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POLICY

DEVELOPING A POLICY FRAMEWORK FOR THE SOUTH AFRICAN SOCIAL SECURITY ADJUDICATION SYSTEM

PREPARED FOR THE DEPARTMENT OF SOCIAL DEVELOPMENT, SOUTH AFRICA

by

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ABBREVIATED INDEX

EXECUTIVE SUMMARY

Social security adjudication in South Africa presently faces a range of challenges which limits the system's ability to ensure access to justice. Difficulties include inaccessibility of adjudication institutions; absence of fair and public procedures; restricted scope of jurisdiction and powers of the institutions; inappropriate institutional framework of institutions; and fragmentation and lack of co-ordination. The Committee of Inquiry into a Comprehensive System of Social Security for South Africa consequently proposed that a uniform adjudication system be established to deal conclusively with all social security claims. Given the current drive on the part of government to introduce a comprehensive social security system, and the need to establish a uniform institutional framework to achieve streamlining and synergies in the social security system, it is necessary to consider a uniform social security adjudication framework, also as far as appeals are concerned.

Based on an analysis of the current public social security adjudication system and the evident lack of access to justice for users of the system, a clear need therefore exists to develop a streamlined social security appeal framework in South Africa. The framework must be sensitive to the prescriptions of the Constitution, aligned with international and regional standards and should utilise existing best practice (both within South Africa and comparatively) as a benchmark for appropriate reform of the current system. It must accordingly be established to realise the right of access to courts (justice) in section 34 of the Constitution, which implies that it must be accessible, independent and impartial, and must facilitate the resolution of disputes in a fair and public hearing. The socio-economic context of applicants/beneficiaries implies that they do not have access to justice. All facets of access must thus be considered and barriers should be eliminated.

Therefore, the social security adjudication system must be accessible to the most marginalised members of society. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, *another independent and impartial tribunal or forum*. The administration of social security, including the decision of a social security tribunal, constitutes administrative action, which means that it must be undertaken lawfully, reasonably and procedurally fairly. This is related to the constitutional imperative of efficient public administration. For purposes of the Promotion of Administrative Justice Act (Act 3 of 2000), recourse to an available independent and impartial tribunal or forum cannot easily be bypassed by approaching a court directly.

Standards that are relevant for the development of an adjudication framework for public social security institutions in South Africa may be found in comparative adjudication institutions (such as the Pensions Fund Adjudicator, Commission for Conciliation, Mediation and Arbitration, Competition Tribunal and National Consumer Tribunal) and procedures already in existence in South Africa. An analysis of these selected adjudication institutions results in various commonalities being identified. For example, the independence of these institutions is generally guaranteed through a variety of mechanisms, including their scope of jurisdiction, functions, remedies and enforcement powers; the appointment and discipline of adjudicators; funding arrangements; human resource and administrative structures; managerial frameworks; governance, oversight and supervision arrangements and their accountability and

reporting requirements. Access to the adjudication institutions by complainants is also facilitated in a variety of ways.

The analysis undertaken reflects the clear trend in South Africa to resolve disputes through structures, such as tribunals and forums, other than courts. Significantly, there is a range of evidence to suggest that the effective functioning of such institutions has been enhanced by the precise manner in which legislation has regulated their existence.

International and regional standards provide important benchmarks for the establishment of the new social security appeals system in South Africa. These standards, if ratified, have to be applied. Even if they are not ratified, they must nevertheless be considered when interpreting the right to access to social security and related rights – aimed at ensuring access to justice. The relevant standards draw a clear distinction between internal reviews (complaints) and external appeal institutions and procedures; suggest the establishment of independent and impartial courts or tribunals; provide for reasonable time limits for reviews (complaints) and appeals; require the guarantee of expeditious (rapid) and simple proceedings; indicate the need to comply with the principles of a fair trial and due process; stipulate the right to representation and legal assistance (legal aid) as standard guarantees; and indicate the importance of effective and enforceable remedies.

Countries with well-established social security appeals systems equally provide an important benchmark for South Africa. In most cases a tribunal-like system, which generally reflects the international standards framework, has been established – in the form of an apex adjudication institution for social security appeals. The bodies so created are invariably characterised by the fact that they are independent institutions, outside the control of government. They have a wide scope of jurisdiction, also in relation to the available remedies and orders they can grant. Furthermore, they ensure access to justice for appellants, in particular through flexible procedures and time periods.

The options for an appropriate social security adjudication framework involve the use of existing courts, establishment of a new dedicated court or the establishment of an independent and impartial tribunal. However, the options of utilising the existing courts or establishing a new dedicated court raise serious questions regarding *accessibility*. Courts are generally less accessible; and their processes are usually formal in nature and costly. Since potential users of the system are poor, injured, ill or unemployed, the social security adjudication system should be as accessible as possible.

The preferred option is to create a uniform, independent and impartial administrative Tribunal. This Tribunal should serve as the new highest level of non-judicial appeal in social security matters, meaning that all appeals against an unsatisfactory benefits-related administrative decision in terms of the UIA / COIDA / ODMWA / RAFA and the SAA should proceed to the Tribunal *before* the High Court is approached (on a limited judicial review basis). These decisions relate to access to social assistance and social insurance benefits, including the granting, refusal, adjustment, reduction, suspension, withdrawal and termination of benefits. The suggested Tribunal deliberately bears the characteristics of a statutorily-established, accessible, inexpensive, flexible, well-resourced, efficient and helpful dispute

resolution forum of record. An eminently-represented consultative institution, to be known as the Tribunal Advisory Council, should hold part of the obligation of monitoring and evaluating the functioning, performance and impact of the Tribunal, critically engage with the Tribunal leadership, provide advice and recommendations on the Tribunal's operations, and make recommendations concerning the removal of the Tribunal President, adjudicators and assessors.

As suggested by the Taylor Committee, the new uniform adjudication system should in principle and incrementally also cover private sector social security institutions and should include in particular the suggested second pillar retirement funds arrangements (i.e. private accredited funds and private voluntary schemes), envisaged as part of the design and roll-out of a comprehensive system of social security for South Africa.

The Tribunal should not be attached to the organisational structure of any government department. It should enjoy a high status as the overarching appeals Tribunal for social security adjudication in South Africa and must have a proper regional presence. The Tribunal will qualify as an "organ of state" and should be listed as a national public entity under Part A of Schedule 3 of the PFMA, which indicates and regulates its financial obligations. The basic values and principles governing public administration (contained in chapter 10 of the Constitution) will apply to the Tribunal.

The high status of the Tribunal informs the choice of its funder. It is suggested that the Tribunal must be financed and provided with initial and ongoing working capital mainly from money appropriated by Parliament. The amount of funding provided should be sufficient and must contribute towards ensuring the creation of an accessible, effective and authoritative uniform social security adjudication system.

A clear legislative mandate and basis is required for the uniform social security appeals adjudication system. This should provide for the establishment of the new Tribunal, and should regulate in particular the Tribunal's institutional, financial, organisational, operational, human resource and reporting frameworks. The dispute resolution framework should also be provided for. While the statutory instrument intended to achieve this could be a separate instrument, ideally the instrument should be integrated/incorporated into, or appropriately related to, a new social security law that provides for the envisaged overarching South African social security institutional framework.

Statutory interventions should also inform the interfacing between the Tribunal and internal social security dispute resolution mechanisms and between the Tribunal and the High Court (for judicial review purposes). In addition, legal provision has to be made for the reform of the existing (internal) social security dispute resolution structures and mechanisms. This is required since these structures and mechanisms do not adequately meet the constitutional requirements of administrative justice and access to social security.

The Tribunal must be financially sustainable, which requires a strategic approach to organisational development; a clear integration between strategic goals and staff values, beliefs and behaviours; and strategic interventions focused clearly on leadership and management of change. An organisational

culture that creates an environment in which employees and members are engaged, challenged and motivated is critical to the Tribunal's success.

Strategic and operational arrangements consist of adjudication processes, process flows and strategic and operational support processes. Adjudication processes comprise the stages in the adjudication of appeals by the Tribunal, from receipt of an application to the lodgement of the Tribunal decision with the High Court for judicial review. Strategic and operational support processes are arrangements which assist the Tribunal in achieving the effective implementation of its core business. These include drafting of Tribunal Rules, procedures and guidelines; provision of human and material capital, monitoring and evaluation; capacity building; Tribunal administration; and management of Tribunal employment relations, litigation, information, governance and interface and information technology.

While M&E (monitoring and evaluation) of the Tribunal is evidently required, this needs to be effected in a manner which is appreciative of its independence. A context-sensitive approach to achieve this requires the establishment of a consultative institutional framework to undertake monitoring and evaluation, make recommendations to the Tribunal and provide advice. This framework, provisionally referred to as the Tribunal Advisory Council, will comprise high-level stakeholder representatives and will constructively engage with the Tribunal leadership, among others on the basis of the key performance indicators contained in the Tribunal President's performance management agreement.

The Tribunal's functioning, performance and impact, as well as stakeholder and user perspectives of the Tribunal should be the subject of monitoring and evaluation. In particular, the establishment of the Tribunal, process flows, operations of the Tribunal, and system output, outcomes and impact need to be evaluated and assessed. Various actors/institutions should bear the responsibility to be engaged in monitoring and evaluation reporting, which should be supported by training and capacity-building interventions, including the appointment of skilled monitoring and evaluation experts.

The communication strategy provides broad guidelines in relation to the communication requirements. It outlines an overall strategy, from a communications perspective, to be followed in the implementation of the new and reformed social security adjudication environment. An overall national plan, together with specific sectoral communication plans for the different role players, must be developed. The communication strategy faces many challenges, including requisite financial resources, the availability of skilled communicators, the inaccessibility of some stakeholders or role players and the communication methods utilised. Effective communication requires integrated communication by the mandated communication institutions.

There are some inherent challenges facing the Tribunal. These include the array of social and economic barriers facing people in the country; the question of political ownership of the Tribunal and other inter-institutional difficulties; and the need for a co-ordinated legislative framework, supported by sufficient funding, coupled with broad stakeholder endorsement and support. The strategies and process followed in establishing the Tribunal should be designed to minimise the adverse effects of these challenges.

Other foreseen risks in the establishment of the Tribunal are of a more detailed nature, and are likely to emerge during the implementation of the Policy. These include difficulties in relation to the legislative context and impact; organisational arrangements; strategic and operational arrangements; the accountability framework and monitoring and evaluation; and matters of communication. Significantly, the detailed description of the manner in which the Tribunal is to be created and its inherent characteristics, as reflected in the Policy, serves to eliminate or mitigate a number of these possible risks.

ABBREVIATIONS

AJTC	Administrative Justice and Tribunals Council (United Kingdom)
CCMA	Commission for Conciliation, Mediation and Arbitration (South Africa)
CCOD	Compensation Commissioner for Occupational Diseases (South Africa)
CMS	Council for Medical Schemes (South Africa)
COID	Compensation Fund for Occupational Injuries and Diseases (South Africa)
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993 (South Africa)
DOH	Department of Health (South Africa)
DOL	Department of Labour (South Africa)
DSD	Department of Social Development (South Africa)
FaHCSIA	Department for Families, Housing, Community Services and Indigenous Affairs (Australia)
FSB	Financial Services Board (South Africa)
GCIS	Government Communication Information Service (South Africa)
HPCSA	Health Professions Council of South Africa
IDTT	Interdepartmental Task Team on Social Security (South Africa)
ILO	International Labour Office/International Labour Organisation
ITSAA	Independent Tribunal for Social Assistance Appeals (South Africa)
LLB	Bachelor of Laws Degree (South Africa)
LRA	Labour Relations Act 66 of 1995 (South Africa)
M&E	Monitoring and Evaluation
MBOD	Medical Bureau for Occupational Diseases (South Africa)
ODMWA	Occupational Diseases in Mines and Works Act 78 of 1973 (South Africa)
PAJA	Promotion of Administrative Justice Act 3 of 2000 (South Africa)
PFA	Pension Funds Adjudicator (South Africa)
PFMA	Public Finance Management Act 1 of 1999 (South Africa)
RAF	Road Accident Fund (South Africa)
RAFA	Road Accident Fund Act 56 of 1996 (South Africa)
SAA	Social Assistance Act 13 of 2004 (South Africa)
SASSA	South African Social Security Agency (South Africa)
SSAA	Social Security Appeal Authority (New Zealand)
SSAT	Social Security Appeal Tribunal (Australia)
Tribunal	Tribunal for Social Security Appeals to be established
UIA	Unemployment Insurance Act 63 of 2001 (South Africa)
UIF	Unemployment Insurance Fund (South Africa)

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PART A

INTRODUCTION: CONTEXT, VISION, MISSION, GUIDING PRINCIPLES AND UNDERLYING VALUES, STRATEGIC GOALS AND OBJECTIVES

Context

South African social security statutes provide for appeal mechanisms. These statutes consist mainly of the Social Assistance Act 13 of 2004; the Unemployment Insurance Act 63 of 2001; the Compensation for Occupational Injuries and Diseases Act 130 of 1993; the Pension Funds Act 24 of 1956; the Medical Schemes Act 131 of 1998; and the Occupational Diseases in Mines and Works Act 78 of 1973.

However, the current system providing for appeals against social security decisions faces many problems. Some of these problems relate to limited access by users of the system; the inappropriateness of the current appeal institutions; the failure to provide for and/or properly distinguish between internal review and external appeals and to provide for a streamlined interfacing between internal review and external appeals; the uncoordinated and fragmented nature of the system; and the absence of a systematic approach in the establishment of appeal bodies.

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There is also a lack of a systematic approach to the regulation of appeals in the South African social security system. While some laws specifically provide for the establishment and functioning of adjudication institutions and mechanisms, other laws leave such issues to the discretion of the relevant Minister. Furthermore, there are a host of matters which come into play from an administrative justice perspective, such as the right to administrative action that is lawful, reasonable and procedurally fair.

One of the primary considerations in the development of an adjudication system is the need to ensure that an institutional separation exists between administrative accountability, review and revision and a wholly-independent, substantive system of appeals. It is, therefore, necessary to separate the accountability of the social security administering institutions, on the one hand, and the appeal institution on the other hand. This will ensure the impartiality of the adjudication process and a proper review/appeal in terms of the standards of adjudication. However, most social security statutes fail to make an appropriate distinction between (internal) reviews and (external) appeal procedures.

In addition, there are also other problems with the current social security adjudication/external appeal system, as is apparent from the narrow and inconsistent jurisdictional scope of the institutions entrusted with the external resolution of relevant disputes; the lengthy period of time taken to adjudicate appeals; inconsistencies in review and appeals provisions in various laws; prescription and time limits for the lodging of appeals; and the lack of independence of some of the existing appeal institutions.

Some social security statutes provide for appeals to the ordinary courts. However, the ordinary courts are not always the appropriate forums to deal with social security appeals. The powers of the ordinary courts to deal with these matters are unsatisfactory as, subject to some exception, the courts only have review powers and no appeal powers and are apparently not specialised enough to deal effectively with social security matters. In addition, access to the courts is limited in particular as far as the indigent are concerned (also due to the absence of legal aid); undue delays are the order of the day; cases are often dealt with on a pure technical and legalistic basis, with little regard to broader fairness considerations; and court proceedings tend to be prohibitively expensive.

It has to be concluded that the current system of social security adjudication in South Africa, including the system of appeals, does not conform to the constitutional requirements pertaining to access to justice and the right to access to social security. This is partly the result of the fact that, with some exception, the social security laws providing for public social security institutions essentially predate the new constitutional era.

It is therefore necessary to establish a dedicated social security appeals framework through a policy framework, supported by legislation. Already in 2002, the Committee of Inquiry into a Comprehensive System of Social Security for South Africa proposed that a uniform adjudication system be established to deal conclusively with all social security claims. Such a system should, according to the Committee, in the first instance, involve an independent internal review or appeal institution. The jurisdiction of such a body should cover all social security claims, whether under the UIA, the RAFA, the COIDA and all the

other benefits (including the Social Assistance Act) emanating from the social security system (including claims falling under the jurisdiction of the Pension Funds Adjudicator). The Committee further recommended that there should be an institutional separation between administrative accountability, review and revision on the one hand and a wholly independent, substantive system of appeals on the other hand. This could involve an independent appeal institution being established.

Government policy foresees, per decision of Cabinet, the creation of a new comprehensive social security system. An integral part of that policy is the development of a uniform, streamlined institutional regime (IDTT *Comprehensive Social Protection: Overview* (2010); DSD *Creating Our Future: Strategic Considerations for a Comprehensive System of Social Security* (2008)). Social security adjudication constitutes a core building block of the suggested institutional edifice. Therefore, the establishment of the new Tribunal should reflect and dovetail with the current high-level drive to create a new comprehensive social security system and a uniform institutional regime. However, as discussed in the section on legislative impact and changes, for reasons related to constitutional compliance, it might be necessary to establish a uniform social security appeals adjudication system before the actual introduction of the (rest of the) new comprehensive system and its institutional framework. In such an event, the adjudication system should be tailored in such a way as to ensure its alignment with the rest of the institutional design. Care should be taken that the adjudication framework applicable to new public schemes, such as the envisaged National Social Security Fund and the National Health Insurance Scheme, is developed with the overall uniform appeals adjudication system in mind.

The new uniform adjudication system should in principle also cover private sector social security institutions (such as occupational retirement schemes and health insurance arrangements). This was recommended by the Taylor Committee and is justified – and required – from the perspective of consistency, simplicity and uniformity. However, this might not be immediately possible, given the extensive fragmentation of the private dimension of the social security adjudication system and the need to involve private sector stakeholders in the redesigning thereof. For these practical reasons, but also given the need to align public social security schemes and their adjudication regimes with the constitutional and international standards framework, a phased approach towards the incremental inclusion of private sector institutions is recommended. In particular, the uniform adjudication system, with emphasis on the appeals service, should be extended to cover the suggested second pillar retirement funds arrangements (i.e. private accredited funds and private voluntary schemes), envisaged as part of the design and roll-out of a comprehensive system of social security for South Africa.

Vision

To establish the most effective social security appeals system for those who are vulnerable and therefore access and rely on social security benefits, and to ensure that they enjoy proper access to justice in accordance with the values of and fundamental rights enshrined in the South African Constitution.

Mission

The mission of the Policy is to develop a uniform social security appeals service for South African public social security institutions that is accessible and independent and to arrange for a fair, expeditious, efficient, less expensive and more flexible process of appeals.

Guiding principles and underlying values

The principles which guide and values which underlie this Policy and the establishment of a uniform social security appeals adjudication framework for South Africa include:

(i) Commitment to constitutional norms, values and prescripts;
(ii) Respect for international and regional standards;
(iii) Accessibility to a fair and equitable adjudication system, in particular for those who are poor and vulnerable;
(iv) Quality service to those who access and rely on social security benefits, in accordance with Batho Pele principles; and
(v) Efficiency, effectiveness and professionalism.

Strategic goals and objectives

The specific objectives of the social security adjudication reform Policy are to:

- Ensure that the new uniform social security appeals adjudication body is accessible and independent, and exercises its appeal jurisdiction in a fair, expeditious, efficient, inexpensive and flexible manner;
- Introduce an authoritative appeal institution and special and earmarked adjudication procedures to deal effectively and conclusively with the resolution of social security disputes in accordance with the right to have access to social security, and the right of access to justice;
- Develop a streamlined social security appeal framework in South Africa, which is sensitive to the prescriptions of the Constitution; is aligned with international and regional standards; and utilises existing best practice, both within South Africa and comparatively, as a benchmark for appropriate reform of the current system;
- Suggest a legislative framework for the establishment of a new social security Tribunal and regulate its institutional, financial, organisational, operational, human resource and reporting frameworks;
- Propose a framework for the institutional separation between administrative accountability, review and revision and a wholly independent, substantive appeal system;
- Propose the establishment of a dedicated Tribunal Advisory Council (or Board) to monitor the Tribunal's performance and impact; provide advice and recommendations on the Tribunal's operations; and make recommendations concerning the removal of the Tribunal President, adjudicators and assessors.

PART B: ACCESS TO JUSTICE AND SOCIAL SECURITY ADJUDICATION

1. The concept of access to justice and its application

1.1 Introduction

Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Therefore, the social security adjudication framework that is established must be in conformity with the right as envisaged in section 34 of the Constitution. The Constitution envisages that the right will be realised only when the various components of the right are fulfilled – in relation to the scope of the concept of access to justice and its implications for social security adjudication.

The current social security adjudication framework requires reform so as to realise the constitutional right of access to courts for social security applicants or beneficiaries. The right to have any dispute that can be resolved by the application of law decided before a court or another independent and impartial tribunal or forum seeks to ensure access to the institutions and mechanisms to resolve disputes. In relation to social security applicants and beneficiaries, it thus ensures access to justice.

1.2 The concept of "access" to "justice"

The concept of access to justice is defined both narrowly and broadly. The narrow (traditional) definition of the concept of "access" to "justice" concerns the situation where state legal systems ensure that every person is able to utilise the legal processes for legal redress irrespective of their social or economic capacity and where every person receives a just and fair treatment within the legal system. The traditional definition of the concept is based on the principle that the legal system should be structured and administered in such a manner that it provides everyone with affordable and timeous access to appropriate institutions and procedures through which to claim and protect their rights.

The traditional definition of the concept of access to justice, which is understood in terms of legal rights, processes and procedure, fails to take into account the impact of the social and economic conditions (such as poverty, literacy, geographical location etc) on the ability of claimants to use the adjudication system. A broad approach to the concept of access to justice goes beyond access to the institutions that resolve disputes and to legal services. The socio-economic condition of claimants (especially poverty) has an inevitable impact on the ability of the poor and the marginalised to utilise the legal system. Therefore, the concept of access to justice is defined in a manner that also considers the number of barriers to the ability to utilise the legal processes to receive a just and fair treatment. Such ability is hampered through various barriers (geographical, time-related, linguistic, cultural, social or legal etc).

It is accepted that, in South Africa in particular, the impact of the socio-economic conditions of claimants and other barriers on their ability to utilise the adjudication system must be considered within the concept of access to justice. In the case of *Mohlomi v Minister of Defence*, the Constitutional Court stated that South Africa is a land where poverty and illiteracy abound and differences of culture and language are pronounced. It is a land where such conditions isolate the people as it excludes them from the mainstream of the law. It is a land where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.

1.3 The scope of the access to justice concept

Access to justice, as expressed in section 34 of the Constitution (the ability of a person to utilise the legal system to receive a just and fair treatment) has three components. In the first instance, access to justice requires that accessibility to the adjudication institutions must be ensured. This means everyone who has a dispute must be able to bring a dispute to a court or tribunal to seek redress. Secondly, access to justice entails that effective dispute resolution institutions and mechanisms must be in place. Effectiveness requires, amongst others, that courts tribunals or forums that resolve disputes must be independent and impartial in the execution of their duties. Finally, in order to ensure access to court, section 34 guarantees the right to have disputes resolved in a fair and public hearing.

Accessibility of adjudication institutions: This requires that law or conduct should not deny the ability and opportunity to access dispute resolution institutions; and that all obstacles in the way thereof must be eliminated. This includes the ability of the users of the adjudication system to be able to have their disputes heard, which encompasses a number of different aspects, such as:

- the ability of users of the institutions to be able to access them
- the fairness with which they are treated;
- the justness of results delivered;
- the speed with which cases are processed;
- the responsiveness of the system to those who use it; and,
- the ability of the adjudication institutions to ensure equal treatment for persons from different backgrounds (including socio-economic backgrounds).

The scope of the concept of access to justice in the Constitution is also interpreted in terms of the interrelated, interdependent and mutually-supporting nature of the rights in the Bill of Rights (the interrelationship of the rights of the Constitution are discussed later in this Policy). In this case, the concept of access to justice means not only access to the courts but includes the (collective) rights to equality, human dignity, just administrative action, and other matters concerning the administration of justice. The relationship between access to justice and other rights in the Constitution (especially socio-economic rights) requires that access to these other constitutional rights must also be included in the notion of access to justice. Access to socio-economic and other rights is thus necessary for the achievement of access to justice. This is because there can be no access to justice in the face of poverty, unemployment and social inequality.

The Constitution guarantees access to justice for everyone. Therefore, the concept access to justice must be interpreted within the context of the Constitution's equality concept. Equality involves both formal and substantive dimensions. Formal equality entails the prohibition of unjustified discrimination, in the sense that all persons must be treated in the same manner, irrespective of their circumstances. Equality of access to courts in the formal sense ensures that all persons should have equal access to effective dispute resolution mechanisms necessary to protect their rights and interests. Formal equality requires sameness of treatment, implying that the adjudication system should be open to everybody in the same manner, irrespective of their circumstance.

However, formal equality is insufficient because it ignores economic and social differences between individuals or groups of persons. Where a concept of formal equality is applied in relation to access to a social security adjudication framework, accessibility to dispute resolution institutions may be denied to some potential litigants due to their social and economic conditions. Formal equality is therefore insufficient to ensure that everyone is able to have their disputes resolved since conditions of poverty, illiteracy and geographical location can influence the ability of a person to be able to utilise the adjudication system to a greater or lesser extent.

Substantive equality aims to promote the attainment of equality, by focusing on outcomes. It requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal. In this case, the economic and social conditions of individuals or groups of persons are taken into account in determining the attainment of equality of access to justice. Adopting a substantive approach to equality in relation to access to justice for social security applicants/beneficiaries is about breaking down the barriers that prevent the poor and indigent from accessing the social security adjudication system. In this case, access to justice therefore means more than the legal right to bring a case before a court. It includes:

- The ability to bring a case before a court (in order for a person to be able to bring his or her case before a court, he or she must have knowledge of the applicable law);
- Some knowledge about what to do in order to achieve access to justice;
- The ability to identify that he or she may be able to obtain a remedy from a court; and
- The necessary skills to be able to initiate the case and present it to the court.

Access to justice for social security claimants thus requires that an appropriate adjudication system needs to be established. Therefore, the necessary legislative, policy, institutional (and other relevant) requirements for the resolution of social security disputes must be put in place. In addition, it also includes ensuring that prospective users of the dispute resolution system are able to access the system. The adjudication system developed should take into account and eliminate possible barriers that may prevent users of the system from utilising the system.

Due to the particularly vulnerable and desperate status of many social security claimants, it may be necessary to develop a special dispute resolution system. The socio-economic context of social security litigants (often the very poorest of our society) warrants the consideration of dispute resolution systems or mechanisms that will be more suitable to their peculiar needs and circumstances. This category of persons therefore requires an expeditious, efficient, affordable and easily accessible dispute resolution system.

Effectiveness of the adjudication institution In order to be able to guarantee access to justice, an adjudication institution must be effective. Effectiveness of the adjudication institution entails that the institution must be able to provide claimants with appropriate redress. The adjudication institution must be able to decide disputes according to the facts and the law, including freedom from improper influence (both internal and external). This means that to be effective, an adjudication institution must be independent and impartial.

The right of access to justice in section 34 requires that a person who has a dispute has the right to have the dispute resolved by a court or where appropriate, another independent and impartial tribunal. Section 34 therefore envisages that there will be circumstances where it may be more appropriate for a tribunal or forum to resolve such disputes. This implies that where it is appropriate to do so, legal disputes can and should be resolved by other tribunals and forums apart from ordinary courts. Judicial authority in the country is vested in the courts. However, the overburdened state of the courts and their inappropriateness to hear certain disputes due to either a lack of specialised knowledge or experience means another independent and impartial tribunal or forum may be preferred in a particular type of dispute. Another adjudication institution could be preferable for a particular type of dispute due to its expertise, the need to consider local circumstances, or the need for the adoption of expeditious, informal and inexpensive procedures.

In addition, access to justice requires tribunals and forums that resolve disputes to be independent and impartial. Some important reasons in support of the establishment of independent and impartial tribunals are the following:

- A tribunal is able to focus its attention on the issues presented by the parties without being distracted by the broader concerns of the relevant government department or other extraneous influences;
- The individual rights and interests in question (in this case the right of access to social security) are so important as to merit the special attention which only a body not distracted by general administrative concerns can give them;
- The desirability of an impartial decision free from the considerations of policy which departmental officials and ministers propagate but which engender so-called ‘departmental bias’; and
- The desirability of insulating the decision concerned from the vicissitudes of parliament and party politics, especially considering the important legal rights and interests are at stake.

The independence of a tribunal or forum has three essential components. These components include:

- Security of tenure for the tribunal or forum officials,
- A basic degree of financial independence for the tribunal or forum; and
- Institutional independence in matters that relate directly to the exercise of the tribunal's or forum's judicial function. Institutional independence implies control over the administrative decisions that bear directly and immediately on the exercise of the tribunal's or forum's judicial functions.

Tribunals or forums must also be impartial. The requirement that an adjudication institution must be impartial means that the institution's decisions should be unbiased. The test is not whether the institution (or person) making the decision is in fact biased, but whether it (or he/she) may be perceived as biased by a reasonable member of the public. The perception on the part of users of the social security system is thus a further consideration supporting the requirements of independence and impartiality. The word 'impartial' therefore connotes an absence of bias, actual or perceived.

Fairness and the requirement of a public hearing: In order to ensure access to justice, the Constitution requires disputes to be decided in a fair public hearing by courts or independent and impartial institutions.

Independence and impartiality

As discussed earlier, the right to a fair trial implies that adjudication institutions are impartial and have judicial independence to decide disputes according to the facts and the law, including freedom from improper internal and external influence.

Other procedural fairness requirements

The resolution of disputes must also be undertaken in a fair manner. Embedded in the right to a fair trial is also the right to procedural equality. This implies that adjudication institutions should therefore ensure that claimants have reasonable opportunities to assert or defend their rights. This implies, among others:

- Reasonable notice of the time when the dispute is to be decided should be given to a person concerned (the notice must be such that it gives the person an adequate and fair opportunity to seek judicial redress. The adjudication institution should also be given the power to condone a failure to comply with any notice requirements.);
- Power to determine the appropriate procedures (where a dispute is resolved by a tribunal or another forum, the procedures do not have to be identical to those of a court of law. This is because the requirements of fairness in terms of section 34 are flexible and depend on different factors. Therefore, a tribunal or forum can be empowered to adopt procedures different from those of a court. This would enable a measure of flexibility to be granted to a tribunal or forum in deciding disputes.);
- Personal appearance and appropriate representation (each party to a dispute should be able to participate in the adjudication of the dispute. Each party should also be guaranteed the right to

engage a lawyer or another qualified representative of their choice. where the right to appear personally and to representation are to be limited, it must be justified (such as if it is to facilitate access to justices by saving costs and time; and in keeping the procedure simple));

- Legal assistance provided by the State (claimants who cannot afford legal assistance should be entitled to be represented by a lawyer appointed by the state);
- Equal access to evidence (each party should also have access to the relevant evidence, including documents, expert opinions, etc);
- Rapid resolution of disputes (disputes must be resolved as expeditiously as possible, especially in social security disputes);
- Inexpensive adjudication procedures (procedures should be free or costs should be kept at the absolute minimum so as to allow even the poor to be able to resolve disputes);
- Duly motivated decisions (in other words the reasoning that led to the decision in dispute must be explained);
- Guarantee of an effective remedy (the adjudication institution should be able to make a decision that is legally enforceable).

Court or tribunal proceedings must also be held in public due to the need for transparency, giving a proper opportunity for the issues to be decided openly and providing for the presentation of evidence. Where proceedings are to be held in private, these would constitute a limitation of section 34 and must be justified in terms of the Constitution.

1.4 Implications of access to justice on social security adjudication

The right of access to justice for social security claimants entails that a person who has a dispute should be able to bring a dispute to a court or tribunal to seek redress. This requires the right not to have his or her access to justice subjected to undue and unjustified interference or restriction. Therefore, social security claimants who are unhappy with a decision should have an unfettered ability to bring a cause of action to a court or another adjudicating forum, and also be able to get appropriate redress.

In the South African context, the prevailing socio-economic conditions of social security applicants or beneficiaries have the impact that many people are simply unable to place their problems effectively before the courts. Therefore, access to justice for social security applicants/beneficiaries entails the consideration of the many facets of access and eliminating all unreasonable restrictions or barriers to the free enjoyment of the right (thereby ensuring accessibility of the adjudication institutions). Possible barriers to access to justice include (but are not limited to) the socio-economic context of litigants such as unemployment and poverty; the inaccessibility of adjudication institutions; restrictive time limit and notice requirements; delay in the resolution of disputes; procedural hurdles; applicants'/beneficiaries' lack of knowledge of their rights (also due to illiteracy); and the absence of dispute resolution alternatives to litigation.

In addition, since access to justice further requires that the adjudication institutions are independent and impartial, the institutions established must not suffer from undue and unjustified interference and/or restriction on their ability to provide appropriate redress for the users. The dispute resolution

mechanisms or procedures must also be established to ensure that social security applicants or beneficiaries are able to get a fair and public hearing.

2. Challenges of access to justice in the South African social security adjudication system

The current South African social security adjudication system faces various challenges. These challenges have the effect of limiting the ability of these institutions to ensure the right of access to justice for social security applicants and beneficiaries. These challenges include the:

- Inaccessibility of adjudication institutions;
- Absence of fair and public procedures;
- Restricted scope of jurisdiction and powers of the institutions;
- Inappropriate institutional framework of institutions; and
- Fragmentation and lack of co-ordination in the various social security laws and adjudication institutions.

2.1 Inaccessibility of social security adjudication institutions

Accessibility of a social security adjudication institution enables users of the institution to be able to reach the institution and to present his or her case. Accessibility of an adjudication institution relates (amongst others) to the geographical or physical location of the institution, the language(s) used during the dispute resolution process and whether provision is made for interpretation, the required documentation and forms, and timeframes for the resolution of disputes.

Currently, some institutions are geographically spread across the Republic. In addition, some laws empower the adjudication institutions to be convened at any determined place within the country. This ensures that adjudication services are closer to the people, who do not have to travel far to access them. However, other adjudication institutions are located in a single, central venue for the whole country. This affects in particular workers who have contracted occupational lung diseases as well as workers who have become unemployed, and their dependants. Both the Certification Committee and the Medical Reviewing Authority (together with the Medical Bureau for Occupational Diseases (MBOD)) established in terms of Occupational Diseases in Mines and Works Act (ODMWA) are located in Johannesburg. Similarly, the National Appeals Committee of the Unemployment Insurance Fund is located in Pretoria.

The accessibility of some of the adjudication institutions is also advanced through various dispute lodgement options. Cases can be lodged by hand, through telefax or by registered mail). Some institutions also provide reasonable time periods for the lodging of a case. As an example, for accessing the Compensation Court in terms of COIDA, the deadline is 180 days after receiving notice of the decision. However, for most institutions, the deadline is 90 days after receiving notice of the decision. In addition to the limited time period for lodging cases, the institutions are also not empowered to condone failure to meet the notice periods.

Where hearings are held, they are invariably conducted in English. However, interpreters are provided where necessary. The parties to a dispute are also notified of the dispute resolution outcome. In addition, the Road Accident Fund provides for the travel and accommodation needs of persons required to attend a hearing.

The documents and forms used for lodging of cases make some of the institutions inaccessible. This is because many of the documents and forms are in English.

Accessibility of justice is hampered through delays in the resolution of disputes. This is because timeframes for finalisation of cases have not been stated in many of the social security laws. It is only the Social Assistance Act that requires the Independent Tribunal for Social Assistance Appeals (ITSAA) to finalise an appeal within 90 days from the date on which the appeal was received. It is commonly known that justice delayed is justice denied.

Generally, litigation in the High Court and sometimes in the Labour Court currently constitutes the available external dispute resolution avenues. As an example, in terms of the Unemployment Insurance Act, objections to compliance orders have to be referred to the Labour Court for the order to be made an order of the Court. Furthermore, due to its inherent review powers, all the decisions of public social security institutions can be reviewed by the High Court. This will be the case except where a law expressly provides otherwise. In addition, COIDA outlines specific issues to be dealt with by High Court on the basis of appeal. Also in terms of COIDA, the Compensation Commissioner can state a case on a question of law to the High Court. ODMWA grants a similar power to the Compensation Commissioner for Occupational Diseases (CCOD) to state a case on a question of law to the High Court on appeal. The Road Accident Fund Act requires a person with a claim against the Fund to bring a claim in any High Court within whose area of jurisdiction the occurrence which caused the injury or death took place. Due to its inherent review powers, all the decisions of public social security institutions are reviewable (on the basis of review) by the High Court (except where expressly provided otherwise). However, the ordinary courts are not always the appropriate forums to deal with social security appeals. The powers of the ordinary courts to deal with these matters are unsatisfactory, as the courts only have review powers and no appeal powers and are apparently not specialised enough to deal effectively with social security matters. In addition, access to the courts is limited in particular as far as the poor are concerned (also due to the cost of legal proceedings and the absence of legal aid; undue delays in deciding disputes and the pure technical and legalistic basis on which cases are often dealt with).

2.2 Procedural issues

The procedures used in resolving disputes have an impact on access to justice for social security applicants or beneficiaries. Adjudication procedures ensure that claimants are able to access an adjudication institution; and that they are able to receive a just and fair treatment in the resolution of the dispute. The adjudication forums adopt a variety of dispute resolution procedures. Some of the adjudication forums convene a hearing, where necessary. Public hearings are convened by the Road Accident Fund Appeals Tribunal for the purpose of considering legal arguments. Where a hearing is convened, the personal attendance of the parties is permitted. A person may also appear personally

before the Medical Reviewing Authority for Occupational Diseases either at the request of the Chairperson of the Reviewing Authority or at the request of a person whose case is being dealt with by the Authority. A person may further be requested to undergo a medical examination. The parties may in addition be represented by a lawyer; or another representative (such as a member, office bearer or official of a registered trade union or employees; or any other person or organisation acting on behalf, of a claimant). State-provided legal aid is mostly not available for social security claimants. This results from the fact that legal aid from Legal Aid South Africa (formerly called Legal Aid Board) is still largely directed at criminal cases. However, Legal Aid South Africa is increasing its assistance in civil cases (where it prioritises matters involving children, women in divorce proceedings, maintenance and domestic violence cases, and unlawful evictions).

However, some forums undertake dispute resolution only by means of documentary evidence. Examples of this include the review by the Medical Reviewing Authority for Occupational Diseases of a disease certification decision of the Certification Committee in terms of ODMWA. The National Appeals Committee of the UIF Board also considers the decision of the Regional Appeals Committees only on the basis of the documents submitted. In addition, the Independent Tribunal for Social Assistance Appeals considers the decisions of the South African Social Security Agency (SASSA) by means of documentary evidence. The same is true of the resolution of appeals by the Road Accident Fund Appeals Tribunal. In these instances, no personal appearance or representation is possible.

Alternative avenues that may provide for speedier, more flexible dispute resolution (such as mediation, conciliation or settlement of a dispute) are not available for most disputes (only in terms of COIDA are the parties to a hearing required to hold a pre-hearing conference).

The parties to a dispute are also notified of the dispute resolution outcome.

2.3 Powers and functions of adjudication institutions

The scope of the powers and functions of social security adjudication institutions has an impact on their effectiveness in ensuring access to justice. Where an adjudication institution is given wide powers and functions, it is able to adjudicate effectively - in that it can adjudicate a wide range of disputes and grant remedies that are both effective and appropriate.

The effectiveness of existing social security adjudication institutions is limited by the scope of powers and functions afforded to them. These institutions can only exercise the powers and functions that are provided in the laws creating them. This has an impact on the scope of remedies that can be provided by these institutions, as the possible remedies are also limited to those provided for in the laws.

The adjudication institutions generally do not have the power and the mechanisms to enforce their judgments. Some of the social security laws state that the decisions of the adjudication bodies are binding on the administrative institutions. In addition, the panel of a presiding officer and assessors in terms of COIDA (the Compensation Court) is considered to have the status of a Magistrate Court. Its decisions can also be enforced in the same way as the decisions of a Magistrates Court. Therefore,

where an adjudication institution is unable to enforce its decision, an applicant or beneficiary may have to apply to a court such as the High Court for relief.

Ideally, social security adjudication institutions should be able to reconsider their original decisions. No power is granted to the adjudication bodies to reconsider their original decision. The only exception however, as provided in terms of COIDA, is that a Presiding Officer may correct the error or defect. Social security claimants will therefore only be able to appeal or apply for a review of the decision in the High Court. However, due to the problems faced by litigants who resort to the High Court, this limits the rights of access to justice for social security applicants and beneficiaries.

2.4 Institutional framework of adjudication institutions

In addition to earlier remarks on independence and impartiality, the realisation of the right of access to justice entails that dispute resolution institutions and mechanisms must be in place and they must be effective. Effectiveness requires that courts, tribunals or forums that resolve disputes must be independent and impartial in the execution of their duties.

The current social security adjudication institutions may not fully meet the standards independence and impartiality, which is required to ensure effectiveness in promoting access to justice. This is because the adjudication forums can be regarded as internal organs of the social security institutions and therefore not independent of these institutions. In the first place, the Ministers or Directors-General of the Departments that are in charge of the social security institutions are mostly responsible for the appointment of members of the adjudication institutions. The only exception is the Road Accident Fund Appeal Tribunal which is established by the Registrar of the Health Professions Council of South Africa (HPCSA). The relevant Ministers or Directors-General also determine the period of appointment and (other) conditions of employment of members, including remuneration. Ministers or Directors-General can further discipline the members and terminate their appointment.

The social security adjudications forums also do not have independent funding through direct appropriations from parliament. They are mostly funded by the relevant Departments as part of the Departments' annual budget allocations. The lack of financial independence of the adjudication institutions is also indicated by the fact that they are not independent accountable institutions in terms of the Public Finance Management Act (PFMA) 1 of 1999.

Government departments are invariably responsible for the management and, governance of these institutions. Oversight and supervision are as a rule undertaken by the Departmental or institutional heads. Subject to some exceptions, the adjudication institutions are also required to report to Departmental or institutional heads. Human resource and administrative support is usually provided by the social security administration institutions themselves.

Most of the laws creating the current social security adjudication institutions do not require that only suitably qualified persons are appointed as adjudicators. This fails to promote the effectiveness of the institutions in ensuring access to justice. Stating minimum academic qualifications and relevant

professional and other experience (including legal qualifications and experience) in the laws would enhance effectiveness. Examples include the Social Assistance Act and the Road Accident Fund Act. The Regulations to the Social Assistance Act states minimum qualifications and experience requirements for the members of the ITSAA panel who are legal practitioners and medical practitioners. The Regulations to the Road Accident Fund Act also state minimum qualifications and experience requirements for the medical practitioners that make up the Appeal Tribunal.

2.5 Fragmentation and lack of co-ordination

The current social security (adjudication) system is fragmented and lacks a co-ordinated approach. This is due to the large number of laws and adjudication institutions. Appeal mechanisms are fragmented across the social security system, at times involving specially-constituted appeal bodies such as the HPCSA or the High Court. There is a lack of consistency in the provisions relating to reviews and appeals in the various laws. While some laws specifically provide for the establishment and functioning of dedicated appeal institutions and mechanisms, other laws leave such issues to the discretion of the relevant Minister. Due to the seriousness of the issues at stake, it is inappropriate to establish an appeal tribunal purely through Ministerial or Registrar direction.

As the Committee of Inquiry into a Comprehensive Social Security System for South Africa observed in the past, there is thus a need to establish a uniform adjudication system to deal conclusively with all social security claims. Such a dedicated appeals institution will provide a faster, less expensive and more informal process of appeals. This calls for the introduction of special and earmarked adjudication procedures and institutions, in order to deal effectively and conclusively with rights to social security. The system should, in the first instance, involve internal reviews and an independent appeal institution. The appeal framework could involve a tribunal or a court (which could be a specialised court) which has the power to finally adjudicate all social security matters. This will ensure that there is an institutional separation between administrative accountability, review and revision and a wholly independent, substantive system of adjudication.

3. Constitutional access to justice requirements

3.1 Introduction: the supremacy of the Constitution

The Constitution is the supreme law of South Africa. Any law or conduct which is inconsistent with it is invalid and the obligations imposed by the Constitution must be fulfilled. The Constitution was adopted to heal the divisions of the past and in order to establish a society based on democratic values, social justice and fundamental human rights. It is the specific aim of the Constitution to improve the quality of life of all citizens and to free the potential of each person.

The Bill of Rights embodies the rights of all people in the county and affirms the democratic values of human dignity, equality, freedom, supremacy of the Constitution and the rule of law. The state must respect, protect, promote and fulfil the rights contained in the Bill of Rights. The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

As a result, a new social security adjudication system in South Africa must be:

- aligned with constitutional values;
- appreciative of the supremacy of the Constitution; and
- consistent with the rights contained in the Bill of Rights.

A new social security adjudication system should rectify existing deficiencies and must be fully appreciative of the manner in which different constitutional rights intersect and relate to one another.

3.2 The inter-relationship of the various constitutional rights involved

Human rights in South Africa are inter-related and indivisible. The Constitutional Court has stated that the concept of "inter-related" human rights has "immense human and practical significance in a society founded on human dignity, equality and freedom". For example, there can be no doubt that human dignity, freedom and equality are denied to those who have no food, clothing or shelter. The Constitution recognises that the rights contained in the Bill of Rights must be mutually supporting. The state should, as a result, give effect to its obligations to respect, protect, promote and fulfil human rights in a holistic manner.

Everyone has the right to have access to social security. People who are unable to support themselves and their dependants enjoy the right to have access to appropriate social assistance. The *accessibility* of social security adjudication systems is particularly important, given that the people in the country most likely to require proper enforcement of this right are often the most marginalised members of society. For these people, enjoying meaningful access to social security, including sufficient access to a court or tribunal in cases of a dispute, would serve to enhance their experience of justice. A properly constructed, carefully implemented social security adjudication system would also have the benefit of enhancing the dignity of the millions of people reliant on social security for their survival and well-being. Realisation of socio-economic rights, including the right to have access to social security, also advances racial and gender equality and contributes to the evolution of a society in which people are equally able to achieve their full potential.

In terms of section 34 of the Constitution, "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, *another independent and impartial tribunal or forum*". This right is foundational to the stability of an orderly society. Proper access to courts, or another independent and impartial tribunal or forum, ensures the existence of peaceful, regulated and institutionalised mechanisms to resolve disputes, without any need for people to resort to self help (in terms of which people are feel compelled to take the law into their own hands because they believe that the system is unable to provide them with just solutions to their problems). The right is of cardinal importance in the context of the rule of law and the principle against self help.

As indicated in the previous section, the concept of "access to justice", in addition to ensuring affordable and timeous access to appropriate adjudication institutions and procedures, may be defined broadly. This ensures that the socio-economic context in the country, including financial and geographic barriers, is taken into account when considering the concept of access to justice. Such factors should, as a result, inform the creation of a new adjudication body for social security.

It is clear that a newly created system which entrusts social security adjudication to, for example, specially constituted (independent and impartial) tribunals is permissible. It will, as a rule, not be possible to circumvent this arrangement by directly approaching a court for relief.

Also, unlike section 27 of the Constitution, which contains an internal limitation to the right to have access to social security, there is no reference to the state only having to take reasonable measures within its available resources to achieve "progressive realisation" of the right to access courts or tribunals. It is, however, true that all rights in the Bill of Rights may be limited by a law to the extent that the limitation is reasonable and justifiable in South African society. This implies that access to social security should be immediately realisable, but subject to any reasonable and justifiable limitation. There is, as a result, reasonable scope for the state to plan and prepare for the introduction of a new social security adjudication institution in South Africa, without acting over-hastily. For example, it is reasonable to limit a person's right to access a new social security adjudication institution if an unreasonably long period of time has been taken to appeal against a decision of a social security body. It is, nevertheless, important to consider the socio-economic context of social security appellants in determining matters such as reasonable time frames.

Section 33 of the Constitution, dealing with just administrative action, also makes reference to adjudication via an independent and impartial tribunal.

3.3 Just administrative action and principles governing public administration

The recommended option proposes a synchronised system of "administrative appeal" to a newly constituted tribunal, followed by the opportunity for (limited) "judicial review" to the High Court. In this way, the new system should successfully be able to supervise multiple aspects of any social security decision taken. Firstly, the proposed tribunal is viewed as an "administrative appeals body", empowered to hear complaints against certain decisions taken by public social security institutions in terms of underlying social security legislation. As an administrative appeals body, the tribunal would be able to hear the "merits" of the case which is being appealed (including matters such as the facts of the case, the reasons why it is believed that an administrator made the incorrect decision and arguments for the relief sought). Secondly, retaining the usual upper court power of (limited) judicial review is important for testing that the tribunal conducts its own functions lawfully, reasonably and procedurally fairly (irrespective of whether or not the tribunal arrived at the "correct" decision, which is a merit matter), failing which the tribunal's decision might be overturned.

Decisions by public institutions, including government decisions which adversely affect a person's rights, generally constitute "administrative action". The administration of social security is considered to be administrative action and the decision of a newly created social security tribunal would also amount to administrative action. Everyone has the right, in terms of section 33(1) of the Constitution, to administrative action that is just, which means that this action must be lawful, reasonable and procedurally fair, and that written reasons should be given when a decision is taken. The Constitution promised the enactment of national legislation which would provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal. The Promotion of Administrative Justice Act (PAJA) confirms that any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

Providing for the right to appeal to an administrative appeals body (such as a tribunal or forum) against administrative decisions taken by a public social security institution would provide an important safeguard against unsatisfactory administrative decisions. This would also enhance the sense of justice likely to be experienced by social security applicants and beneficiaries. Administrative appeal bodies should be well placed to make appropriate, administratively just decisions. As indicated above, dissatisfied appellants would, in addition to having the merits of their matter considered on appeal to a tribunal, be able to review that tribunal's decision, on a limited basis, by way of an application to the High Court.

The option of establishing an independent and impartial tribunal to consider administrative action on the basis of an appeal must also be linked to the constitutional imperative of efficient public administration. PAJA was enacted specifically to promote an efficient administration and good governance, and to create a culture of accountability, openness and transparency in the public administration, in the exercise of a public power or in the performance of a public function. These principles must guide the creation of a new social security adjudication system for South Africa. Chapter 10 of the Constitution supports this. It demands an efficient, economic and effective use of resources; impartial, fair, equitable and unbiased provision of services; responding to people's needs; and the fostering of transparency through the provision of timely, accessible and accurate information to the public. These principles apply to organs of state which may be responsible for social security adjudication, such as a newly created social security tribunal or forum.

3.4 The nature and consequences of social security adjudication through a tribunal

Decisions of a newly created tribunal (or similar forum) for social security appeals are likely to be considered to be *administrative decisions of a quasi-judicial nature*. This has the important consequence that the procedure expected of such a tribunal or forum is more informal and more flexible than that of courts. These decisions will also be considered to be "administrative action" and must themselves meet the administrative justice standards of lawfulness, reasonableness and procedural fairness.

A newly constituted social security adjudication body, such as an administrative tribunal, would fall outside of the definition of the "judicial system", as defined in section 166 of the Constitution, and should be classified as a national public entity in terms of the Public Finance Management Act (PFMA).

The PFMA regulates financial management and financial accountability of sub-components of national government. It defines a "national public entity" to include an entity which is established in terms of national legislation, is accountable to Parliament and is fully or partially funded from the National Revenue Fund. For example, national public entities listed in Part A of Schedule 3 of the PFMA include the CCMA, the Competition Tribunal and the National Consumer Tribunal. A national public entity would not be considered to be an organisational component of a national department. Funding could be obtained via the National Revenue Fund and Parliament could ensure proper accountability.

A further consequence is that the principles contained in PAJA for the judicial review of administrative action would apply to the decisions of such a newly constituted tribunal or forum, unless special legislation creating such a body determined that different principles should be applicable. The result is that the decisions of a newly created tribunal or forum (other than a court) would normally remain subject to judicial review by a court of law (which has the status of a high court). This has important implications for preventing an appellant from circumventing a newly created tribunal and approaching the High Court immediately once he or she is dissatisfied with a social security-related decision. This should also assist in ensuring that social security adjudication is properly streamlined. A properly constructed social security adjudication system will, in sum, comprise a full appeal to a newly created tribunal or forum, followed by limited judicial review to the High Court.

3.5 Administrative tribunals, access to courts and judicial review

The establishment of recent tribunals such as the Competition Tribunal and the National Consumer Tribunal demonstrates a significant trend towards issue-specific and dedicated dispute resolution in South Africa through avenues other than the courts. Creating sufficiently specialised administrative bodies to deal with administrative appeals is clearly permissible. This has the added benefit of allowing legislation to purpose-build the characteristics of such a body to enable it to conduct its functions more effectively than other institutions (such as the courts). For example, administrative appeal bodies are usually quicker and less expensive than courts of law, in addition to having specialist expertise in the area in question. The courts, nevertheless, retain the important role of ensuring that the decisions of bodies such as these administrative appeals tribunals meet the constitutional standards of lawfulness, reasonableness and procedural fairness contained in section 33 of the Constitution.

This role may best be performed through (limited) judicial review of the decisions of such bodies by a court of law. A newly created tribunal for social security adjudication would, for example, not have the status of the High Court or form part of the judicial arm, because it is an administrative "tribunal". Carefully crafting the statute which creates a new tribunal or forum for social security appeals could minimise the intervention of the High Court (or similar court). This may contribute to achievement of the ideal situation of meaningful access to justice in terms of which social security disputes are resolved quickly, cheaply and with the minimum of legal formality, without compromising the quality of the adjudicative process and decision-making. This does not imply that the inherent review power of the High Court (or a similar court) should be removed.

As discussed above, it is crucial that such a tribunal is in fact independent and impartial and appropriately constructed to resolve disputes by the application of law in a fair public hearing. The independence and impartiality of the social security adjudication system being created is significant for a number of reasons, including the perception that will be created amongst the users of the system. Spreading the control / supervising function over the tribunal or forum which hears social security appeals among different entities beyond the control of government is one method of heightening the perception and reality of independence and impartiality (for example, by giving Parliament certain powers of oversight and involving the Auditor-General in order to ensure that good financial practices are followed). Another method of increasing the independence and impartiality of the system is to ensure that the tribunal or forum is created in a way which highlights that it functions as a body of high status, just as recently created tribunals such as the Competition Tribunal and the National Consumer Tribunal have been established in a manner which enhances their status in the country.

The consequence of the above is that a new tribunal or forum would be sufficiently capacitated, in matters such as human resources, administrative support, staffing arrangements and qualifications of its leadership, in order to be able to meet the criteria for listing as a national public entity of the PFMA. It should be sufficiently independent from the control of the state and should be able to fulfil its mandate with the assistance of independent funding. If this is the case, such a body would fall within the understanding of an "independent and impartial tribunal or forum" which, according to section 34 of the Constitution, may serve as a valid alternative to accessing *courts*.. Excluding the jurisdiction of the High Court to hear the merits of a matter is much less likely in cases where the body making an administrative appeals decision is not adequately independent or separate from the state administration.

As indicated above, recourse to an available administrative appeals body may not easily be bypassed. Importantly, this avenue will be considered to be an "internal" or "domestic" remedy for purposes of PAJA. The implication is that an appellant must, as a rule, use the appeals tribunal / forum prior to approaching the court for judicial review of that decision. Because the judicial review power of the courts would be limited, only grossly unreasonable tribunal / forum decisions are likely to be overturned by the reviewing court. This will ensure that not all unsuccessful appellants proceed, as a norm, to court by way of an application for judicial review., As the decisions of an administrative appeals body will themselves be subjected to (limited) court review in terms of PAJA, a good measure of discretion may be afforded to these bodies in the exercise of their functions and in the procedures chosen for the fulfilment of their role.

3.6 Constitutional perspectives on the enforcement of rights, including legal constraints

A newly created administrative appeals tribunal or forum should enjoy the power to join affected parties to any matter before it. The powers of such a body to decide social-security related disputes and the precise disputes which may be dealt with by such a body are to be determined by legislation. It may, for example, be too much to expect an administrative tribunal or forum to be capacitated to hear class action cases. In general, and based upon comparative examples and the international standards framework, only benefit-related claims brought by the range of social security claimants should be

adjudicated by the new tribunal or forum. The suggested boundaries in this regard are contained in the section dealing with the so-called "preferred option".

The High Court (or a court of equivalent status) will, in exceptional cases or where a specially created tribunal or forum has no jurisdiction in a matter, retain the power to assist social security applicants, beneficiaries or dependants of beneficiaries who approach the court directly. There is good reason for allowing the High Court to retain its inherent jurisdiction to assist people who approach the court directly for matters other than ordinary benefit-related social security appeals against the decision of a public social security institution. For example, class actions, constitutional matters and urgent matters might be of the nature that requires prompt and direct High Court access. Section 38 of the Constitution, for example, allows a wide range of persons, including anyone acting in the public interest, to approach a competent *court* for relief.

The tribunal should have wide appeal powers, including the ability to confirm, vary, set aside or replace a social security decision on appeal. Powers of wide appeal involve a complete reconsideration of the merits of a matter, implying great discretion in relation to matters such as procedure, the hearing of evidence, as well as the broad range of available remedies.

A further constitutional issue relates to the enforcement of rights. The decisions of a new tribunal or forum must be enforceable easily and cost-effectively. This will enhance the effectiveness of the new tribunal or forum and ensure that access to justice is not unnecessarily delayed.

4. Access to justice standards in key comparative adjudication models in South Africa

Standards that are relevant for the development of an adjudication framework for public social security institutions in South Africa may be found in comparative adjudication institutions and procedures already in existence in South Africa. Some South African adjudication institutions, such as the Pension Funds Adjudicator (PFA), the Council for Medical Schemes (CMS) and the Commission for Conciliation, Mediation and Arbitration (CCMA), provide good comparators because of their linkages with social security (and labour law) matters. Others, such as the Tax Board, the Special Tax Court and the Financial Service Board (FSB) Appeal Board, are relevant because of their well-established nature and the long duration of their operation. Finally, the Competition Tribunal and the National Consumer Tribunal provide important examples of newly-established avenues for attending to appeals and / or reviews of decisions of administrative institutions created by statute. Viewed together, such bodies provide a possible benchmark for the comparison of public social security adjudication institutions and procedures.

4.1 Accessibility of adjudication institutions

The accessibility of a new social security adjudication institution is likely to be crucial for its ultimate success. As discussed previously, an accessible system would be one which enabled its users to present their cases with very little difficulty. Accessibility includes reference to matters such as the geographic / physical location of the adjudication institution, the language(s) utilised during proceedings, the user-

friendly nature of the prescribed documents and forms and the reasonableness of timeframes for lodging disputes and for the resolution of disputes.

Geographical / physical location: Access to comparative adjudication institutions by complainants in South Africa has been facilitated in various ways. The CCMA, for example, has offices in all the provinces (with more than one office in some provinces). Other institutions, such as the FSB Appeal Board, convene in as many places as is necessary. In some instances, proper geographical access to institutions is not always sufficiently ensured. Certain institutions, such as the Pension Funds Adjudicator, the Competition Commission and Tribunal and the National Consumer Tribunal, only rely upon a single, centrally-located presence for the fulfilment of their functions.

Language, documentation and forms: Comparative adjudication institutions in South Africa generally do well to ensure that interpretation services are made available during tribunal processes. For example, bodies such as the Competition Tribunal and the CCMA ensure proper participation of non-English speakers during processes due to the extensive availability of skilled interpreters. Although forms and other documentation are often available only in English (see, for example, the National Consumer Tribunal), support staff (for example, at regional offices of the CCMA) are usually able to assist speakers of all other languages commonly spoken in the region to complete the formalities.

In the case of the FSB Appeal Board, no new information is permitted, which means that the appeal decision is made on the same information that was available to the underlying decision-maker. An application may, however, be brought for new documentation, oral evidence and other information to be introduced. In the case of the CCMA, an arbitration hearing is considered to be a completely new hearing, and parties are generally free to lead any relevant evidence in support of their cases.

Claim lodgement time periods and prescription: An expeditious dispute resolution process (from the time that a claim is lodged through to notification of a tribunal or forum decision on appeal) serves to enhance the sense of justice likely to be experienced by all people who need to access available social security benefits. The speed of the process should not, however, threaten the ability of people to lodge their claims, particularly when considering that a number of people might not be aware of their social security-related rights, might be poorly advised (if they are advised at all) or might find it physically challenging to access the necessary institutions in order to lodge their claims. As a result, the stipulated claims lodgement time periods and the period of prescription must be reasonable and should properly consider the hardships likely to be suffered by people seeking to access available remedies. These time periods should not be unnecessarily strict or inflexible, as this is likely to result in the denial of access to justice for those in need.

South African comparative adjudication institutions vary with respect to the stipulated claim lodgement time periods and periods of prescription. A period of 30 days is utilised by the CCMA, FSB Appeal Board and the Tax Court. In the case of the CCMA and the Tax Court, it is significant that late referrals may be condoned once good cause has been shown for a delay. An applicant who misses the stipulated 30 day period for lodging a dispute with the CCMA, for example, would fill out a simple “Application for

Condonation" form, explaining the period of the delay, the reasons for the delay, the prospects of success in the matter and any prejudice likely to be caused to the other party. The other (employer) party is given a chance to respond to this application, after which a commissioner makes a finding as to whether or not the late referral should be condoned.

Dispute resolution timeframes: Reasonable dispute resolution timeframes should encourage adjudicators to attend to matters as expeditiously as possible, without compromising the veracity of the adjudication process itself. In the context of endeavours to enhance access to justice, unnecessary delays may well lead to the denial of justice. Dispute resolution timeframes are not always stipulated when it comes to the comparative key adjudication models in South Africa. The CCMA processes, by contrast, are tailored towards ensuring that dispute resolution occurs fairly and quickly, and with the minimum of legal formalities.

External dispute resolution avenues: The scope and nature of external dispute resolution avenues vary, depending upon the attributes of the adjudication body itself.

4.2 Procedural issues

As explained earlier, the procedures used in resolving disputes have a material impact on access to justice for social security applicants or beneficiaries. Procedurally fair adjudication procedures, for example, ensure that claimants are able to access an available adjudication institution and that they are able to receive fair and just treatment when it comes to having their disputes resolved. The right of personal appearance and effective representation opportunities also contributes towards a fair procedure. Allowing for a measure of flexibility in the process, for example by creating viable alternative dispute resolution avenues, may also contribute to this end. Finally, a key component of procedural fairness is proper notification of the outcome of decisions taken by adjudication institutions, including the manner in which decisions are communicated and the time-frame within which a decision is reached. These matters are considered in further detail below, with specific reference to comparative adjudication institutions in South Africa.

Adjudication procedures: Institutions are generally empowered to determine their own adjudication procedures, which has resulted in the adoption of flexible, tailor-made processes. The institutions are also permitted to determine the place and time of a hearing. Such provisions make it possible for the adjudication institutions to be supple in the manner in which they approach disputes, which enhances effectiveness and accessibility.

Appearance and representation (including legal aid): The accessibility of the various institutions considered is facilitated by allowing non-individual claimants (for example, trade unions) to bring disputes in some cases. Personal appearance of parties to a dispute and other interested parties is allowed in most cases. Legal representation is permitted before the Competition Tribunal, Competition Appeal Court and the FSB Appeal Board. Parties before the CCMA are entitled to be represented by, for example, fellow employees or trade union representatives. Legal representation is also permitted, although parties who seek legal representation for ordinary misconduct or incapacity cases need to

satisfy a commissioner that legal representation is warranted, when considering factors such as the complexity of the matter and the comparative ability of the parties to present their cases. None of the statutes regulate the provision of free legal representation, which, in the absence of available legal aid, implies that it is generally accepted that parties have to pay for their legal representation.

Alternative dispute resolution avenues: The various enabling statutes provide for comparative adjudication institutions to implement multiple dispute resolution procedures (including alternative dispute resolution mechanisms, in some cases). As an example, a CCMA commissioner must generally commence with conciliation before a dispute is arbitrated by the CCMA or adjudicated by the Labour Court. Depending upon the nature of the dispute, a CCMA commissioner has the discretion to conduct the process in a manner which is likely to result in the dispute being resolved fairly and expeditiously. This includes mediating the dispute; conducting a fact-finding exercise; and making a recommendation to the parties, which can be in the form of an advisory arbitration award. The PFA has the power to either investigate a complaint referred to it, or to require a complainant to first conciliate the dispute.

Notification of decisions: Decisions are made in writing, are signed and are usually in English. Legislation ensures that decisions are disseminated to the affected parties. For example, adjudication institutions usually notify affected parties of a decision in a form and manner which the parties themselves have chosen on their referral form, such as registered post or facsimile. In the case of the Competition Tribunal, a website is used as a database of decisions.

4.3 Powers and functions of adjudication institutions

Comparative adjudication institutions have been created by legislation, which has generally gone to great lengths to establishing tailor-made institutions which are capacitated to function effectively in their own areas. This effectiveness has been facilitated by granting adjudication institutions jurisdiction over a wide range of matters. Allowing adjudicators to choose from a variety of possible orders and remedies and granting them the power and flexibility to control the process in the manner in which they deem appropriate (subject to certain guidelines) has also contributed to the success of the process. The proper enforcement of these powers and functions is crucial for the legitimacy of the established system. Adjudication institutions should, ideally, be able to reconsider their own decisions in order to prevent unnecessary recourse to the courts.

Scope of jurisdiction: Some of the South African comparative adjudication institutions have a fairly wide scope of jurisdiction. Jurisdiction is, however, circumscribed by statute. In general, a wide scope of persons can bring disputes to the institutions, which can deal with an extensive range of matters. For example, the parties that can make an application to the National Consumer Tribunal include consumers, credit providers, credit bureaux, debt counsellors and the National Credit Regulator.

Adjudication powers and functions: The institutions enjoy extensive powers, such as the power to subpoena persons. The scope of functions performed by these institutions is also fairly wide. Terms such as “any matter in the Act” ensure a wide interpretation is afforded to adjudication powers and functions.

Scope of remedies: Institutions are understood to be capacitated to provide a wide range of remedies, including, in some instances, making an order which any court of law may make; providing interim relief and making cost orders.

Enforceability of decision: The effectiveness of adjudication institutions is enhanced by provisions which empower institutions that are not courts of law to enforce their decisions. The decisions of such institutions are often deemed to be the judgment of a court, and are then enforced as such.

Reconsideration of decision: There is no uniformity in this regard. Bodies such as the Council for Medical Schemes and the Competition Tribunal make no provision for their own reconsideration of a decision. In the case of the CCMA, a decision may be varied or rescinded by the Commission, for example, in the case of an obvious material error having been made.

4.4 Institutional framework of institutions/forums

As discussed previously, proper access to justice demands not only that dispute resolution institutions and mechanisms must be in place, but also that they are established in a manner which allows them to function effectively. For example, the body responsible for the appointment of adjudicators, as well as their conditions of service and qualifications, may impact upon the status afforded to adjudicators, which could impact upon the manner in which the adjudication institution is perceived by the users of the system. The institutions' / forums' source of funding is significant, due to its close relationship with the attribute of independence. Independence is also relevant with respect to the chosen organisational structure, human resources and managerial framework, with institutions that are able to choose their own internal structures and frameworks generally being able to demonstrate sufficient independence in other areas as well. Vesting the governance and oversight of adjudication institutions in the legislative arm of government, and providing for financial accountability through the PFMA, also suggests a proper mode of supervision and reporting.

Appointment of adjudicators: In order to ensure the independence of the various institutions, diverse modalities have been utilised for the appointment of adjudicators. In many cases, the adjudicators of the institutions are appointed by the President of the Republic (for example in the case of the Competition Tribunal and National Consumer Tribunal), or by an independent tripartite Governing Body (for example in the case of the CCMA). In a few instances, appointments are determined by a line Minister.

Determination of conditions of service of adjudicators: As with appointments, the President of the Republic or an independent tripartite Governing Body may be responsible for determining the remuneration and conditions of service of adjudicators. In some cases, remuneration and conditions of appointment are determined by a line Minister.

Qualifications of adjudicators: The effectiveness and independence of the adjudication institutions is promoted by requiring that only suitably qualified persons are appointed as adjudicators. This is done by stipulating minimum academic qualifications and relevant professional and other experience for persons appointed as adjudicators. In some instances legal qualifications are necessary, given the nature of the disputes likely to be adjudicated.

Discipline and termination of service of adjudicators: The authority that is empowered to appoint adjudicators of these institutions is also empowered to discipline the adjudicators and to terminate their services. For example, adjudicators appointed by the President can only be disciplined and have their services terminated by the President.

Funding: The independence and autonomy of comparative adjudication institutions (excluding courts of law) is bolstered by their financial accountability, coupled with the source of funding. Funding for the Council for Medical Schemes, the CCMA, the Competition Commission and Tribunal, and the National Consumer Tribunal comes from moneys appropriated by Parliament.

Human resource and organisational structure: Human resource and administrative support is generally managed by most of the institutions themselves. These institutions have a tradition of being empowered to independently appoint their own staff.

Managerial framework and administrative support: The statutes that establish the key comparative adjudication institutions specifically regulate the management of these institutions. For example, the Office of the Pension Funds Adjudicator is managed by the Adjudicator, while the CCMA is headed by a Director.

Governance, oversight and supervision: Governance, oversight and supervision of the comparative adjudication institutions vest mostly in Parliament or in a Board / Governing Body. However, Ministers also undertake governance, oversight and supervision functions in the case of the Board of the Council for Medical Schemes and the Appeal Board of the FSB.

Accountability and reporting: The financial autonomy of these institutions is further enhanced by their listing as national public entities in Schedule 3A of the PFMA. This indicates autonomous financial accountability for these institutions. Human resource and administrative support is also managed by the institutions themselves in most instances.

4.5 Conclusion

Existing comparative (non-public social security) adjudication institutions and procedures demonstrate the practical application of standards which might be very relevant for the development of an adjudication framework for public social security institutions in South Africa. An analysis of selected adjudication institutions results in various commonalities being identified. For example, the independence of these institutions is generally guaranteed through a variety of mechanisms, including the appointment and discipline of adjudicators, funding arrangements, human resource and

administrative structures, managerial frameworks, governance, oversight and supervision arrangements and their accountability and reporting requirements. Some of the South African comparative adjudication institutions also enjoy a fairly wide scope of jurisdiction, while the jurisdiction of other institutions is restricted by statute. The scope of functions performed by these institutions is also relatively wide, coupled with a range of available remedies and power to enforce their own orders. Access to the adjudication institutions by complainants is facilitated in a variety of ways.

The analysis undertaken reflects the clear trend in South Africa to resolve disputes through structures, such as tribunals and forums, other than courts. Significantly, there is a range of evidence to suggest that the effective functioning of such institutions has been enhanced by the precise manner in which legislation has regulated their existence.

5. Access to justice standards in international instruments

5.1 Relevance of international and regional standards

In the search for an appropriate benchmark for the establishment of an appropriate social security appeal mechanism in South Africa, it is important to take into account international and regional standards. In fact, as a respected member of the international community and a leader in SADC and on the African continent, South Africa is well-placed to incorporate and implement international and regional standards in social security. This also affects the area of social security adjudication.

The relevance of international and regional standards is accentuated by the progressive constitutional framework which gives eminence to international standards. Among others, the Constitution indicates that international standards adopted or ratified by South Africa are binding on South Africa (see section 231). It further requires any court, tribunal or forum to consider international law when interpreting a fundamental right (see section 39), such as the right to access to social security and the right to access to courts/justice. According to the Constitutional Court even non-binding international standards have to be so considered.

There are several ILO Conventions and Recommendations which are helpful in the search for appropriate standards for social security adjudication. Some of the ILO instruments where these standards are reflected include:

- Social Security (Minimum Standards) Convention (No 102 of 1952)
- Employment Promotion and Protection against Unemployment Convention (No 168 of 1988)
- Medical Care Recommendation (No 69 of 1944)
- Income Security Recommendation (No 67 of 1944)

The applicable ILO standards have been captured in a report submitted to the ILO Annual General Conference in Geneva in 2011 (*Social security and the rule of law*). This provides a useful summary of the principles discussed in more detail below.

The ILO report stresses that these standards constitute minimum guarantees, which are part of the State's duty to ensure the proper administration of social security institutions and services.

Also, SADC has adopted social security adjudication standards similar to those contained in ILO instruments. Article 21.1(b) of the Code on Social Security in SADC (2007) stipulates that SADC Member States should endeavour to establish proper administrative and regulatory frameworks in order to ensure effective and efficient delivery of social security benefits, in particular *easy access for everyone to independent adjudication institutions that have the power to finally determine social security disputes, inexpensively, expeditiously and with a minimum of legal formalities*. (emphasis added)

The above-mentioned ILO and SADC standards affect several areas of social security adjudication. There areas include:

- Establishment of sequential and complementary reviews and appeals procedures
- Establishment of independent and impartial courts or tribunals
- Provision of reasonable time limits for reviews (complaints) and appeals
- Guarantee of expeditious (rapid) and simple proceedings
- Enforcement of procedural guarantees to ensure a fair hearing
- Guarantee of representation and legal assistance
- Provision of effective (enforceable) remedies

5.2 Establishment of sequential and complementary reviews and appeals procedures

A clear distinction has to be drawn between two stages of adjudication of social security disputes. This implies that a complaining applicant or beneficiary should be able to access a higher level independent appeal body, should they still feel aggrieved once the review procedure within the social security institution which decided on the issue in the first place has been exhausted.

According to the ILO, there should both be a first complaint phase, generally before the higher level administrative body within the social security institutions, and a second stage of appeal against the decision of the administrative body, generally before an administrative, judicial, labour or social security court or tribunal.

This required standard is for various reasons important for the reform of the South African social security adjudication system. Firstly, in some cases, a formal internal complaints or review mechanism is not provided for by the relevant social security law. This applies in particular to non-medical claims in the case of the Road Accident Fund and the Compensation Commissioner.

Secondly, as is discussed in more detail below, the current highest level of appeal body available under the existing social security laws lacks the core characteristic of independence as required by international standards.

Thirdly, with some exception, provision is not made in the social security laws for the High Court to exercise a proper appeal function when hearing social security disputes. In other words, an opportunity to fully reconsider the matter heard by the lower-level adjudication institution does not, as a rule, exist. This is the result of the fact that disputes emanating from public social security institutions, namely SASSA, the RAF, the Compensation Fund, the Unemployment Insurance Fund and the Compensation Commissioner, can be entertained by the High Court only on the basis of judicial review.

5.3 Establishment of independent and impartial courts or tribunals

A major requirement in the various international instruments for the establishment of an adjudication appeal framework is for this to be independent and impartial. The ILO has observed that this fundamental right is intended to guarantee that courts and judges are impartial and have judicial independence to decide disputes according to the facts and the law, including freedom from improper internal and external influence (see *Social security and the rule of law*).

In general, social security adjudication forums in South Africa fail to meet the ideal standard of independence and impartiality, as they can effectively be regarded as internal organs of the social security institutions. In most instances, but with some exception, the Ministers or Directors-General of the relevant Departments in charge of the respective social security institutions are responsible for the appointment of members of the adjudication forums. They also determine the length and (other) conditions of employment of members, including remuneration, can discipline the members and terminate their appointment.

The social security adjudications forums also do not have independent funding through direct appropriations from parliament. They are mostly funded by the relevant Departments as part of the Departments' annual budget allocations. The financial dependence of the adjudication forums is further indicated by the fact that they are not independent accountable institutions in terms of the Public Finance Management Act (PFMA) of 1999. Management, governance, oversight and supervision are also undertaken by the Departmental or institutional heads; and the adjudication forums are in most cases required to report to Departmental or institutional heads.

5.4 Provision of reasonable time limits for reviews (complaints) and appeals

The Constitutional Court recently again indicated that time limits and notice periods are considered necessary in a dispute resolution system as they bring certainty and stability to social and legal affairs and maintain the quality of adjudication (*Road Accident Fund v Mdeyide*). However, where time limits are applicable, they must afford social security litigants an adequate and fair opportunity to bring a case, taking into account their ability to bring the case to court. As the court remarked, the socio-economic conditions in South Africa (the backdrop of poverty and illiteracy in our society) are important in considering the reasonableness and justifiability of time bar and notice periods. This is because in a society where the workings of the legal system remain largely unfamiliar to many citizens, due care must be taken that rights are adequately protected as far as possible.

This principle is echoed by international standards. According to the ILO, the principle of due process implies the right of every person to a fair and public hearing by an independent and impartial court or tribunal within a reasonable time (*Social security and the rule of law*). The ILO suggests that although its standards do not prescribe the length of the period which should be available to the claimant to lodge a complaint, its Committee of Experts considers that such period should be of a reasonable duration.

It is suggested that there is scope for reform of time limits applicable to the adjudication of social security disputes involving public social security institutions in South Africa. This applies not only to the lodgement of claims, but also to the lodgement of appeals. These time limits (in both cases) vary considerably in length. It is also doubtful whether, generally speaking, sufficient time is granted, in particular when an appeal is lodged. For example, the 90 day period within which review applications have to be brought in the case of a medical-related claims decision under ODMWA could be questioned – bearing in mind the prevailing socio-economic conditions affecting claimants and their dependants, and the geographical inaccessibility of claims procedures. Also, with some exception, the relevant social security laws do not empower the social security institution or the adjudication bodies to consider the granting of condonation for late filing of an appeal, on good cause shown.

5.5 Guarantee of expeditious (rapid) and simple proceedings

International standards require the expeditious resolution of disputes. This aims to protect the parties against excessive delays in legal proceedings and to highlight the impact of delay on the effectiveness and credibility of justice.

Litigation procedures should therefore be simple and rapid. As has been noted by the ILO, simple and rapid procedures are crucial to ensure that the rights of complaint and appeal are accessible and effective. They are especially important in social security matters as benefits are, in most cases, the only financial support available to beneficiaries. Also, decisions by the relevant body that reject or modify benefits, claims or requests should be explained to individual claimants in writing in simple, clear and easy to understand terms. This implies that the language and terminology to be used should be that which would be readily understood by an individual of similar background, education and related circumstances (in this case social security applicants/beneficiaries who may either be illiterate or not understand English) (*Social security and the rule of law*).

The requirement for simple procedures further requires that the law and regulations relating to social security be drafted in such a way that beneficiaries and contributors can easily understand their rights and duties. Simplicity should thus be a primary consideration in devising procedures to be followed by beneficiaries and contributors (ILO Income Security Recommendation).

A major problem facing social security adjudication in the South African context is the length of time it takes for disputes to be resolved. The speedy resolution of social security disputes is not guaranteed as time frames for finalisation of cases are not stated in many of the South African social security statutes. It is only the Social Assistance Act which requires the Independent Tribunal for Social Assistance Appeals to finalise an appeal within 90 days from the date on which the appeal was received. Delay in the

adjudication of disputes impairs social security litigants' rights of access to justice. The Constitutional Court has held that "inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs" (*Mohlomi v Minister of Defence*).

5.6 Enforcement of procedural guarantees to ensure a fair hearing

It is internationally accepted that social security appeal procedures should observe principles of due process. This flows from the right to appeal a decision as a fundamental element of procedural fairness and of fair treatment. In fact, as noted by the ILO, "the right to a fair trial therefore is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms, including the right to social security, and enables effective functioning of the administration of justice." (*Social security and the rule of law*) It is, therefore, required that the resolution of disputes must be undertaken in a fair and public manner.

Several associated rights are linked to the obligation to observe principles of due process. This includes in particular the need to ensure procedural equality between the parties to the dispute – since social security applicants and beneficiaries usually have to face a government or administrative body. Therefore, individual appellants should have reasonable opportunities to assert or defend their rights.

Procedural equality between the parties to proceedings further requires equal access to evidence. This means each party should also have access to the relevant evidence, including documents, expert opinions, etc. The burden of proof should not also lie exclusively with the complainant (i.e. the social security appellant). It also flows that parties should have adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence. As indicated by the African Commission on Human and Peoples' Rights, a party should further be entitled to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the relevant body (*Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa*).

Fairness also requires that proceedings should be inexpensive. Social security applicants and/or beneficiaries who appeal against decisions of social security institutions should not be deprived of the right to adjudication due to costs. According to the ILO, if a fee is charged, the cost of appeal should be kept at the absolute minimum so as to allow for the effective exercise of the right of access to justice, including by persons of small means (*Social security and the rule of law*).

Some of the above principles are adhered to by South African social security appeal institutions. In particular, as a rule no fee is charged for the appeal proceedings. However, in other areas requiring a fair procedure the international standards indicate that reforms are needed. For example, in several instances no provision is made for the appellant to present arguments and evidence and to challenge or respond to opposing arguments or evidence – simply because personal appearance is not foreseen or allowed, and the matter is decided purely on the basis of documents relied on when the initial decision was made. Also, from a procedural point of view, the various social security statutes do not formally

regulate the burden of proof, and therefore largely leave it to the discretion of the adjudicator to deal with the matter.

5.7 Guarantee of representation and legal assistance

The right to a fair trial implies a right to representation. According to the ILO, the right to receive legal aid is an essential means of helping beneficiaries in their efforts to identify and understand their legal rights and obligations. This flows from the fact that, firstly, it is often the case that the provisions of the relevant national legislation are not formulated in simple and readily understandable terms. Secondly, such aid is also rendered necessary by the unequal positions of the parties involved, as state institutions and bodies are in a more favourable position. The ILO makes the point that beneficiaries often feel helpless when faced with complicated provisions, and without proper assistance they may be unable to resolve the issues that arise. Therefore, assistance in social security matters enables people to understand their legal obligations and assert their legal rights more effectively (*Social security and the rule of law*).

Therefore, the ILO suggests that both parties involved in social security adjudication should be guaranteed the right to engage a lawyer or other qualified representative of their choice. Furthermore, where necessary, legal assistance provided by the State should be available: "the law should guarantee that claimants who cannot afford legal assistance are entitled to be represented by a public defender/counsel for the defence appointed by the competent authority."

This is echoed by the position (in general terms) adopted by the European Court of Human Rights and the African Commission on Human and Peoples' Rights. The Commission suggests that a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so requires, and without payment by the party to a civil case if he or she does not have sufficient means to pay for it. The interest of justice is determined in civil cases by considering the complexity of the case and the ability of the party to adequately represent himself or herself; the rights that are affected; and the likely impact of the outcome of the case on the wider community (*Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa*).

There is need to reform parts of the South African social security adjudication framework as far as these issues are concerned, in the light of the international standards. Some South African social security statutes provide for both personal appearance and representation and for the parties to a dispute to be represented (for example COIDA and ODMWA). However, this is not always the case. Sometimes, as a rule, no personal appearance, let alone representation, is allowed (as in the case of appeals heard by ITSAA). Alternatively, while legal representation is allowed, representation by persons other than practising lawyers is not provided for in the law.

Furthermore, contrary to the requirements of international and regional instruments, the statutes do not guarantee a right to free legal assistance for parties to social security disputes. However, it can be argued that a right to legal aid and legal assistance is foreseen in the right to a fair public hearing in section 34. South African courts have also confirmed this conclusion. In *Nkuzi Development Association v*

Government of the Republic of South Africa, the Land Claims Court held that labour tenants and occupiers have a right to legal representation or legal aid at state expense if substantial injustice would otherwise result, and they cannot reasonably afford the cost thereof from their own resources. This approach makes a compelling case for the provision of free legal assistance to the parties in social security disputes, also in view of their socio-economic status.

5.8 Provision of effective (enforceable) remedies

The international standards applicable to due process entail that an appellant has the right to an effective remedy, which should be "accessible, affordable, timely and effective", and be legally enforceable (*ILO: Social security and the rule of law*).

From a legal point of view, more can be done to improve the effectiveness of remedies available under the different social security laws. The possible remedies that can currently be provided by the public social security institutions in South Africa are limited due to the circumscription of such remedies in the various statutes. This emanates from the restricted powers afforded to these institutions. Sometimes the institution is only given the power to give a particular ruling provided for in the relevant law; at times it can grant another decision it deems appropriate. The limited scope of remedies is often linked to the limitation on the kinds of disputes which a certain social security institution is entitled to deal with.

The same applies, as regards enforceability of the decisions of the existing adjudication mechanisms. Some of the social security statutes stipulate that the decisions of the adjudication forums are binding on the administrative institutions (for example, SASSA). Under COIDA the Compensation Court is considered to have the status of a magistrate court (with its decisions enforced as such). However, most of the adjudication forums are not afforded the power and mechanisms to enforce their rulings.

6. Access to justice standards in comparative (international) adjudication models

6.1 Introduction and overview

Countries with well-established social security adjudication systems provide an important benchmark for South Africa. Constitutionally, when interpreting the right to access courts (including tribunals) and the right to access social security, reference to such foreign systems is encouraged. Section 39 of the Constitution allows a court, tribunal or forum to consider foreign law.

Over the years these countries have developed models which suit their particular context. Three countries which have been investigated in this regard are Australia, New Zealand and the UK. They have in common that they have all established at some level a dedicated tribunal-like framework to deal with social security appeals. There are only a few countries in the world which utilise specialised social security court structures to decide a social security dispute. The best example is perhaps Germany. However, for reasons discussed elsewhere in this Policy, a tribunal system is advocated for South Africa, and not a specialised court structure.

When studying the Australian, New Zealand and UK social security appeal systems, one is left with several impressions. The first is that these systems are essentially aligned with the international standards applicable to social security adjudication, as discussed above. Specialist independent bodies have been created in a bid to ensure the proper resolution of disputes. These include, but are not limited to, the Social Security Appeal Tribunal (SSAT) in Australia, the Social Security Appeal Authority (SSAA) in New Zealand, and the First-tier Tribunal and Upper Tribunal in the UK.

These bodies operate as independent institutions, outside the control of government, even if some of them structurally form part of government. The wide scope of jurisdiction and extensive powers granted these institutions promote their effectiveness. Effective dispute resolution is also ensured through access by and the participation of claimants.

The second impression concerns the impact of the multi-tiered nature of social security adjudication institutions in these jurisdictions. This ensures that the administrative organs/institutions that undertake the determination of applicants' and beneficiaries' rights to social security benefits also undertake internal review procedures (first level adjudication or claims procedures). Therefore, where an applicant for social security benefits is aggrieved by a decision of the administering institution, he/she is able to request a revision or review of the initial decision. After the exhaustion of the internal review processes, applicants have access to an "external" appeal mechanism or institution (second level or appeal procedures, undertaken by the relevant tribunals).

As far as the third impression is concerned, the social security appeal adjudication systems operating in Australia, New Zealand and the UK are characterised by being intent on ensuring that appellants enjoy access to justice. This much is evident from the range of flexible measures introduced in these systems, in particular in relation to time periods and procedures.

6.2 Accessibility of adjudication institutions

Geographical/physical location: The SSAT has various offices in Australia. In addition, hearings are also conducted in regional centres throughout Australia. Also in New Zealand and the UK, hearings are held in a variety of locations.

Languages and related issues (including interpretation): At times provision is made to deal with language barriers. For example, in Australia the SSAT may allow an interpreter if a party to the review is not proficient in English.

Appeal lodgement time periods and prescription: Access to justice is ensured for appellants through the length of, and flexibility as regards prescribed time periods. Relatively extensive time periods for the lodgement of appeals are provided for in the relevant social security laws of Australia, New Zealand and the UK. In addition, these time periods are not inflexible. On good cause shown it may be possible to allow late applications. In the case of the SSAT, even the lodgement mode is flexible: social security appeals can be lodged over the telephone, in writing or in person at any SSAT office.

Disputes resolution timeframes: Speedy resolution of disputes is guaranteed as dispute resolution time-frames are invariably stipulated, or targets to achieve a speedy outcome are officially set by the adjudication institutions. In Australia, the SSAT is required to deal with cases as expeditiously as is consistent with their proper consideration.

External dispute resolution avenues: In principle, the possibility to approach first a higher-level tribunal (in Australia) and a higher court of law on the basis of judicial review (New Zealand) exists.

6.3 Procedural issues

Adjudication procedures: The extensive powers afforded these institutions enable them to determine the procedure when dealing with the dispute. For example, in New Zealand, the SSAA has full discretionary power to hear and receive evidence or further evidence on questions of fact, either by oral evidence or by affidavit. In addition, proceedings before the Authority shall not be held bad for want of form; and the procedure at the hearing is as the Authority determines, except where it is provided by the relevant law or by any regulations in force under the Act (*Social Security Act* section 12). In the UK, the First-tier Tribunal may regulate its own procedure (*Rule 5 of The Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008*).

In Australia, flexibility is also built into the submission of evidence. A ruling may be made that submissions can be made by telephone or by means of other electronic communications equipment – for example if the application is urgent, or a party lives in a remote area, or the appellant is unable to attend the hearing because of illness. The hearing therefore could take place by telephone or even video conference.

As indicated above, where the case for this has been made out, interpretation services are also provided (Australia).

Appearance and representation (including legal aid): The rule appears to be that a hearing has to be held. Personal appearance is the norm. However, a party may also wish to be represented, in which case, in all three jurisdictions, another person or even a lawyer may represent the party. However, this does not necessarily mean that legal fees will be covered by legal aid. In Australia and New Zealand, the reasonable costs incurred for travel and accommodation in connection with the review may be paid.

Alternative dispute resolution avenues: In Australia and the UK, statutory provision is made for alternative dispute resolution possibilities. In both cases, the parties to the dispute can enter into an agreement at a pre-hearing conference which could define, and indeed limit, the decision which the tribunal may make. In the UK, the First-tier and Upper Tribunals may bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute.

Notification of decisions: With some exception, the time-frame for notification of a Tribunal decision is either specified, or it is required that the relevant Tribunal must provide notice as soon as is reasonably practicable after the decision has been made. The need to give supporting reasons for the decision is invariably stipulated.

6.4 Powers and functions of adjudication institutions

Scope of jurisdiction: The adjudication institutions are afforded an extensive scope of jurisdiction. A wide range of persons can bring disputes to these institutions. At times this may include a person or institution that lodges an appeal in a representative capacity (e.g., a trade union, where the claimant was a member of the union). In addition, in most of the jurisdictions the scope of disputes covered by the institutions is fairly extensive with limited circumscription. The institutions are also afforded wide powers in the adjudication of disputes.

Adjudication powers and functions: Comprehensive powers are given to the tribunals to determine the social security appeal. These powers relate partly to the available remedies and orders which can be given, and partly to the steps tribunals can take to finally determine the dispute – among others investigative powers and the power to subpoena witnesses.

Moreover, in Australia, the SSAT is allowed to entertain new evidence which was not even before the administration that took the original decision.

Scope of remedies: The tribunals have an extensive array of possible remedies at their disposal, which surpasses the range of orders which South African adjudication institutions can grant. Also, the rule appears to be that costs orders can only be made in exceptional circumstances – for example, where the appeal was frivolous or vexatious or one that ought not to have been brought (New Zealand).

Enforceability of decision: In the UK, decisions of the First-tier and Upper Tribunals are enforceable as if it were relief granted by a relevant court (the High Court in the case of the Upper Tribunal) on an application for judicial review. However, not all of the institutions are empowered to enforce their decisions. The decisions are forwarded to administering institutions for implementation, which may be legally compelled to give effect to the decision.

Reconsideration of decision: The relevant tribunals in Australia and the UK have been given the power to reconsider their own decisions – under circumstances provided for in the relevant law.

6.5 Institutional framework of institutions/forums

Independence and institutional accommodation: The institutions are mostly created as independent statutory bodies. Their independence is protected through their institutional framework, the appointment and discipline of adjudicators, their funding arrangements, their human resource and administrative structures, their managerial framework, their governance, oversight and supervision arrangements, and their accountability and reporting.

Nevertheless, structurally these institutions form part of the governmental framework. Invariably they fall within the portfolio of either the lead ministry (Australia) or the Department of Justice (New Zealand; UK). This, however, does not affect their independence.

Appointment and qualifications of adjudicators: The independence of these institutions is reflected in the manner of and criteria for the appointment of adjudicators. Appointment by the national executive heads of the respective countries (on the recommendation of the relevant Ministers) also contributes to the authority and status of the institutions. As an example, the Queen of England appoints the Senior President of Tribunals (head of the Tribunals who manages the First-tier and Upper Tribunals); while the Governor-Generals of Australia and New Zealand (representatives of the Queen of England in Australia and New Zealand and Heads of State of these countries) appoint members of the SSAT and SSAA respectively.

In addition, the effectiveness of the institutions is promoted by stating minimum academic qualifications and relevant professional and other experience.

Determination of conditions of service of adjudicators: The conditions of employment of the adjudicators of these institutions are often prescribed by the statutes that establish them. This entrenches the independence of these institutions as there is little scope for interference in their activities.

Discipline and termination of service of adjudicators: Two factors relating to discipline and termination of service underscore the independence of the adjudication institutions in Australia, New Zealand and the UK. Firstly, adjudicators of these institutions can only be disciplined and their service terminated by the national executive heads of the respective countries. Secondly, this would not be possible unless certain specified circumstances are present.

Funding: The independence of the adjudication institutions is also promoted through their funding arrangements. In most cases the respective Departments of Justice provide funding. However, the Department for Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) funds the SSAT.

Human resource and organisational structure: The provision of human resource and administrative support to the adjudication institutions varies. While in Australia it is per administrative arrangement provided by the lead social security ministry (FaHCSIA), in New Zealand it is provided by the Department

of Justice. In the UK, human resource and administrative support to the First-tier and Upper Tribunals is provided by an independent government agency – the Courts and Tribunals Service.

Managerial framework and administrative support: The statutes establishing the social security adjudication institutions in the countries studied regulate the management of these institutions by persons appointed for that purpose. These managers have to be suitably qualified, as they have to meet the requirements set for appointment as members.

Governance, oversight and supervision: Independence of adjudication institutions is further ensured as governance, oversight and supervision arrangements are undertaken mostly by Parliament (New Zealand) or by an independent Board (UK). However, FaHCSIA undertakes governance, oversight and supervision of the SSAT in Australia.

Accountability and reporting: Accountability and reporting arrangements for the different institutions vary. Financial accountability and reporting may be the responsibility of either the line Ministry (Australia and New Zealand) or the Ministry of Justice (UK – which has designated the Tribunals Service Chief Executive as the Accounting Officer).

Annual reports have to be submitted to the line Ministry which will publish the report (UK) and/or table same in Parliament (Australia and New Zealand).

PART C: DEVELOPING AN APPROPRIATE SOCIAL SECURITY ADJUDICATION FRAMEWORK

7. Overall recommendations and key issues

7.1 Rationale for a new uniform social security appeal institution

A. The current non-judicial adjudication institutions, with some exception, predate the new constitutional dispensation in South Africa. These institutions have for most part not been streamlined with the requirements of the Constitution.

B. Based on an analysis of the current public social security adjudication system, and the evident lack of access to justice for users of the system, a clear need exists to develop a streamlined social security appeal framework in South Africa, which –

- Is sensitive to the prescriptions of the Constitution;
- Is aligned with international and regional standards; and
- Utilises existing best practice, both within South Africa and comparatively, as a benchmark for appropriate reform of the current system.

C. A coherent, simplified and uniform system of social security appeals for all public social security institutions, which builds on, but is institutionally and structurally separate from an internal system of social security complaints, provides an ideal avenue for realising access to justice for social security applicants and beneficiaries. One apex institution should serve as the dedicated appeal institution for all public social security schemes, if the applicant or beneficiary is still aggrieved by the outcome of the internal review of the social security dispute.

D. Consideration should be given to expand the new uniform adjudication system to incrementally include also private sector social security institutions (such as occupational retirement schemes and health insurance arrangements). This was also recommended by the Taylor Committee and makes sense from the perspective of consistency and uniformity. However, for practical reasons, and given the urgent need to align public social security schemes with the constitutional and international standards framework, a phased approach towards the inclusion of private sector institutions and their adjudication regimes is recommended. The phased approach should in particular cover the suggested second pillar retirement funds arrangements (i.e. private accredited funds and private voluntary schemes), envisaged as part of the design and roll-out of a comprehensive system of social security for South Africa.

E. The adjudication framework applicable to new public schemes, such as the envisaged National Social Security Fund and the National Health Insurance Scheme, should be tailored in such a way as to ensure their integration with the uniform framework suggested here, once these new public schemes are operational.

F. It is recommended that the new apex body for the hearing of social security appeals should not be a court. This flows from the fact that the jurisdiction of courts is generally restricted to hearing matters on the basis of (limited) judicial review, and not appeal; courts are rarely sufficiently specialised to comprehensively deal with social security matters; procedures applicable to court applications and hearings are overly formalistic; and long delays and cost orders do not guarantee adherence to a basic tenet of access to justice, namely a rapid and inexpensive finalisation of the dispute.

G. For the South African context, therefore, the establishment of a dedicated social security (appeals) tribunal is recommended. While this tribunal should have the power to finally determine and decide a social security dispute, judicial review by courts needs to remain intact – although this will in all likelihood be the exception rather than the rule. However, access to courts on this basis will be restricted by the operation of the rule that internal remedies must be exhausted first before a court is approached on the basis of judicial review – which means in this case that the Tribunal must be approached prior to the matter proceeding to the High Court.

7.2 Establishing a Tribunal for social security appeals

H. The Tribunal should be set up via a statutory instrument which should also regulate the Tribunal's institutional, financial, organisational, operational, human resource and reporting frameworks. In particular, the dispute resolution framework, relating to social security appeals and subsequent judicial review of Tribunal decisions, should be provided for.

I. The statutory instrument could be a separate instrument, for which some precedent in South Africa exists. Ideally, however, the instrument should be integrated/incorporated into, or at least appropriately related to, a new social security law that provides for the envisaged overarching South African social security institutional framework. Institutionally it could be streamlined to coincide with the establishment of the envisaged National Social Security Fund. However, resultant time delays may require a (tentative) alternative arrangement (such as a separate law to be subsequently integrated in a broader institution-related law), especially in view of the risk created by not properly aligning the current inadequate system of social security appeals jurisdiction with constitutional prescripts.

J. It is crucial that, in accordance with constitutional prescripts and minimum international and regional standards, the legal framework should guarantee the independence of the Tribunal. The independence of the institution should be reflected in provisions which entrench the high-level status of the Tribunal; and regulate the appointment, remuneration, conditions of service, discipline and termination of service of the Tribunal leadership, adjudicators and assessors; financial responsibility (including registration under the PFMA as a Schedule 3A entity); and reporting requirements in a manner aligned with the independence of the institution.

K. Given the high status of the Tribunal, it should be financed mainly from money appropriated by Parliament. The amount of funding provided should be sufficient and must contribute towards ensuring the creation of an accessible, effective and authoritative uniform social security adjudication system. As a Schedule 3A PFMA entity, it will be subject to stringent financial accountability.

L. The Tribunal should be presided over by a Tribunal President who exercises comprehensive jurisdiction and gives clear guidance and direction to the Tribunal. Adjudicators should be legally qualified and have sufficient experience. As members of the Tribunal they can, if the need arises, be assisted by assessors registered with relevant professional organisations, although adjudicators alone decide matters which come before the Tribunal.

M. The new entity should have its own staff, who may per contractual arrangement be seconded from existing social security adjudication bodies and/or by government departments.

N. A high-level of professionalism and ethical conduct should be required from the Tribunal leadership, adjudicators, assessors, staff and functionaries. The relevant law should disallow a conflict of interest and require acceptance of, and adherence to Codes of Conduct developed for members, staff and other functionaries of the Tribunal.

O. Annual reporting should be undertaken by the Tribunal, in accordance with the PFMA (financial matters) and to the indicated line Ministry, who does not exercise control over the Tribunal. The line minister is responsible for forwarding the report to the President of the country, and for tabling same in Parliament.

P. It is recommended that the Tribunal has a country-wide presence. To enable the Tribunal to operate all over the country, regional offices and circuit arrangements should be in place. Geographically it should be accessible to many applicants and beneficiaries even in remote areas. Access to justice should further be enhanced through an appropriate language policy and the rendering of assistance by the Tribunal to prospective appellants.

Q. The Tribunal should have sufficiently extensive powers to hear and finally determine/decide benefits disputes (i.e. disputes concerning access to social assistance and social insurance benefits, including the granting, refusal, adjustment, reduction, suspension, withdrawal and termination of benefits) of social security applicants and beneficiaries (i.e. claimants/appellants), which emanate from public social security institutions – namely the Compensation Fund, the Unemployment Insurance Fund, the Road Accident Fund, SASSA, and the Compensation Commissioner. Tribunal rules should inform and explain relevant aspects of appeal lodgement, hearing and decisions, and streamline interfacing with existing (reformed) social security adjudication structures and the High Court (for judicial review purposes).

R. It should have an extensive array of remedies at its disposal, in order to bring finality to the dispute in a manner deemed appropriate. It should also be able to reconsider and enforce its own decisions, which for this purpose should be accorded the status of a court judgment.

S. Various sets of time limits need to be stipulated in the law, to enhance consistency and ensure the prompt resolution of disputes. However, time limits applicable to the lodging of the appeal should display in-built flexibility, notably through condonation provisions, so as to take into account the socio-economic position and conditions of many social security beneficiaries in the country.

T. The procedures applicable to the hearing of appeals should be flexible and largely left to the discretion of the presiding adjudicator. However, due process principles should apply, which imply the right to personal appearance and presentation as well as the right to be represented by a qualified person and, subject to some restriction, a lawyer. Legal aid provided by the State should be available in cases where this is required and the usual criteria for access to legal aid in civil cases have been met.

7.3 Some matters of implementation

U. In the absence of an existing overarching and advisory structure for tribunals in South Africa, the establishment of a *dedicated consultative institutional framework* to be known as the Tribunal Advisory Council (or Board) is suggested. The Council should be established to undertake monitoring and evaluation of Tribunal performance and impact, make recommendations to the Tribunal, and provide advice. It should further make recommendations concerning the removal of the Tribunal President, adjudicators and assessors. This has to be a dedicated apex body for the new Tribunal, as tribunals in South Africa currently lack a monitoring institution (in the UK, the Administrative Justice and Tribunals Council (AJTC) was created by the Tribunals, Courts and Enforcement Act, 2007 to be the independent and authoritative voice to monitor and improve the way public bodies make decisions affecting individuals and the workings of redress mechanisms, including tribunals).

The composition of the Council should reflect high-level stakeholder representation – mirroring the interest and involvement of the executive, the judiciary, independent constitutional institutions vested with supervisory powers to ensure constitutional democracy in South Africa, and the social partners (including representatives from relevant government social security departments, national treasury, the auditor-general, the Tribunal President and stakeholders such as organised business and labour, the South African Human Rights Commission and the Office of the Chief Justice). While the Council is not meant to exercise its functions and powers in a prescriptive manner, given the independence of the Tribunal, its advice will nevertheless have strong persuasive value, in view of the breadth and level of representation on the Council.

The core powers and functions of the Council will be to request and receive annual and further progress reports from the Tribunal, as well as reports from other institutions responsible for monitoring and evaluation; to consider and comment on these reports, also via the development of synthesis reports; to conduct and/or commission research into, and review Tribunal performance and impact, and constructively engage with the Tribunal leadership on maters relevant to the Tribunal's operations, performance and impact, including evaluative research on user and stakeholder perceptions and appreciation; to advise the Tribunal President on the development of Tribunal Rules and standard-setting; and to make recommendations on the removal of the Tribunal President, adjudicators and assessors.

In its formal engagement with the Tribunal leadership the Council will make recommendations, suggest direction, and provide instructive advice, in order to enhance the role, effectiveness and impact of the Tribunal. The inputs so made will form part of the basis for subsequent and continuing monitoring and evaluation of Tribunal performance. Therefore, even though the recommendations, direction and advice emanating from the Council are not intended to impact on the independence of the Tribunal, the strong persuasive value of the Council's engagement with the Tribunal flows from a combination of certain key characteristics – with particular reference to the breadth and level of representation on the Council and the close association with the monitoring and evaluation and performance management contexts (see immediately below).

These tasks will be undertaken in light of the relevant constitutional standards and values, the legislative framework applicable to the Tribunal, the developing jurisprudence impacting on the Tribunal, the external and internal policy frameworks informing Tribunal direction and functions, and key performance indicators contained in the Tribunal President's performance management agreement.

V. Once the new Tribunal is operational, the existing highest level of non-judicial appeal bodies embedded within the respective social security institutions should cease to exist. Appropriate transitional arrangements need to be in place to provide for pending litigation and other matters.

W. Existing social security dispute resolution structures and mechanisms internal to public social security schemes do not adequately meet the constitutional requirements of administrative justice and access to

social security. It is suggested that these structures be reformed in a manner which will render them compliant with constitutional prescripts.

X. Statutory interventions are required to provide the legal mandate for the introduction of the range of reforms of the current system. In addition to regulating the establishment of the Tribunal, these interventions should also deal with the interfacing between the Tribunal and internal social security dispute resolution mechanisms and between the Tribunal and the High Court (for judicial review purposes), as well as the reform of the internal mechanisms.

Y. Implementation of the new social security adjudication system should be accompanied by an appropriate communication strategy, a context-sensitive monitoring and evaluation framework and a dedicated plan to mitigate risks and challenges which the new system might pose.

8. Various options for establishing an appropriate policy framework

Section 34 of the Constitution indicates that the right of access to justice can be realised through a court or, where appropriate, another independent and impartial tribunal or forum. The Constitution therefore gives the state options on the institutional framework for realising the right. However, it recognises that there may be circumstances where an institution other than a court will be more appropriate for the resolution of a particular class of disputes. It is thus important to examine a selection of relevant options for establishing an institutional framework for the resolution of social security disputes.

The options for establishing an appropriate social security adjudication framework involve the utilisation of the existing courts (such as the High Court), the establishment of a new dedicated court (such as a court with the status of a High Court) or the establishment of an independent and impartial tribunal. The utilisation of the existing courts or the establishment of a new dedicated court raises serious questions regarding *accessibility*. Courts are, for a number of reasons, generally less accessible than tribunals. Court processes are usually formal in nature and ordinary people struggle to give a proper account of their case before Magistrates and Judges without the assistance of legal representatives, which often results in a cost implication for the people concerned. The people who, following this option, will be asked to take their appeals directly to a court come, in most cases, from the ranks of the poor, alternatively have experienced an injury or illness, road accident or have fallen into unemployment and seek some form of compensation or other assistance: the new system must make social security adjudication as accessible as possible for these people and following this approach fails to achieve this end. In addition, if any one of these options is implemented, it means that there will be a further appeal to the High Court or to the new dedicated court (with the status of the High Court) instead of an application for judicial review.

8.1 Establishment of a uniform social security tribunal, followed by review to a special court (with the status of the High Court)

One option is the establishment of a uniform, independent and impartial administrative tribunal to conduct appeals and a special court with the status of the High Court to undertake judicial review of the decisions of the tribunal. This tribunal should serve as the new highest level of non-judicial appeal, meaning that all appeals against administrative action in the form of benefits-related decisions by a social security institution in terms of the UIA / COIDA / ODMWA / RAFA and the SAA should proceed to the tribunal *before* the special court with the status of the High Court is approached. These decisions relate to access to social assistance and social insurance benefits, including the granting, refusal, adjustment, reduction, suspension, withdrawal and termination of benefits.

In terms of this option, a special court of the status of a High Court is earmarked as the body responsible for judicial review of the social security tribunal's decisions. Special courts, such as the Labour Court, Labour Appeal Court and Competition Appeal Court serve a useful function in instances where the disputes in question require detailed knowledge of a specialised branch of law. In such cases, judges of the High Court, while being general legal experts, are not considered to be the most suitable presiding officers for the disputes in question. Specially trained judges (with knowledge of the particular legal discipline concerned) are appointed to preside over matters in the special court, although there is a great deal of overlap between the manner in which they function, their conditions of appointment, status and the like.

One of the problems which result from the creation of specialised courts of the status of a High Court is the cost concerned with setting up a self-standing court structure. While it is true that the creation of a specialised court structure for social security matters may potentially result in excellent decisions being made by appointed members of the judiciary who have special expertise in social security law, there is a serious risk that cost and other practical constraints may result in this option proving to be unsustainable. This caution must be read together with existing South African government policy which envisages the integration of specialist courts into the court system (an example of this is the uncertainty regarding the Superior Courts Bill, which contemplates the collapsing of the Labour Court within the ordinary structures of the High Court).

The possibility of expanding the jurisdiction of the Labour Court (which already exists as a special court of the status of the High Court) to hear social security appeals has been given serious consideration. The Labour Court, however, is not experienced in dealing with social security matters. It is not particularly well-placed, at least in comparison with the High Court, to deal with the review of an administrative decision taken by a new social security tribunal. Matters such as class actions emanating from social security disputes constitute foreign territory for a court such as the Labour Court, and such matters proceed much more naturally to the High Court. When considering the present involvement of the Labour Court in social security matters, it becomes clear that its current jurisdiction is very limited (being restricted to matters directly related to the employment relationship), and that it would require substantial legislative expansion for the Labour Court to be tasked with the review of the complete

range of appeal decisions expected from the tribunal. The Labour Court, significantly, also has a limited presence in the country and is concentrated only in a few centres.

It may also be added that courts such as the Labour Court, Labour Appeal Court and Competition Appeal Court have a "limited jurisdiction" in the sense that lower-level bodies (such as the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Competition Commission or Competition Tribunal) would have dealt with a range of matters which otherwise may have proceeded directly to these courts. The High Court inherently enjoys comprehensive jurisdiction to deal with a range of potential disputes or preliminary matters which may arise in this area. This has the potential of creating confusion regarding the jurisdiction of both the High Court and of the newly-created special court with the status of a High Court on these matters (an example is the uncertainty on the jurisdiction of the High Court in employment and labour relations disputes, where conflicting Constitutional Court rulings on the matter have left the jurisdiction issue unresolved).

8.2 Establishment of a new government institution or enabling an existing government institution to conduct social security appeals

This option involves consideration of the merits of situating a new social security appeals body within government. Such an option will be similar to the manner in which the Independent Tribunal for Social Assistance Appeals (ITSAA) is presently located within the Department of Social Development as an organisational component. Expanding the Independent Tribunal for Social Assistance Appeals to permit it to deal with all social security appeals is also contemplated as part of this option.

The possible benefits of such an approach would be some cost-efficiency (at least in the sense that existing support and infrastructure could be built upon when creating the appeals institution). It will also likely ensure a sense of governmental control over the new institution. This perceived benefit of government control could, however, also be the biggest cause for concern regarding this option. By locating the new social security appeals body as an internal component of government, this institution is not likely to be characterised as being "independent" of government. As an example, appellants who must travel to an existing government department to lodge an appeal against a national public entity may perceive an unfavourable decision on appeal as being due to institutional bias on the part of the new body.

Even in the absence of such a perception, it is expected that this option would carry with it the burden of continued *wide* jurisdiction of the High Court. Put simply, the new (internally located) social security appeals body would not constitute an adequate replacement for access to justice or an *independent tribunal* (as provided for in section 34 of the Constitution). Therefore, dissatisfied appellants may be entitled to approach the High Court on a wide range of matters. There would, in other words, be very little argument (with this option) to suggest a restricted role for the courts and a major risk would be that the courts would continue to be burdened with numerous social security-related cases – either on an appeal or review basis.

Section 34 of the Constitution states that, "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". There is some authority to suggest that a construct which results in social security appeals being carried out by a government body would leave the door open for people who are dissatisfied to approach the High Court to *decide* their social security disputes in a manner akin to a full appeal. Social security appellants could argue for wide recourse to the High Court in social security disputes because the government body decision would not be considered to be a decision made by an "independent and impartial tribunal or forum". In addition, it could be argued that section 169(b) of the Constitution states that the High Court may *decide* any non-constitutional matter not assigned to another court by an Act of Parliament.

There would appear to be little point in pursuing this option, as the consequence will be little more than what is already the *status quo* in the country. Apart from, perhaps, consolidating the highest level of internal social security appeals under a single body, the broad possibilities for proceeding to court imply that this body's decisions would not serve as "final and binding" and the potential for judicial involvement is great.

An option such as this that has the effect of forcing large numbers of people to seek redress in the high court will not promote the right of access to justice. This is because of the many challenges faced by social security (and other) litigants in the present court system (such as costs, delays etc).

8.3 Creation of a new specialised court structure for social security matters

This option involves two sub-components, both of which were given consideration. In the first place, there is the potential for creating a uniform special court (equivalent in status either to a lower or higher court) followed by appeal via the ordinary court structure. Alternatively, it is possible to create a new, uniform special court followed by appeal to a special appeal court.

In this option the new body to be created is a *court* rather than a tribunal. The consequences of this differentiation are as follows:

- The decisions of the new court will not amount to an "administrative decision" and would not be subject to judicial *review* in terms of PAJA but would be subject to appeal in terms of the court structure;
- The new court would form part of the judiciary, and would accordingly be excluded from the definition of an organ of state, from being considered to be a national public entity and the like. This has significant implications for the accountability, reporting structure, governance, leadership and legal construct of the new court;
- As a part of the judiciary, the new court would be independent and subject only to the Constitution and the law. No person would be permitted, in general, to interfere with the functioning of such a court, although higher courts will always exercise the right to overturn the decisions of lower courts through their judgments on appeal. The higher courts exercise a supervisory function over lower courts and the accepted principles of "judicial precedent" forces

lower courts to follow the decisions of higher courts, even where they may disagree with that higher court's decision.

While a number of these principles have favourable implications, from a practical perspective it may be particularly costly to roll-out a new sub-court structure across the country to hear social security disputes. The formal processes associated with court action might also not be particularly suitable to social security decision-making. In addition to the cost of creating such a court sub-system, the costs associated with litigating before courts in general must also be factored in. Both the sub-options in question are unlikely to result in the speedy resolution of disputes, given the backlogs generally associated with court processes. This option only, and in exceptional cases, operates in a few countries in the world, such as Germany. However, this option may not be possible due to the existing government policy which envisages the integration of specialist courts into the court system.

8.4 Utilisation of existing court structures (general or special court/ lower or higher court) followed by existing (special appeal) options

This option foresees the use of existing lower courts (such as the Magistrates' Courts) or higher courts (either the High Court itself, or perhaps the Labour Court, already dealt with above) as the body to which social security appeals should be brought. Again, this option differs from the preferred option in that the use of a *court* replaces the preferred recourse to an independent and impartial tribunal. This option differs from the previous option discussed in that it is the *existing* court structure which is utilised, rather than proposing the creation of a partially / completely new court system. This option accordingly attempts to address one of the most significant weaknesses of the previous option, namely the actual *cost* associated with establishing new courts in South Africa.

Unfortunately, while it may appear to be cost-effective to rely on the existing court structure (the Magistrates' Courts, High Court or Labour Court), the major problem not addressed by this option is the serious backlog and lack of capacity generally associated with, apart from the appropriateness of the court system in South Africa (as discussed above). The Magistrates' Courts and High Courts are generally considered to be already overloaded, and one of the reasons for proposing the creation of a new tribunal (instead of a court) is precisely in order to *alleviate* the existing burden on the courts. As indicated previously, utilising courts to adjudicate and determine social security disputes on an appeal basis (against the decision of a social security body) is unlikely to be expeditious or cost-effective.

Perhaps more importantly, as discussed above, issues of the inaccessibility of the courts (due to the formality of their procedures and the length of time it will take to achieve justice due to multiple appeals) make this option inappropriate.

8.5 Creation of a uniform, independent and impartial administrative tribunal followed by judicial review by the High Court

A further option is to create a uniform, independent and impartial administrative tribunal. This tribunal should serve as the new highest level of non-judicial appeal, meaning that all appeals against administrative action in the form of an underlying decision concerning a social assistance or social insurance benefit by a social security institution in terms of the UIA / COIDA / ODMWA / RAFA and the SAA should proceed to the tribunal *before* the High Court is approached.

This option is considered the most appropriate option in terms of the constitutional requirements for a social security adjudication framework. This option therefore passes constitutional muster as it realises the right of access to justice (the right of everyone to an accessible, independent and impartial court, tribunal or forum which resolves disputes in a fair and public hearing); the right of access to social security; the right to equality; the right to human dignity; the right to administrative action that is lawful, reasonable and procedurally fairly; and the basic values and principles governing public administration. It is also aligned with the international standards framework applicable (for example, International Labour Organisation, United Nations and other human rights instruments) as well as with national and international best practice. In addition to constitutional and administrative law considerations, and the national and international comparative standards, various other legal and policy considerations inform the choice of a tribunal as the preferred option. As the most appropriate option considered, the key characteristics of this option will be discussed in detail.

9. The preferred option: the creation of a new tribunal for social security adjudication in South Africa

The recommended option is to create a uniform, independent and impartial administrative Tribunal, which may in time be referred to by the abbreviation “TRISSA”. The Tribunal should not be attached to the organisational structure of any government department. It should serve as the new highest level of non-judicial appeal in social security matters. This means that all appeals against the benefits-related decisions taken by social security administrators in terms of the UIA, COIDA, ODMWA, RAFA and SAA should proceed to the Tribunal before the High Court is approached (on the basis of its inherent jurisdiction to judicially review administrative action). These decisions relate to access to social assistance and social insurance benefits, including the granting, refusal, adjustment, reduction, suspension, withdrawal and termination of benefits.

The Tribunal should enjoy a high status as the overarching appeals Tribunal for social security adjudication in South Africa. It should be listed as a national public entity under Part A of Schedule 3 of the PFMA. The Tribunal will have the status of an “organ of state”. The basic values and principles governing public administration (contained in chapter 10 of the Constitution) will apply to the Tribunal.

The proposed Tribunal, in addition to being constitutionally compliant and enhancing access to social justice, must be specifically aligned with the applicable international standards framework. For example, the International Labour Organisation recommends dispute resolution procedures designed to ensure simple and rapid social security dispute adjudication.

There should be a specific, new statute dedicated to explaining the following details of the Tribunal. There is also a need to ensure that provisions contained in existing legislation are aligned with the existence of a new, designated Tribunal. In particular, the legal framework should clearly indicate that all social security decisions which affect social security applicants, beneficiaries or dependants of applicants or beneficiaries may be appealable to the Tribunal, and not to another body or to the courts. More specifically, jurisdiction should be limited to causes of action contemplated by legislation and directly related to the appeal against an unsatisfactory underlying decision concerning a social assistance or social insurance benefit of a public social security body.

9.1 Accessibility

The success of the Tribunal may ultimately depend upon its accessibility. As discussed previously, an accessible system would be one which enabled its users to present their cases with ease. Accessibility includes reference to matters such as the geographic / physical location of the Tribunal, the language(s) utilised during proceedings, the user-friendly nature of the prescribed documents and forms and the reasonableness of timeframes for lodging disputes and for the resolution of disputes.

The Tribunal deliberately bears the characteristics of an accessible, flexible, inexpensive and efficient dispute resolution forum. It is explicitly suggested that no fees be charged by the Tribunal to social security applicants, beneficiaries or dependants of applicants and beneficiaries who seek to exercise their right to access the Tribunal in order to appeal against the decision of a social security body.

Geographical/physical location: The Tribunal must have a proper national presence. This enhances easy and meaningful access to the Tribunal and ensures that people are not deterred from approaching the Tribunal because of its location. The President of the country, after consulting the relevant Minister, must determine the location of the Tribunal's head office. The Tribunal must maintain at least one office in each province of the Republic, and as many local offices as is considered necessary. These are also matters to be determined by the President of the Tribunal, after consultation with the relevant Minister. Provision should be made for the Tribunal to travel "on circuit" to outlying areas in a region in order to ensure even better access to justice for people likely to require its services.

The Tribunal should be sufficiently capacitated to fulfil its appeal functions across the country. The President of the Tribunal will be able to delegate relevant functions of that office to regional heads of the Tribunal. This will ensure the effective decentralisation of authority and should be conducive to excellent service delivery. A dispute should generally be heard in the region in which the cause of action arises, unless the president or deputy president of the Tribunal decides otherwise.

The Tribunal should be physically located in its own premises in all regions of the country and have / lease its own buildings and offices from where it operates.

Languages and related issues (including interpretation): The Tribunal should introduce a language policy in order to ensure that various constitutional rights are not unjustifiably limited by the Tribunal's use of language. The Tribunal's decision should be issued in English.

However, the Tribunal should have at its disposal the services of interpreters who are fluent at least in all of the official languages of the country. Should interpretation not be available in a non-official language of preference, the appellant may be made responsible for securing and paying for the required interpretation services. The languages used at regional level should reflect the realities of the region in question by taking into account the preferred language of appellants residing in that area.

The Tribunal and its staff should be properly geared towards assisting users of the new system. For example, the Tribunal may advise a party to a dispute about the procedure to be followed in appealing to the Tribunal. A party may also be assisted by the staff of the Tribunal to obtain advice, assistance or representation and stakeholders may be given advice or training relating to the primary objects and functions of the Tribunal. Staff should be properly sensitised towards helping appellants who are likely to be drawn from the ranks of the most vulnerable members of South African society.

Required documentation and forms: A series of forms and precedents must be developed by the Tribunal, including a standard appeal form for the ordinary referral of disputes to the Tribunal.

The required documentation and forms must be designed to ensure a seamless, streamlined and simplified flow of information between the pursuit of remedies within the social security institution and adjudication before the Tribunal, and between the Tribunal and the reviewing court.

Claim lodgement time periods and prescription: Appeals to the Tribunal would already have been the subject of (streamlined and simplified) internal reconsideration and remedies, which would have taken a period of time to finalise. A 60 day period of time is recommended for the lodging of an appeal to the Tribunal. Assuming that the existence of the Tribunal is properly communicated to the general population of the country prior to its coming into operation (a matter dealt with in the sections of the Policy relating to communications, risks and mitigation) this should be a sufficient period of time to allow even impoverished, illiterate and uneducated people to enquire about the details and location of the Tribunal, to obtain advice and representation if necessary and to appeal to the Tribunal.

It should be possible for the Tribunal to condone a late referral where a sound explanation has been provided for the failure to refer the dispute timeously. Condonation should be granted when good cause is shown, taking into account factors such as the period of delay, the explanation for the delay, the prospects of the appeal succeeding and any likely prejudice which will be caused to the social security institution should condonation be granted.

Disputes resolution timeframe: The Tribunal should complete its hearing of the appeal as expeditiously as possible, given that it has wide discretion to deal with the appeal in a manner the appointed adjudicator considers to be most appropriate in the circumstances. Adjudicators should issue a signed

appeal decision, with brief reasons, within 14 days of the conclusion of the appeal hearing. The President of the Tribunal, or the regional head, should be empowered to grant an extension of the time period for the finalisation of an appeal decision where the adjudicator demonstrates good reasons for an extension.

A maximum period of 180 days should be allowed for an applicant to apply for the review of the decision of the Tribunal to the High Court. This period will commence running from the date that the Tribunal award is served on the affected party.

It must be emphasised that applications for judicial review to the High Court ought to be the exception, rather than the rule, given that dissatisfied applicants and beneficiaries would have enjoyed the full opportunity to approach the Tribunal on a wide appeal basis.

External dispute resolution avenues: Recourse to the Tribunal is considered to be an internal remedy, for purposes of PAJA, which implies that appellants are forced to utilise the services of the Tribunal and cannot bypass the Tribunal, in the vast majority of cases, by approaching the High Court directly. The High Court does, however, retain the power to review Tribunal decisions in terms of PAJA, for example if an adjudicator makes an unreasonable, unlawful or procedurally unfair determination. In exceptional cases, it might be possible to approach the High Court directly for special relief such as the granting of an interdict or in class action disputes.

9.2 Procedural issues

Adjudication processes should, as a rule, be characterised by the attributes of accessibility, fairness and speed. In addition, the proceedings must generally be easily understood and uncomplicated. The core work of the Tribunal is to be conducted by legally qualified adjudicators. Given the nature of some of the disputes likely to come before the Tribunal, it is also necessary for assessors to be part of the new structure.

Adjudication procedures (including consideration of evidence): A measure of flexibility is granted to adjudicators in deciding social security appeals. This is consistent with international standards and with the status of the Tribunal as an administrative body tasked with expeditiously determining a large number of disputes on appeal. Adjudicators should be able to conduct the appeal hearing in a manner considered appropriate in order to determine the dispute fairly and quickly. The merits of the dispute must be evaluated properly, but with the minimum of legal formalities.

From an evidentiary perspective, the appeal is based upon the actual claim lodged. In addition to all evidence presented at the time the application for benefits was brought before a social security institution, evidence originally in existence and available, but not adduced before the social security institution, may be considered by the Tribunal. It is also suggested that the Tribunal enjoy the power to consider any new evidence that may have surfaced since the launching of the original claim for benefits. This reflects an inclusive approach to consideration of relevant information. The Tribunal is also given the power to refer a dispute back to the underlying social security body, given the nature of information

it has at its disposal and with due consideration of what it considers to be the most appropriate manner of dealing with the matter.

Parties are accordingly entitled to personally present evidence, including new evidence which was unavailable or not presented at the time that the public social security institution dealt with the matter. Parties or their representatives may call witnesses and address concluding arguments. It should be evident from such factors that some of the current practices of, for example, the Independent Tribunal for Social Assistance Appeals, in terms of which appeals are dealt with in an average period of 30 minutes would be completely inadequate when compared to the proposed workings of the Tribunal, which is more aligned with basic principles of natural justice.

Witnesses may be subpoenaed in order to secure their attendance for purposes of testifying before the Tribunal or for purposes of obtaining relevant documentary evidence. Subpoenaed witnesses will be entitled to appropriate witness fees. Failure to comply with the terms of an issued subpoena may result in a finding of contempt of the Tribunal, as reflected below.

Once a social security applicant, beneficiary or dependant of an applicant or beneficiary has, on the face of their application, demonstrated compliance with the statutorily established criteria for benefits, the onus should shift to the social security institution to justify why the person is not entitled to the relief in question.

The Tribunal will be constituted by either a single adjudicator, or by a panel of three adjudicators (for more complex cases), with the assistance of an assessor where required. Adjudicators are permitted to direct the filing of statements within a fixed period of time, setting out the material facts upon which the applicant relies and the legal issues arising. The President of the Tribunal, or a regional head, might also convene a “pre-hearing conference” where further clarity is necessary, where there is scope for narrowing the issues in dispute, or where there is a reasonable prospect of the dispute being settled.

The admissibility of innovative evidentiary techniques, such as the presentation of video-evidence, requires consideration, given the possibility that a number of appellants may be physically unable to access the Tribunal. Telephonic communication between the Tribunal and appellants who choose not to physically appear for a scheduled process should also be a possibility, in particular given the realities faced by poor people living in rural areas which are far away from the Tribunal premises. Such an intervention would require the express agreement of the appellant, and should not in any way undermine the appellant’s rights to personal appearance and to representation, including legal representation. The CCMA provides a good example of how telephonic consultations are used in order to facilitate a “pre-conciliation” settlement of a dispute.

Appearance and representation (including legal aid): The basic requirements of administrative justice and natural justice principles ensure that parties appearing before the Tribunal will have a proper opportunity to argue the issues in dispute. Parties to the dispute are entitled to appear in person.

Parties enjoy equal access to evidence, may present evidence, call witnesses and address concluding arguments.

Legal representation should be permitted, but regulated. Unless agreement was obtained regarding legal representation, an applicant or beneficiary who required legal representation would have to apply for this. The presiding officer would be obliged to grant legal representation, unless there were factors which made legal representation unnecessary. In this case, the presiding officer would furnish reasons for rejecting the application. The state should take steps to ensure that appropriate legal assistance is readily available for those who qualify for this, thereby enhancing the sense of meaningful access to justice for vulnerable members of society. Parties are also entitled to be represented by people other than legal practitioners, such as trade union representatives.

Parties who fail to attend proceedings before the Tribunal will not be penalised by having their disputes dismissed – the Tribunal will still make a decision on the papers before them in such instances, thereby restricting the likely number of rescission applications.

Alternative dispute resolution avenues: No alternative dispute resolution processes are foreseen, other than a pre-appeal settlement being concluded between the parties. Pre-hearing processes include the possibility of the filing of statements and a pre-hearing conference, as indicated above. The adjudicator would be empowered, in terms of the proposed statutory framework, to facilitate some form of mediation, conciliation or settlement of a dispute during a scheduled pre-hearing process. The Tribunal President, or a Regional Head, may schedule such processes in order to obtain clarity on a particular issue, to narrow the issues in dispute or in cases where there is a reasonable prospect of settlement without the need for adjudication.

Notification of decisions: Parties to a dispute before the Tribunal will be anxious to receive quick notification of the outcome of their case, using a method of communication which they have chosen. A decision of a single adjudicator of the Tribunal hearing a matter alone, or a majority of the adjudicators in any other case, will be considered to be the decision of the Tribunal. The decision must be in writing, accompanied by proper reasons and signed.

Adjudicators should issue a signed appeal decision, with brief reasons, within 14 days of the conclusion of the appeal hearing. The Tribunal must (via the Regional Registrars) serve or (in cases of notification by post) dispatch a copy of that appeal decision on each party to the dispute or their duly appointed representative within three days of finalisation of the hearing. Appellants should be notified using their preferred method of communication indicated on the referral form. Given the fact that it is unlikely that the majority of appellants will have access to either electronic mail or facsimile services, the Tribunal should investigate using mobile technology in order to perhaps send short messages via mobile telephones (SMS), containing the crux of the outcome, in addition to a more complete notification of the decision. The social security body against whom the appellant has appealed must also be informed of the outcome of the appeal. It is suggested that a proper system of notification be developed in this regard. Notification could also be duplicated to the state attorney, in order to enhance the enforcement

of decisions, in cases where a finding adverse to the social security body has been made. Other relevant institutions or persons (such as professional organisations) may also be informed, should the Tribunal deem this appropriate.

The President of the Tribunal, or the regional head, should be empowered to grant an extension of the time period for the finalisation of an appeal decision where the adjudicator demonstrates good reasons for an extension.

An application for judicial review of a Tribunal decision should be filed with the High Court. The Registrar of the High Court should immediately notify the Tribunal Head Office, after which the Tribunal decision and any other relevant information will be filed with the reviewing court. A person who resorts to approaching the Tribunal in response to a Tribunal decision which he / she considers to be unsatisfactory will be referred to the High Court and provided with reasonable assistance in this regard (for example, the Tribunal should be able to easily inform the person regarding how to approach and contact details of the applicable High Court).

9.3 Powers and functions of the Tribunal

The Tribunal should be a body of record and should exercise its functions in accordance with the provisions of the relevant statute(s). It should be a body enjoying a high level of respect and status in the country.

Scope of jurisdiction: The Tribunal must have jurisdiction throughout the Republic as a designated social security appeals body. The scope of the Tribunal's powers must be wide-ranging with respect to decisions regarding a social assistance or social insurance benefit taken by social security administrators. A Tribunal should, for example, have the authority to confirm, vary or set aside the decision of an underlying social security institution, as confirmed below. It should not easily be possible to bypass the Tribunal and proceed directly to court in cases where the Tribunal has jurisdiction over a dispute. Legislation should ensure that an appeal to the Tribunal is a necessary internal or domestic remedy (in relation to the courts) which must be exhausted before any court intervention, as described above. Jurisdiction should, however, be limited to causes of action contemplated by legislation and directly related to the appeal against an unsatisfactory underlying decision, relating to benefits, of a public social security body. The person who appeals to the Tribunal should always be an applicant, beneficiary or a dependant of an applicant or beneficiary who is dissatisfied with any decision taken by a public social security institution in terms of legislation.

Class actions should be excluded from the purview of the Tribunal's jurisdiction, given the complexities associated with such disputes and the possible benefits of having high-impact issues resolved directly by the High Court. Disputes where the cause of action is not based on an appeal against an underlying social security decision should also not be permitted. For example, disputes against service providers, contractual or delictual disputes and criminal offences will be excluded from the Tribunal's material scope of jurisdiction. These matters should continue to be dealt with directly by the courts. It is not

intended to equip the Tribunal with expansive powers of awarding contractual or delictual damages, criminal sanctions or the like, as these matters are best left to the court structure.

Adjudication powers and functions: The manner in which the Tribunal is to be established is expected to reflect its fundamental role in the adjudication of social security disputes. The powers and functions fulfilled by adjudicators, assessors and other Tribunal staff must contribute towards the idea of the Tribunal as a well-respected, powerful adjudication institution which remains subject to the review power of the High Court.

For example, the Tribunal must have a wide range of powers at its disposal. This would include the independent discretion to confirm, vary or set aside the underlying administrative decision concerning a social assistance or social insurance benefit. In cases where such an underlying social security decision is set aside, the adjudicator may make a final and binding ruling on the matter, without the need for the case being sent back to the social security body concerned. Tribunal decisions must be considered to be "final and binding", unless set aside by the High Court on review.

Any decision made by the Tribunal may also be accompanied by a costs order where this is warranted, as discussed below. Adjudicators may also make an order regarding the disclosure of relevant documents in appropriate circumstances.

The Tribunal should have a research and development / capacity development office, as indicated in the organisational arrangements section of the Policy. The Tribunal must compile and publish information and statistics about its activities. It may conduct and publish research into matters relevant to its function. All decisions of the Tribunal should be published on a Tribunal website and stored, together with other relevant information, in the Tribunal archives.

As mentioned above, the Tribunal may advise a party to a dispute about the procedure to be followed in appealing to the Tribunal. A party may be assisted by the staff of the Tribunal to obtain legal advice, assistance or representation. Stakeholders may be given advice or training relating to the primary objects and functions of the Tribunal. Appellants who are dissatisfied with the outcome of an appeal to the Tribunal will be given appropriate information to assist them to access the applicable High Court, for purposes of launching an application for judicial review of the Tribunal's decision.

The Tribunal may make rules to regulate its proceedings and may publish guidelines regarding any relevant matter, thereby contributing to the ancillary functions of general information-sharing and effective operational strategies.

Scope of remedies: The effectiveness of the Tribunal's remedial powers is safeguarded by the range of remedies, powers and functions at the disposal of adjudicators, as discussed above. Cost orders will generally not follow the order of the Tribunal and adjudicators will generally be hesitant to award costs orders against unsuccessful appellants and / or their representative, in order to prevent appellants from being discouraged from accessing the Tribunal. However, in cases of frivolous and vexatious applications

for appeal, an adverse costs order might be issued in order to deter the launching of unnecessary appeals in the future. For example, an appellant who persistently seeks an amount of compensation for an occupational injury or disease far in excess of the amount permitted by COIDA might, depending upon his or her conduct during the proceedings, be penalised by way of an adverse costs order.

The Tribunal should also be empowered to make a costs order *de bonis propriis* (which is a special type of costs order imposed against a legal practitioner for unsatisfactory professional conduct), in order to deter legal representatives from adopting a money-making approach to the Tribunal. The President of the Tribunal should appoint taxing officers to perform the functions of a taxing officer in terms of the Rules of the Tribunal. Any bill of costs should be taxed in the same manner as cases falling within Schedule B of the prescribed Magistrates' Court tariff (in terms of the Magistrates' Courts Act).

The Tribunal will also be permitted to make an order of contempt of the Tribunal in limited cases (for example when a witness fails to respond to a subpoena), subject to the confirmation of the President of the Tribunal.

Enforceability of decision: Facilitating the enforceability of the decisions of the Tribunal is a crucial component of ensuring that the Tribunal achieves the necessary respect from users and stakeholders. The process of establishing the Tribunal, and the permitted time-periods for compliance with Tribunal decisions, must take this into account. For example, decisions of the Tribunal should generally be implemented within a period of 14 days following notification of the decision to a social security institution.

The effective decentralisation of authority to designated regions will accelerate the enforceability of national decisions and facilitate a national roll-out of the Tribunal. A decision of the Tribunal may be served, executed and enforced as if it were an order of the High Court. An appeal decision that orders the payment of an amount of money could be executed by virtue of a Tribunal-issued warrant of execution, or by way of the standard warrant of execution prescribed in the Rules for the Conduct of Proceedings in the High Court. Notification could also be duplicated to the state attorney in cases where a finding adverse to the social security body has been made, in order to further reduce the chances of non-compliance with a Tribunal decision.

Reconsideration of decision: Any adjudicator who has issued an appeal decision, or another adjudicator appointed by the regional head of the Tribunal for this purpose, may vary or rescind an appeal decision either of their own accord, or in response to an application for variation or rescission. This would be likely in cases where there is an ambiguity or an obvious error or omission in the appeal decision. Allowing the Tribunal to reconsider its own decisions is an important characteristic, as it should prevent unnecessary referrals to the High Court.

9.4 Institutional framework and composition of the Tribunal

The high status of the Tribunal should be reflected in the leadership and composition of the Tribunal as well as in the terms and conditions of appointment of adjudicators. This status should also inform matters such as the Tribunal's governance and reporting requirements, as well as the manner in which it obtains funding.

In order to enhance the status and independence of the Tribunal, adjudicators are to be considered to be members (rather than employees) of the Tribunal. No *ad hoc* members are foreseen, although Acting Adjudicators may be appointed for a flexible period in order to alleviate an unexpectedly high workload. This configuration should assist in ensuring continuity, bearing in mind that there is no reason for preventing adjudicators from being repeatedly re-appointed when their contracts come to an end. The Tribunal's work will also be enhanced by the involvement of properly qualified independent assessors, such as medical practitioners, where necessary. The appointment of adjudicators and assessors is considered below.

Appointment of adjudicators and assessors: Decentralising the functioning of the Tribunal by creating properly staffed regional offices served by a sufficient number of adjudicators and assessors, all operating under the leadership of appointed Regional Heads, is a key characteristic of the Tribunal. The Tribunal's core functions will, in other words, be carried out by appointed regional heads and adjudicators. The Tribunal must, in terms of its composition (adjudicators and assessors), represent a broad cross-section of the population. As far as adjudicators are concerned, it must comprise sufficient persons with legal training and experience to deal with a wide range of potentially complex disputes on appeal. As many competent persons as is considered necessary should be appointed across the country as adjudicators to perform the required functions. The number of adjudicators appointed will also depend upon the number of cases being referred to the Tribunal in the various parts of the country.

Given the nature of some of the disputes which are likely to come before the Tribunal, it is also necessary for assessors, such as medical assessors, to be part of the structure being created. A list of approved, suitably qualified assessors should exist for each region. The President of the Tribunal should appoint assessors on the recommendation of the relevant professional bodies (such as the HPCSA), who must determine the required qualifications of assessors and submit a short-list for the approval of the Tribunal President. Adjudicators should be able to apply to the regional head for the aid of an assessor, and the regional head will draw from the list of approved assessors depending upon the specific expertise sought. The role of assessors shall be limited to providing advice to the adjudicator(s) appointed to hear the appeal. Assessors would not be able to cast a vote, or have any decision-making powers, in order to influence the Tribunal's final decision on the matter.

The President of the country must appoint the President and Deputy President of the Tribunal, on the advice of the relevant Minister. The Minister may appoint the adjudicators on the recommendation of the President of the Tribunal and with due consideration of inputs received from labour and employer representatives.

The President of the Tribunal should be empowered to appoint suitably qualified adjudicators as Regional Heads for each of the regions identified. These would normally be serving adjudicators. When making all appointments, due regard should be had to the need to constitute a Tribunal that is independent, competent and representative in respect of race, gender and the appointment of disabled people.

Determination of conditions of service of adjudicators: The relevant Minister, on the recommendation of the President of the Tribunal, would be responsible for determining the conditions of service and remuneration of regional heads, adjudicators and assessors. The President of the country should decide these matters for the President and Deputy President of the Tribunal, after consultation with the relevant Minister and the Minister of Finance. It is important that such determinations consider the risk (as identified and discussed in the part of this Policy dealing with Risks and Mitigation) of the possible inability to attract suitable, highly qualified adjudicators (in particular) to serve the Tribunal around the country. The conditions of service of adjudicators should provide adequate incentives to enable suitably qualified people to consider applying for appointment as adjudicators on a contract basis.

The President and Deputy President of the Tribunal should be a South African citizen, ordinarily resident in South Africa. Other adjudicators should be a citizen or permanent resident of South Africa, ordinarily resident in the country. It is important that Tribunal members' salary, allowances and benefits may not be reduced during their term of office. Adjudicators should be appointed on a full-time basis for a three year (fixed-term) period. This period may be repeatedly renewed, depending upon the adjudicator's performance. The President and Deputy President of the Tribunal may be appointed for a renewable period of five years.

Qualifications of adjudicators and assessors: Given the strong legal nature of the matters to be determined by the Tribunal, and considering the fact that the process is an appeal, it is recommended that all adjudicators require the Bachelor of Laws (LLB) degree prior to appointment, coupled with five years' relevant experience post-LLB. Certain occurrences should disqualify a person from appointment, for example if the prospective adjudicator is an unrehabilitated insolvent or has been convicted of a serious offence.

Qualifications criteria for the position of President and Deputy President of the Tribunal should be increased in order to demand ten years' relevant work experience post-LLB, coupled with relevant managerial and financial experience. The latter requirements are particularly important, given the range of managerial functions and finance-related obligations which are the responsibility of the Tribunal's leadership.

Specific, tailor-made training (perhaps via an informal / internal training institute) would be important for adjudicators and, to some extent, assessors. The qualifications required of assessors would be largely dependent upon the qualifications criteria required for membership of the appropriate professional body. For example, in the case of medical practitioners registration with the HPCSA would be the suggested minimum requirement. In addition, factors such as 5 years of post-qualification experience;

not having had the professional registration revoked in the past; confirmation that the person is fit and proper; lack of full-time employment with the public health service and absence of conflict of interest could be possible additional requirements.

Discipline and termination of service of adjudicators: The President of the Tribunal may, on at least three month's written notice addressed to the state President, resign from the Tribunal completely, or simply resign from his or her position as President. Any other adjudicator or assessor may resign by giving at least two month's written notice to the Tribunal President.

The President of the country may, on the recommendation of the Tribunal Advisory Council, remove the Tribunal President for serious misconduct, permanent incapacity or for engaging in any activity that may undermine the integrity of the Tribunal. The Tribunal Advisory Council may do likewise with respect to adjudicators and assessors, on the recommendation of the Tribunal president.

Funding: The Tribunal will be unable to fulfil its envisaged statutory mandate in the absence of sufficient initial and ongoing funding. For example, in addition to the operating costs and the costs associated with remunerating the Tribunal leadership, adjudicators, assessors and other personnel, the Tribunal will require certain immovable and movable property in order to fulfil its tasks. The independence of the Tribunal is ensured by making Parliament ultimately responsible for the Tribunal's initial and ongoing funding. This also has the benefit of safe-guarding the adequacy of the funding likely to be obtained, given that Parliament will be able to dip into the national finances in order to establish and sustain the Tribunal. In addition to the money appropriated by Parliament, any fees payable in terms of relevant legislation, income derived from the investment and deposit of surplus money and any other money which accrues lawfully from any source may be utilised by the Tribunal. No fees should be charged to appellants.

The Tribunal President may, on behalf of the Tribunal, invest or deposit any money that is not immediately required for Tribunal contingencies or to meet current expenditures provided that this is done in accordance with the applicable Treasury Guidelines, and with due consideration of the Tribunal's obligations as a national public entity in terms of Schedule 3A of the PFMA. Financially experienced personnel are included in the proposed organisational structure of the Tribunal at both national and regional levels, while the national level of the Tribunal will also be staffed by an internal auditor, in order to minimise the risk of financial mismanagement.

Human resource and organisational structure: The organisational structure of the Tribunal is an important aspect of its overall operations, and is discussed in some detail in a specific section of the Policy. The organogram included with this document illustrates that the Tribunal will be headed by a President. A Deputy President and regional heads will also be appointed, while adjudicators and assessors will be contracted to conduct the main business of the Tribunal.

The Tribunal President should be permitted to appoint other (administrative) staff, or contract with other persons / institutions, to assist the Tribunal in carrying out its functions, including a suitable Tribunal secretariat. The remuneration, allowances, benefits and other terms and conditions of appointment of a member of staff or the terms of a contractual arrangement with another person or institution undertaking this task, may be determined by the Tribunal President, in consultation with the relevant Minister and the Minister of Finance. The Tribunal should, in particular, be permitted to enter into a contract to secure the services of highly experienced administrative personnel presently employed by the existing social security institutions and the tribunal's operating under their auspices. This will ensure that people with the required experience and skill are directed towards employment opportunities with the Tribunal, which will have a positive impact upon the actual functioning of the organisation.

Managerial framework and administrative support: The leadership of the Tribunal is likely to be a decisive factor in determining the success of the Tribunal. The Tribunal should be headed by a President, who should be highly skilled and experienced in social security dispute resolution. The President will manage and direct the activities of the Tribunal and supervise the Tribunal's staff.

A Deputy President should also be appointed to assist the President and to perform the functions of the President whenever that office is vacant, or when the President is for some other reason temporarily unable to perform his / her functions. These office bearers should be stationed at the indicated "head office" of the Tribunal.

Each region of the country will be headed by a regional head, who is subordinate in status to the President and Deputy President of the Tribunal, and who will report to the Tribunal President. This is important in order to ensure the effective decentralisation of authority, enforcement of head office decisions and a national roll-out of the Tribunal, as reflected above.

The administrative staff of the Tribunal could fall under the authority of a Chief Registrar, who would report directly to the Tribunal President. Additional "divisional heads" could be responsible for matters such as capacity building, operations, finance, corporate services, internal audit, accountability, monitoring and evaluation, as reflected on the organisational arrangements organogram. Regional registrars must also be appointed, reporting to the regional heads of the Tribunal. These staff members would be directly engaged in the core business of the Tribunal, namely managing the flow of social security appeals, and are crucial to the workings of the Tribunal.

Governance, oversight and supervision: In addition to financial management activities conducted by the finance department of the Tribunal, as well as internal audit processes managed by the appointed internal auditor / the internal audit office, the Auditor-General (a constitutionally established office) will be required to conduct regular audits of the Tribunal's activities, in accordance with its normal practice. As soon as is practicable after receiving a report of an audit review, the Minister must send a copy of the audit report to the President of the country, the President of the Tribunal and the Tribunal Advisory Council (discussed below). The report must also be tabled in Parliament.

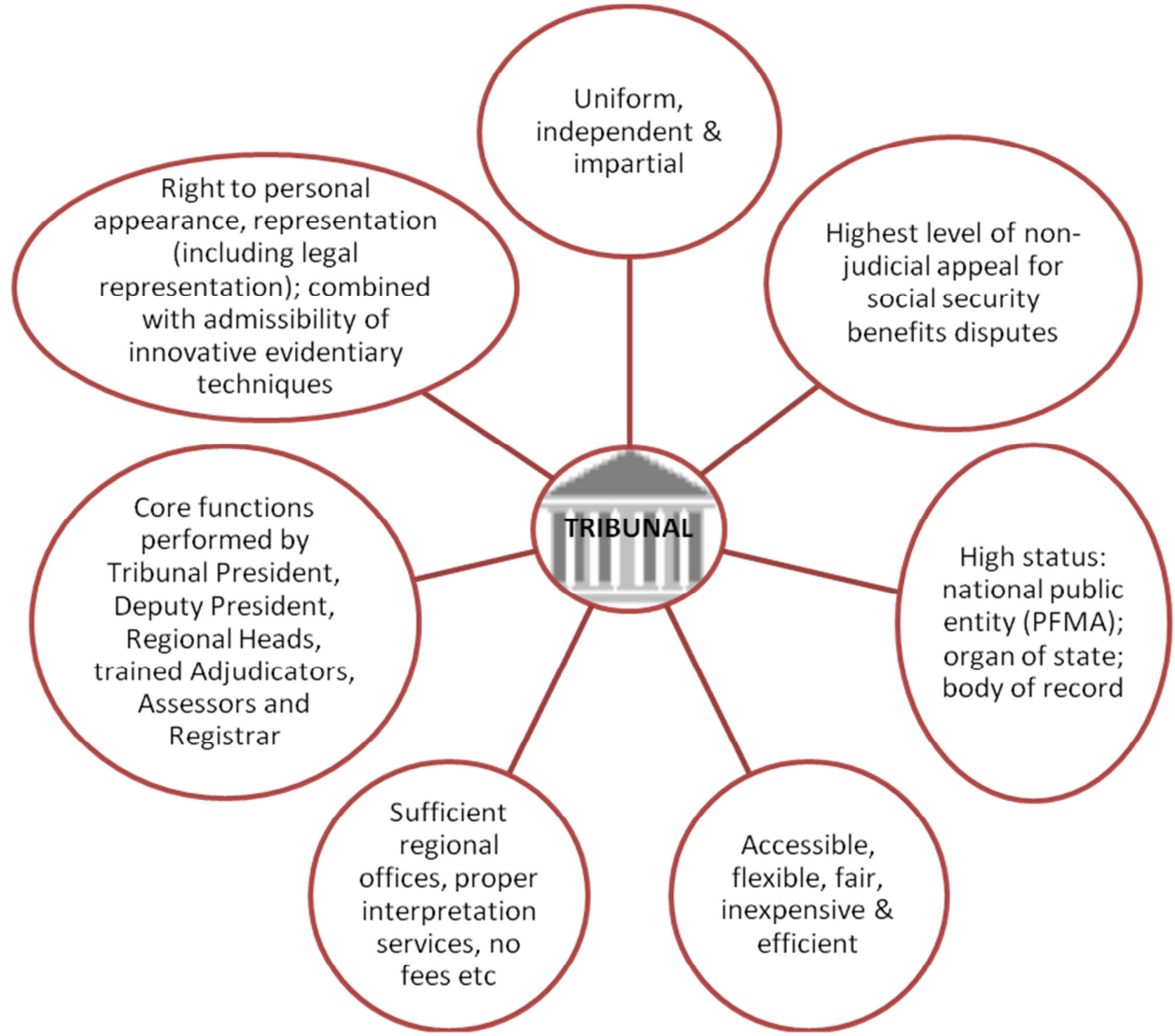
An adjudicator will be prohibited from advising or representing any person before the Tribunal. If, during a hearing, it appears that there is a conflict of interest, the adjudicator must immediately and fully disclose the fact and nature of that interest to the regional head and withdraw from any further involvement in that hearing. Adjudicators, assessors and other staff will be obliged to follow ethical guidelines in the performance of their functions, including any applicable Codes of Conduct which are introduced, in addition to professional ethical rules which may be binding upon them.

Accountability and reporting: It is suggested that the Tribunal Advisory Council / Board should accept part of the obligation of monitoring the functioning of the Tribunal. As reflected in greater detail in the part of the Policy relating to accountability, monitoring and evaluation, the Tribunal Advisory Council should be responsible for reflecting on monitoring and evaluation reports and on broader policy dimensions affecting the Tribunal before providing (non-binding) advice to the Tribunal regarding the best course of action in the circumstances.

The Tribunal must also comply with generally accepted standards of accounting practice, principles and procedures, as discussed in the preceding paragraphs. For formal purposes, the Tribunal must also report to the responsible line Minister regarding its activities on an annual basis. This will enable the Minister to table the Annual Report of the Tribunal (including information regarding its activities and financial position) in Parliament and to forward same to the President of the country. It must also be noted that, at least as far as its core adjudication function is concerned, the Tribunal is, in a certain sense, "accountable" to the High Court, in that unreasonable decisions may be set aside by High Court judgments, which will themselves create legal precedent which will bind the future decision-making on the part of the Tribunal (including possibly affecting the decision-making process).

It is particularly important that both the President and Deputy President of the Tribunal possess suitable managerial experience and general financial knowledge to enable the various Tribunal obligations to the Tribunal Advisory Council, the Auditor-General and the line Minister to be carried out successfully.

DIAGRAM 1: KEY TRIBUNAL ATTRIBUTES



KEY TRIBUNAL ATTRIBUTES
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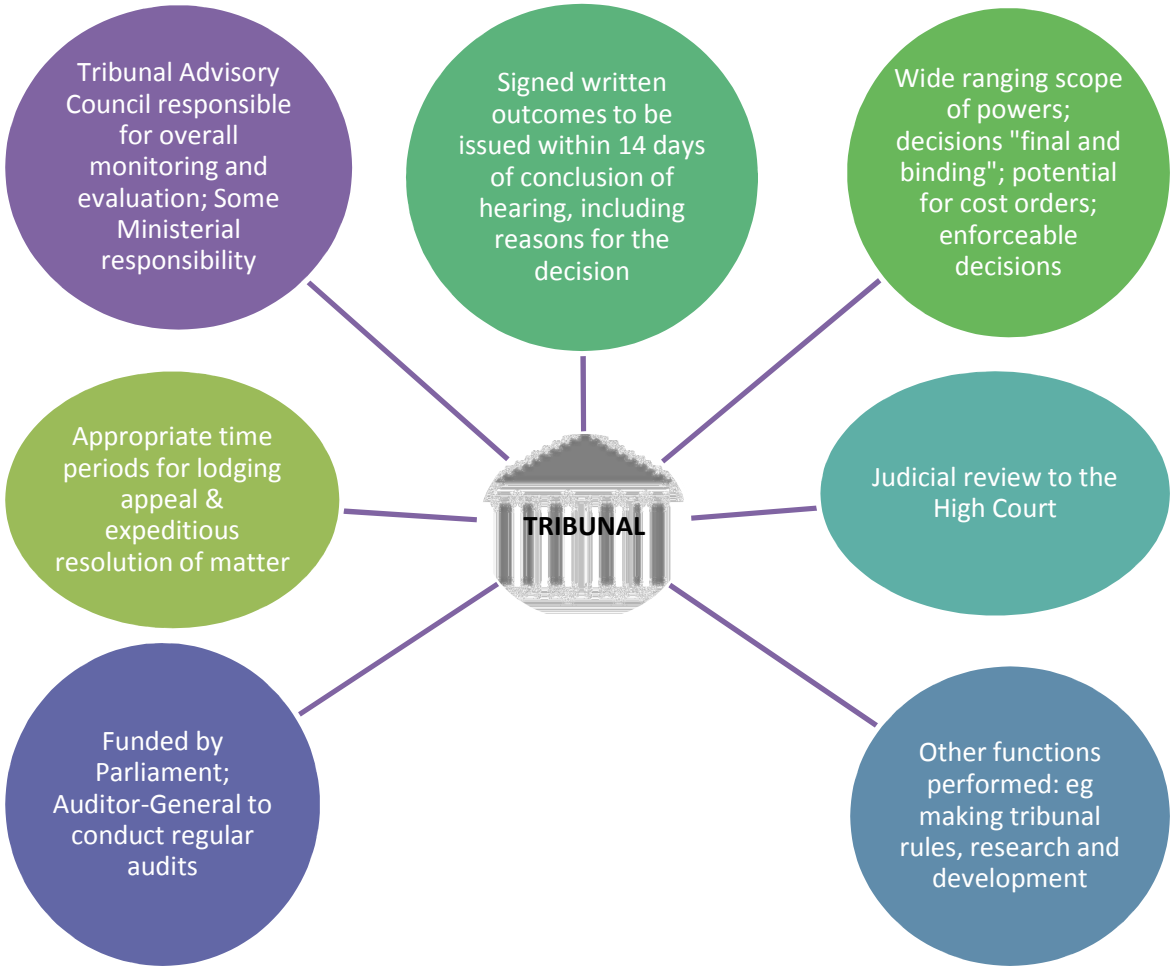


PART D: IMPLEMENTATION

10. Funding

This section of the Policy specifically considers the following selected funding-related matters pertaining to the Tribunal, including fixed-asset requirements:

- Source of funding
- Amount of funding
- Utilisation of funding and fixed-asset requirements
- Possible cost-savers
- Some details regarding the experience of the CCMA in this regard

10.1 Source of funding

The Constitution lays the basis for consolidated national and provincial revenue and expenditure accounts. It provides the platform for the receipt of revenue and the making of appropriations from single general purpose funds. In terms of section 213(1) of the Constitution, a National Revenue Fund was established "into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament". The South African National Treasury is the government department responsible for the management of the national budget. Although government programmes pertaining to social services, social security and welfare, for example, are funded from direct tax revenue, the social insurance schemes such as the Road Accident Fund, Compensation Fund and Unemployment Insurance Fund raise contributions that do not form part of the main budget. Social security systems generally utilise a wide variety of funding sources.

The high status of the Tribunal informs the choice of its funder. It is suggested that the Tribunal must be financed and provided with working capital mainly from money appropriated by Parliament. This allocation may be supplemented by any fees payable to the Tribunal in terms of any legislation, although care must be taken to ensure that appellants are not required to pay any fees when seeking to utilise the Tribunal's services. Finally, income derived from the investment and deposit of surplus money, and any other money which accumulates lawfully from any source, will also accrue to the Tribunal.

10.2 Amount of funding

The amount of money required to fund the creation, sustainability and success of the Tribunal, and the likely period of funding, requires serious consideration and proper financial costing. Such costing must consider funding requirements from both a national office and regional office perspective, given the extensive recommendations relating to the regionalisation of the Tribunal. It is worth noting, for purposes of comparison, that over R50 million appears to have been spent by the Independent Tribunal for Social Assistance Appeals during the 2010-2011 financial year, in addition to over R2 million for capital asset requirements.

At the very least, the amount of funding provided should contribute towards ensuring the creation of an accessible and authoritative social security appeals service. The Tribunal's budgetary requirements may be divided into the "pre-launch" (initial start-up) funding required; and the Tribunal's ongoing, regular monetary needs, again from both a national and regional perspective.

The major funding-related matters (requiring detailed costing) concern the following:

- The amount of money to be spent, on an ongoing basis, in remunerating the President of the Tribunal, the Deputy President, Regional Heads, the Registrar, adjudicators, assessors and other staff, and in providing benefits to staff who qualify as employees. Statutory payments in respect of staff members (such as payments for unemployment insurance and skills development levies) also require budgeting. There will be additional initial costs in recruiting appropriate people to staff the Tribunal across all levels.
- A decent budget for induction and training of adjudicators, assessors and the remainder of the Tribunal staff.
- The need to create a sufficient number of Tribunal Regional Offices throughout South Africa, with at least one regional office to be situated in each of the provinces. The costs associated with the foreseen travel of adjudicators and assessors "on circuit" also need to be factored.
- Creation of effective operations systems, including research, monitoring and evaluation systems, litigation management structures, a good governance configuration and information management tools and programmes. Contractors may need to be engaged in order to assist in the development of some of these systems, and this could potentially amount to a significant additional cost.
- Sufficient immovable property at national and regional level, including adjudication / hearing venues, administration offices (including a designated administration head office), space for archiving of documents and a research office, bearing in mind the need for the Tribunal to be properly accessible to the likely users of the system.
- Necessary movable property, including a small fleet of vehicles (also to enable adjudicators to travel on circuit when necessary), computers, office furniture and related operational expenditure such as stationery supplies, postage and telephone expenses.
- Costs associated with securing and managing Tribunal assets, including safety, security and maintenance considerations (such as costs related to occupational health and safety).

10.3 Utilisation of funding and fixed-asset requirements

As indicated above, the available funding will be utilised in two phases: initial funding will be needed to create and capacitate the Tribunal before it even begins to function (including, for example, costs associated with head-hunting the President of the Tribunal, securing premises, developing more detailed documentation regarding the establishment and long-term operationalisation of the Tribunal and the like); subsequent funding will be required on an on-going basis to ensure that the established Tribunal is able to operate consistently in the future in accordance with its statutory mandate (including, for example, costs associated with securing suitable premises at national and regional levels, office expenditures and travel costs (also for meetings of the Tribunal Advisory Council)). Such funding must

become an ear-marked budgetary item for Parliamentary purposes, to ensure that there is an uninterrupted, regular supply of sufficient funding for the Tribunal to perform its functions effectively.

Cost savers

Choices will have to be made carefully, in particular, regarding the utilisation of funding with respect to immovable property. The talent-seeking / heading-hunting process to fill vacant positions might be assisted by opportunities for seconding existing social security administrative personnel to the Tribunal, thereby saving costs. Given the high levels of expertise and experience possessed by the majority of administrative personnel presently employed by the State and engaged in social security-related work, such a move would also enhance the quality of the work of the Tribunal.

The CCMA example

The experience of the CCMA serves as a useful illustration of the kinds of matters which have a financial implication and which should be included in the more detailed costing exercise to be conducted (outside of this Policy). The CCMA's government grant for the 2010-2011 financial year was R402 million. Its operating expenditure was just over R381 million and the average cost per case referred was R2500,00. Staff costs accounted for 32% of the grant income, with over R130 million being spent in connection with salaries and benefits. Case disbursements amounted to over R144 million for the 2010-2011 year. The experience of the CCMA regarding venue requirements, personal safety and property security (including occupational health and safety issues), vehicle, travel and telephone management is insightful for the creation of the Tribunal.

By way of example, the CCMA presently requires approximately 200 venues across the country, including venues such as churches, community and school halls, as well as Labour Centres. The CCMA has a total of 22 regionally operating leases, which requires a competitive bidding process in the Government Tender Bulletin prior to signature. Offices and premises must meet the national standard in terms of workflow, image, security and accessibility. The overarching consideration in the utilisation of Tribunal funding should be to ensure the creation of an accessible and effective uniform social security adjudication system. The above-mentioned suggestions should contribute to the process of developing more detailed costing calculations at both national and regional level prior to the actual operationalisation of the Tribunal. For example, matters such as the establishment of an appropriate performance management system (at national and regional levels) will need to be considered and costed. The number of regional offices required, as well as the number of adjudicators, assessors and support staff will also be affected by the number of cases likely to be considered by the Tribunal on a regular basis. Given the present dearth of reliable information in this regard, this Policy does not purport to make concrete suggestions in this regard (the figures received from the Independent Tribunal for Social Assistance Appeals would suggest that approximately 300 social assistance matters are likely to proceed to the Tribunal on appeal on a monthly basis, requiring approximately 15 adjudicators to cover these matters alone).

10.4 Financial accountability

The Tribunal qualifies as a public entity for purposes of the PFMA, as it is an institution to be established in terms of national legislation; is fully or substantially funded from the National Revenue Fund; and is accountable to Parliament. As a Schedule 3A PFMA entity without a controlling Board, the President of the Tribunal will be the accounting authority. Comprehensive responsibilities are imposed on the Tribunal President as the accounting authority. For example, the Tribunal President will be subject to stringent financial obligations, including the obligation to report to Parliament and National Treasury. This reporting will facilitate the regular financial audits to be conducted by the Office of the Auditor-General vis-à-vis the Tribunal.

From an internal perspective, officials other than the Tribunal President have a range of stringent financial duties in terms of the PFMA. These include the development of appropriate systems of Tribunal (internal) financial management and control. This should result in irregular, fruitless and wasteful expenditure being prevented and should facilitate the effective, efficient, economical and transparent use of financial and other resources.

11. The organisational arrangement of the Tribunal

11.1 Introduction

Well-conceptualised organisational structures are fundamental to the creation, sustainability and success of a new South African institution such as the proposed Tribunal. These structures, including matters such as human resources, fixed-asset requirements and organisational culture, explain the framework within which an organisation arranges its lines of authority and communications, and allocates rights and duties. Organisational structure, in essence, determines the manner and extent to which roles, responsibilities and powers are delegated, controlled and co-ordinated. An appropriate structure also facilitates information transfer amongst the different organisational levels.

The Tribunal's mission, vision and strategic objectives, discussed at the beginning of this Policy, guides the choices made in this regard. For example, the organisational structure of the Tribunal should be rooted in excellence and social justice. Internal processes and systems must be enhanced and entrenched for optimal deployment of resources. The overall structure should enable effective implementation of the Tribunal's strategy and stimulate an organisational culture that supports the delivery of the Tribunal's mandate.

The organisational arrangements of the Tribunal should be specifically designed to:

- Improve accessibility of services to users;
- Entrench a culture that focuses on performance and service delivery excellence;
- Implement best practice policies and good governance structures;
- Source and retain the best talent for the organisation, with due regard to national employment equity considerations;
- Align the organisational design with the facilitation of delivery of the overall strategy;

- Ensure effective development, implementation, evaluation and reporting on the organisational strategy; and
- Foster a dynamic organisational culture informed by the values of the Tribunal.

This section of the Policy specifically considers the following selected organisational matters pertaining to the Tribunal:

- Organisational hierarchy, human resources and staffing;
- Organisational culture; and
- Phasing-in and time-frames.

11.2 Organisational hierarchy

Leadership: The overall strategy of the Tribunal is predicated on the need to develop the Tribunal as a unique organisation involved in the adjudication of public social security-related disputes. As indicated above, the Tribunal must be financially sustainable, which requires a strategic approach to organisational development, a clear integration between strategic goals and staff values, beliefs and behaviours, and strategic interventions focused clearly on leadership and management of change. The high status of the Tribunal must be reflected in the appointment of an outstanding President to head the Tribunal. The President of the Tribunal is responsible for performing a wide variety of important tasks (including the recommendation of appointment of Tribunal adjudicators, financial accountability functions, development of Tribunal Rules, standard-setting and bearing ultimate responsibility for operational control), and must be assisted in the performance of these functions by a Deputy President of the Tribunal. Further details in this regard, and with respect to the structures and staff profile described below, are contained in other sections of this Policy and illustrated on the attached organogram.

Regional Heads, Adjudicators, Assessors and Registrars: Regional Heads of the Tribunal will assume great responsibility regarding the core business of the Tribunal, namely adjudication of public social security-related disputes. The Regional Heads will report directly to the President of the Tribunal.

From a dispute resolution perspective, the appointed adjudicators and assessors will report to the Regional Head regarding the fulfilment of their functions. Regionally-situated Registrars will bear the responsibility of ensuring the administrative functioning of the regional offices of the Tribunal. These individuals will report directly to their respective Regional Heads. From the perspective of recruitment and selection, contractual arrangements between the Tribunal and current state employees working in the area of social security might result in secondment agreements which operate to the benefit of the Tribunal. Present social security panellists, adjudicators and decision-makers who meet the minimum qualifications criteria for appointment as Tribunal adjudicators should be given the full opportunity to secure appointment. Such measures will ensure that the present wealth of experience in social security dispute adjudication is, at least to some extent, retained. There is also a notable role to be played by

business and union representatives, legal academics and the legal fraternity in general with respect to matters of selection. The suggested Tribunal appointments process for adjudicators involves the Tribunal President recommending qualified adjudicators for appointment by the appropriate line Minister. Although the President of the Tribunal may be in the best position to advise the Minister regarding the merits of the suggested candidates, it is suggested that an advisory panel, comprising government, business and union representatives and members of the legal fraternity, including legal academics, serve as the forum to ensure an appropriate level of stakeholder participation in the appointment of adjudicators. The appointment will be made by the Minister, acting upon the recommendation of the Tribunal President, who will consider the input of the suggested advisory panel (to be chaired by the Tribunal President).

In the case of assessors, it is suggested that the President of the Tribunal appoints assessors (who must be registered with the appropriate professional body) on the recommendation of the relevant professional body involved (such as the HPCSA).

It is proposed that Regional Heads be assisted in the performance of their functions through sufficiently capacitated Research and Development-, Operations and Human Resources-, Finance-, Monitoring and Evaluation expertise within their respective regional offices. These sub-divisions of the Regional Offices of the Tribunal will report directly to their respective Regional Heads, and also to one of the Tribunal's national portfolios established specifically to deal with the branch in question, as illustrated on the attached organogram. These Tribunal national portfolios are now considered.

Capacity Building (Research and Development): The Tribunal's national office will also include a section dealing specifically with Capacity Building, including matters regarding research and development. The person in charge of Capacity Building should be assisted by a small, select team, and should report directly to the President of the Tribunal. Further details regarding the research and development functions to be performed by the Tribunal are contained in the part of the Policy relating directly to Strategic and Operational matters. The Capacity Building office should include control of the Tribunal archive, facilitate public access to information, provide information and statistics (for example to government departments and Statistics South Africa), compile an annual report and take measures to ensure the security of confidential information. This office will also be important for conveying information in the case of a High Court review of a Tribunal decision, and will be the office to receive and circulate precedent-setting decisions of the High Court amongst the members of the Tribunal. The Tribunal Advisory Council may use this division of the Tribunal to conduct / outsource any research it requires in order to perform its functions effectively.

Strategic and Operational Arrangements: The actual operation of the Tribunal, at both national and regional level, is concerned with matters such as core-business process flows, the creation of a litigation-management framework and the development of appropriate operational guidelines. The Tribunal's Regional Offices will need to be staffed by appropriately qualified and experienced personnel who are able to assist the Regional Heads in attending to core-business process flow. It may also be possible to streamline the Regional staff complement required, by incorporating aspects such as Capacity Building

and even Human Resources under this section, as explained in the next section of the Policy. The proposed national structure of the Tribunal accordingly includes a portfolio which oversees these functions at a national level, and as an addition to Regional Head reporting on these issues. This is demonstrated on the attached organogram.

Finance and Internal Audit: As a result of the Tribunal's creation as a public entity listed under Schedule 3A of the PFMA, the financial affairs of the Tribunal are a particularly significant concern. The statutory duties, responsibilities and liabilities imposed on the leadership of the Tribunal include submission to regular audits conducted by the Office of the Auditor-General, a constitutionally established body. Failure to adhere to the legislative and policy prescripts of the organisation may have serious consequences. As a public entity funded by the fiscus, the Tribunal must ensure that its processes and practices are regularly reviewed to ensure compliance with legal obligations, the use of funds in an economic, efficient and effective manner, and adherence to good corporate governance practices that are continually benchmarked. As a result of these obligations, it is important that the organisational structure of the Tribunal includes adequate financial expertise at both regional and national levels.

Although Regional Heads might possess some experience in financial management, they will generally require the assistance of an employee with an accounting-related qualification to assist in managing a range of important finance-related obligations (such as the payroll, management of allocated funding, attending to regional expenditures). It is recommended that the financial personnel at regional level will, again in addition to reporting to the Regional Head, also report to the designated national portfolio dealing with financial affairs and expenditure, as well as to an Internal Auditor who reports directly to the President of the Tribunal.

Corporate services: Like any other service industry entity, human capital and staffing is likely to be central to the attainment of the Tribunal's goals. The Corporate Services department of the Tribunal will operate at the national level and will have the duty to support the rest of the organisation in delivering on this part of its mandate. It will be responsible for delivering the means to enable the Tribunal to function effectively and to achieve its objectives. This obligation extends beyond merely securing physical locations and facilities to include all aspects of human resources and organisational culture and governance. This includes matters relating to induction and training, employee relations, remuneration and benefits, talent and succession planning. This portfolio will also, for example, be responsible for submitting Employment Equity Plans and reports relating to the achievement of employment equity targets. Aspects relating specifically to fixed-asset requirements are dealt with in greater detail in the section relating to funding, above, while matters of organisational culture are considered below. At regional level, it may be possible to combine human resource-related functions as an operational matter, rather than having separate regional personnel dealing exclusively with these issues.

11.3 External Reporting

The attached organogram reflects the external reporting lines of the Tribunal, an issue which is described in greater detail in other sections of this Policy. It should be clear that Tribunal reporting is split and shared amongst a range of external institutions and functionaries of high status.

For example, and as explained in greater detail elsewhere, the Tribunal Advisory Council to be formed boasts representatives from some of the most important offices in the country. Given the important function of the Tribunal Advisory Council, and the range of information it is likely to require from the Tribunal, it is suggested that part of the Tribunal's national administrative staff dedicate their time to facilitating the necessary flow of information between the Tribunal and the Tribunal Advisory Council (including bearing responsibility for logistical arrangements and the like). The High Court, when it fulfils its function as the body which reviews the decisions of the Tribunal, serves as a supervisory institution with respect to matters of Tribunal jurisprudence and creates legal precedent through its judgments (just as it does for the lower courts). The Auditor-General fulfils important functions of ensuring proper financial control and accountability, while the responsible line Minister, and the President of the country, also play some or other role in the workings of the Tribunal.

11.4 Organisational culture

All government organisations are expected to have a "corporate culture", reflecting positive attitudes regarding the way work ought to be done and the way the people within the organisation are expected to behave. In the case of the Tribunal, the essence of an effective organisational culture is the creation of an environment in which appropriate public social security dispute resolution occurs. An organisational culture that creates an environment in which employees and members are engaged, challenged and motivated is critical to the Tribunal's success. The effectiveness of organisational culture is ultimately reflected in the overall effectiveness of the entity in question.

The Tribunal's processes and practices are underpinned by the principles of openness, integrity and accountability, and an inclusive approach that recognises the importance of all stakeholders with respect to the viability and sustainability of the Tribunal.

The Tribunal should, for example, conduct regular countrywide customer satisfaction surveys, via an appropriate service provider. This will enable the Tribunal to determine the overall experience and satisfaction level of users and stakeholders with regard to the delivery of the services offered by the Tribunal. Such a survey will also expose public perceptions concerning the Tribunal's service delivery and identify aspects having the most significant impact on customer satisfaction. This will allow the Tribunal to develop a plan to address any shortcomings in its operation.

Developing context-specific Codes of Conduct for Tribunal Adjudicators, Assessors and other staff will contribute towards ensuring the creation of an appropriate organisational culture, and will ensure that ethical considerations (such as the absence of direct conflicts of interest) are integrated into Tribunal operations.

11.5 Phasing-in and time-frames

The actual operationalisation of the full organisational structure of the Tribunal will depend upon the Tribunal's launch-date. A series of milestones in the establishment of the full organisational structure of the Tribunal will need to be met prior to this launch-date.

For example, after legislation establishing the Tribunal is passed, a parliamentary allocation of funding will be required. This will facilitate the appointment of the President and Deputy President of the Tribunal, which needs to precede the appointment of Regional Heads, adjudicators and assessors. Other Tribunal staff members also need to be appointed. The Tribunal President and Regional Heads will need to be involved in contractual arrangements relating to possible staff procurement and to the securing of appropriate premises for administration and adjudication across the country. All of these issues need to be finalised prior to the actual commencement date of Tribunal operations. Further details in this regard are contained in the section of the Policy on Strategic and Operational Arrangements.

Finally, it must be noted that the Tribunal Advisory Council will only come into operation once the other key milestones have been achieved and the Tribunal has in fact commenced with its operations.

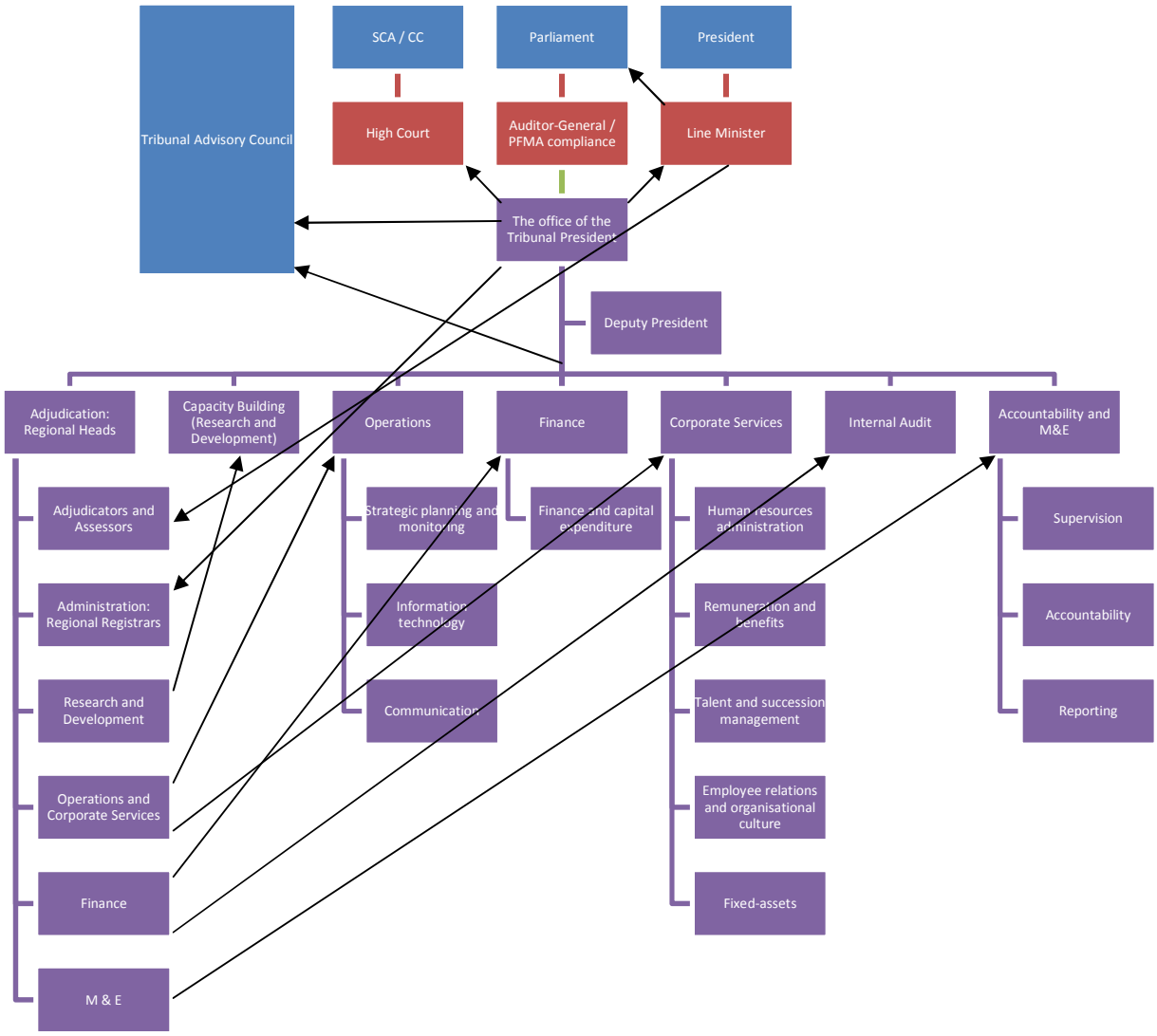


DIAGRAM 2: ORGANOGRAM

12. Legislative impact and changes

12.1 Introduction

A clear legislative mandate is required for the introduction of a uniform adjudication system to deal with social security appeals, and the associated reforms that need to be effected. This flows from the administrative law requirement that an institution which is structurally embedded in the broader governmental framework, as an organ of state in the constitutional sense, cannot exist or exercise powers and functions without a formal statutory basis. Simultaneously, users of the system, in particular social security applicants and beneficiaries, but also service providers and social security administrative and adjudication institutions, will be affected by the new dispensation. All of these individuals and institutions need to have legal clarity on their rights and obligations and an informed understanding of the processes involved in relation to the settlement of social security benefits disputes on appeal (i.e. disputes concerning access to social assistance and social insurance benefits, including the granting, refusal, adjustment, reduction, suspension, withdrawal and termination of benefits). And, of course, to the extent that the existence and operations of current institutions may be affected by the establishment of a uniform tribunal-like institution, modifications to existing legislation are required.

For purposes of the legislative impact and changes informed by this Policy, it is therefore necessary to reflect on five distinct but interrelated areas:

- The development of a legislative drafting plan;
- Establishment of the new Tribunal, with specific reference to
    - The desired instrument to effect same; and
    - A high-level discussion of the suggested legislative framework (the outline of the legal changes required by the context is contained as an Annexure to the Policy);
- Interfacing with existing (reformed) social security institutions/adjudication bodies;
- Interfacing with external (High) Court structure; and
- Reform of existing internal adjudication institutions/mechanisms.

12.2 Legislative drafting plan

In order to fine-tune the content of the legislative framework pertaining to the Tribunal and to determine the exact/concrete extent of the required modifications to existing laws, as well as the process steps to be taken, there is need to develop, upon approval of this Policy, a tailor-made legislative content and process plan (referred to here as the legislative drafting plan). This is a task to be undertaken by the indicated line Ministry, in close collaboration with the range of other ministries whose portfolios might be affected by the new uniform system and the modifications to the existing regime. The legislative drafting plan should also be developed in consultation with the relevant social security institutions falling under the auspices of these ministries, including SASSA, as well as the current social security adjudication bodies operating within the framework of the existing legal framework applicable to public social security institutions in South Africa. It might be advisable, for this purpose, to

set up a representative task team to spearhead, oversee and monitor the development, approval and implementation of the legislative drafting plan.

12.3 Establishment of new tribunal

Establishment via designated/dedicated new/separate or an integrated law?: As earlier indicated, there is some South Africa precedent and authority for setting up a tribunal via a dedicated statutory instrument. Two of the more recent examples include the Transport Appeal Tribunal Act (Act 39 of 1998) and the Administrative Adjudication of Road Traffic Offences Act (Act 46 of 1998). In some instances specific laws regulated the establishment of tribunals to deal with transitional arrangements only, at times informed by the new South African constitutional dispensation. The Defence Special Tribunal Act (Act 81 of 1998) and the Labour Appeal Court Sitting as Special Tribunal Act (Act 30 of 1995) could be cited as examples.

It is, however, suggested that the statutory framework providing for the establishment of the new Tribunal should reflect and dovetail with the current high-level drive in the country to create a new comprehensive social security system and a uniform institutional regime. Therefore, ideally speaking, the legal framework pertaining to the new Tribunal should be integrated or incorporated into, or at least appropriately related or linked to, the envisaged comprehensive system and uniform institutional context. The legal framework could, for example, provide that the creation of the new Tribunal coincide with the establishment of the envisaged National Social Security Fund. The practical implication will be that the legislative framework applicable to the Tribunal structurally becomes part of a new overarching social security law informing the introduction of the comprehensive system.

This might be the ideal solution, in particular in view of the cross-cutting nature and impact of the Tribunal's existence and operations. However, it is suggested that this exposes the current social security adjudication system in South Africa to inherent risks and challenges, in particular from a constitutional and access to justice perspective. Adopting the preferred approach outlined here will evidently delay the establishment of the Tribunal and the modifications to the existing legal and institutional regime pertaining to the adjudication of social security appeals emanating from public social security institutions in South Africa. It is clear from the earlier discussion in this Policy that the current system of social security appeals jurisdiction is not properly aligned with the new constitutional dispensation in South Africa – partly as a result of the fact that the current adjudication bodies were mostly set up under legislative regimes established during the pre-constitutional era. As the current system may therefore not pass constitutional muster, it could be foreseen that serious challenges of a constitutional nature could be raised in relation to the existence and operations of current social security adjudication bodies and the enforceability of their decisions.

As a tentative measure, therefore, it might be apposite to follow an alternative approach. In terms of this approach it might be advisable to have a dedicated Tribunal law developed, adopted and implemented prior to the introduction of a new overarching law informing the envisaged comprehensive social security system and overall institutional dispensation, and to subsequently

integrate the Tribunal law so developed into the new comprehensive legal framework. If this *modus operandi* is pursued it is, of course, necessary to ensure that the dedicated Tribunal law is properly aligned with the agreed framework of the new overarching South African social security system and associated institutional regime.

Benchmarking the legislative framework: The legislative framework relating to the establishment of the new Tribunal has to be informed by the considerations expressed in this Policy. In particular, the vision, mission and strategic objectives set out earlier provide broad direction to the development of appropriate legal provisions.

In general terms, the need to ensure access to justice for users of the system should influence the nature and content of measures and processes developed in the legal arena. In more concrete terms, given the supremacy of the Constitution, care should be taken to ensure compliance with constitutional values, prescripts, rights and obligations, in particular as far as they relate to access to justice perspectives. Furthermore, for the reasons discussed earlier, alignment with international and regional standards is essential. These overarching constitutional and international standards therefore constitute guiding principles for the development and interpretation of appropriate legislative provisions.

Also, as is evident from the earlier discussion, the experience with other tribunals in South Africa and similar tribunals in certain comparative jurisdictions is of great importance in giving shape and contours to the legislative ambit of Tribunal establishment. Therefore, salient characteristics of these tribunals, which may be adapted to suit the particular context of the envisaged new Tribunal, are utilised to serve as a benchmark for developing the legislative framework for both the establishment of the Tribunal and the other reforms required to be made to the current adjudication environment.

12.4 Suggested legislative framework

Establishment, composition and locations: This part of the legislative framework deals with some of the structural foundations of the Tribunal. It sets out the purpose and objectives of the new Tribunal, as well as the guiding principles that should inform an understanding of the rest of the law and influence the interpretation of its provisions. Paramount in this regard is the need, to be cast in the form of a legislative provision, to develop a uniform social security appeal service for South African public social security institutions that is accessible and independent and to arrange for a fair, expeditious, efficient, less expensive and more flexible process of appeals. Legislative provision should be made for this service to incrementally also include other, non-public social security institutions, as well as the suggested second pillar retirement fund arrangements (i.e. private accredited funds and private voluntary schemes), envisaged within the context of a comprehensive system of social security for South Africa. Compliance with constitutional prescripts and aligning South Africa with applicable international and regional standards will constitute another set of guiding principles.

Also covered in this part will be the range of definitions in relation to core terms utilised in the law, as well as important provisions on the law's sphere of application.

The law should further provide for the establishment of the Tribunal in incremental fashion – the line Minister should be given the power to let different parts/provisions of the law become operational at varying stages, in accordance with the need to logically build the Tribunal as an institution, before it can commence with its core business. The high-level status, as well as the independence of the Tribunal, should be explicitly stated.

It is further necessary to regulate the composition of the Tribunal, with specific reference to its membership. This covers the important position of President of the Tribunal, as supported by the Deputy-President position. Of particular relevance in this regard are provisions stipulating their recruitment and appointment (by the President of the country), the specific qualifications required for these positions, remuneration and conditions of service, comprehensive powers and functions, as well as discipline and termination of service – in a way which gives expression to its high-level status and required independence. Similar matters need to be provided for in relation to adjudicators and assessors, on the basis of the framework indicated elsewhere in the Policy. Other core positions within the Tribunal structure will also be regulated in this part, namely the regional heads and the Tribunal Registrar. Delegation of powers will be arranged.

Provision has to be made for appropriate performance management arrangements, in relation to all of the above functionaries, as is the case with the obligations imposed in the area of conflict of interest, and compliance with a relevant Code of Conduct.

As discussed elsewhere in this Policy, the location and country-wide operations of the Tribunal are crucial for affording users of the system access to justice. The law should stipulate provisions indicating the national and regional presence of the Tribunal, and its ability to render services on a roaming/circuit basis.

Funds and business of the Tribunal: Funding of the Tribunal and the management of funds received, including the making of investments, are critical elements which require legislative regulation. The same applies to matters of financial reporting and auditing, which need to be regulated in accordance with the PFMA framework and other legal provisions pertaining to corporate finance. Lines of non-financial reporting, notably to the indicated line Ministry, the President of the country, Parliament and the suggested Tribunal Advisory Council have to be clearly stipulated. The law should further deal with the procurement and use of movable and immovable property, as well as with the institution of litigation against the Tribunal, and the circumstances under which the Tribunal, its members and staff will be exempted from liability – in particular when decisions, which are compliant with procedural requirements, have been taken in good faith.

Staff and organisational arrangements: A core component of the Tribunal's structural design, to be provided for statutorily, relates to the functions to be executed by organisational divisions within the Tribunal – as is evident from the discussion below on the different areas of implementation of this Policy. Equally important is the procurement of suitable staff (also via contractual arrangements with

government institutions), and the regulation of their remuneration, conditions of service, employee benefit programmes, discipline and termination of service, as well as the training/induction they would require. As is the case with members of the Tribunal, appropriate provisions should deal with issues of conflict of interest and compliance with a dedicated Code of Conduct.

Jurisdiction, powers, functions and duties of Tribunal: Some of the key areas covered by this part of the legislative framework concern the stipulation of the types of disputes which fall within the Tribunal's scope of jurisdiction (i.e. benefits disputes as described – i.e. disputes concerning access to social assistance and social insurance benefits, including the granting, refusal, adjustment, reduction, suspension, withdrawal and termination of benefits) and those which are excluded from this scope; the parties who may lodge an appeal (i.e. applicants, beneficiaries and their representatives); assistance to be rendered by the Tribunal to appellants; and the possibility of alternative dispute resolution mechanisms.

Appeal to Tribunal: This part of the law deals with the core function of the Tribunal, namely appeals against social security benefits decisions emanating from the various public social security institutions. It confirms the entitlement to lodge an appeal; defines the scope of appeal (for example, with reference to evidence that may and may not be considered); describes the procedure applicable to the lodgement of the appeal; stipulates that the Tribunal can only be approached once the dispute resolution mechanisms available with the relevant social security institution have been exhausted; provides for referral of the matter back to the institution if it has not yet been reconsidered by same; and guarantees the right of judicial review of Tribunal decisions but subjects same to the exhaustion of remedies available within the Tribunal context. Importantly, a range of time limits, described elsewhere in this Policy, are regulated, at times subject to the flexibility arrangements where flexibility is required. Six sets of time limits are stipulated:

- Lodging of application of appeal and condonation of late appeals
- Reasonable period within which matter must be heard by Tribunal
- Period within which decision must be made
- Period for notification of decision
- Time line for enforcement of Tribunal decisions
- Lodging of application for judicial review and PAJA

Tribunal proceedings: Salient procedural matters are regulated in this part of the law, relating to matters such as the flexible nature of proceedings; the adoption, role and effect of Tribunal Rules; record-keeping by the Tribunal; the right to personal appearance and presentation; representation, including legal representation to the extent that this is not disallowed; the circumstances under which the appellant is entitled to interpretation; witnesses and the submission of evidence; the burden of proof in Tribunal hearings; and alternative hearing procedures and participation modalities where this is required by the context (for example, when the appellant is unable to travel to attend Tribunal proceedings).

Remedies and enforcement of decisions: Effective remedies and the enforceability of Tribunal decisions are crucial for the successful resolution of social security disputes. This part of the law therefore indicates the remedies which a party can obtain from the Tribunal and the final and binding nature of Tribunal decisions; the need to supply written reasons and notify the appellant of his/her right to judicial review in the event of an unfavourable outcome; notification of the decision; enforcement of the Tribunal decision as if it is judgment of a court of law; and the limited circumstances under which costs orders and contempt of Tribunal orders may be made.

Research and development: As one of the building blocks in the structural edifice of the Tribunal, provision is made for an archive and publication function exercised by the Tribunal; the undertaking of research and making available information and statistics; preparation of annual and other (including monitoring and evaluation) reports; the building of capacity among users of the system; and the right to, and conditions for, accessing information held by the Tribunal.

Establishment of Tribunal Advisory Council: Given the need to establish an overarching institution tasked with executing an advisory and monitoring role vis-á-vis the Tribunal, the law also regulates, among others, the establishment of a Tribunal Advisory Council; its high-level composition; matters related to the appointment of members of the Council; the functions and powers of the Council; and the rendering of administrative and research support by the Tribunal.

Transitional provisions, repeal of legal provisions and general provisions: Moving seamlessly to a new Tribunal environment requires the regulation of a range of important transitional matters, in a way that ensures the successful establishment and operationalisation the Tribunal, and smooth finalisation of outstanding matters. The law therefore has to provide for the transfer of pending litigation before existing institutions to the Tribunal at a stage when the Tribunal is ready to commence with the hearing of appeals. Also, transfer and secondment of staff and the power to contract with government departments and social security and other institutions to procure suitable staff needs to be provided for. Finally, the law stipulates the legal provisions that are required to be repealed as a result of the new Tribunal having been established and put in operation, and the limited power of the line Minister to make appropriate Regulations.

12.5 Interfacing with existing (reformed) social security institutions/adjudication bodies

As it is necessary to develop clear guidelines on the interfacing between the Tribunal and the institutions from where the dispute originated and were internally dealt with, provisions have to be included in the new legal framework which deal with the receipt and lodgement of appeals with the Tribunal; the receipt of, and request of records and documentation by the Tribunal; notification of the Tribunal decision to the appellant relevant social security institution; and implementation of the decision by the institution.

12.6 Interfacing with external (high) court structure

Different aspects of the interfacing between the Tribunal and the High Court have to be regulated by statute. Two areas need to be covered in the applicable legislative instrument. Firstly, it might be necessary for the Tribunal to rely on High Court procedures and mechanisms to have its decisions enforced. Secondly, there has to be provision for the smooth transfer of the matter to the High Court, should an aggrieved appellant wish to institute an application for judicial review of the Tribunal's decision. The law therefore should regulate the submission of records to the High Court. In this regard the legal provisions fulfil various purposes, notably to ensure that appellants are to be notified of the right to judicial review; are referred to the High Court; and are otherwise provided with advice. High Court rules and PAJA provisions are decisive with regards to the hearing of the judicial review matter by the High Court, as has to be confirmed by the relevant provision in the law. Finally, a legal provision needs to require the implementation of the High Court judgment and notification of that judgment by the Tribunal to the relevant social security institution, which was not necessarily a party in the High Court proceedings.

12.7 Reform of existing internal adjudication institutions/mechanisms

This Policy indicates that the current social security adjudication bodies, which were in most cases established during the pre-constitutional era, do not comply with the prescripts of the 1996 Constitution and its Bill of Rights provisions. In particular, requirements relating to administrative justice and the right to access to social security are not adequately met. In addition, these institutions do not constitute independent and impartial tribunals and forums in the constitutional sense of the word.

Legislative provisions are therefore required to render current social security institutions and the adjudication bodies operating under their auspices compliant with the Constitution; to simultaneously ensure a smooth and simple streamlining between these (internal) dispute resolution mechanisms and the Tribunal; and to remove provisions which are no longer regarded necessary as a result of establishment of the Tribunal.

Compliance with constitutional prescripts is ensured by legal provisions which create formal internal adjudication systems where these are currently non-existing (for example, in the event of non-medical or compensation claims within the ODMWA and RAFA contexts), and which require the incorporation of administrative justice requirements within the framework of the operations of these bodies (such as the provision of written reasons for decisions, and procedural fairness tenets, such as the right to make representations).

Interfacing between the internal mechanisms and the Tribunal will be enhanced by the adoption of universal characteristics across all internal mechanisms but retaining flexibility where required. Consistent and simplified arrangements pertaining to matters such as time frames, applicable procedures, process flows and reconsideration by internal structures before the matter is allowed to proceed to the Tribunal, therefore need to be introduced by legislation.

Current legislative provisions which should be removed are those providing for the current highest level of non-judicial institutions (since they are replaced by the Tribunal – alternatively, they can be merged or collapsed with other internal structures); those allowing direct access to the High Court on the basis of appeal or review; and those that grant the Director-General of the relevant government department the power to state a case for consideration by the High Court (available under COIDA and ODMWA).

13. Strategic and operational arrangements/guidelines, including core business processes and process flows

13.1 Adjudication operations

The suggested adjudication process is made up of three phases. It commences with the pre-adjudication stage, followed by the adjudication stage, and ends with post-adjudication processes.

13.2 Pre-adjudication phase

Receipt of appeal application: The social security appeal process commences with the receipt of an appeal application from an applicant or a beneficiary aggrieved by with a reconsidered or reviewed decision of a social security institution. An application for an appeal could also be received from any person or organisation representing an applicant or a beneficiary. The appeal application must be received within 60 days of the social security institution reconsidering or reviewing the original decision. An appeal application may be delivered by hand, post, fax or electronic mail. An appeal application may contain new information that has arisen since the claim was decided by the social security institution.

The institutions responsible for the administration of social security institutions must notify applicants and beneficiaries or their representative of the right to appeal; and refer them to the Tribunal. This should be done using the standard appeal form developed by the Tribunal for the ordinary referral of disputes.

Condonation of late appeal application: Where an applicant or a beneficiary or a representative fails to lodge an application for appeal within 60 days of the social security institution reconsidering or reviewing the original decision, the Tribunal can condone a late application lodgement where a sound explanation has been provided for the failure to lodge the dispute application timeously.

Assessment of application and supporting documentation: When an appeal application is received by the Tribunal (and, in the case of a late application which has been condoned), staff of the Tribunal assess the application and the supporting documentation. This is to ascertain the completeness and accuracy of the application and supporting documentation.

Request for further reasons and information (if necessary): If necessary (due to the incomplete nature or inaccuracy of the appeal application and supporting documentation) the Tribunal may request further information from the applicant, beneficiary or a representative. It can also request further information and reasons for the decision from the social security institution.

Provision of assistance to appeal applicants: When an applicant, beneficiary or his/her representative appeals a decision by a social security institution to the Tribunal, the Tribunal must render him/her all reasonable assistance in lodging the application.

Registration of appeal application in Tribunal system: When the complete and accurate appeal application and supporting documentation are received, they must be captured on the Tribunal data system.

Acknowledgement of appeal application: When the appeal application and supporting documentation have been verified and captured on the tribunal data system, the Tribunal must forward a letter of acknowledgement of receipt of the appeal application and supporting documentation. The letter of acknowledgement must be forwarded to the address provided by the applicant, beneficiary or a representative or by any other method indicated by the applicant, beneficiary or representative. The letter of acknowledgement must be sent within 5 days of receipt of a complete and accurate appeal application and supporting documentation.

Forwarding of copy of appeal application to other party to dispute: When a complete and accurate appeal application and supporting documentation is received by the Tribunal, the Tribunal forwards copies of the appeal application and supporting documentation to the other party to the dispute.

Schedule date, place and time of appeal adjudication: The Tribunal then schedules a date, place and time for the adjudication of the appeal.

Notification of parties of date, place and time of appeal adjudication hearing: The Tribunal must then give each of the parties to the dispute written notice of the date, place and time of the appeal adjudication hearing. Consequences of failure to attend should be indicated.

Withdrawal of application: An applicant, beneficiary or representative may, at any time before the adjudication of an appeal application by means of a written notice, withdraw an appeal application from the Tribunal.

13.3 Adjudication phase

Adjudication of appeal: When an appeal is scheduled for a hearing, an adjudicator may conduct pre-hearing processes to give the parties the opportunity of clarifying the outstanding issues in dispute, exchange information and documentation (in order to shorten the actual proceedings before the Tribunal) and possibly resolve the matter themselves. Pre-hearing processes include the possibility of the filing of statements and a pre-hearing conference. In exceptional cases, and upon the specific request of both parties, an adjudicator can facilitate some form of mediation, conciliation or settlement of a dispute.

Where an appeal application is not resolved through a pre-appeal process, it is scheduled for a hearing. A hearing is conducted on a date and time and at a place determined by the Tribunal and communicated to the parties. Parties to the dispute are entitled to be present in person. If a party is not able to attend at the venue for the hearing, the Tribunal may facilitate their participation by arranging hearings by tele-conference or by video-conference.

The process of deciding social security appeals must be flexible. Adjudicators can conduct the appeal hearing in a manner considered appropriate in order to determine the dispute fairly and quickly. The merits of the dispute must be evaluated properly, but with the minimum of legal formalities.

Parties to the dispute can present evidence, including new evidence which was unavailable or not presented at the time that the public social security institution dealt with the matter. Parties appearing before the Tribunal can argue the issues in dispute. Parties or their representatives may call witnesses and address concluding arguments. Witnesses may be subpoenaed in order to secure their attendance for purposes of testifying before the tribunal or for purposes of obtaining relevant documentary evidence. Subpoenaed witnesses are entitled to appropriate witness fees. Failure to comply with the terms of an issued subpoena may result in a finding of contempt of the Tribunal.

Where the application of a social security applicant, beneficiary or dependant of an applicant or beneficiary indicates that he or she satisfies the requirements of access to a benefit as provided in a law, it is the responsibility of the social security institution to justify why the person is not entitled to the benefits in question.

The Tribunal can be constituted by either a single adjudicator, or by a panel of three adjudicators (for more complex cases), with the assistance of an assessor where required. Adjudicators may direct the filing of statements within a set period of time, setting out the material facts upon which the applicant relies and the legal issues arising. The President of the Tribunal, or the regional head might also convene a “pre-hearing conference” in certain, exceptional situations where further clarity is necessary.

The Tribunal may develop innovative evidentiary techniques, such as the presentation of video-evidence, for the presentation of evidence at a hearing where a witness is unable to appear in person.

Legal representation as well as representation by another person (such as a trade union, employers’ organisation or civil society organisation) is permitted. However, an applicant or beneficiary who requires legal representation must apply to the Tribunal to obtain agreement regarding legal representation. The presiding officer must grant permission for use of legal representation, unless there are factors which make legal representation unnecessary. In this case, the presiding officer must furnish reasons for rejecting the application. The state must take steps to ensure that appropriate legal assistance (legal aid) is readily available for those who qualify for this, thereby enhancing the sense of meaningful access to justice for vulnerable members of society.

Parties who fail to attend proceedings before the Tribunal cannot be penalised by having their disputes dismissed. However, the Tribunal will still make a decision on the documentary evidence before it in such instances, thereby restricting the likely number of rescission applications.

Request for further information (if necessary): Where the Tribunal is unable to make a decision during the hearing of an appeal, due to the insufficiency or inconclusiveness of the information and evidence presented, the Tribunal may request additional information. Additional information may be requested from the appellant, his or her representative and from the social security institution.

Medical examination of appellant (if necessary): Where the Tribunal is unable to make a decision on the basis of the medical report presented by a social security institution or by an appellant or his/her representative, the Tribunal may request that the applicant or beneficiary undergo a second independent medical examination at the Tribunal's cost.

Writing of Tribunal decision and reasons thereof: Tribunal adjudicators must issue a signed appeal decision, with brief reasons, within 14 days of the conclusion of the appeal hearing. The President of the Tribunal, or the regional head, should be empowered to grant an extension of the time period for the finalisation of an appeal decision where the adjudicator demonstrates good reasons for an extension.

Reconsideration of decision (if necessary): After the Tribunal has made a decision on an appeal, the Tribunal may vary or rescind the appeal decision either of its own accord, or in response to an application for variation or rescission. Variation or rescission can occur where there is an ambiguity or an obvious error or omission in the appeal decision.

13.4 Post-adjudication phase

Communication of Tribunal decision, reasons and notice of right to further appeal: The Tribunal must serve a copy of the appeal decision on each party to the dispute or their representative. Appellants should be notified using their preferred method of communication indicated on the referral form. The social security body against whom the appellant has appealed must also be informed of the outcome of the appeal. It is suggested that a proper system of notification be developed in this regard. Notification could also be forwarded to the Office of the State Attorney in cases where a finding adverse to the social security body has been made. The decision may also be communicated to relevant government departments and professional bodies. Decisions of the tribunal should also be published on a tribunal website.

Filing of appeal documentation, record of hearing and notification of decision in Tribunal storage system: As an institution of record, the Tribunal must keep a record of all its proceedings. The Tribunal is required to file copies of the appeal application and supporting documentation, the record of the hearing and the notification of appeal decision in the Tribunal storage system. The Tribunal must develop an electronic records management system to ensure digital recording.

Assistance with application for judicial review: Where an appellant indicates that he or she intends applying to the High Court for the review of the Tribunal's decision, the Tribunal must render to the appellant all reasonable assistance with the application for judicial review.

Filing of appeal documentation, record of hearing and decision with High Court (on receipt of High Court request upon their receipt of an application for judicial review) and forwarding of High Court review judgment to social security institution: The Tribunal must lodge the appeal application and supporting documentation, the record of the hearing and the notification of appeal decision records with the High Court upon request from the Court. The documents must be lodged within 14 days of the request from the High Court.

A judicial review decision from the High Court must be communicated by the Tribunal to the social security institution whose decision was the subject of the appeal to the Tribunal.

13.5 Strategic and operational support processes

The Tribunal's strategic and operational support arrangements are processes that assist the Tribunal in achieving the effective implementation of its core business processes and process flows. The Tribunal's strategic and operational support arrangements include the adoption of an enabling legislative and regulatory framework (including the development of appropriate operational guidelines), the establishment of an adjudication management framework, corporate services support, research and development support (including capacity building), monitoring and evaluation support, IT business design and improvement services and governance and interface mechanisms.

Developing a legislative and regulatory support framework (Act(s), regulations, standard operating procedures and guidelines): An appropriate legislative and regulatory framework for the establishment of the Tribunal must be developed by the line Ministry responsible for the Tribunal in close collaboration with the range of other ministries whose portfolios might be affected by the new uniform system and the modifications to the existing regime . The legislative and regulatory framework will provide for the composition and locations, funding and business, staff and organisational arrangements, jurisdiction, powers, functions and duties of the Tribunal, the process for appeals to the Tribunal, and Tribunal proceedings.

Tribunal Rules, standard operating procedures and guidelines: Tribunal Rules stipulating the operations and processes of the Tribunal will be drafted by the Tribunal President. The Rules will provide for the regulatory framework and conditions under which the Tribunal must operate and will govern the functioning and operations of the Tribunal.

Standard operating procedures and guidelines will also need to be developed and implemented to ensure uniform norms and standards and a standardised delivery mechanism in the consideration of appeals to the Tribunal throughout the country. These would outline the procedures for applications to the Tribunal, and the processes for the determination of appeals.

Human and material capital: The Tribunal needs the necessary capital (human and material) to implement its strategic objectives. Human resources management and development services will be established, and human resources management policies, programmes and strategies designed. It will ensure compliance with legislation relating to human resources practices, promote good employment relations between the Tribunal and members or staff and implement performance management systems.

Physical locations and facilities, such as adjudication venues, administration offices space for archiving of documents and a research office will be secured. Movable property, such as a small fleet of vehicles, computers, office furniture and related operational supplies such as stationery supplies, postage and telephone facilities will also be procured. Corporate services will also be responsible for providing the human and material capital.

Management of Tribunal employment relations: Tribunal employment relations will be properly managed. This will involve the management of staff and organisational arrangements; recruitment and appointment; contractual arrangements with government departments, social security institutions and other institutions; remuneration and conditions of service; employee benefits and benefit programmes; labour relations (including employee litigation) and discipline and termination of service. Corporate services should be responsible for the management of Tribunal employment relations.

Management of litigation against Tribunal: The management of Tribunal litigation should fall under the auspices of the corporate services section of the Tribunal. Guidelines for the management of litigation against the Tribunal must be developed. These guidelines must enable the Tribunal to identify possible litigation matters and for these to be dealt with as per the guidelines. The guidelines should facilitate the early, expeditious and efficient resolution of possible litigation matters, before these matters reach the courts.

The Tribunal's enabling legislation should regulate the obligation to deliver a notice to the Tribunal of intended legal action where the resolution of possible litigation matters is not feasible. This will create awareness on the part of the Tribunal on the proposed litigation, and offer it an opportunity to seek the resolution of the dispute before the commencement of litigation.

Capacity building and information management (Research and development): Capacity building and training interventions will be undertaken. This will develop the capacity of the Tribunal members and staff, and in educating the users of the system and stakeholders on the Tribunal functions, operations, core business processes and process flows.

Guidance and advice in ensuring compliance with the legislative and regulatory framework must be provided. Training of Tribunal adjudicators, assessors and staff must also be undertaken to ensure adherence to this legislative and regulatory framework. The capacity building and training role should be performed by the research and development function of the Tribunal.

As discussed under the organisational framework, there is also need for archiving, provision of information to the public, collection of information and statistics compilation for annual reports and securing of confidential information. In addition, the research and development function will perform these tasks.

Monitoring and evaluation: Benchmarks to monitor and evaluate the performance of the Tribunal will be developed. In addition, an annual review of the tribunal business processes and flows will be conducted. This is to ensure compliance with the standard operating procedures or guidelines and to improve performance. The monitoring and evaluation function will develop the monitoring and evaluation service.

Performance management review of the members and staff of the Tribunal will also be carried out by the monitoring and evaluation support function. Performance standards for members and staff will be developed and members and staff will be assessed annually against the set standards.

Norms and standards for each operational process will be set and regular reporting will assist in the review of the standard operating procedures and guidelines. The monitoring and evaluation function will also supervise the implementation of the proposals in review reports.

Tribunal administration (adjudication management support) : The management of appeals to the Tribunal (including the management of appeals pending with current social security adjudication institutions) is performed by the Tribunal administration. It will also manage applications for judicial review.

Management of appeals to the Tribunal (including appeals pending with current social security adjudication institutions)

All appeals received by the Tribunal, including appeals pending with current social security adjudication institutions that are transferred to the Tribunal at the time of the inception of its adjudication functions will be managed according the process of adjudication operations discussed above (pre-adjudication, adjudication and post-adjudication processes).

Management of applications for judicial review

Reasonable assistance to an appellant who has indicated that he or she intends applying to the High Court for the review of the Tribunal's decision will be provided by Tribunal staff. Guidelines must be developed by the Tribunal to ensure that appellants who intend applying to the High Court for judicial review are provided the necessary assistance.

Governance and interface management: The various governance and interface arrangements of the Tribunal require that proper mechanisms are put in place to promote appropriate compliance with governance requirements and the necessary interfacing. Guidelines to ensure the success of governance and interfacing, which is split amongst a range of external institutions and functionaries, should be developed by the governance and interface management function.

The facilitation of the necessary flow of information between the Tribunal and the existing (reformed) social security institutions, between the Tribunal and the external (High) court structure, between the Tribunal and the Tribunal Advisory Council; between the Tribunal and government departments/parliament/constitutional institutions; and between the Tribunal and other relevant stakeholders will also be the responsibility of the governance and interface management function.

Information technology management: The responsibility of implementing, maintaining and upgrading information technology equipment and systems, and rendering an information technology support service to the Tribunal will be that of the Tribunal's information technology management service.

DIAGRAM 3: ADJUDICATION PROCESS FLOWS

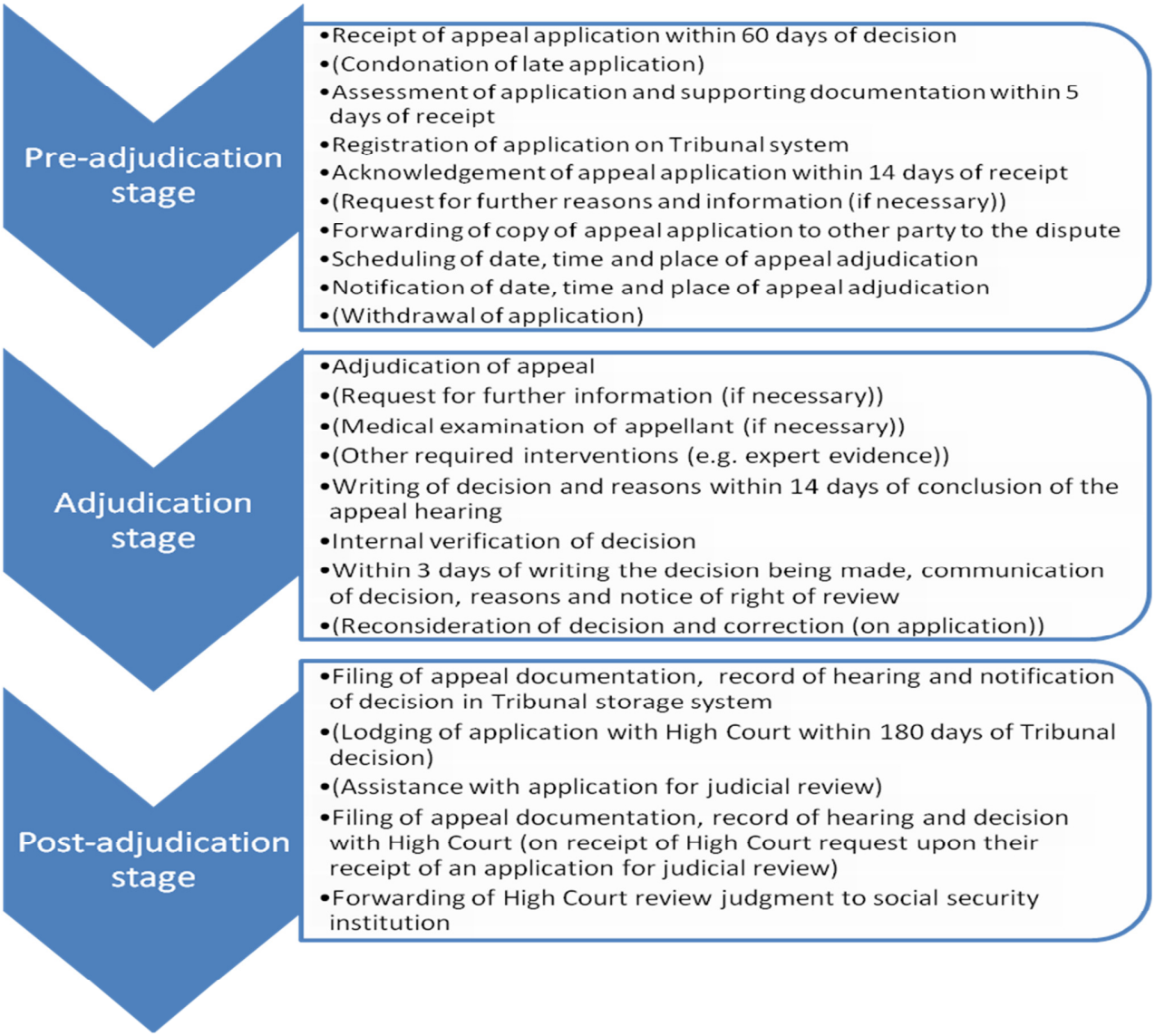


DIAGRAM 4: STRATEGIC AND OPERATIONAL ARRANGEMENTS/GUIDELINES

14. Accountability framework and monitoring and evaluation

14.1 Introduction

Effectiveness and transparency require that there be a proper accountability and monitoring and evaluation (M & E) framework in place for the Tribunal. Being a public entity utilising public money to render a public service to social security applicants and beneficiaries, the Tribunal must, and must be seen to, give proper account of its financial and non-financial performance and to be subject to monitoring and evaluation by interested and affected stakeholders. The challenge is how to achieve this in an environment where the Tribunal has to remain an independent body. The Policy suggests that this is possible, firstly through a context-sensitive accountability regime which emphasises the role and impact of a dedicated reporting and consultative framework linked to performance management review. In the second place, the task of undertaking monitoring and evaluation is spread out over a range of relevant institutions, with the envisaged high-level Tribunal Advisory Council exercising certain apex functions. In the third instance, monitoring and evaluation is undertaken against benchmarks set in the overall statutory instrument and the various plans developed in the organisational, operational and communication domains.

14.2 Accountability

Internal accountability

A broad distinction should be drawn between internal and external accountability. Internally, performance review, reporting, accountability and supervision form the basis for a proper framework of high-level and standardised service rendering. This is supported by legislative provisions regulating conflicts of interest and compulsory adherence to a relevant Code of Conduct. Organisationally and operationally, reporting obligations, lines and procedures should inform structured plans that drive the reporting process. Within the context of the PFMA, officials other than the Tribunal President have a range of stringent financial duties, such as to carry out the system of financial management and internal control established for the Tribunal; to prevent irregular, fruitless and wasteful expenditure; and to be responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility (section 57).

External accountability

External accountability comprises three different but to some extent related dimensions. The first dimension concerns financial accountability, the second non-financial accountability, and the third the important role of a suggested overarching consultative institutional framework, constituted by a Tribunal Advisory Council.

Financial accountability primarily relates to the Tribunal's PFMA obligations. The object of the PFMA is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies, including national public entities (section 2). The Tribunal, like a range of other tribunals in the country, such as the Competition Tribunal and the National Consumer Tribunal, evidently qualifies as a public entity for purposes of the Act, as it is an

institution established in terms of national legislation; is fully or substantially funded from the National Revenue Fund; and is, in terms of the framework discussed below, accountable to Parliament. It will therefore have to be included as a Schedule 3A entity in terms of the PFMA, which means that in the absence of a controlling Board, the President of the Tribunal will be the accounting authority. Comprehensive responsibilities are imposed on the Tribunal President as the accounting authority, amongst others with reference to (see section 51):

- ensuring that the Tribunal has and maintains proper systems of financial and risk management and internal control;
- taking effective and appropriate steps (amongst others) to collect all revenue due to the Tribunal, and to prevent irregular and other kinds of inappropriate expenditure (i.e. fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the Tribunal);
- being responsible for the management and safeguarding of the assets and for the management of the revenue, expenditure and liabilities of the Tribunal;
- complying with tax and other commitments required by legislation;
- taking effective and appropriate disciplinary steps against any employee of the Tribunal under certain circumstances;
- being responsible for the submission of reports, returns, and the like to Parliament and to the relevant executive authority or, in this case, national treasury; and
- general compliance and ensuring adherence by the Tribunal, with the provisions of the PFMA and any other legislation applicable to the Tribunal.

From the above it appears that the Tribunal President will be subject to stringent financial obligations, including the obligation to report to Parliament and National Treasury. The reporting so undertaken will provide a framework for the financial auditing role of the Auditor-General vis-à-vis the Tribunal.

Non-financial accountability concerns the obligation imposed by the Tribunal law to annually report to the indicated line Minister and the Tribunal Advisory Council referred to below. As discussed elsewhere in this Policy, the line Minister has the task to forward the report to the President of the country and table same in Parliament, in order to enable Parliament to exercise its supervisory functions vis-à-vis the Tribunal.

14.3 Monitoring and evaluation

Applicability of Monitoring and Evaluation to the Tribunal context

As indicated in government's *Policy framework for the Government-wide Monitoring and Evaluation System* (2007), a distinction has to be drawn between monitoring and evaluation. Monitoring aims to provide regular feedback on progress in implementation and results and early indicators of problems that need to be corrected. It usually reports on actual performance against what was planned or expected. Evaluation assesses relevance, efficiency, effectiveness, impact and sustainability. Impact evaluations examine whether underlying theories and assumptions were valid, what worked, what did

not and why. Evaluation can also be used to extract cross-cutting lessons from operating unit experiences and to determine the need for modifications to strategic results frameworks.

From an overall perspective, therefore, monitoring and evaluation helps to provide an evidence base for public resource allocation decisions and helps identify how challenges should be addressed and successes replicated (*Policy framework for the Government-wide Monitoring and Evaluation System* 1-2).

All government departments and organs of state are bound by the government-wide monitoring and evaluation framework. Per section 239 of the Constitution, organs of state also include non-departmental agencies (or institutions) exercising a public power or performing a public function in terms of any legislation. It would therefore be appropriate to assume that the Tribunal itself should also be included in this framework. However, it should be equally evident that the monitoring and evaluation framework and its operationalisation has to be sensitive to the fact that while the Tribunal is structurally part of government/the executive, it is not subject to government supervision and control. For this reason the construct suggested in this Policy includes monitoring and evaluation undertaken in respect of the Tribunal by government and other stakeholders in an overarching separate consultative institutional framework, provisionally referred to as the Tribunal Advisory Council.

Monitoring and evaluation obligations: Areas, contents and responsible institutions

There are several areas or aspects of Tribunal existence, functioning and output which should be the subject of monitoring and evaluation activity. Simultaneously, different institutions and role-players have to be involved in undertaking monitoring and evaluation, which need to be addressed at achieving varying objectives. It is, therefore, necessary to identify the monitoring and evaluation roles to be fulfilled by the range of institutions and role-players, in terms of areas/aspects covered, actors who bear responsibility in this regard, and objectives to be achieved. The areas/aspects covered relate to the following:

- Establishment of Tribunal, with specific reference to the adoption of legislative, structural and institutional changes, the new legal framework providing for the establishment of the Tribunal, and the actual setting up/establishment of the Tribunal;
- Process flows – between existing internal social security adjudication institutions and the Tribunal; within the Tribunal; and between the Tribunal and the High Court;
- Operations of the Tribunal, in relation to its adjudication and non-adjudication functions; communication; and leadership of the Tribunal; and
- System output, outcomes and impact (assessment) – focusing on quantitative and qualitative analysis; and overall assessment of Tribunal performance and impact.

Establishment of Tribunal

Overall the matter to be reported on is whether the Tribunal has been established in accordance with the proposals contained in this Policy; what problems have been experienced, what corrective/remedial steps as well as adjustments are required; and what should be done to bring these about?

As far as legislative changes are concerned, some of the relevant questions to be addressed in monitoring and evaluation reports are whether the legal changes required by the establishment of the Tribunal have been implemented; what delays and problems have been experienced; whether other changes are required; and what needs to be done to bring about changes in the legal domain? It is envisaged that reporting in this regard should be undertaken by the Tribunal itself; by the individual line function ministries (with the indicated line Ministry for the Tribunal possibly fulfilling a coordinating role; and by the Tribunal Advisory Council on the basis of the reports received by the Council.

Similarly, in the area of structural and institutional changes, some of the core issues to be reported on relate to whether the existing highest level of non-judicial appeal institutions have been phased out; and whether the existing/remaining internal adjudication structures have been reformed in accordance with the Policy proposals. Reporting in this regard should be done partly by the Tribunal; by individual line function ministries (with the indicated line Ministry for the Tribunal again possibly fulfilling a coordinating role); and by the Tribunal Advisory Council.

A further matter concerns the adoption and operationalisation of the new legal framework providing for the establishment of the Tribunal. Issues to be considered relate to whether the relevant legislative framework has been introduced and implemented, also with reference to the phased introduction required by the context; and what next steps are required to bring this about. Reports by the Tribunal; by individual line function ministries (possibly coordinated by the indicated line Ministry for the Tribunal); and by the Tribunal Advisory Council are required.

Finally in this regard, applicable reports have to reflect on the setting up/establishment of the Tribunal. In particular, has the Tribunal been set up, as foreseen, institutionally, structurally, financially, organisationally and operationally; what teething problems and hurdles have been experienced and how have these been addressed; what needs to be done further; which adjustments need to be effected according to what timeframe? These matters require reporting by the Tribunal and by the Tribunal Advisory Council.

Process flows

A next set of issues which should be subject to reporting concerns various process flows. In essence, what need to be answered are questions such as whether the relevant process flows are operational and successful? What problems are experienced, what corrective/remedial steps as well as adjustments are required; and what should be done to bring these about?

Three process flow areas appear to be relevant. Firstly, there are process flows between the existing (reformed and remaining) internal social security adjudication institutions and the Tribunal. Reports for this purpose should emanate from the relevant public social security institutions or their individual line function ministries (possibly coordinated by the indicated line Ministry for the Tribunal); by the Tribunal; and by the Tribunal Advisory Council.

Secondly, there are process flows within the Tribunal. The Tribunal itself and the Tribunal Advisory Council should be reporting on this. Finally, a seamless flow between the Tribunal and High Court (in relation to matters subjected to High Court judicial review) is of crucial importance. Reports in this regard should reflect the experience of various stakeholders as far as this matter is concerned, and could therefore come from the Tribunal; the Office of the Chief Justice (if/when operational for this purpose); and from an overall perspective from the Tribunal Advisory Council.

Operations of the Tribunal

Importantly, monitoring and evaluation also has to reflect on the operations of the Tribunal, in particular its core business, namely its adjudication functions. In broad terms, reporting should relate to whether the Tribunal is functioning optimally. Are problems experienced, also by users; how should they be addressed; and which adjustments need to be brought about in what fashion? Other issues to be covered under this heading include communication and Tribunal leadership.

As regards the Tribunal's adjudication functions, consideration should be given to whether the framework/system of adjudication of administrative appeals is in place and whether they are functioning properly. What solutions are available for problems being experienced by the Tribunal and by users; and what modifications are required? It is envisaged that reports on these matters are required from the Tribunal, also based on evidence-based research; and from the Tribunal Advisory Council as part of its high-level and overarching commenting and advisory function.

Non-adjudication functions (e.g., administrative, financial and training functions) constitute another area of investigation. For example, are the relevant operational and organisational structures and capacity-building interventions in place and properly functioning? These matters need to be reported on by both the Tribunal and the Tribunal Advisory Council.

Furthermore, the effectiveness of the Tribunal as an institution is largely dependent on the success of the communication strategy, and the quality and efficacy of its leadership. As far as communication is concerned, the overall question is whether the communication plan/strategy has been appropriately implemented? Questions raised in this regard include whether there has been, and still is, proper communication, also in terms of capacity-building of stakeholders as foreseen by the Policy. What needs to be addressed and improved in this context, and how? Reports on this should be forthcoming from the Tribunal, also based on evidence-based research, and by the Tribunal Advisory Council.

In connection with the leadership of Tribunal, there needs to be an evaluation, in particular, of the experience with the Tribunal leadership by Tribunal members, functionaries and staff, by users of the system, as well as by stakeholders. This might require evidence-based research undertaken or commissioned by the Tribunal Advisory Council.

System output, outcomes and impact (assessment)

Given the need to overall evaluate the new social security appeal system, it is necessary to reflect on the extent to which the Tribunal is being used for the purpose for which it has been set up. Is the Tribunal sufficiently appreciated, and are the Tribunal mission, vision and strategic objectives being met? Which adjustments are required, and what is needed in this regard? Several tasks need to be undertaken in this regard, with particular reference to both a quantitative and qualitative analysis and evaluation, and an overall assessment of the system and its impact.

For purposes of the quantitative analysis and evaluation, relevant statistical data reporting is required. This could be contained in reports of the Tribunal (with research involvement of its Research & Development department); and further reflected on by the Tribunal Advisory Council.

Equally relevant is the qualitative analysis and evaluation. This involves in particular an evaluation of the experience in this regard of Tribunal members, functionaries and staff, by users of the system, and by stakeholders. The evaluation should be undertaken by the Tribunal (with research involvement of its Research & Development department), and in reports based on evidence-based research undertaken/commissioned by the Tribunal Advisory Council.

Finally, there should be an overall assessment of the new system. In particular, has the objective of introducing a uniform social security (appeals) adjudication institution been achieved, as well as the establishment of an effective and streamlined social security adjudication process? Furthermore, has the objective of access to justice been met? Also, are constitutional objectives bearing in mind international standards met? Ideally, this should be reflected on in reports by the Tribunal (with research involvement of its Research & Development department); in reports based on evidence-based research undertaken/commissioned by the Tribunal Advisory Council; and in reports by the South African Human Rights Commission in view of its constitutional and statutory mandate.

14.4 Process and institutional issues, requirements and arrangements in relation to monitoring and evaluation

Several other matters impacting on monitoring and evaluation related to the new social security appeals adjudication system need to be in place. These concern the following:

(a) Dedicated M&E plan: A dedicated monitoring and evaluation plan has to be developed by each of the institutions involved in Tribunal-related monitoring and evaluation.

(b) Tribunal M&E reporting: As far as the Tribunal is concerned, the core of its monitoring and evaluation reporting should (also) be contained in its annual report(s).

(c) Time-bound and ongoing M&E: Some of the monitoring and evaluation functions/issues indicated above require reporting for an initial period of time only; other functions/issues are of an ongoing nature and require periodic/regular reporting.

(d) Coordinating role of indicated line Ministry: The indicated line Ministry for the Tribunal could play a coordinating role as regards the monitoring and evaluation reports forthcoming from the individual line function ministries accommodating the various public social security institutions, as well as from SASSA.

(e) Tribunal Advisory Council: As indicated above, the envisaged consultative structure/institution (Tribunal Advisory Council) plays a crucial role in terms of monitoring and evaluation of the Tribunal and the new system – not only through the development of synthesis reports submitted for regular reflection by Council representatives and stakeholders, but also for purposes of consultative engagement with the Tribunal; in addition, it will undertake or commission relevant evidence-based research.

(f) Training, capacity-building and appointment of skilled M&E experts: Training and capacity-building for purposes of monitoring and evaluation skills transfer, and (to the extent necessary) the appointment of sufficiently skilled monitoring and evaluation experts to the Tribunal, as well as the other institutions tasked with monitoring and evaluation in terms of this Policy, is a priority, needs to be planned, and requires a suitable budgetary framework.

Monitoring and evaluation requires the relevant skills in data collection and evaluation. Therefore, adequate training for the data collectors and the data end-users is essential. Persons involved in monitoring and evaluation must be properly trained, as the collection of information must be according to the specific legal and institutional environment of social security (appeals) adjudication, and promote privacy and confidentiality. It must also be of high quality (in terms of relevance, accuracy, timeliness, accessibility, interpretability and the like). This may require collaboration with Statistics SA as the lead agency in this area which works with each government institution (in this case the Tribunal as a public entity rather than a government institution in the strict sense) that gathers information that has broader public value.

Each data collection unit in the social security appeals adjudication system must consider interventions to build capacity in the short-, medium- and long-term, and needs to develop a capacity building plan for this purpose. A capacity building plan may have to first consider how an institution will design a strategy, and then consider the skills required to implement it. The latter part of the capacity building plan will compare existing capacities with what is required to implement the monitoring and evaluation strategy (based on the assignment of roles and responsibilities, and the skills that certain employees should have). Once the gap has been identified, various capacity building options can be identified and costed. The timing of the roll-out of capacity building interventions may be tempered by budget or labour market skills constraints. These risks should be noted and carefully managed.

(g) Policy review: It is recommended that, based on the outcome of monitoring and evaluation reporting over a number of years, there should be a review of this Policy after 5 years.

15. Communication strategy/plan

15.1 Introduction

This communication strategy merely provides broad guidelines in relation to the communication requirements. An overall national plan, together with specific sectoral communication plans for the different role players must be developed.

The communication plan outlines an overall communication strategy to be followed in the implementation of the new and reformed social security adjudication environment. This includes the key stakeholders for and content of communication; and the communication approach. It identifies key stakeholders who will be communicated to. It highlights the communication process to be followed with reference to the role that each communication role player has.

The communication strategy provides an overview of the need for effective communication; the need to align the communication plan and strategy to the governmental framework of official communication; the objectives of the communication strategy; critical success factors of communication of the strategy; guiding principles for communication; and the barriers to communication. Communication strategies are also presented, such as the methods of communication and the use of technology; and the key communication milestones. Finally, the mandated communication institutions and their responsibilities are discussed.

15.2 Need for effective communication

The establishment of a new social security adjudication framework in South Africa gives rise to the need for an effective strategy to inform users of the system, role players and stakeholders about the reform process and the functioning of the framework. Effective communication will create awareness of the reforms and of the existence of the adjudication institutions (including the newly-established tribunal).

This communication plan and strategy is developed in accordance with the governmental framework of official communication. This ensures that communication relating to the social security adjudication reform process and the functioning of the Tribunal is in accordance with government requirements on communication. Government is also the logical mandated institution and leader responsible for ensuring that information relating to such an important reform process (i.e. the establishment of a streamlined social security system and a uniform social security adjudication institution) is properly communicated within the broad governmental framework. Government's involvement will also facilitate the achievement of its (government's) vision of an integrated, coordinated and coherent communication between government and the South African public to enable citizens to participate in the country's transformation.

15.3 Objectives of the Communication Strategy

- Inform stakeholders and role players about the reforms to the social security adjudication system;
- Create awareness on the establishment of the new social security appeal tribunal with stakeholders and role players;
- Educate stakeholders and role players on the functioning of the social security adjudication institutions (including the new tribunal);
- Allocate communication roles and responsibilities to mandated communication institutions.
- Serve as a framework for the development of an overall national plan, together with specific sectoral communication plans for the different role players.

15.4 Critical success factors of communication

The critical factors that will affect the effectiveness of the communication of the social security adjudication reforms and of the functioning of the adjudication institutions are the following:

- Dedication of sufficient financial and other resources to communication;
- Availability of sufficiently specialised persons in the mandated institutions to carry out communication;
- The utilisation of appropriate communication methods and technology;
- Development of appropriate communication material.

15.5 Guiding Principles for Communication

- The need to develop an overall national plan, together with specific sectoral communication plans for the different role players;
- The prioritisation of communication due to the number of stakeholders affected by the Policy;
- The setting up of an extensive and wide-ranging communication strategy as a priority due to large number of stakeholders involved;
- The development of communication materials and use of communication methods that are easily understandable and accessible (also due to category of users of the system);
- The promotion of multilingualism in the development of communication materials;
- The development of appropriate timeframes for the various milestones for communication.

15.6 The Communication Plan

The Communication Approach: There is a need to develop a specific overall national plan, together with specific sectoral communication plans for the different role players.

The communication will be carried out at both the system reform stage and at the institutions operation stage. The communication suited to each stage will be developed. During the reform stage, communication is aimed at creating awareness by informing stakeholders and role players of the reforms to the social security adjudication system.

When the system is established and the institutions are in operation, communication will educate stakeholders and role players on the functioning of the social security adjudication institutions (including the new tribunal).

Key stakeholders for and content of communication: Various stakeholders will be affected by either the reform of the social security adjudication system and/or of the activities of the new uniform adjudication institution (i.e. the new tribunal). These stakeholders must be informed of the reform process and of the operation of the reformed internal adjudication institutions and the new tribunal. Stakeholders who are users of the system would also be informed on how the system works.

In addition, stakeholders of the reformed social security adjudication system and/or of the activities of the new uniform adjudication institution (i.e. the new tribunal) must be informed of the interface between the various components of the system. This involves the interface between the internal adjudication systems within the respective social security funds (including SASSA) and the new tribunal; and the interface between the Tribunal and the High Court (judicial review institution). The process flow with the respective adjudication institutions will also need to be communicated.

Stakeholders of the reformed social security adjudication system include the following:

- Social security applicants and beneficiaries who are users of the system;
- Public social security funds (i.e. South African Social Security Agency (SASSA));
- Social security forums currently undertaking adjudication;
- Government departments and constitutional institutions (i.e. the Auditor-General and the Human Rights Commission) affected by the reforms and the activities of the new Tribunal;
- Cabinet, which will approve the reform proposals;
- Relevant parliamentary Portfolio Committees performing legislative oversight duties;
- NEDLAC;
- Trade unions that will be representing workers in accessing social security benefits and will be involved in the adjudication of disputes;
- Employers and employers' organisations who are employer representatives;
- The media, which will assist in disseminating information regarding the reform process and the new tribunal;
- Civil society organisations such as non-governmental organisations, community-based organisations and faith-based organisations. Many of these organisations assist applicants and beneficiaries in accessing social security benefits and will also be involved in the adjudication of disputes;
- Professional associations (in particular legal, medical and social worker associations) whose members are also involved in the adjudication of social security disputes;
- The judiciary, as an integral part of the social security adjudication system;
- The Judicial Services Commission, as the oversight body for judicial institutions;
- Office of Chief Justice as the envisaged administrator of the judiciary; and,
- The general South African public (due to the significance of social security within the South Africa society).

Communication strategies

Methods of communication and the use of technology

There are many methods and mediums of communication. The method and medium chosen to communicate with a particular category of persons or institutions should be one that will ensure that the information reaches as many people as possible with accurate and timely information. Information and communication technology that facilitates accessibility of information will also be used in communicating the reforms and the functioning of both the Tribunal and the internal social security adjudication institutions.

Social security applicants, beneficiaries and civil society organisations should be reached through formal correspondence prepared for this purpose. Such correspondence should be handed to applicants and beneficiaries and civil society organisations upon contact with the respective social security funds (including SASSA). Applicants and beneficiaries and civil society organisations should also be reached through community road shows and media advertisements.

Social security funds, social security adjudication forums, government departments, cabinet, parliamentary Portfolio Committees, NEDLAC, constitutional institutions such as the Auditor-General and the Human Rights Commission, trade unions and employers/ employers' organisations who are employer representatives should be targeted through workshops and meetings, as well as through formal correspondence addressed to each of these institutions. Staff of social security adjudication forums affected by the establishment of the new tribunal should further be informed through formal staff memorandums or circulars by email or intranet.

Formal correspondence should also be addressed to professional associations, members of the judiciary, the Judicial Services Commission, and to the Office of Chief Justice.

A standard media statement should be prepared and press conferences held to inform the media about the reforms.

Key Communication Milestones/stages: Key communication milestones refer to the schedule of processes and events that will be communicated. The first milestone for communication is the approval of the Policy proposal by cabinet. The cabinet decision must be communicated to all role players and stakeholders through the most medium appropriate communication methods and mediums.

When the Policy proposal has been approved by Cabinet and a commencement date specified, stakeholders would need to be notified about scheduled date(s) for the implementation of the Policy proposals.

The next milestone is the implementation of the reform proposals. This will involve information on the setting up of the adjudication institutions, such as the new tribunal.

Once the adjudication institutions have been set up and functioning properly, the communication milestone will be in informing users of the system of how the system operates. This stage of communication is ongoing, as users must constantly be made aware of how to utilise the system. This will involve communication of information on the new tribunal, such as Tribunal rules, processes and policies.

15.7 Mandated communication institutions and their responsibilities

Lead Ministry: As the lead ministry in the social security adjudication reform process and the implementation of the Policy proposals, this ministry will also be responsible for the coordination of communication between the various mandated institutions. The development of press statements and organisation of press conferences will be carried out by the lead ministry together with the GCIS.

The lead ministry will also prepare and transmit formal correspondence with the relevant stakeholders. It will also be responsible for organising community road shows and media advertisements to promote awareness of the reform process and of the new institutional framework. In addition, it will arrange workshops and meetings with stakeholders, where the reform process will be debated.

The lead ministry will also encourage role players outside the governmental framework (such as trade unions, employer organisations and civil society who are representatives of applicants or beneficiaries) to use the communication plans developed; and to develop their own specific sectoral plans.

Government Communication and Information Service (GCIS): The GCIS is the primary institution charged with providing strategic leadership in government communication and to coordinate a government communication system that ensures that the public is informed about government's policies, plans and programmes.

Therefore, the GCIS will be responsible for communication at the general stakeholder or role player audience level. This would include developing press statements and organising press conferences. The GCIS, through its National Liaison Unit, promotes interdepartmental cooperation and integration of communication, and assists departments to develop effective communication strategies. It supports the implementation of departmental (or sector-specific) communication plans and convenes communication coordination forums (such as a forum of all role players in the adjudication policy communication). Such forums encourage integrated planning and coordination of government's communication programme and messages, especially at the joint-role player and message delivery level. The GCIS will thus promote cooperation and integration of communication between the various communication role players. It will also assist them in developing effective communication strategies and in the implementation of their communication plans.

Tribunal: The Tribunal is responsible for communicating with the users (appellants, representatives, the reformed social security institutions from where appeal emanate and the OCJ) of the Tribunal and other affected stakeholders. This is achieved through the publication and dissemination of information about its structure, functions, operations, policies and practices. In addition, the Tribunal must educate users and other stakeholders on how to utilise the services of the Tribunal.

The Tribunal will also provide information on its structure, functions, operations, policies and practices to the Tribunal Advisory Council in order for the Council to undertake its monitoring, enforcement and advisory role.

The Tribunal will also provide information to the High Court and to the revamped internal social security adjudication institutions to facilitate proper interfacing with the tribunal.

Social security funds/SASSA and supervising government departments: Social security funds, including SASSA and supervising government departments will be responsible for correspondence with applicants, beneficiaries and staff. Formal correspondence should be prepared, which would be handed to applicants and beneficiaries and civil society organisations representing them whenever each of these social security funds are approached for application of social security benefits. This should indicate the available institutions and procedure for the resolution of disputes.

Government departments acting as supervisory bodies for social security funds must inform these funds of the proposed changes to the social security adjudication framework, including the establishment of the new Tribunal. This can be achieved through formal memorandums or circulars by email or intranet.

Staff of social security institutions affected by the establishment of the new framework will be informed through formal staff memorandums or circulars by email or intranet.

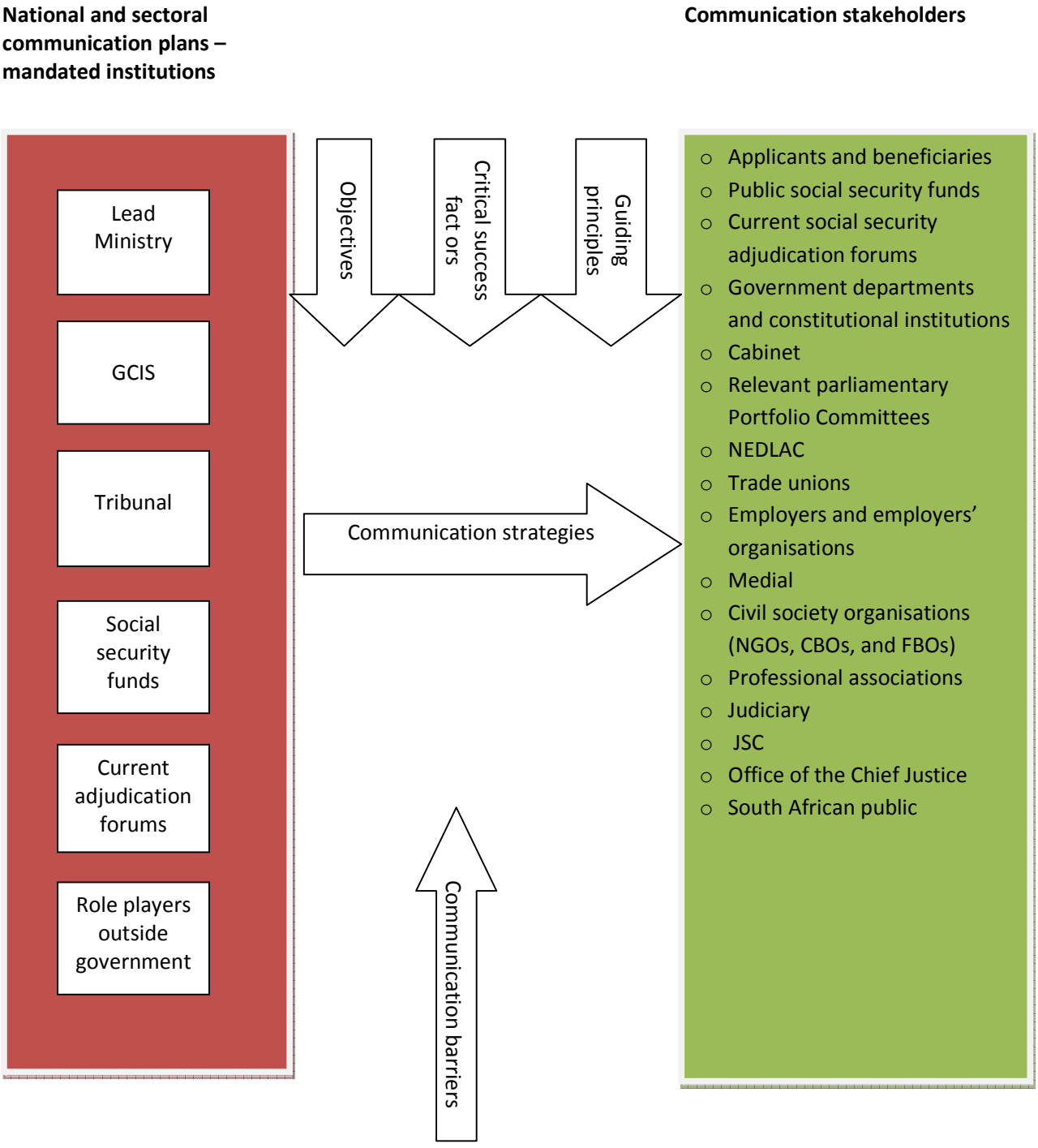
Current social security adjudication forums: Current social security adjudication forums will need to inform both applicants to these forums as well as members (adjudicators and assessors). The members of some of these forums will be affected by the proposed changes to the adjudication system. As a result, there will be concerns and uncertainty for those affected by the proposals. Staff of social security adjudication forums affected by the establishment of the new framework will also be informed through formal staff memorandums or circulars by email or intranet.

For applicants and beneficiaries and civil society organisations representing them, formal correspondence should also be prepared, which would be provided to persons involved in dispute resolution. This should indicate the procedure for the resolution of disputes in the forum concerned, and available avenues for further adjudication.

Role players outside government (e.g. trade unions, employers' organisations and civil society): Role players outside the governmental framework (who are encouraged to use the communication plans developed and to develop their own specific sectoral plans) will inform their members through

workshops, meetings and (in the case of trade unions and employers' organisation) through correspondence with their members.

DIAGRAM 5: COMMUNICATION PLAN



16. Risk analysis and mitigation

16.1 Introduction and approach

This section is divided into two main parts. The first part deals briefly with inherent challenges pertaining to the (appeals) adjudication of social security matters and the establishment of the Tribunal. The second part considers specific areas of risk which will exist *despite* the preferred recommendation being followed, and explains how the proposed system mitigates against the likelihood of such occurrences.

The approach adopted in this section is to briefly explain the nature of the risks associated with both of the parts (and their sub-parts) mentioned above and to provide a few key examples of the types of risks envisaged. The second part, in particular, includes some discussion regarding how the present design of the preferred option might mitigate the identified concerns. Where relevant, other ideas for mitigation of risk (stemming from outside of the preferred option) are also identified.

16.2 Inherent challenges

Extraneous factors impacting on "access": The social and economic barriers to the realisation of the constitutional ideals of human dignity, equality and freedom are well known in South Africa. Extreme poverty and lack of basic education are serious constraints facing millions of South Africans. These realities impact upon the physical ability of people to access institutions such as courts or tribunals. The geographic spread of people living in rural areas and language barriers are further extraneous factors which pose a challenge to the ability of average, unsophisticated people to access the proposed Tribunal.

Mitigation: The Tribunal is able to mitigate some of the adverse realities facing people in South Africa by being sensitive to the type of considerations mentioned above. The ethos of the Tribunal must embrace an environment in which employees and members are engaged, challenged and motivated to be sensitive to such realities. The Tribunal's processes and practices are intended to be underpinned by the principles of openness, integrity and accountability, and an inclusive approach that recognises the importance of overcoming these barriers to accessing the Tribunal's services. In particular, the construct of the Tribunal, as conceptualised and described in this Policy, mitigates the risk of an inefficient system of social security adjudication. For example, the detailed proposals regarding the various matters to be considered in the creation of the Tribunal will result in an accessible institution (in terms of geography, language and the assistance rendered to people in need).

Political ownership and inter-institutional difficulties: It is important that potentially differing governmental views regarding matters such as the need for a new Tribunal, the nature of this body and its reporting line do not cloud the issues and stifle the actual creation of this proposed adjudication institution. Political leadership will ensure that the various government ministries and departments

work together to iron out logistical and other difficulties in order to clear the path for the operationalisation of the Tribunal.

Mitigation: Determining in advance, and with sufficient agreement, who the responsible Tribunal line Ministry will be will have significant advantages, and will obviate the likelihood of unnecessary differences of opinion. Certain important functions, discussed elsewhere in this Policy, fall to the line Minister, but inter-ministerial co-operation (perhaps as an extension of the IDTT process) will be crucial to the future success of this initiative. Locating the Tribunal in the best possible place within the existing public social security system structure (bearing in mind national social security reform and latest developments) will allow the state to play an important leadership role in the establishment of the Tribunal, without compromising the Tribunal's actual independence. There should be general consensus that a uniform institutional framework for social security in South Africa is required in the near future. The proposed Tribunal to be created should be able to form an integral part of the envisaged framework.

Co-ordination of legislation: There are two complementary, but distinct, issues which are relevant in this regard. Firstly, there is a need for the created Tribunal to be co-ordinated with the existing social security adjudication institutions (as reflected in existing legislation). Secondly, the Tribunal must be developed with due regard to the broader, ongoing initiatives relating to the institutional reform of the entire social security system.

The range of public social security legislation presently in existence may ultimately require some integration, in order to avoid unnecessary overlaps and to prevent confusion amongst users of the system. With a view to creating space for the functioning of a new Tribunal, the existing public social security structures and institutions require high-level legislative and operational reform, a matter which might cause resistance in certain quarters. There is a clear need to develop a streamlined social security appeal framework in South Africa. Attempting to amend the existing social security laws in the absence of designated legislative provisioning establishing the new Tribunal would result in its introduction in a piecemeal fashion. This may also lead to unnecessary time delays which could result in non-compliance with constitutional provisions relating to timely access to justice. Failure to combine the creation of the Tribunal with reform of the existing (underlying) social security dispute resolution interventions will most likely result in unnecessary duplication and, ultimately, a chaotic adjudication environment.

The integration of the Tribunal with the new overarching South African social security institutional framework is an important, yet difficult, additional consideration which impacts upon the likely future of the Tribunal. Time delays in the establishment of the National Social Security Fund may provide a further challenge.

Mitigation: The Tribunal may be set up via an integrated or designated statutory instrument which should also regulate the Tribunal's institutional, financial, organisational, operational, human resource and reporting frameworks. In particular, the dispute resolution framework, relating to social security appeals and subsequent judicial review of Tribunal decisions, should be provided for. Although there is

some precedent in South Africa for introducing tribunals by way of designated legislation, the ideal situation would be to incorporate the establishment of the Tribunal within a comprehensive, overarching new social security law.

As an interim measure, the legislation providing for the present (inadequate) system of social security appeals could be amended, (possibly in combination with a designated statute creating the Tribunal) given the serious risks associated with an improperly aligned adjudication system and the likely difficulties in passing an all-embracing new social security law in a short period of time.

Funding: One of the biggest risks facing the establishment of the Tribunal (and related to the issue of political will) is that sufficient (initial and ongoing) funding is either not received at all from Parliament, or is not received timeously. Adequate resource allocation is a pre-requisite for the creation and sustainability of the Tribunal and insufficient budgetary provisioning will rapidly result in the destruction / failure of the Tribunal.

Mitigation: The line Minister, with the support of the other relevant Ministers, must present the case for the establishment of the Tribunal to Parliament. Political unanimity and a pointed focus on the goal of creating a new Tribunal at the executive governmental level will strengthen the case for the Tribunal to receive the required funding from Parliament. The sufficiency of the funding to be received from Parliament, coupled with the timing of the financial allocation, may largely be determined by the manner in which the line Minister will be able to present and argue the case for the establishment of a new Tribunal.

Endorsement and support: The characteristics of the Tribunal, emanating from the various comparative examples considered and directed towards the development of a uniform social security appeal service for South African public social security institutions that is accessible and independent, may displease certain stakeholders who believe that they are insufficiently involved with the new system. A broad base of stakeholder support is required, in addition to the political and financial support mentioned above, in order for the Tribunal to fulfil its intended mandate.

Mitigation: The process of establishing the Tribunal should be a consultative one, in terms of which key stakeholders such as trade unions and the existing social security adjudication bodies (the present highest level of non-judicial appeal social security institutions) ought to be able to participate in a consultative process regarding the development of the new Tribunal. An inclusionary consultative approach will enhance the likelihood of sufficient stakeholder participation in the formation of the Tribunal, which will ultimately be to the benefit of the process. For example, the proposed process of appointing Tribunal adjudicators, although ultimately in the hands of the Tribunal President and the responsible line Minister, incorporates a consultative role for trade unions, business and government representatives, as well as for the legal fraternity.

16.3 Risks and mitigating factors in the establishment of the tribunal

This section considers the following, more detailed, foreseen risks (and mitigating factors) in the establishment of the Tribunal:

1. The legislative context and impact;
2. Organisational arrangements;
3. Strategic and operational arrangements;
4. Accountability framework and monitoring and evaluation;
5. Communication plan.

These matters emerge from the preceding sections of the Implementation Part of the Policy.

The legislative context and impact

Status of the Tribunal and independence

The Tribunal must be created as an adjudication entity of high status which is independent of any external influence. Compromises in its creation) which dilute the status of the Tribunal (for example, by diminishing the authority of the Tribunal President and creating a direct, solitary reporting line between the Tribunal and the applicable ministry) may ultimately weaken or negate its potential to enhance access to social security and justice in South Africa.

Mitigation The Tribunal should be established with due regard being given to the fact that its status and independence, both in reality and in the manner in which it is perceived by the users of the system, is crucial for its chances of success. The high status of the tribunal should be reflected, for example, in the Tribunal's listing as a national public entity under Part A of Schedule 3 of the PFMA, in the leadership and composition of the tribunal, in the manner of the appointment of the Tribunal President and Deputy President of the Tribunal, as well as in the terms and conditions of appointment of adjudicators. This status should also inform the Tribunal's functions and powers, managerial arrangements, matters such as the tribunal's governance and reporting requirements, as well as the manner in which it obtains funding. The independence of the Tribunal may be protected by spreading the control of the Tribunal amongst a range of different entities, as discussed in the preferred option section of the Policy and as illustrated in the organogram attached to the "organisational arrangements" section of the Policy.

Availability and willingness of sufficient suitably qualified adjudicators and assessors

Adjudicators should be legally qualified and have sufficient experience. As members of the Tribunal they can, if the need arises, be assisted by assessors registered with relevant professional organisations, although adjudicators alone decide matters which come before the Tribunal. Given the Tribunal's need to comprise legally qualified members with sufficient, relevant experience, there is some risk that the Tribunal will struggle to attract a critical mass of potential adjudicators to leave their existing employment arrangements in order to accept a three year contract appointment with the Tribunal.

Mitigation: By incentivising the remuneration and benefits offered to adjudicators and assessors, in a manner which gives due recognition to the important function they will perform and in a way which is commensurate with their seniority, this risk should be avoided. As far as the actual Tribunal construct is concerned, it is important that adjudicators and assessors may be repeatedly re-appointed, as this is a factor which may encourage them to commit to serving on the panel of Tribunal adjudicators / assessors.

Establishing an appropriate training framework for adjudicators and assessors

Despite the minimum qualifications and experience levels sought on the part of adjudicators and assessors, it might well be the case that appointed adjudicators and assessors lack any direct experience regarding the adjudication of social security-related matters. This could pose a risk to appellants in that adjudicators (and assessors) who are untrained in the nuances of social security legislation (at a theoretical level) or adjudication procedures (from a practical perspective) might adopt an incorrect / over-simplified approach to adjudicating disputes.

Mitigation: Appropriate and ongoing opportunities for social security-specific and procedurally-oriented training will mitigate against the risks of such occurrences. This is a matter specifically envisaged by various proposals contained in the Policy, such as the organisational inclusion of a Capacity Building (Research and Development) office at both the national and regional levels. These measures should ensure that legal practitioners who may lack social security law expertise will receive the necessary content training, while social security law experts (such as suitably qualified academics) who lack practical experience may receive procedurally-oriented training.

Ethical considerations (such as conflicts of interest)

The staff of the Tribunal, adjudicators and assessors must be individuals of good character. This will ensure that the Tribunal maintains the respect of the users of the system and other stakeholders in the country. Conflicts of interest must be avoided or properly dealt with, failing which the work of the Tribunal might be undermined.

Mitigation: Developing context-specific Codes of Conduct for Tribunal Adjudicators, Assessors and other staff, as suggested by the manner in which the new Tribunal has been proposed, will contribute towards ensuring the creation of an appropriate organisational culture, and will ensure that ethical considerations (such as the absence of direct conflicts of interest) are integrated into Tribunal operations. These Codes of Conduct will, for example, make it clear that a person who chooses to accept an appointment as an adjudicator is precluded from representing parties to a dispute before the Tribunal in future, as long as he or she remains on the appointed list of Tribunal adjudicators.

Location of Tribunal

The Tribunal must enjoy a proper national presence, which requires both a national office and an adequate number of regional offices well-spread across the Republic. Failure to spread the functioning of the Tribunal around the country is likely to impact upon the accessibility of the Tribunal to potential users.

Mitigation: The President of the Tribunal must be able to delegate relevant functions of that office to Regional Heads of the Tribunal. This will ensure the effective decentralisation of authority and should be conducive to excellent service delivery. A dispute should generally be heard in the region in which the cause of action arises, unless the President or Deputy President of the Tribunal decides otherwise. This all implies that the Tribunal must have a sufficient number of properly equipped and staffed Regional Offices in all of the nine provinces of South Africa. Properly equipped adjudicators and assessors should also be required, on a periodic and needs basis, to travel "on circuit" to outlying areas in order to enhance the accessibility of the system. These are all matters which have been integrated into the actual Tribunal construct, as demonstrated in other areas of the Policy (such as the sections on the preferred option and strategic and operational arrangements, and on the organisational organogram).

Exhausting available (streamlined) internal remedies

The Tribunal is a public social security *appeals* adjudication institution. The idea that social security applicants must first approach an underlying social security department / body to apply for benefits (and also for the reconsideration of an adverse decision on the part of that department / body where this is available, such as in the case of SASSA and COIDA) must be retained where this is already in existence. Where the framework for the proper reconsideration of disputes is absent at the underlying level, this should be remedied. An incoherent, malfunctioning underlying social security system will most likely result in too many matters proceeding directly to the Tribunal or to the High Court.

Mitigation: The proposed system foresees the integration of the Tribunal as an appeals adjudication institution to be accessed only once an applicant or beneficiary is dissatisfied with a social security-related decision taken in terms of legislation. The aggrieved person should, ideally, have applied to the underlying social security body for a reconsideration of this adverse decision prior to approaching the Tribunal, the SASSA experience demonstrating that this may significantly reduce the number of cases proceeding to the next level of appeal. (By way of example, the figures received from the Independent Tribunal for Social Assistance Appeals indicate that there has been an almost 2/3rds reduction in cases proceeding to this tribunal, with only 5000 cases being referred there over an 18 month period between April 2010 and September 2011. This reduction is at least partly as a result of the introduction of forced reconsideration of SASSA decisions.) As a result, the suggested social security process flow of the Tribunal, as explained in the strategic and operational arrangements section, retains an important role for underlying social security bodies, including their reconsideration of their own social security decisions prior to matters proceeding to the Tribunal. Similarly, a dissatisfied appellant may only approach the High Court, as a rule, once the "internal remedy" of the Tribunal (in this sense) has itself been exhausted.

Accessing the High Court

There may be some negative perceptions around the "replacement" of the High Court (at least to some extent) with the creation of a new Tribunal. Some users of the system may believe that their right to access a *court* has been stripped by the creation of the Tribunal.

Mitigation: The best manner of dealing with this issue is to ensure the proper construction of the Tribunal as a viable, constitutionally-sanctioned alternative to courts. It must be emphasised that section 34 of the Constitution itself allows the creation of independent and impartial tribunals as valid substitutes for courts. A well interfaced system, in terms of which social security-related disputes flow seamlessly from internal dispute resolution opportunities to the Tribunal and then, in exceptional cases where an appellant is dissatisfied with the work of the Tribunal, to the High Court on the basis of judicial review, should address this concern. Importantly, the recommendations in this Policy regarding the creation of the Tribunal, in addition to permitting judicial review of Tribunal decisions, explicitly address the risks identified above by retaining the limited possibility of a direct application to the High Court (for example, in urgent matters and in disputes involving class actions and interdict applications).

Effectiveness of decisions, including enforcement

The success of the Tribunal will be undermined by too limited a range of remedies, or the inability to reconsider erroneous decisions or to enforce decisions which find against social security institutions.

Mitigation: As indicated elsewhere, the Tribunal should have an extensive array of remedies at its disposal, in order to bring finality to the dispute in an appropriate manner. It should also be able to reconsider and enforce its own decisions, which for this purpose should be accorded the status of a court judgment. These are all matters which have been addressed in the preferred option section of the Policy, which describes the characteristics and attributes of the Tribunal in some detail.

Exercising the discretion to exclude legal practitioners from representing appellants

The proposed system does not automatically permit legal representation. Lawyers may be aggrieved by this arrangement and by the exercise of an adjudicator's discretion to disallow legal representation in a particular matter before the Tribunal.

Mitigation: The manner in which the Tribunal has been crafted attempts to strike an appropriate balance between granting appellants opportunities to appear and be represented before the Tribunal (including legal representation) while maintaining the essential characteristics of expeditious social security adjudication. The concern of lawyers who may feel that they are insufficiently included in the proposed structure is unwarranted. The Tribunal construct gives adjudicators only a limited discretion to refuse legal representation where this is requested by the appellant party. The adjudicator would have to provide reasons for a finding that legal representation is unnecessary in a particular matter, a decision which itself might be the subject of judicial review. It should also be noted that the suggested qualifications criteria for appointment as an adjudicator is grounded in knowledge of the law and experience in law.

Information access

Lack of availability of information pertaining to a social security appeal will make it extremely difficult for the Tribunal to arrive at a just conclusion. The Tribunal's failure to retain and store relevant information may hamper the ability of the High Court to perform its reviewing function.

Mitigation: The importance of information retention and access to information is emphasised, in particular, in both the strategic and operations section of the Policy, as well as in the part dealing with organisational arrangements. Information relating to a social security applicant or beneficiary should be consolidated at the underlying institutional level. Once a matter has proceeded to the Tribunal, new information and evidence presented should also be carefully compiled and retained so that a reviewing court (in the case where an appellant is dissatisfied with the decision of the Tribunal) may be given a file / the record of relevant information very soon after an application for review is received. The time periods associated with this process are also dealt with in the strategic and operations section of the Policy. The Capacity Building section of the Tribunal, located within the organisational structure of the Tribunal at both national and regional levels, must incorporate a proper system of archiving appeal files and other relevant information, and create systems which permit interested parties to access this information quickly and easily when the need arises.

Transitional issues

The removal / rearrangement of the current highest level of non-judicial appeal (at the social security institutional level) may result in certain transitional difficulties. For example, matters which were brought before an institution which no longer exists will need to be heard by the Tribunal.

Mitigation: Transitional issues are discussed in further detail in the portion of the Policy pertaining to the legislative framework for the Tribunal. The suggestion is that there will be a statutory basis and framework for attending to transitional difficulties resulting from the introduction of the Tribunal in a manner which replaces the various institutions at the present highest level of non-judicial appeal. Matters which are pending before the current highest level of non-judicial appeal must be transferred to the Tribunal at the time that the former institution ceases to deal with such matters, which must coincide with the date on which the Tribunal commences operations. Practically speaking, therefore, the present highest level of non-judicial appeal would need to continue operating as it does presently until the legislation which creates the Tribunal is promulgated and operationalised. Matters which are pending before the present highest level of non-judicial appeal at the date of commencement of the adjudication function of the Tribunal ought to be transmitted to the Tribunal for finalisation.

Organisational arrangements

Human resources and staffing risks (including human capital management)

Human capital and staffing is likely to be central to the attainment of the Tribunal's goals. The Tribunal must be staffed by properly skilled and qualified personnel who embrace the organisational culture of the Tribunal and perform effectively.

Mitigation: The preferred option, legislative impact and organisational arrangements sections of the Policy explain the important need to create employment / secondment opportunities for experienced staff presently employed in the area of social security delivery. The likely benefits of this suggestion include retention of expertise and cost savings (in that the need for training may be reduced).

The Corporate Services department of the Tribunal will operate at the national level and will have the duty to support the rest of the organisation in delivering on this part of its mandate. It will be responsible for delivering the means to enable the Tribunal to function effectively and to achieve its objectives. This obligation extends beyond merely securing physical locations and facilities to include all aspects of human resources and organisational culture and governance. This incorporates matters relating to induction and training, employee relations, remuneration and benefits, talent and succession planning.

Matters relating to fixed-asset requirements (including facilities management) and organisational culture

The Tribunal requires adequate immovable and movable property (including premises, motor vehicles, office equipment, stationery supplies and the like) in order to function. This is a matter closely related to the availability of adequate funding, addressed above. In addition, there is some risk that the facilities placed at the disposal of the Tribunal may not be properly maintained and fall into disrepair. This is a concern related to the question of organisational culture, a matter previously addressed.

Mitigation: Such considerations are discussed in great detail in various sections of the Policy, in particular the part dealing with organisational arrangements. The manner in which the Tribunal has been constructed is intended to ensure that all employees and members of the Tribunal need to be inducted and trained so that they conduct themselves with due regard to the need to maintain and protect the facilities at their disposal. This will contribute towards the development of a tailor-made organisational culture for members and employees of the Tribunal. The internal audit, accountability and monitoring and evaluation frameworks, situated at national level, should assist the Regional Heads in managing the facilities available.

Phasing-in and Time-Frames

The actual operationalisation of the full organisational structure of the Tribunal will depend upon the Tribunal's launch-date. A series of milestones in the establishment of the full organisational structure of the Tribunal will need to be met prior to this launch-date. Failure to achieve the set targets may result in the development of an incoherent appeals system

Mitigation: The Tribunal should be introduced, via legislation, in logically sequenced phases. The details of the proposed legislation requiring enactment are contained in the section of the Policy relating to the legislative impact.

For example, after legislation establishing the Tribunal is passed, a parliamentary allocation of funding will be required prior to the date of commencement of the Tribunal. This will facilitate the appointment of the President and Deputy President of the Tribunal, which needs to precede the appointment of Regional Heads, adjudicators and assessors. Terms and conditions of engagement for the remaining Tribunal positions and functions require determination. Other Tribunal staff members, such as regional heads, division heads for finance, operations, capacity building, corporate services and accountability, monitoring and evaluation, also need to be appointed before the Tribunal commences operations. The

Tribunal President and Regional Heads must be involved in contractual arrangements relating to possible staff procurement and to the leasing of appropriate premises for administration and adjudication across the country, also making sure that these premises are fit for working purposes and adequately secured. Induction and training is also required. All of these issues need to be finalised prior to the actual commencement date of Tribunal operations. Finally, it must be noted that the Tribunal Advisory Council will only come into operation once the other key milestones have been achieved and the Tribunal has in fact commenced with its operations. Further details in this regard are contained in the Policy section on Strategic and Operational Arrangements, and should be captured when the envisaged legislative content and process plan is drafted, upon approval of this Policy.

Strategic and operational arrangements

Matters relating to adjudication operations and flows, including management of appeals and time-frames

These issues are addressed, in particular, in the strategic and operational arrangements part of this Policy. The pre-adjudication, adjudication and post-adjudication process flows will be largely ineffective if they fail to strike an appropriate balance between expeditiousness and allowing social security applicants and beneficiaries sufficient time to ascertain and take the steps required (in order to apply for benefits and to appeal against an unfavourable decision). An inflexible, unfair Tribunal process, in terms of which appellants remain uninformed about the nature of the proceedings and what is expected of them in terms of their participation and appearance, is wholly inadequate. Such matters are intrinsically linked to effective operational arrangements, including successful communication strategies, and may be considered to be pre-requisites for the functioning of the Tribunal.

Mitigation: Streamlined process flows, including precise time-frames for pre-adjudication, adjudication and post-adjudication processes, have specifically been developed with due regard to the need to balance quick dispute resolution with accessible and fair systems. The operations department of the Tribunal must manage the possible challenges in relation to adjudication operations. Development and implementation of standard operating procedures and guidelines, coupled with other initiatives considered in the strategic and operations section of the Policy should sufficiently mitigate the identified risks.

The following key design characteristics of the adjudication system to be established should enhance the prospect of a well-managed, timeous appeals process:

- An adequate period of time (60 days) is allowed for the receipt of an application for appeal and flexibility is maintained in the manner in which the appeal documentation may be transmitted;
- The established process encourages regular communication between trained Tribunal staff and appellants (or their chosen representatives). For example, Tribunal staff should peruse the appeal documentation received and have the opportunity to request further information from an appellant or his / her representative, rather than merely rejecting the appeal outright for this reason. There is also ample provision made for Tribunal staff to be sensitised to the inherent

challenges facing the average social security applicant, and to assist appellants appropriately throughout the appeals process;

- Non-compliance with time-frames may be condoned once an appellant demonstrates good cause for a delay;
- The emphasis on appropriate use of technology and the importance of data retention combine to ensure that the chances of documentation loss are reduced;
- The pre-adjudication time-frames for Tribunal staff to acknowledge receipt of an appeal, notify the other party to the dispute about the appeal, schedule a matter for hearing and notify the parties about the hearing date encourage consistent communication with parties and rapid progress in processing the appeal;
- Pre-hearing opportunities may result in the issues in dispute being narrowed, or even in the settlement of the dispute;
- The flexibility afforded to adjudicators in determining appeals should also contribute towards the establishment of effective, cost-efficient and timely dispute resolution practices;
- Permitting innovative presentation of evidence and partly placing the onus on the social security institution (once a basis for benefits has been laid by the appellant) mitigates the risk of unjust appeal outcomes, as does the decision to permit personal appearance and representation (including legal representation);
- Time periods for adjudicating the dispute to completion, including notifying the parties of the outcome of the dispute, have also been carefully constructed to minimise the risk of unnecessary process delays;
- Unnecessary applications for judicial review (to the High Court) may be reduced by the power of the Tribunal to reconsider, vary or set aside erroneously made decisions; and
- The record-keeping systems established by the Tribunal should enhance the effective processing of those matters which are ultimately referred to the High Court for judicial review: the Tribunal will be able to access the full records of the dispute and convey these documents to the High Court without delay. The outcome of an application for judicial review will filter back to the Tribunal, and via the Tribunal to the underlying social security institution, suggesting that Tribunal adjudication best practices may continuously evolve under the guidance of the High Court.

<u>Other dispute resolution and litigation management (e.g. contractual / delictual claims)</u>

The Tribunal may face legal challenges both internally, in the form of matters pertaining to employee relations, for example, and externally. The latter would result in cases where the Tribunal is, for example, sued as a result of a breach of contract with a service provider, or in cases where there is a vicarious liability claim on the basis of an employee having committed a delict while acting in the course and scope of his / her employment with the Tribunal. Failure to plan for such eventualities may have a negative financial and reputational impact on the Tribunal.

Mitigation: The leadership of the Tribunal, with the assistance of the accountability, monitoring and evaluation unit (situated at Tribunal national level) must conduct a proper risk audit, and must identify the likelihood of such occurrences. Once the extent of the risk is known, steps may be taken to mitigate against such adverse situations. For example, preventative steps might be adopted and insurance may be secured in order to enable the Tribunal to settle any meritorious contractual or delictual claim when the need arises. Properly qualified legal advisors should be appointed at the national level in order to assist the Tribunal in defending (or settling) contractual or delictual claims for damages. From the perspective of ensuring harmonious employee relations, appropriately qualified and experienced industrial relations practitioners will be appointed. The corporate services division of the Tribunal, as explained in the organisational arrangements section of the Policy, will oversee human resource administration and should liaise with the Capacity Building division of the Tribunal to arrange for ongoing training in matters pertaining to labour law and employee relations.

Accountability framework, monitoring and evaluation

Management reporting and compliance with PFMA obligations

The Tribunal must ensure that it complies with the range of statutory reporting requirements which accrue to it as a national public entity listed in Schedule 3A of the PFMA. Failure to do so may amount to an offence in terms of the PFMA and may adversely affect the reputation of the Tribunal as well as future budgetary allocations from Parliament.

Mitigation: The recommended Tribunal leadership structure addresses this concern by directing that the Tribunal President be a person with both management and financial experience (in addition to possessing legal qualifications). In addition, the national Tribunal structure contains a designated finance division, in addition to an internal auditor and an accountability, monitoring and evaluation section. It is envisaged that the Capacity Building division of the Tribunal will play a part in facilitating that the relevant Tribunal staff possess the adequate knowledge levels in this regard, including an understanding of PFMA and other reporting obligations. The various internal Tribunal structures should, cumulatively, be able to reduce the chances of the Tribunal leadership failing to report and comply with the Tribunal's PFMA obligations.

From an external perspective, the required regular reporting to the office of the Auditor-General should ensure that a high level of financial accountability is secured and maintained.

The relationship between the Tribunal Advisory Council and the Tribunal and the failure to report

In the absence of an existing overarching and advisory structure for tribunals in South Africa, the establishment of a dedicated Tribunal Advisory Council has been suggested in the section of the Policy dealing with the legislative context. The particular areas of concern in this regard relate to the adoption and implementation of the recommendations of the Tribunal Advisory Council, and to the risk that the Tribunal will fail to submit (timeous) reports to the Tribunal Advisory Council (and to the responsible line Minister where this is required).

Mitigation: The composition of the Council reflects high-level representation of a range of key stakeholders, including the judiciary and the executive. Including such matters as key performance indicators in the Tribunal President's performance management agreement, for example, will ensure that the relationship between the Tribunal and the Tribunal Advisory Council is not neglected. While the Council is not meant to exercise its functions and powers in a prescriptive manner, given the independence of the Tribunal, its advice will nevertheless have strong persuasive value, in view of the breadth and level of representation on the Council. This should mitigate against the risk of the Tribunal completely ignoring well-conceived recommendations on the part of the Tribunal Advisory Council.

Similarly, it is suggested that the Tribunal's statutory obligations to report to the Tribunal Advisory Council, the Auditor-General (in respect of PFMA compliance) and to the line Minister, and the adverse (financial and reputational) consequences of failing to report reduce the risk of Tribunal failure to report. Such a failure would also be completely anomalous in view of the Tribunal's organisational culture.

Communication plan

Financial outlay and specialised communicators

There are various challenges and risks that the communication strategy faces. Communication requires financial outlay, as resources would have to be dedicated to the dissemination of information. Shortage or lack of the requisite financial resources to ensure appropriate communication would lead to the reduction or cancellation of communication initiatives. Effective communication must also be undertaken by skilled professionals. Inability to attract sufficiently specialised persons to carry out the communication role means that effective communication would not be possible.

Mitigation: Further details in this regard are contained in the section of the Policy dealing specifically with communications issues. The actual development of an overall, national communications plan for the Tribunal, coupled with the introduction of sector-specific communication plans, will ensure that the importance of sufficient financial allocation for communication is properly explained and justified. Sectoral communication plans, in particular, may be able to anticipate detailed financial requirements for the various operations of the Tribunal. Communication leaders within the Tribunal need to dedicate appropriate financial and human resources in disseminating the information. Proper budgeting processes will ensure that this aspect of the resources required by the Tribunal to operate and function effectively is taken into consideration.

In addition to appointing specialised communications experts to take responsibility for this aspect of the Tribunal's activities, capacity development initiatives (either led by the Capacity Building division of the Tribunal or outsourced to appropriate service providers) will contribute to the perpetual utilisation of appropriate, tactically sound communication at all levels.

Reach (range) of communication

Despite the best communicators and communication strategy, there exists the risk that information regarding the social security adjudication system reforms and the operation of the Tribunal may not reach some role players or stakeholders. Failure of information to reach some users of the system, role players or stakeholders is due to different factors, especially their geographical location and the method of communication utilised.

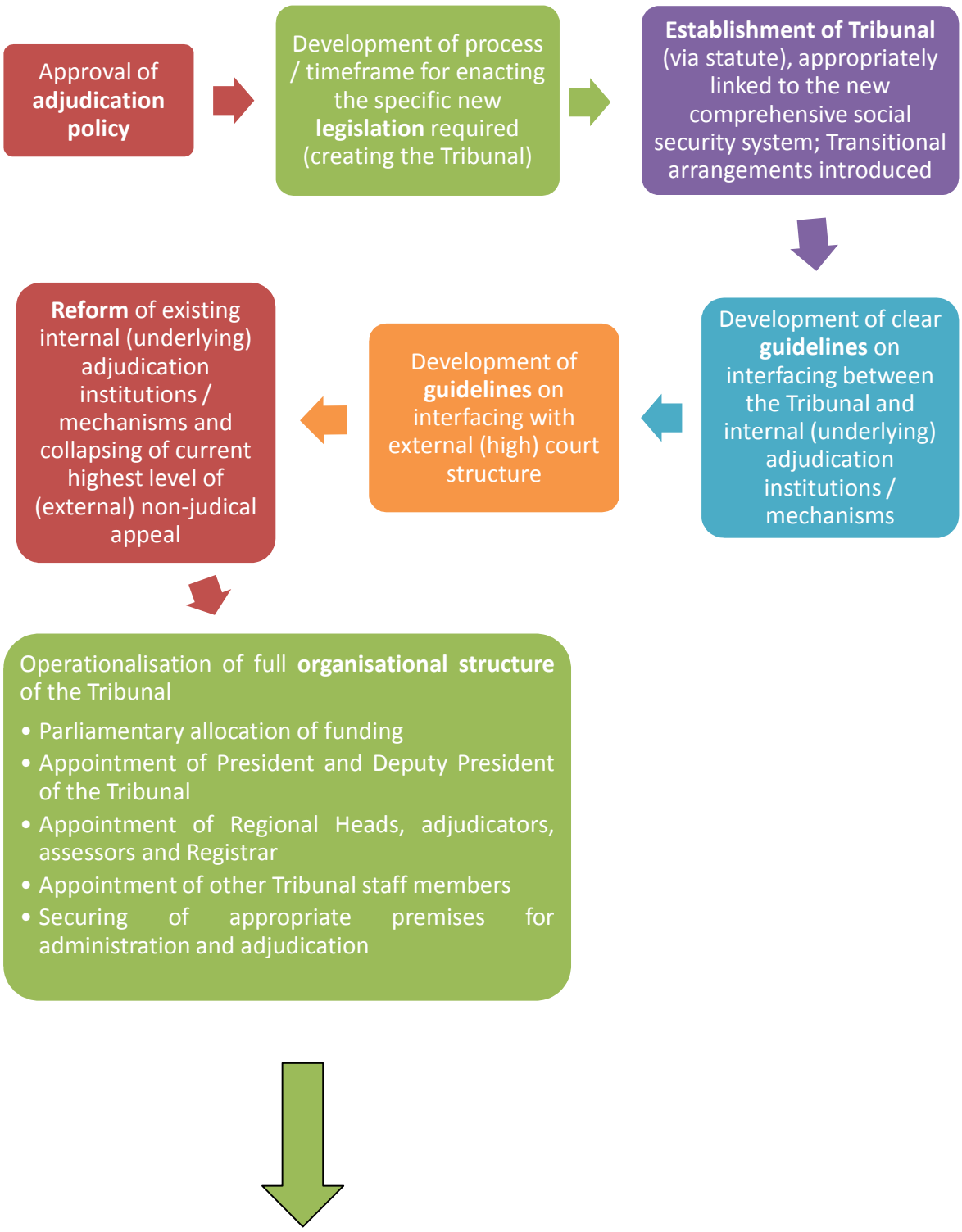
Mitigation: In order to address the identified risks, the information and communication methods must be designed to take into account spatial and other differences in the target audience. This matter is also addressed in the section of the Policy dealing specifically with communication. Consistent monitoring and evaluation of the communication strategies adopted, coupled with an innovative mindset which appreciates the extraordinary range and nature of communication required, will facilitate the correct communications environment for the Tribunal. For example, and at a first level, paper-based communication (drafted in the home-language of likely recipients) and handed to all people who approach a social security institution or government department may prove to be useful, in combination with radio and television advertisements explaining the basic information regarding the functioning of the Tribunal. At a second level, the range of users, role players and stakeholders must be informed, in greater details, about the reforms and operations of the underlying institutions and about the substantive and procedural basis for proceedings before the Tribunal. These levels of communication will need to be sustained and repeated on a regular basis subsequent to the initial sharing of information.

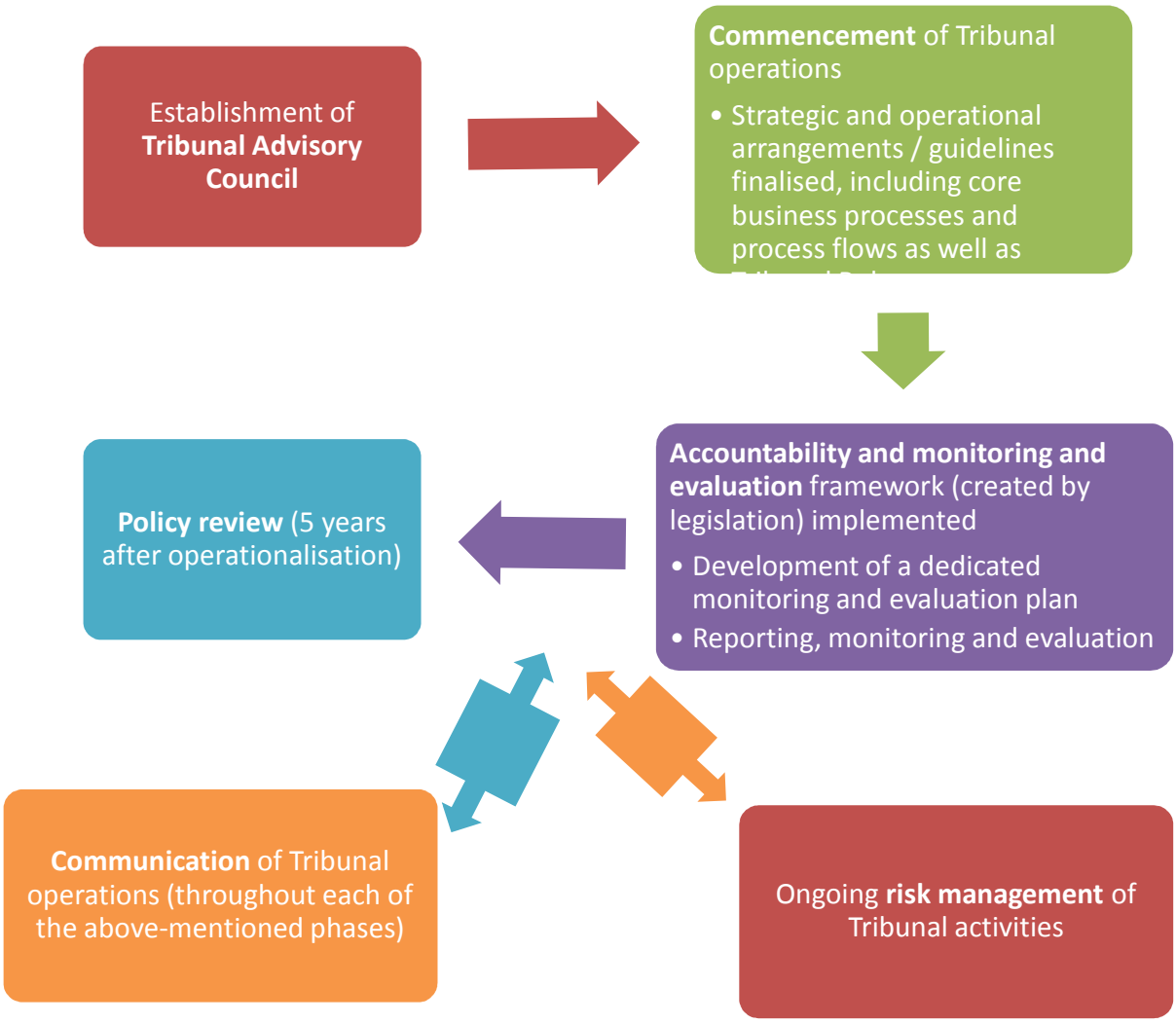
Requirements of integrated communication on the part of the mandated communication institutions

Effective communication within a multi role player framework such as the reformed social security adjudication system requires integrated communication on the part of the mandated communication institutions. Failure to achieve such an integrated process will reduce the effectiveness of communication.

Mitigation: The Lead Ministry and the Government Communication and Information Service (GCIS) will be able to facilitate the development of a comprehensive national communications plan for the Tribunal, in combination with relatively detailed sectoral plans. The Lead Ministry and the GCIS are well-placed to coordinate the various communication interventions and direct the appropriate volume of information towards the various stakeholders and role players involved (listed in the communications strategy section of the Policy) in a fashion which will achieve the required standard of integration and using a mode of communication which is apt. Further details in this regard are also contained in the communication strategy portion of this Policy.

DIAGRAM 6: IMPLEMENTATION SCHEDULE




Establishment of **Tribunal Advisory Council**
Commencement of Tribunal operations
• Strategic and operational arrangements / guidelines finalised, including core business processes and process flows as well as
Accountability and monitoring and evaluation framework (created by legislation) implemented
• Development of a dedicated monitoring and evaluation plan
• Reporting, monitoring and evaluation
Policy review (5 years after operationalisation)
Communication of Tribunal operations (throughout each of the above-mentioned phases)
Ongoing **risk management** of Tribunal activities

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ANNEXURE 1

OUTLINE OF DRAFT LAW ESTABLISHING THE NEW TRIBUNAL

(i) *Establishment, composition and locations*

- Purpose and objectives of new Tribunal
- Guiding principles
- Definitions
- Application
- Establishment
- Status of Tribunal
- Composition of Tribunal
- Appointment of President
    - Recruitment and appointment
    - Qualifications
    - Remuneration and conditions of service
    - Discipline and termination of service
    - Powers and functions
    - Vacancy
- Appointment of Deputy-President
    - Recruitment and appointment
    - Qualifications
    - Remuneration and conditions of service
    - Discipline and termination of service
    - Powers and functions
    - Vacancy
- Appointment of adjudicators
    - Recruitment and appointment
    - Qualifications
    - Remuneration and conditions of service
    - Discipline and termination of service
    - Powers and functions
    - Acting adjudicators and vacancy
    - Training
- Appointment of assessors
    - Recruitment and appointment
    - Qualifications
    - Remuneration and conditions of service
    - Discipline and termination of service
    - Powers and functions
    - Vacancy

    - Training
- Appointment of Registrar of Tribunal
- Performance management arrangements
- No conflict of interest
- Code of Conduct for Tribunal officers
- Delegation
- Location
    - National office
    - Regional offices
    - Roaming/circuit function
- Regional heads

(ii) *Funds and business of Tribunal*

- Funds of Tribunal
- Financial management
- Utilisation of funds
- Bank accounts and investments
- Reporting and auditing
- Non-financial reporting
- Immovable and movable property
- Legal proceedings against the Tribunal
- Limitation of liability

(iii) *Staff and organisational arrangements*

- Organisational divisions within the Tribunal
- Recruitment and appointment
- Contractual arrangements with government departments, social security institutions and other institutions
- Remuneration and conditions of service
- Employee benefits and benefit programmes
- Labour relations
- Discipline and termination of service
- Training/Induction
- Performance management arrangements
- No conflict of interest
- Code of Conduct for Tribunal staff

(iv) *Jurisdiction, powers, functions and duties of Tribunal*

- Kinds of disputes subject to Tribunal jurisdiction
- Disputes not subject to Tribunal jurisdiction

- Parties who may lodge appeal
- Alternative dispute resolution modalities
- Powers and functions of Tribunal
- Duties of Tribunal
- Assistance to be provided to appellants
- No fees to be charged for appeals
- Information requests by Tribunal

(v) *Appeal to Tribunal*

- Right to appeal to Tribunal
- Scope of appeal
- Lodging of appeal
- Withdrawal of appeal
- Obligation to exhaust remedies available with social security institution
- Referral of matter back for reconsideration by social security institution
- Right to approach courts limited
- Right of judicial review of Tribunal decisions
- Time limits, condonation and prescription
    - Lodging of application of appeal and condonation of late appeals
    - Reasonable period within which matter must be heard by Tribunal
    - Period within which decision must be made
    - Period for notification of decision
    - Time line for enforcement of Tribunal decisions
    - Lodging of application for judicial review and PAJA

(vi) *Tribunal proceedings*

- Tribunal an institution of record
- Tribunal rules
- Flexible nature of proceedings
- Personal appearance and presentation
- Interpretation
- Representation, including legal representation
- Witnesses
- Evidence
- Power to subpoena
- Burden of proof
- Limitation of new information
- Alternative hearing procedures and participation modalities

(vii) *Remedies and enforcement of decisions*

- Orders which Tribunal can make
- Decision must contain written reasons and notification of right to judicial review
- Final and binding nature of Tribunal decision
- Power to vary or rescind decision
- Notification of decision
- Enforcement of decision
- Cost order
- Contempt of the Tribunal

(viii) *Research and development*

- Archive and publication function
- Access to information
- Research function and the provision of information and statistics
- Annual and other reports
- Capacity-building of users of system and stakeholders

(ix) *Establishment of Tribunal Advisory Council*

- Objective of establishing the Council
- Composition of Council
- Appointment of Council members
    - Appointment; stakeholder selection
    - Remuneration and conditions of service
    - Termination
    - Vacancy
- Appointment of Chair and Vice-chair
- No conflict of interest
- Code of Conduct for Council members
- Powers and functions of Council
- Administrative and research support to be provided by Tribunal
- Meetings

(x) *Transitional provisions*

- Pending litigation
- Contracting with government departments, social security institutions and other institutions
- Transfer and secondment of certain staff
- Transfer of all records held by existing adjudication institutions to social security institutions
- Cessation of operations of existing adjudication institutions

(xi) *Repeal and savings*

- Repeal of legal provisions relating existing non-judicial appeal institutions

(xii) *General provisions*

- Litigation against Tribunal and prior notification
- Security of confidential information held by Tribunal
- Use of name of Tribunal
- Offences
- Penalties
- Short title and commencement
- Limited power to make Regulations

ANNEXURE 2

GLOSSARY OF KEY ISSUES, CONCEPTS AND TERMS

The definitions which follow relate specifically to issues, concepts and terms as used in the write-up of the "preferred option" and do not necessarily apply throughout the research report as a whole. The definitions contained below must be understood and read in the light of the context within which the various terms defined are utilised in the actual text / matrices contained in the report.

Accredited	A person certified by the appropriate authorities as being suitably qualified to fulfil a particular role.
Acting panellists	A Tribunal member who meets all the qualifications criteria for appointment as a (full) panellist but who is appointed only for a limited duration.
Administrative action	Any decision taken, or any failure to take a decision by the public social security institution or the Tribunal when exercising a public power or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect: see section 1 of the Promotion of Administrative Justice Act, 2000.
Administrative decision-making	Means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an **empowering provision** contained in social security legislation, including a decision relating to a) Making, suspending, revoking or refusing to make an order, award or determination, *in particular relating to benefits and services provided by social security laws*; b) Giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; c) Issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; d) Imposing a condition or restriction; e) Making a declaration, demand or requirement; f) Retaining, or refusing to deliver up, an article, or g) Doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to make a decision must be construed accordingly.
Appeal body	The Tribunal is empowered to hear complaints against certain decisions taken by public social security institutions in terms of underlying social security legislation.

Assessor	A specialist practitioner (for example, a medical practitioner) who will assist a panellist / panellists to arrive at the correct decision without having the power to cast a vote which may influence the final decision of the Tribunal.[2]
Basic values and principles governing public admin-istration	As reflected in chapter 10 of the Constitution of the Republic of South Africa, 1996, and including the following: a) Promotion and maintenance of a high standard of professional ethics; b) Efficient, economic and effective use of resources; c) Development-oriented public administration; d) Impartial, fair, equitable and non-biased services; e) Responding to people's needs and encouraging public participation in policy-making; f) Accountable public administration; g) Timely, accessible and accurate information provision, thereby fostering transparency; h) Good human-resource management and career-development practices, maximising human potential;
Causes of action	The matters which may legitimately form the basis of a social security appeal.
Condone	To allow or permit, even though the stipulated time period has passed.
Conflict of interest	A personal involvement / relationship with a party to the appeal or a matter subject to the appeal (including a pecuniary interest in the dispute) which may result in the reasonable perception of bias.
De bonis propriis	A punitive costs order where the legal representative is made to pay the costs of the proceedings as a result of his / her undesirable conduct.
Empowering provision	A law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken by a public social security institution or the Tribunal.
Final and binding ruling	In this context, the ultimate decision on a matter, subject only to limited judicial review.
Forum of "first instance"	Direct recourse to the Tribunal, without internal or domestic remedies first being exhausted. It is possible, in exceptional cases, for the High Court to sit as a forum of first instance.
Frivolous and vexatious applications	Unnecessary and wasteful recourse to the Tribunal where there is no reasonable basis for the complaint being brought.

[2] As an alternative to a tribunal-approved list of assessors, it would be an option to consult employer and employee bodies (such as trade unions) with respect to the appointment of the panel of assessors in each region.

Independent and impartial	Autonomous and self-governing, subject to high-level reporting and accountability to the appropriate Minister (in terms of the PFMA) and to Parliament.
Internal or domestic remedy to be exhausted	Means that any available complaint avenues within the organisation of a social security body must be pursued before the Tribunal is approached. Can also be interpreted to mean that recourse to the Tribunal must be had before the courts are approached.
Judicial review	The limited review of a Tribunal decision by the High Court.
Jurisdiction	The ability of the Tribunal to hear a particular dispute. Only certain categories of disputes are capable of being adjudicated by the Tribunal, in particular, appeals against various decisions taken by a public social security body negatively affecting applicants, beneficiaries and dependants of applicants and beneficiaries of social security. Some matters, such as contractual disputes, criminal matters and delictual claims for damages, fall beyond the range of matters to be decided by the Tribunal.
Lawful, reasonable and procedurally fair	The core components of what is understood by "just administrative action"; essentially suggests that decisions should be taken by the authorised person / body in a rational and fair manner, following all necessary formalities and requirements prior to the decision being taken.
Legal representation	Assistance by an attorney or advocate properly admitted by a South African court to practise as such.
Limited review	Distinguishable from an "appeal" and dealt with more fully in the section dealing with administrative justice principles. The focus is more on the procedure followed by the body taken on review. The reviewing authority would not be allowed to substitute its view for the decision of the body taken on review merely because it considered the latter decision to be "wrong". The body taken on review would have had to have committed a serious irregularity in order for its decision to be set aside. For example, a panellist would have to make a decision that no reasonable panellist could have made in order for the court to overturn that panellist's decision.
National public entity	Defined as (a) a national government business enterprise; or (b) a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is – (i) established in terms of national legislation; (ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and (iii) accountable to Parliament – see definition of "national public entity" in s 1 of the PFMA.

Organ of state	Defined in section 239 of the Constitution of the Republic of South Africa, 1996, to mean – a) any department of state or administration in the national, provincial or local sphere of government; or b) any other functionary or institution – i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.
Panellist	An appropriately qualified person appointed to serve as a member of the Tribunal.
Rescission applications	A request for a decision made to be taken back, cancelled or annulled.
Social security appeals	A plea or request to the Tribunal for a decision made by a public social security body (to the detriment of a social security applicant or beneficiary or to the detriment of a dependant of a social security applicant or beneficiary) to be reconsidered..
Social security legislation	Refers to the Unemployment Insurance Fund Act, 2001, the Compensation for Occupational Injuries and Diseases Act, 1993, the Social Assistance Act, 2004, the Road Accident Fund Act, 1996, and the Occupational Diseases in Mines and Works Act, 1973.
Tribunal	The new independent social security appeals tribunal proposed.
Vary or rescind	The power of the Tribunal to amend or cancel its own decision when an obvious error has been made.
Wide appeal powers	This includes the Tribunal power to confirm, vary, set aside or replace a social security decision on appeal. Powers of wide appeal involve a complete reconsideration of the merits of a matter, implying great discretion relating to matters such as procedure, the hearing of evidence and a broad range of available remedies.