
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<td>Richard Calland</td>
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<td>Roseline Nyman</td>
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<td>Sheldon Magardie</td>
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<td>Steven Friedman</td>
<td>Professor</td>
<td>Centre for the Study of Democracy, University of Johannesburg</td>
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<td>Stuart Wilson</td>
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<td>Toby Fisher</td>
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<td>Vidhu Vedralankar</td>
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<td>Zackie Achmat</td>
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<td>Ndifuna Ukwazi (NU)</td>
<td>17 October 2014</td>
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**Focus groups**

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<th>Number of Participants</th>
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<tr>
<td>1</td>
<td>20 people</td>
<td>Community leaders from four informal settlements</td>
<td>4 September 2014</td>
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<td>2</td>
<td>25 people</td>
<td>Housing and informal trade activists from inner city Johannesburg</td>
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<td>3</td>
<td>7 people</td>
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