

**PUBLIC INTEREST  
LAW ORGANISATIONS  
IN SOUTH AFRICA**

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*Models, Impact & Sustainability*

2023

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THE RAITH  
FOUNDATION

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## INTRODUCTION

*The central purpose of this study is to analyse the working models of public interest law organisations ('PILOs') in South Africa and their impact, and to explore what additional support they require in order to build resilience and maximise their contribution to social justice.*

*PILOs are non-governmental organisations that use the law to advance social justice.*

In this study the focus is specifically on those PILOs that have the capacity to conduct public interest litigation, that is to conduct court proceedings, though this is unlikely to be their only law-based strategy for social change as most PILOs also engage in advocacy and research. PILOs are required to be registered as law centres in terms of the Legal Practice Act 28 of 2014 ("Legal Practice Act").

The study seeks to build on previous donor-supported studies of the sector,<sup>1</sup> and emerging academic literature.<sup>2</sup> This category of litigating PILOs excludes those organisations that may frequently engage in public interest litigation as litigants (parties), although they do not themselves have the legal capacity to conduct litigation.

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1 Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (Atlantic Philanthropies 2014); SERI, 'Public Interest Legal Services in South Africa: Project Report' (RAITH Foundation, Ford Foundation 2015); 'Social Justice Sector Review Report: Critical Reflections on the Social Justice Sector in the Post-Apartheid Era' (RAITH Foundation 2020).

2 Jackie Dugard and Malcolm Langford, 'Art or Science - Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27 SAJHR 39; Malcolm Langford and others (eds), *Socio-Economic Rights in South Africa: Symbols or Substance* (CUP 2014); Jason Brickhill, *Public Interest Litigation in South Africa* (Juta 2018). The study draws on conceptual frameworks developed as part of my doctoral research at the University of Oxford, supervised by Prof Kate O'Regan and Prof Sandra Fredman. See Jason Brickhill 'Strategic litigation in South Africa: Understanding and evaluating impact' DPhil thesis, University of Oxford, 15 October 2021.

At the outset, it is necessary to express gratitude to the leaders and staff of PILOs for their generous and honest participation in this study. Several interviewees expressed some discomfort at studies of this sort that call on them to ‘open themselves up’ and share their challenges and institutional weaknesses, as well as their strengths and successes, concerned that this might influence public and donor opinions of them. Many commented that they were willing to share openly only because the study was being conducted by a researcher who had spent many years working in the sector and whom they trusted.<sup>3</sup> That trust is not taken lightly.

**South Africa today has a public interest sector of significant sophistication, expertise and breadth (of substantive areas of work, geographical coverage and strategies). It stands out globally. Its work is supported by a range of key institutional donors and partners, all part of a broader ecosystem promoting access to justice and constitutionalism.**

In this report, I set out the typologies of PILOs and public interest litigation that I deploy, as well as the general methodology for the study.

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<sup>3</sup> It is appropriate to disclose upfront that I worked at one of the PILOs, the LRC, for over 8 years from 2008-2016, as an attorney, advocate and then head of its Constitutional Litigation Unit. I had also worked with almost all the other PILOs on specific cases or campaigns. In 2022, I took up the role of Director of Litigation at another PILO, SERI. My experience no doubt brings insights and biases. I have sought to mitigate potential biases by conducting wide-ranging interviews, testing my own preconceptions and engaging openly with participants in the study.

## METHODOLOGY

The approach to methodology was developed before commencing the study, and refined following a pilot interview and PILO review. The terms of reference identified the following themes:

- Contextual analysis;
- General overview of the state of the Public Interest Legal Services (PILS) sector;
- An overview of operating models of the PILOs, including staffing profiles;
- An analysis of factors contributing to the success and impact of PILOs;
- An identification of challenges faced by organisation individually and as a sector;
- Recommendations at individual organisations and sector strengthening levels.

**Out of these themes, the following discrete research questions arose:**

- (i) **What is the current state of the PILS sector and the various PILOs that make it up?**
- (ii) **What types of PILOs are operating and what models of public interest litigation are they deploying?**
- (iii) **How are PILOs structured and resourced to do their work?**
- (iv) **What are their main challenges and needs in this regard?**
- (v) **To what extent do PILOs have the internal capacity to do their work and to what extent are they forced to outsource by briefing external counsel, using external consultants to issues such as human resources, communications, financial management and training?**
- (vi) **What levels of success have PILOs seen with their public interest litigation, approaching their work in streams or focus areas with illustrative examples?**
- (vii) **What legal, material and political impact has the public interest litigation of PILOs had, approaching their work in streams or focus areas with illustrative examples?**
- (viii) **What factors may explain the success of PILOs and the impact of their work? In particular, how do the type of PILO and the model of litigation used, their operating model and staffing, and other factors that emerge from the study, explain success and impact?**
- (ix) **What additional resources and interventions would enable PILOs to enhance their success and impact?**

The study was conducted by mixed methods that enable insights to be drawn from quantitative and qualitative approaches and data. The main methods used included:

- **Review and analysis of documents** – annual reports, budget documents (annual financial statements plus management financials where available), staffing profiles (link to salaries and experience), case lists.
- **Interviews** – semi-structured interviews with the heads of all 10 core PILOs. The interviews were not anonymous, but respondents were permitted to request particular statements not to be attributed to them or to go off the record entirely on specific issues. A list of those persons interviewed is set out in Appendix I and a draft topic guide for the semi-structured interviews is attached as Appendix II to this report.
- **Group discussion** – following the completion of the document analysis and interviews, a draft of the report was presented to the RAITH Board and then later to the PILO heads for comment and discussion. The comments valuably informed the final report.

**The overall aim across these methods is to track trends in budgeting and resourcing (inputs) and work output and impact (outputs), and to explore the relationship, if any, between these trends.**

The study particularly investigates what factors may explain these trends and relationships, including factors such as: types of PILO, models of litigation, staffing profiles and operating models. In particular, the study considers the role of internal/external counsel, in-house communications and research capacity, and fund-raising capacity, exploring how these factors affect success and impact. On the basis of this research, the report seeks to make a series of practical recommendations regarding possible additional support and interventions to enhance the impact of PILOs and help them to build resilience.

## SUCCESS AND IMPACT

Two key concepts for the study are **success** and **impact**. These terms are widely used, often without definition and without distinguishing between them.

### 3.1 Success

**Success** is concerned with whether public interest litigation *achieves its objectives*. It is successful if it meets its actual goals, which may differ from the publicly stated goals. Success may include winning in court, but is not defined by it. Success may be achieved notwithstanding loss in court,<sup>4</sup> though this is rare and should not be over-emphasised.<sup>5</sup> In South Africa today, few public interest cases are pursued without a realistic prospect of success. This was different during apartheid and colonial rule, where the objectives of public interest litigation were often to preserve the historical record or draw public attention to injustice, even if court victory was not expected.<sup>6</sup> In contemporary South Africa, public interest litigation is employed as a tactic to secure a court order that is directly linked to broader objectives.

### 3.2 Impact

**Impact** is more broadly concerned with the *effects* of litigation. It is related to success but also independent of it. Unsuccessful litigation may have certain impact and successful impact may have impact that extends beyond the court victory and implementation of a court order. Indeed, it is likely that the impact of all litigation is broader and more complex than the narrow confines of a court order. Impact is best understood to include *legal, material and political* impact.<sup>7</sup>

4 Dugard and Langford (n 2).

5 Roni Amit, 'Winning Isn't Everything : Courts, Context, and the Barriers to Effecting Change Through Public Interest Litigation' (2011) 27 SAJHR 8.

6 See generally, Richard Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994* (Routledge 1995); Tembeka Ngcukaitobi, *The Land Is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa* (Penguin 2018); Brickhill, *Public Interest Litigation in South Africa* (n 2).

7 For similar approaches to a typology of impact, see César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2010) 89 TLR 1669; Langford and others (n 2); Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Hart 2018); SERI (n 1).



**Legal impact** is the effect of litigation on the development of the law, including binding government policies. For example, a precedent establishing that poverty is a prohibited ground of discrimination under the Constitution would be legal impact.

**Material impact** is the ‘tangible effect’ of public interest litigation, including changes to conduct or practice and the payment of money. For example, the delivery of social goods (such as school textbooks, medicines or temporary housing), the payment of money (for example, social grants) or the cessation of mining in an area would all be material impact.

**Political impact** is concerned with changes to the *power* associated with individuals, institutions and ideas. It includes, for example, shifts in national discourse, building a ‘rights culture’, changing government priorities, shifting the balance of power between constituencies (eg landowners and occupiers), and similar changes concerning power.

These three types of impact may be illustrated with an example concerning the right to housing. Consider an example where a poor community litigate to secure temporary emergency accommodation from the state. The court upholds their claim, in the process confirming that people who face the risk of homelessness when they are evicted have a right to alternative accommodation. The court’s legal finding that there is such a right is **legal impact**. It shifts the law and provides a precedent for the future. The affected community are then actually provided with alternative accommodation by the state. This is **material impact**. It tangibly changes their circumstances. In the course of these events, media attention is drawn to the plight of this and similarly situated communities, and the government begins to give greater priority to the issue, with the President highlighting it as a priority in the State of the Nation Address. This is **political impact**, giving more power to tenure insecure communities, shifting the public discourse and altering government priorities.

Impact includes intended and unintended effects. The intended effects may represent success, as securing a court order and its implementation are likely to mean that the objectives of the litigation have been achieved. Effects can also be positive and negative, and their *evaluation* is distinct from first analysing and identifying what they *are* empirically. Success and impact provide the necessary analytical tools to assess the work of PILOs, which then lays a basis for evaluation.

In the next section, I develop a typology of PILOs in South Africa and in the subsequent section a typology of models of public interest litigation.

## T Y P O L O G Y   O F   P I L O S

*PILOs are defined in this study to include not-for-profit, non-governmental organisations that use the law to pursue social change, including through public interest litigation. They are not the only entities that conduct public interest litigation. So, too, do university law clinics, justice centres of Legal Aid South Africa (LASA), the pro bono departments of private law firms and even the state itself. However, for PILOs, public interest lawyering (including research, advocacy and litigation) is their core activity, whereas for these others it is an ancillary or supplementary function.*

What is structurally distinctive about PILOs relative to broader civil society is that they are all registered as law centres under the Legal Practice Act 28 of 2014 and have the capacity to conduct litigation. Therefore, while there are other law-based civil society organisations that employ the same three strategies, these organisations cannot themselves institute legal proceedings, but must do so through a PILO or law firm. Examples of other civil society organisations that operate in this way are Black Sash, Freedom Under Law, the Council for the Advancement of the South African Constitution (CASAC), Corruption Watch and the Helen Suzman Foundation. In addition, several social movements employ law-based strategies, such as Abahalali baseMjondolo, Equal Education, #ReclaimTheCity and the Social Justice Coalition. Again, these movements may serve as litigants in bringing cases, but cannot themselves institute litigation. This distinctive capacity of PILOs – to bring legal proceedings – is therefore a defining feature.

South Africa has seen a steady growth in the public interest law sector in terms of the number and diversity of organisations. From the initial establishment of the three first-generation PILOs – CALS, the LRC and LHR – at the end of the 1970s, the advent of democracy saw the establishment of a variety of new PILOs through the 1990s and up to the present.<sup>8</sup>

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8 Brickhill, *Public Interest Litigation in South Africa* (n 2) 9–36.

The study will include all current PILOs operating in South Africa. There are at least 13 PILOs, namely (in order of date of establishment):

1. The Centre for Applied Legal Studies (CALS);
2. The Legal Resources Centre (LRC);
3. Lawyers for Human Rights (LHR);
4. The Centre for Child Law (CLC);
5. The Women’s Legal Centre (WLC);
6. The Centre for Environmental Rights (CER);
7. The Socio-Economic Rights Institute of South Africa (SERI);
8. *ProBono.org*;
9. *The Southern African Litigation Centre (SALC)*;
10. SECTION27;
11. Equal Education Law Centre (EELC);
12. Ndifuna Ukwazi (NU); and
13. *Applied Law & Technology (ALT)*.

This study focuses on the 10 core PILOs listed (and not italicised) above. These organisations are all well-established, with strong track records in public interest litigation and durable governance structures.

The three italicised organisations – ProBono, SALC and ALT – are all different from the other 10 ‘core’ PILOs in significant respects. ProBono is a clearing house organisation, its model based on linking private practitioners willing to act pro bono with people seeking legal assistance. SALC operates regionally, doing little litigation in South Africa and is not a public interest law centre as such, but an NGO. SALC declined to participate in this study, explaining that it does little work in South Africa and the bulk of its litigation is elsewhere in Southern Africa.<sup>9</sup> ALT operates in a hybrid commercial-pro bono model. As such, this study includes these three organisations for comparison and insight on appropriate issues, but does not include them in tracking all the statistical trends in the public interest sector in South Africa, as they do not ‘fit’ in respect of all issues.

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9 Email from SALC executive director dated 29 October 2021.

In order to frame this study and to enable the research to explore the distinct challenges and needs of PILOs, it is necessary to develop a workable typology of PILOs. This study adopts a typology consisting of five criteria:

- (i) **Size** – large (40+ staff) / medium (16-39 staff) / small (1-15 staff)
- (ii) **Generalist/specialist**: does the PILO focus on a defined set of issues or areas, or work reasonably broadly across all areas of human rights law and constitutionalism?
- (iii) **Clinical services / strategic approach / combination**: does the PILO operate as a law clinic receiving walk-in clients, or does it conduct ‘test case’ or other strategic interventions that it initiates, or both?
- (iv) **National/local** – does the organisation have a meaningful presence across various parts of the country, or is it located and focused primarily in one location, such as a city?
- (v) **Urban/rural/both urban and rural** – does the PILO’s work concern the rights and interests of urban or rural populations, or both?

In this part of the report, the PIL sector is mapped and each PILO is located within this typology. For example:

**LHR WOULD BE:**

- large;
- generalist;
- combination of clinical and strategic;
- national; and
- both urban and rural.

**NDIFUNA UKWAZI, IN CONTRAST, WOULD BE:**

- small;
- specialist;
- strategic;
- local;
- urban.

## 4.1 Size of PILOs

The current size of PILOs as at the time of the study is reflected in *Table 4.1* below.

**Table 4.1: Size of PILOs (staff numbers as at end 2021)**

Large (40+ staff)	Medium (16-39 staff)	Small (1-15 staff)
LRC (54) LHR (43)	SECTION27 (38) CER (31) CALs (27) SERI (18) NU (17)	WLC (15) EELC (13) CCL (9)

There have been two broad trends in terms of growth or reduction in staff size in the sector. First, the larger, generalist PILOs have contracted – in particular LHR and the LRC. LHR had around 90 staff 15 years ago, reduced to about 70 staff in around 2010, and today it has reduced to 43 staff.<sup>10</sup> The LRC was growing for the first half of the decade, peaking at over 100 staff around 2016, but has now cut back dramatically to approximately 50 staff.<sup>11</sup> For both organisations, reduced funding was a major reported cause for reduction in staffing.<sup>12</sup>

The second trend is that the smaller PILOs have continued to grow steadily. Typical of this trend, CALs grew from 17 in 2011 to 19 in 2015 and eventually to 27 at the end of 2020.<sup>13</sup> The CER, SERI and NU all grew from ‘small’ to ‘medium’ during the decade. NU roughly doubled in just five years to reach 17 staff in 2021.<sup>14</sup> WLC (15 staff) and EELC (13 staff) are on the same growth trajectory, right at the border of small/medium. SECTION27 (38 staff) and CER (31) are approaching ‘large’ (40+). At the time of the study, the sector employs a total of 263 full-time, permanent staff.

## 4.2 Generalist/specialist PILOs

The generalist organisations include only LHR, CALs and (to a significantly reduced extent currently) the LRC. Some PILO leaders were uncomfortable with the term ‘generalist’,<sup>15</sup> taking it to imply a scattergun, aimless approach. To the contrary, generalist does not mean that the organisation does not have a coherent and sophisticated strategy and theory of change, as all three of these organisations do.

<sup>10</sup> Interview: Ncube (LHR).

<sup>11</sup> Interview: Govender (LRC).

<sup>12</sup> Interviews: Govender (LRC); Ncube (LHR).

<sup>13</sup> CALs Annual Reports for 2011, 2015 and 2020, provided by Lee Anne Bruce of CALs by email.

<sup>14</sup> Interview: Shandu (NU).

<sup>15</sup> Interview: Ncube (LHR).

The term does not imply a haphazard approach, but is used simply in contrast to specialist, which describes organisations that focus tightly and exclusively on a discrete focus area, such as environmental justice or children’s rights. Generalist means that the organisations have a founding mandate that is not limited to discrete focus areas, but framed in relation to broad objectives such as constitutionalism, human rights and the rule of law.

The three oldest PILOs, CALS, the LRC and LHR can all be classified as generalist. Having been established with general mandates, they have periodically adjusted their specific priorities. Indeed, the generalist PILOs tend to have carefully considered strategic plans because it is necessary for them to identify areas of focus from a broader initial scope. In interviews, their current heads articulated the thinking and consultation processes that culminated in their current priority focus areas.<sup>16</sup> Each of these generalist PILOs has a carefully developed strategic plan, which is informed both by a needs analysis and their capacity (including financial). Generalist PILOs then take operational decisions about which cases to take on based on their strategic plans and informed by walk-in approaches by clients or becoming aware of systemic problems in other ways. For example, since 1994 all three of CALS, LHR and LRC at different times dedicated resources to assisting communities facing evictions in inner city Johannesburg, in response to widespread unlawful evictions and serious shortages of low cost housing. This work was demand-driven, responding to the needs of walk-in clients, but was adopted as a priority focus area by all three of the generalist PILOs. Generalist PILOs, including LRC and CALS, were also able to provide assistance at the Marikana Commission of Inquiry, responding to a unique and unanticipated tragedy – alongside the more narrowly specialized SERI, which represented most of the families of the deceased mineworkers. While basing operational decisions in part on walk-in approaches and unfolding events may appear haphazard, it is better understood as being responsive to the needs of affected communities. Doing so realises in practice the stated commitment of PILOs to access to justice.

All of the remaining, and newer, PILOs in South Africa are specialist. These organisations have been established with a specialist mandate to focus exclusively on a particular area(s) of law or issue(s). Within those specialist areas, these seven PILOs also identify narrower priority or focal areas, sometimes structured as thematic programmes. I reflect the areas of specialisation of the specialist PILOs and the areas of current priority of the generalist PILOs below:

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16 Interviews: Ncube (LHR); Govender (LRC); Madlingozi (CALS).

**Table 4.1: PILO focus areas**

<b>PILO</b>	<b>Focus area</b>
CALS	Business & Human Rights, Civil & Political Justice, Environmental Justice, Gender Justice, Home, Land & Rural Democracy
LHR	Refugee & Migrant Rights/Statelessness, Penal Reform, Land & Housing, Environmental Rights, Gender Equality, Strategic Litigation
LRC	Education, Land and 'Legacy'
CCL	Children's rights
WLC	Women's rights under five programmes: right to favourable and just working conditions; right to land, housing and property; equality in relationships; sexual and reproductive health and rights; right to be free from violence.
CER	Environmental rights/justice, with focus on activist support & training; corporate accountability; mining; pollution & climate change; and transparency.
SERI	Socio-economic rights, with focus on securing a home, making a living and expanding political space
SECTION27	Health and education rights
EELC	Education rights
NU	Urban land and housing
ALT	Information rights, data privacy and emergent tech & social innovation

The trend in the sector is undoubtedly *towards* specialisation. This has been seen in the establishment of new specialist PILOs, especially over the last 10-15 years, and in the narrowing of focus areas at the generalist PILOs, especially the LRC and to a lesser extent LHR and CALS. Two exceptions to the trend are SERI's addition of a new focus area, 'expanding political space', and SECTION27's addition of budget justice and climate justice as cross-cutting areas of work. Overall, though, the sectoral trend is towards narrowing and specialisation.

In the view of PILO heads, these trends have been influenced by donor attitudes, with strong donor support for newer specialist organisations and a perception of reduced support for residual or access to justice services at generalist organisations.<sup>17</sup> As appears from *figure 6.1* above, the three generalist organisations have continued to receive substantial donor support, but some of the newer specialist PILOs have grown at a faster rate. The generalist PILOs have also felt a pressure to specialise and narrow their focus, seen in particular in the LRC's recent restructuring to reduce its work to predominantly two areas, land and education.

Specialisation, too, carries significant advantages and benefits to the sector. It enables a sustained focus that builds expertise, networks and relationships with key actors (including government officials and civil society actors) and enables focused strategic planning. It is likely that repeat-players will enjoy greater levels of success in court and more significant positive impact.<sup>18</sup>

**Notwithstanding the advantages of specialisation, the trend towards devaluing generalist capacity presents a threat to access to justice and constitutionalism, because it results in diminished national capacity to respond to the new threats to human rights and the rule of law and to address intersectional issues that do not fall neatly into the existing focus areas of the PILOs.**

The paradigmatic example of an intersectional issue is the Marikana Commission of Inquiry, which concerned a complex mix of socio-economic rights violations, collective labour disputes and policing. It did not neatly fit into the focus or priority areas of any PILOs. It was also a massive undertaking demanding enormous resources. Ultimately, SERI and the LRC secured ad hoc funding to act for families in the Commission and CALS supported the South African Human Rights Commission's participation. These were vital contributions to a process that was of major significance to the nation. Such interventions will only be possible in future if there is capacity within the sector to respond to major issues that do not fall neatly into a focus area, or that straddle several areas. Generalist capacity also enables PILOs to respond to events that implicate cross-cutting human rights issues, especially gender equality and climate change. It also provides capacity to serve communities that are currently not prioritised by the PILO sector, such as persons living with disabilities, prisoners (with the notable exception of LHR's work) and the working urban poor.

17 Interviews: Ncube (LHR); Govender (LRC); Yates (ProBono.Org).

18 Marc Galanter, 'Why the Haves Come out Ahead: Speculations on the Limits of Legal Change Essay' (1974) 9 *Law and Society Review* 95.



### 4.3 Clinical services/strategic/combination

The next characteristic by which to distinguish PILOs is whether they provide legal services to walk-in clients on a law clinic basis, only litigate 'strategic' or test case issues of their own choosing, or use both approaches in combination.

The current general trend in the sector is to move away from clinical services for walk-in clients. The COVID-19 pandemic unfortunately compelled PILOs to suspend many of these services or migrate them to online or telephonic services, but the trend runs deeper than that and is not limited to the impact of the pandemic. Independently of the pandemic, the PILO sector has been gradually cutting back on providing walk-in services. It is also related to the trend concerning the weakening and even collapse of large parts of the paralegal and advice office network across the country.

Although it is difficult to determine the reasons for this, PILOs have found it increasingly difficult to secure funding for clinical services, noting that this work is less newsworthy and therefore perceived to be less attractive to donors.<sup>19</sup> While donors have not stated any preference for newsworthy litigation, PILOs have perceived such work to be easier to justify than walk-in services. The LRC recently decided to cut back on these services, retrenching all its paralegals and reducing the walk-in services provided at its four offices.<sup>20</sup> Others, such as LHR, SERI and WLC, are battling on to retain this capacity and to provide extensive legal services to walk-in clients but have struggled during the pandemic.

During the pandemic, PILOs pooled resources to set up a legal hotline to provide free telephonic advice and referrals. LHR co-ordinated this project, to which most of the PILOs contributed human resources. In total, the hotline answered approximately 1 000 legal queries from April 2020 – October 2021.<sup>21</sup> Two hundred of these were able to be resolved during the course of the phone call; approximately 800 required further follow-up from public interest legal organisations. LHR resolved about 70% of the approximately 800 queries. Other participants included: CALS, SERI, CCL, CER, Corruption Watch, EELC, LRC, NU, Probono.org, Section 27, and the Women's Legal Centre. A number of law firm pro bono departments also initially provided support, as well as Power Singh (or ALT). These organisations assisted with hotline queries in accordance with their own thematic focus areas.

19 Interviews: Ncube (LHR); Govender (LRC).

20 Interview: Govender (LRC).

21 Data provided by Wayne Ncube, National Director of LHR, in email dated 29 January 2022.

**Table 4.2 PIL Covid-19 Hotline query statistics**

<b>Subject-matter</b>	<b>Percentage of hotline queries</b>
Evictions and housing related queries	56%
Labour issues	11%
Police brutality / unlawful arrest	9%
Health / Covid compliance	5%
Documentation issues	5%
Children’s issues:	4%
Other issues:	10%

The hotline also received several thousand non-legal queries, regarding access to services and social support, in respect of which the relevant PILOs simply provided referrals. The hotline operated from April 2020 – December 2020. It was re-instituted in July 2021, when the country entered another restrictive phase, and concluded again in October 2021. The hotline was an excellent instance of PIL sector-wide collaboration at an extremely difficult time for the country. It helped to meet access to justice needs during the pandemic in the face of lockdowns and the challenges faced by many people in accessing legal services in person during this period.

#### 4.4 National / local

The next characteristic that defines PILOs is whether they operate nationally or only in one primary location. Only LHR and the LRC have offices in more than one location. The LRC has offices in Johannesburg, Cape Town, Durban and Makhanda. LHR has offices in Johannesburg, Pretoria, Durban and Musina (an office with a focus on assisting migrants and asylum seekers). LHR closed its Cape Town office in 2021. Therefore only LHR and the LRC could be classified as national, and even they have office locations in only three to four provinces each. CER has offices in Cape Town and Johannesburg. All of the other core PILOs are based either in Johannesburg, Pretoria or Cape Town only. The location of PILO offices is set out below:

**Table 4.3: PILO office locations**

PILO	Office locations
CALS	Johannesburg
LHR	Johannesburg, Pretoria, Durban, Musina
LRC	Johannesburg, Cape Town, Durban, Makhanda
CCL	Pretoria
WLC	Cape Town
CER	Cape Town, Johannesburg
SERI	Johannesburg
SECTION27	Johannesburg
EELC	Cape Town
NU	Cape Town

Although most PILOs operate out of one location, mostly in Johannesburg or Cape Town, most of them nevertheless conduct their substantive work in several parts of the country. For example, SECTION27 (based in Johannesburg) does extensive work throughout Limpopo Province. SERI does substantial work in KwaZulu-Natal, in particular for the social movement Abahlali base Mjondolo and in Cape Town for the trade union, the Commercial, Stevedoring, Agricultural and Allied Workers Union (CSAAWU). The LRC, though it does not have an office there, does extensive work relating to land and natural resources in the North-West Province. CER, with offices in Cape Town and Johannesburg, focuses its litigation efforts primarily in Mpumalanga, given the high level of coal-related activity there and because it recognised that, on environmental issues, LRC is active in North-West and LHR in the other northern provinces.<sup>22</sup>

22 Interview: Fourie (CER).

It appears that the Northern Cape and Free State currently receive the least attention from the PIL sector. Beyond occasional cases, none of the PILOs has any fixed presence in those provinces nor any sustained body of substantial work.

#### **4.5 Urban / rural**

Related to whether PILOs operate nationally or locally is the question to what extent their work serves urban or rural communities. Historically, there has been an urban bias to the work of the PIL sector, driven largely by the urban location of PILO offices. This means that the people who are able to approach PILOs tend to be residents of the major metropolitan areas in Gauteng, the Western Cape and KZN. However, several PILOs have historically done work that serves rural communities and some PILOs have increasingly shifted their attention to rural work. Viewing the sector overall, the trend does appear to be to give greater priority to rural areas and communities than had been the case a decade earlier.

CALS is a good illustration of how the urban-rural balance varies from one focus area to another and how it is shifting. Madlingozi estimated that CALS has a roughly 50/50 split on urban and rural work.<sup>23</sup> This balance varies across CALS' five programmes, with environmental justice and home, land and rural democracy primarily rural, gender justice and civil and political justice mainly urban and business and human rights fairly mixed.<sup>24</sup> For specialist organisations with a single thematic focus, there may be a clearer urban or rural bias. Unsurprisingly, the bulk of CER's work is rural or peri-urban, because 'that is where the coal mines and power stations are'.<sup>25</sup>

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23 Interview: Madlingozi (CALS).

24 Interview: Madlingozi (CALS).

25 Interview: Fouries (CER).

## MODELS OF PUBLIC INTEREST LAWYERING AND LITIGATION

### **5.1 Strategies for social change**

The PIL sector employs several strategies and tactics for social change and supports clients and partners that employ their own. The PIL sector generally confines itself to approaches that employ the law, in particular research, advocacy and litigation.<sup>26</sup> As Madlingozi commented, ‘everyone uses three tools in the sector, advocacy, research and litigation. But of course the emphasis would be different depending on different organisations.’<sup>27</sup> Clients and partners of PILOs may, in addition to legal strategies, employ other strategies, such as lobbying, campaigning, protest and petition. Each of these actions may be deployed with or without reference to the law. For example, a protest may be framed in relation to human rights, or with reference to decolonial struggles and historical injustice. Nor are these frames necessarily mutually exclusive.

In the next section, a typology of models of public interest litigation is introduced, which is based in part on the relationship between litigation and other PILO activities, including research and advocacy.

### **5.2 Models of public interest litigation**

In addition to a typology of PILOs themselves, a crucial question is what approach those PILOs take to public interest litigation. I have developed a typology of five models of public interest litigation that capture the relationship between the lawyer, the client and/or the underlying ‘cause’. They also tend to be associated with particular activities and ways of doing public interest litigation. The five models are:

- 1) Client-based litigation;
- 2) Research-based litigation;
- 3) Campaign-based litigation;
- 4) Movement lawyering;
- 5) Court-driven litigation

Each model is briefly explained below, before turning to use of different models in the PIL sector in South Africa and two important debates concerning their effectiveness and legitimacy.

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<sup>26</sup> Budlender, Marcus and Ferreira (n 1).

<sup>27</sup> Interview: Madlingozi (CALs).

### **5.2.1 Client-based litigation**

This model entails litigation being driven by individual litigants (including communities) directly represented by PILOs. Although the litigation may nevertheless relate to a broader cause and form part of a PILO's strategic plan, at its core it is driven by the interests and preferences of the individual clients. Client-based litigation is closely related to access to justice, walk-in clinical services, and is undergirded by the constitutional right to civil legal aid in s 34 of the Constitution.<sup>28</sup> Good examples among landmark cases include the LRC's work in *Grootboom* on the right to housing.

### **5.2.2 Research-based litigation**

Research-based litigation is litigation that has its primary origins in specific legal or non-legal research that identified a systemic problem that warrants legal challenge. Again, there will be clients and a broader cause, and possibly an associated campaign or the involvement of a social movement, so hybrids are possible. It is more difficult to identify real-world examples of research-based litigation because PILOs ordinarily (and appropriately) centre their clients and downplay prior research that may have led to identifying the problem and suitable clients. One example is the LRC's *Mud Schools* litigation, which ultimately secured an R8-billion settlement and a commitment to eradicate mud schools. The attorney in the matter had previously worked as a teacher and then done a master's dissertation on the legal issue of mud schools in the Eastern Cape. He later joined the LRC, where he proposed that the organisation approach mud schools to offer to litigate to secure adequate infrastructure for them.

### **5.2.3 Campaign-based**

Campaign-based lawyering entails the prioritisation of communication tactics and advocacy alongside the litigation that seek to shift the public discourse. I define campaign-based lawyering as litigation that is framed as part of a campaign *in the absence of* a broad social movement. A prominent example is SECTION27's *Textbooks* litigation, which involved an intensive media campaign by SECTION27 that drew the issue to prominence nationally. Later, the litigation sparked the birth of a new local movement, Basic Education for All (BEFA), but in the initial rounds of the case it was run as part of a SECTION27 campaign that involved concerted focus on social, broadcast and print media.

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28 Jason Brickhill and Christine Grobler, 'The Right to Civil Legal Aid in South Africa: Legal Aid South Africa v Magidiwana' (2016) 8 Constitutional Court Review 256.

### 5.2.4 Movement lawyering

Movement lawyering is litigation conducted by, or in partnership with, a social movement. Social movements come in many shapes and sizes and may be national or localised, relatively informal or heavily professionalised, and focus on a broad set of national issues (such as inequality) or very specific issues (such as opposition to a particular mining development). The most well-known examples are the *Treatment Action Campaign* litigation to secure nevirapine to prevent mother-to-child transmission of HIV,<sup>29</sup> and the *Norms and Standards* litigation by the LRC and Equal Education to secure regulations for school infrastructure. However, there are many more examples across the PILOs.

### 5.2.5 Court-driven litigation

The fifth model, which is seen in India,<sup>30</sup> is not present in a strong form in South Africa, though PILOs are at times directly invited by courts to intervene as *amici curiae*. In India, it may involve litigation being initiated and driven even in the absence of individual litigants. Despite some well-intentioned calls for some aspects of this approach to be borrowed from India,<sup>31</sup> it has not been adopted in South Africa. The closest that South Africa has come to this model so far is when a court proactively invites one or more organisations to participate as *amici curiae*.

## 5.3 The litigation models used by PILOs in South Africa

The focus of this study will be on the first four models of litigation – client-based, research-based, campaign-based and movement lawyering. They are not mutually exclusive – different PILOs in the same case may employ different models, and even the same PILO may switch from one model to another during litigation, for example when a social movement is established or a campaign is launched after the launch of proceedings. Moreover, PILOs may opt for different models based on various factors relating to impact and success.

**An analysis of PILO annual reports and strategic plans reveals, and interviews with PILO leaders reaffirmed, that all 10 core PILOs use all four models. However, they do so with varying degrees of emphasis and regularity. Each PILO has its own ideology and ‘theory of change’, with a set of normative pre-commitments about how public interest lawyering should be done.**

29 Mark Heywood, ‘South Africa’s Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health’ (2009) 1 *Journal of Human Rights Practice* 14.

30 For a critical perspective on the court-driven nature of contemporary PIL in India, see Anuj Bhunia, *Courting the People: Public Interest Litigation in Post-Emergency India* (CUP 2017).

31 James Fowkes, ‘How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL’ (2011) 27 *SAJHR* 434; Jackie Dugard, ‘Court of First Instance?: Towards a pro-Poor Jurisdiction for the South African Constitutional Court’ (2006) 22 *SAJHR* 261.

In general, the organisations most closely associated with a client-based approach included the LRC, LHR and SERI.<sup>32</sup> EELC provides clinical services which it describes as ‘community lawyering’, reflecting that its client-based services are embedded in school communities.<sup>33</sup> As Phala explained, ‘Schools exist in communities and what makes schools successful is how the community is doing.’<sup>34</sup>

The organisations that most often adopt a research-based model include the CCL and CALS, unsurprisingly since they are university-based PILOs, as well as SERI and SECTION27, both of which have significant internal research capacity.

Campaign-based lawyering is most clearly represented in the work of SECTION27, which has the greatest communications capacity of any of the PILOs, but is also a feature of the work of CER, EELC and NU. SECTION27 structures all its work under discrete campaigns and has developed a highly sophisticated communications capacity to drive the campaigns outside the legal process. Campaign-based lawyering has been hugely effective at bringing an issue into the public eye, giving it prominence and securing public support. In the Limpopo textbooks litigation by SECTION27, the campaign secured massive attention for the issue across all forms of media and in government, as well as helping to build local community mobilisation that ultimately led to the formation of a local social movement, Basic Education for All.

Research-based lawyering is increasingly a feature of the work of the sector. A decade ago, most of the PILOs did not have internal dedicated research capacity, but relied on partnerships, for example with academic institutions. An exception is CALS, which from its establishment conducted extensive high-quality research, with litigation often accorded less priority as a strategy. The current director of CALS, Madlingozi, would like to see CALS return to its ‘roots’ in this respect and reduce the amount of litigation that it does, so as to prioritise research and advocacy over litigation.<sup>35</sup> He explained that CALS does not call their model ‘movement lawyering’ as it goes beyond movement lawyering with ‘more advocacy, more research and then litigation.’<sup>36</sup> Madlingozi emphasised that CALS does not merely do research in order to support or inform litigation and advocacy, but also ‘to contribute to academic knowledge’.<sup>37</sup> CALS staff also often teach university courses, especially at the University of the Witwatersrand,<sup>38</sup> of which CALS is a part.

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32 Interviews: Govender (LRC); Ncube (LHR); Zondo (SERI).

33 Interview: Phala (EELC).

34 Interview: Phala (EELC).

35 Interview: Madlingozi (CALS).

36 Interview: Madlingozi (CALS).

37 Interview: Madlingozi (CALS).

38 Interview: Madlingozi (CALS).



More recently, the CCL, SERI, NU, CER, LRC and SECTION27 have established positions for specialist researchers, in particular with expertise beyond the law. This prioritisation of research responded to a recognition that PILOs confront highly complex social problems, and that expertise and empirical research are necessary to diagnose problems, identify causes and develop possible systemic solutions. This work adds enormous value to the overall efforts of PILOs, assisting them to determine priorities and plans of action. SECTION27 has specifically developed specialist budget analysis capacity, adding a new dimension to the work of the sector as a whole and helping to bridge traditional disciplinary divides between economics and law. Budget justice has emerged as a dynamic and cutting-edge new area of civil society mobilisation in South Africa, with SECTION27 playing a leading role. In relation to litigation specifically, this budget analysis and research potentially opens up the prospect of challenging budgetary processes and even allocations.

In presenting their work publicly, PILOs tend to de-emphasise research-based lawyering. In the current political context in which 'experts' generally are being challenged and de-legitimised, it appears that PILOs feel some pressure to downplay this aspect of their work.

As concerns movement lawyering, while all the PILOs have acted for social movements, this model is paradigmatic of the work of the EELC and NU, in particular. EELC and NU have exclusive and formalised relationships with the movements Equal Education (EE) and #ReclaimTheCity respectively, both captured in written memoranda of understanding.<sup>39</sup> However, all the other PILOs have social movements as clients and some of these relationships are similarly longstanding. They include CER's relationship with the Mining and Environmental Justice Network of South Africa (MEJCON-SA); SERI's relationship with Abahlali baseMjondolo, Commercial Stevedoring Agricultural and Allied Workers Union (CSAAWU), a farm worker union based in the Western Cape and the Inner City Federation; WLC's relationship with the Cape Flats Women's Movement; LHR's relationships with several localised community mining formations; CALS' relationship with Mining Affected Communities United in Action (MACUA); LRC's relationship with movements of subsistence fishers and many others.

The PILS sector as a whole has accordingly invested significant time and resources in supporting social movements, including helping people to establish and build movements. For example, SECTION27 has provided substantial support to Basic Education for All (BEFA), a local education rights social movement in Limpopo.<sup>40</sup>

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39 Interviews: Shandu (NU); Govender (NU).

40 Interview: Rugege (SECTION27).

Although previous studies have failed to reflect this variety of models, the underlying issue of how PILOs do the work has been the subject of robust debate, both in academic publications and in the sector. The two key questions that tend to frame the debate are: what approaches are most effective; and what approaches are most 'legitimate'.

#### **5.4 Effectiveness of litigation models**

The effectiveness of different models – the extent to which they contribute to success and/or impact as defined above – has long been an important area of research and debate.<sup>41</sup> Some of the literature,<sup>42</sup> and indeed some lawyers in the PIL sector, have tended to suggest that movement lawyering is the most likely to be effective at generating impact at scale. This suggestion is not borne out by the evidence. The reality is much more complex.

As previous studies have recognised, there is limited empirical research into comparative effectiveness.<sup>43</sup> There is undoubtedly a need for socio-legal studies that will conduct detailed empirical case studies into the impact of public interest litigation under the different models.

#### **The question of effectiveness is best understood in relation to the distinction between legal, material and political impact.**

Based on the data available for this study and the existing literature, there is a reasonable basis to conclude that movement lawyering and campaign-based litigation are most likely to contribute to political impact. These two models are most likely to contribute to shifting national discourse, drawing media and popular attention to issues, influencing government policy priorities and positions – all forms of political impact that shift the balance of power.

However, in relation to increased material impact at scale, it appears that other factors – such as the form of the orders granted by courts and the capacity for large-scale data-gathering and monitoring of compliance by PILOs – are more significant.

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41 Gilbert Marcus and Steven Budlender, 'A Strategic Evaluation of Public Interest Litigation in South Africa' (Atlantic Philanthropies 2008); Dugard and Langford (n 2); Budlender, Marcus and Ferreira (n 1); Langford and others (n 2); Jason Brickhill, 'Public Interest Alchemy: Combining Art and Science to Litigate for Social Change', *Twenty Years of South African Constitutionalism* (2014); Brickhill, *Public Interest Litigation in South Africa* (n 2).

42 See, eg, the debate between Marcus and Budlender (n 41); Budlender, Marcus and Ferreira (n 1). and Dugard and Langford (n 2).

43 'Social Justice Sector Review Report: Critical Reflections on the Social Justice Sector in the Post-Apartheid Era' (n 1) 11.

In respect of legal impact, it is likely that research-based lawyering, in particular when it generates test cases, is most likely to lead to new legal developments. All constitutional challenges to laws have their roots, at least in part, in legal research. At times, the research precedes identifying a suitable client.

These are general claims and by no means is it suggested that this will always be the case. This question calls for further empirical inquiry to investigate the relationship between litigation models and legal, material and political impact.

### **5.5 Legitimacy of litigation models**

In respect of 'legitimacy', the literature and discourse in the PIL and donor sectors have seen a clear trend over the last decade to regard movement lawyering as the *most* legitimate form of public interest lawyering on the basis that it reflects most directly the 'voice' and 'will' of affected communities and marginalised and invisibilised groups in society. This in turn has led some in the sector to increasingly to question the legitimacy of other models. The 2020 Critical Review of the Social Justice Sector captured this trend in the discourse:

*Litigation has remained a constant and is still used today to great effect, but there are a growing and visible shift by Public Interest Litigation organisations to towards what has been labelled “people’s lawyering” where the objective of litigation is to build and empower social movements/ community-based movements alongside the litigation process. This stands in sharp contrast to the historical litigation approach which often left the communities alienated from their own court processes.<sup>44</sup>*

The second part of this comment – suggesting that 'historical' approaches have 'often left communities alienated from their own courts processes' – requires further interrogation and analysis. Drawing on the assessment of the work of the PILOs under different models in this study, the starting premise ought to be that all four models are legitimate and have particular value depending on the context. They also all present risks and challenges. There is no presumptively more legitimate model.

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44 *ibid.*

**The particular power of social movements is in shifting the national discourse and balance of power, to create a platform for the voice of marginalised groups to be heard. Protest, petition and association are all constitutionally protected,<sup>45</sup> as is the right to form and join a trade union.<sup>46</sup>**

These are legitimate tactics to deploy, including as part of movement lawyering approaches by PILOs. They have the potential to mitigate the middle class biases and identity of much of civil society. However, movement lawyering does not eliminate the risks of instrumentalising poor people or abuses of power by relative elites. Social movements have their own internal power structures, leadership cohorts and (like PILOs) are not immune to the pervasive social prejudices and ills of sexism, racism, corruption and elitism.

On this basis, the ‘legitimacy’ of models of lawyering and their respective risks in respect of the appropriation of voice of marginalised groups must be understood in context. A generalised presumption that movement lawyering is more ‘legitimate’ than client-based lawyering and walk-in clinical services has the potential to diminish the priority afforded to access to justice for the most marginalised. Asylum seekers and refugees, for instance, should not have to join or form a movement to secure access to justice when the Department of Home Affairs rejects their application, declines to renew their permits or detains or deports them. Nor should residents facing eviction be expected to have mobilised a social movement in order to have their housing rights protected by PILOs. Providing direct legal services to these groups – in a client-based model – may be more empowering for them than the possibility of becoming members of social movements that are confronting the same issues.

Ncube commented that it has become increasingly difficult for LHR to secure funding for such client-based, clinical services.<sup>47</sup> The LRC has had a similar experience in recent years, and has recently cut its paralegal positions and significantly reduced taking on new walk-in clients.<sup>48</sup> Yates of ProBono.Org, which essentially only offers walk-in services through its clearing house model, agreed that this kind of access to justice service is less attractive for some funders than funding high-profile impact litigation with a nationally prominent social movement involved.<sup>49</sup> Although there are notable exceptions and the trend should not be overstated, it would be unfortunate if donors were adopting such an approach. Meaningful access to justice may be realised at individual, household or community level, in the absence of social movements.

45 Sections 16-18 of the Constitution. See *Mlungwana v S* [2018] ZACC 45; 2019 (1) BCLR (CC); 2019 (1) SACR 429 (CC).

46 Section 23(2) of the Constitution.

47 Interview: Ncube (LHR).

48 Interview: Govender (LRC).

49 Interview: Yates (ProBono.Org).

Additionally, client communities who are able to directly instruct their own legal representatives are likely to enjoy greater agency and ownership of the process than members of a large social movement, who may be several steps removed from decision-making processes.

**This report thus concludes that the claims that client-based lawyering necessarily alienates client communities from the legal process are under-researched in South Africa and tend to be based on anecdotal accounts by powerful civil society leaders outside the PIL sector, such as academics or non-legal NGO heads.**

Just as lawyers are at risk of valorising litigation, other civil society actors may tend to valorise tactics and models of working that maximise their role and influence. More rigorous research on the actual effects of litigation on client constituencies in South African conditions is required.

Moreover, relationships between movements and PILOs are complex and require intensive management. Both NU and EELC, which have consolidated strong relationships with the social movements #ReclaimTheCity and EE respectively, have adopted memoranda of understanding to define and manage their relationships.<sup>50</sup> These relationships are maturing and their effectiveness constantly improving as a result of these and related efforts.

Importantly, it must be recalled that there are also no bright lines between the models. Zondo commented, for example, that SERI's work is often a hybrid of movement-based and client-based lawyering, explaining that SERI's litigation often responds to priorities that its movement partners (such as Abahlali, CSAAWU and the Inner City Federation) have identified, but that SERI chooses cases because of how they will affect the lives of specific client groups.<sup>51</sup> SECTION27's work also moves fluidly across the lines of all four models, although it structures its work under campaigns. This flexibility of PILOs demonstrates the value of all four models to respond to different challenges. This report concludes that all four models of litigation employed by the PILOs are legitimate and potentially effective. Rather than any presumptive preferences to support a particular model, the strengths and potential of each model should be recognised and the trend to pressurise PILOs into adopting only movement lawyering should be attenuated.

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50 Interviews: Shandu (NU).

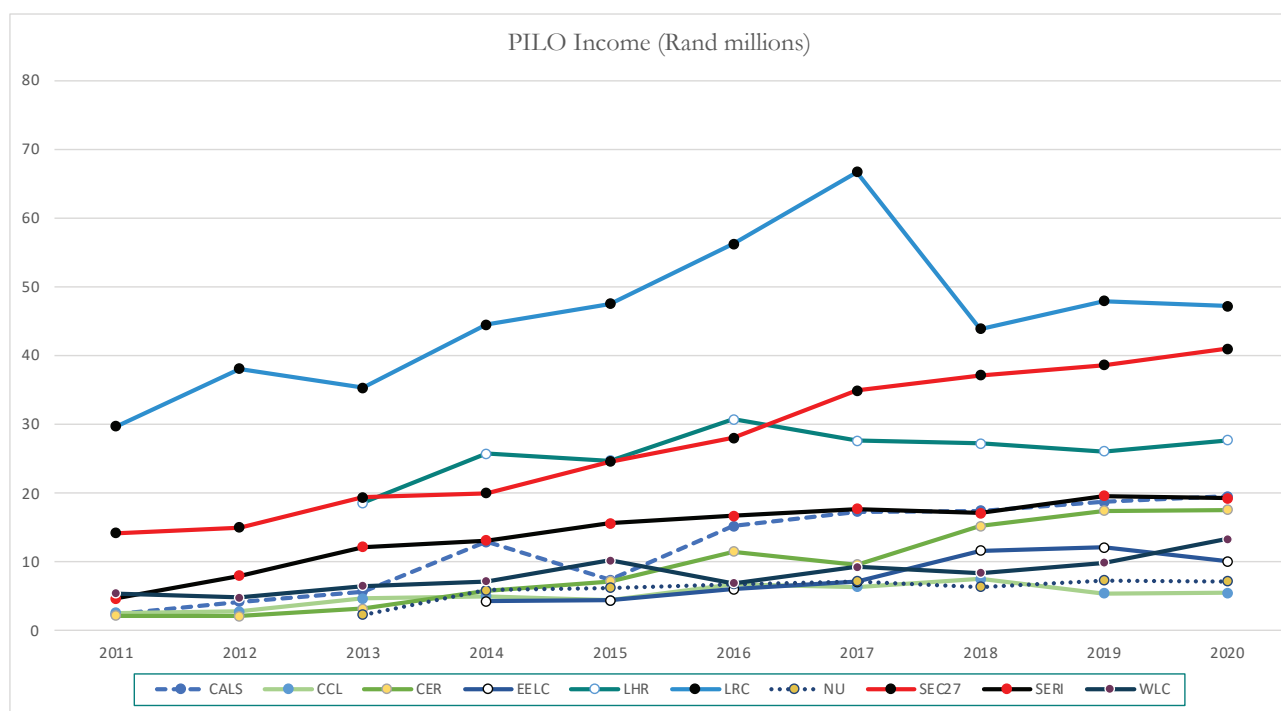
51 Interview: Zondo (SERI).

## FINANCIAL MODELS AND CAPACITY OF PILOS

### 6.1 Funding trends

The funding trends in the sector appear from *Figure 6.1* below, which sets out total annual income for each PILO from 2011 to 2020.

**Figure 6.1: Annual income of PILOs 2011-2020**



(Sources: Annual Financial Statements of PILOs published in Annual or Periodic Reports or provided upon request)

This research follows on from a recent study written by Ayabonga Cawe, commissioned by the RAITH Foundation and the ELMA South Africa Foundation and released in 2021. It provided partial data for PILO income covering about half of the PILOs up to 2018.<sup>52</sup> What the data in *Figure 6.1* above reveals, and was not apparent from the earlier study, is a general downturn in funding in around 2016/2017 or 2017/18 across the PIL sector.

52 Ayabonga Cawe, 'Review of Funding Flows to the Social Justice Sector in the Post-Apartheid Period' (RAITH Foundation and ELMA South Africa Foundation 2021) 21. Available at <https://www.raith.org.za/index.php/resources#59-raith-commissioned-funded-research>

In respect of some organisations, such as the LRC and LHR, this involved drastic reductions in income, but the general trend of more modest reductions or flatter, below-inflation growth is apparent across the sector. Only SECTION27 and (from its establishment in 2012) EELC consistently bucked this trend, showing strong growth in income throughout the latter part of the decade.

In section 7 below, some of the effects of this downturn in income can be seen in relation to staffing reductions. In turn, the reduced capacity has had a significant adverse effect on access to justice, especially in respect of the availability of walk-in or law clinic services to individual clients.

What explains the sectoral funding downturn from around 2016 to 2018? Several factors were mentioned by PILOs and the causes are likely to have varied across PILOs, notwithstanding some general factors. Sources mentioned the following as possibly contributing to the downturn:

- General downturn in civil society funding;
- Reduction in funding specifically to PIL sector;
- Leadership transitions.

### **6.1.1 General downturn in civil society funding**

As Cawe's study demonstrates, the decade has seen a general downturn in funding for South African civil society organisations broadly, including PILOs. Following an investigation of funding flows in the broader Social Justice sector, Cawe found:

*The impact of the 2007–8 global financial crisis, and more recently COVID-19 – although the impact for the sector is yet to be seen – has led to the withdrawal of many erstwhile donors, narrowing the scope and scale of what has been funded in the last decade.*

*Nevertheless, and in spite of the episodes of donor exit, the South African Social Justice Sector has gained significant donor and organisation entry from a number of new funders. This notwithstanding, donor withdrawal during the period preceding and following the global financial crisis has reduced the size of grants in the sector, with an overall decline over time.<sup>53</sup>*

This is the climate in which PILOs operate. However, in addition to the broader downturn affecting much of civil society, the PIL sector itself has seen a reduction in funding.

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53 *ibid* 5.

### **6.1.2 Reduction in donor funding specifically to PIL sector**

The period has also seen a reduction in funding specifically to the PIL sector. The Atlantic Philanthropies Foundation, one of the major donors supporting the sector, ceased operating. Another major donor, the Ford Foundation, has recently significantly redirected its funding away from the PIL sector. It does still fund some PILOs, but with a limited focus mainly on women's rights and climate justice. Using a limited set of PILOs and an earlier cut-off at 2018 for some PILOs and 2015 or 2016 for the rest of the sample, Cave found that PILO funding growth rates were 'consistently much higher than those observed in other non-PILO players in the broader Social Justice Sector'.<sup>54</sup> As *Figure 6.1* above shows, this was no longer the case by the end of the decade in 2020 and the sector had to overcome a challenging funding dip from around 2016 to 2018. While this appears to have partially stabilised, it is clear that the withdrawal of even one or two major donors would result in another challenging period.

### **6.1.3 Leadership transitions**

This factor came up in two different forms. First, the question was raised whether donor support had dipped following transitions across most of the sector to (mostly) young, black women leaders during the second half of the decade, described above. Some PILO heads, including Madlingozi (CALS) and Samaai (WLC), were critical of donor support for the new cohort of younger black women leaders.<sup>55</sup> There is therefore a view among at least some PILO heads that donor sector support for leadership transitions was more rhetorical than real.

However, most individual women heads of PILOs – including Zondo (SERI), Ozah (CCL), Rugege (SECTION27) and Shandu (NU) indicated that this had not been their personal experience. Zondo commented: "To be fair, I felt supported. In terms of SERI's funding for instance there hasn't been a dip."<sup>56</sup>

There accordingly appears to be limited evidence that the dip in funding was attributable to lack of donor confidence in young, black and women leaders appointed during this period. Given the strong performance of organisations such as SERI, CCL, SECTION27 and NU since these leadership transitions, both operationally and financially, there would be no basis for any diminished confidence. In relation to these organisations, there appears to be no relationship between income levels and the transitions to current heads.

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54 *ibid* 21.

55 Interviews: Madlingozi (CALS) and Samaai (WLC).

56 Interview: Zondo (SERI).



The second way in which this factor came up was a suggestion that the manner in which particular transitions were implemented by PILOs may have disrupted funding flow. LHR's unsuccessful transition to Ncube's predecessor, who spent only a few months at LHR, was experienced as highly disruptive and accompanied a funding crisis at LHR.<sup>57</sup> Similarly, the LRC's most recent leadership transition coincided with the over 30% drop in funding reflected in *Figure 6.1* above. What both of these transitions at LHR (to the predecessor to the current director) and LRC had in common was the appointment of new heads from outside the specific PILOs and outside the PIL sector, and processes where the timing did not go according to plan and transitions were delayed. At the LRC, another major contributing factor was the departure of the finance director in circumstances in which LRC funds had been misappropriated.<sup>58</sup> This not only resulted in financial losses to the LRC but damaged donor relations.<sup>59</sup> In respect of ProBono.Org, Yates commented that conflict between her predecessor and the board also resulted in a funding gap at the time of her appointment.<sup>60</sup> These transitions also all took place during a period in which the funding climate for PIL was particularly difficult. Fortunately, all three organisations have now stabilised financially.

These transitions can be contrasted with the careful succession planning at NU, SECTION27, CCL, EELC and SERI, in particular, over the same period. The lesson for the sector, without oversimplifying the complex challenge of high-level leadership transitions, is the need to carefully plan and implement transitions to top leadership, avoiding delays that produce leadership vacuums and acting appointments. A crucial aspect of the process is the handover itself. At EELC for example, although the appointment of Phala in July 2020 was delayed so that there was no overlap with her predecessor, Nurina Ally, Ally and Phala nevertheless undertook a comprehensive process of briefings and structured information-sharing to ease the handover.<sup>61</sup> Ideally, there should be a handover period in which both heads are employed by the PILO for two to three months, or at least a process such as that undertaken at EELC should be followed.

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57 Interview: Ncube (LHR).

58 Interview: Govender (LRC).

59 Interview: Govender (LRC).

60 Interview: Yates (ProBono.Org).

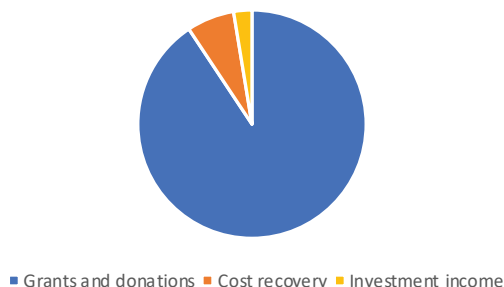
61 Interview: Phala (EELC).

## 6.2 Main funding sources

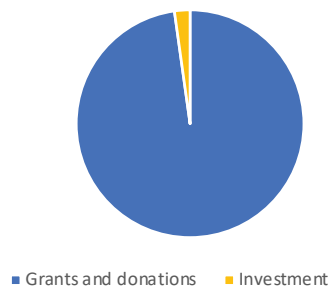
As has been the case since the first PILOs (CALs, the LRC and LHR) were established in the late 1970s and early 1980s,<sup>62</sup> the PIL sector depends on large institutional donors for the vast majority of its funding.<sup>63</sup> The majority of these donors are international, though there are some significant local institutional donors. Early on, the Carnegie Foundation, Ford Foundation and Rockefeller Brothers supported the establishment of CALs and the LRC.<sup>64</sup> From 1994 to 2013, the Atlantic Philanthropies Foundation provided over US\$355 million in support to the PIL sector.<sup>65</sup> Upon the end of its lifetime as a fund, the Atlantic Philanthropies Foundation supported an important study on the PIL sector.<sup>66</sup>

Other major institutional donors during the democratic era have included the RAITH Foundation itself, as well as the Bertha Foundation, Canon Collins Trust, Claude Leon Foundation, Comic Relief, the newly established Constitutionalism Fund, the ELMA Foundation, the Foundation for Human Rights, Legal Aid South Africa, Millennium Fund, Open Society Foundation for South Africa, Sigrid Rausing Trust and various others. The majority of these and the other funds that support PILOs are international. All except for Legal Aid South Africa are private.

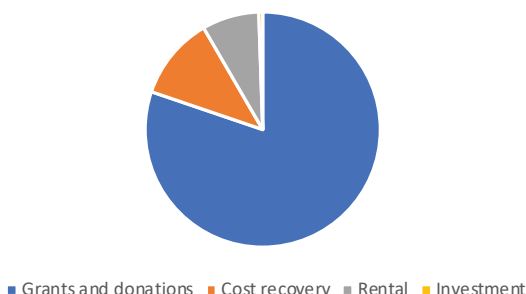
**Figure 6.2.1: SERI income sources 2020/21**



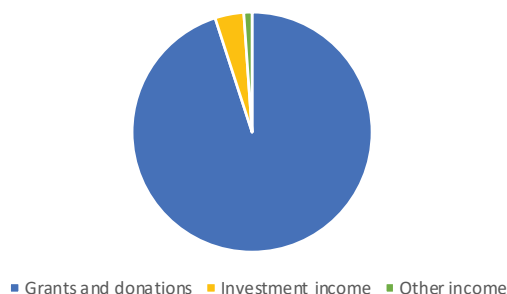
**Figure 6.2.3: WLC income sources 2020/21**



**Figure 6.2.2: LHR income sources 2020/21**



**Figure 6.2.4: SECTION27 income sources 2020/21**



62 Mary McClymont, Stephen Golub and Ford Foundation (eds), *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees around the World* (Ford Foundation 2000) 24.

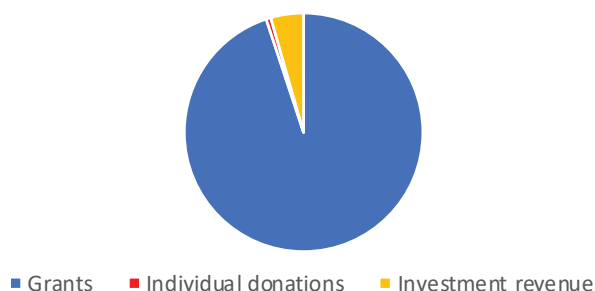
63 Brickhill, *Public Interest Litigation in South Africa* (n 2) 18–19.

64 McClymont, Golub and Ford Foundation (n 62) 24.

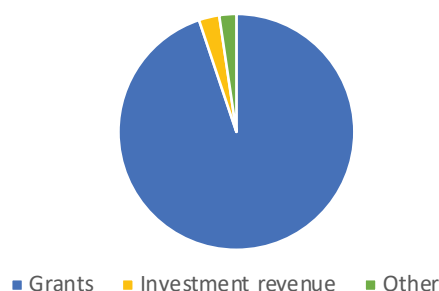
65 Budlender, Marcus and Ferreira (n 1) II.

66 Marcus and Budlender (n 41); Budlender, Marcus and Ferreira (n 1).

**Figure 6.2.5: LRC income sources 2020/21**



**Figure 6.2.6: CER income sources 2020/21**



Although there is a similar pattern to the main income sources, in particular the massive dependence of PILOs on institutional donor income, there are some noteworthy features relating to individual PILOs.

While all PILOs receive some investment income, some such as SECTION27 appear to be achieving better returns on investment. In SECTION27's case, this followed review of their investment policy and approach.<sup>67</sup> CER did a similar review of its investment approach and this has also yielded higher returns.<sup>68</sup> Also, although it does not appear from the charts above, SECTION27 has begun to secure a higher proportion of corporate funding than other PILOs.

In respect of cost recovery, not all PILOs reflect it as a separate item in their annual financial statement. Among those that do reflect it, and while it obviously varies year on year, LHR and SERI stand out for receiving proportionately significant cost recovery in 2020/21. While LRC did not receive significant cost recoveries in the most recent years, in many previous years this was a significant amount for the organisation and is likely to be in future.

Regarding individual giving, it does not appear as an income stream on the financial statements of most of the PILOs, or is reflected but is so low as not to be material at the scale at which PILOs operate. The LRC does reflect individual giving that was material in 2020/21, being just over R200,000 (approximately 0,5% of total income). Govender explained the intensive effort that went into raising even this amount.<sup>69</sup>

67 Interview: Rugege (SECTION27).

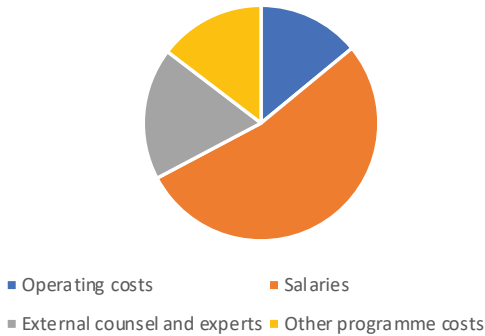
68 Interview: Fourie (CER).

69 Interview: Govender (LRC).

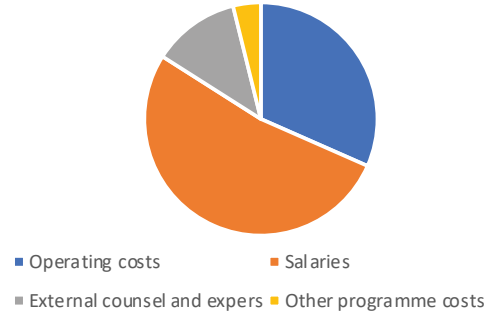
### 6.3 Main costs

The figures below, in respect of a sample of the PILOs, illustrate the main costs of PILOs in 2020/21, in the following four expense categories: salaries; operating/administrative costs; external counsel and experts; and other programme costs.

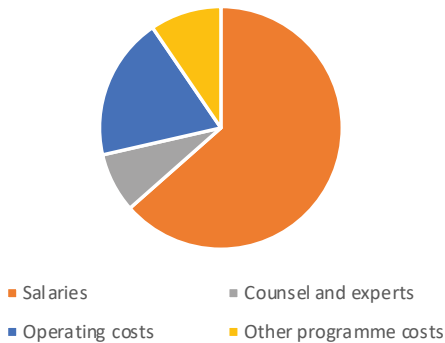
**Figure 6.3.1: SERI main costs (2020/21)**



**Figure 6.3.2: LHR main costs (2020/21)**



**Figure 6.3.3: WLC main costs (2020/21)**



There is a fairly consistent pattern to the main costs of PILOs. The largest single cost for all PILOs is staff salaries, usually followed either by operating costs (especially office rental and other infrastructure) and/or the cost of external counsel and experts. In respect of staff salaries, there is variation across the PIL sector in respect of staff professional categories. Staffing is addressed in the next section below.

Also material for all PILOs are further programme/project costs, including travel to client locations and for meetings and hearings, copying of documents, and similar items. Some PILOs save on significant operating/administrative costs because they are not paying rent and related services. CALS, for example, is based at the University of the Witwatersrand and is not charged for rent, electricity and other services.<sup>70</sup> While all PILOs generally conduct research, advocacy and litigation, the largest proportion of budget is generally spent on litigation – both in respect of internal costs for legal staff and the external costs of litigation expenses, in particular external counsel costs.

<sup>70</sup> Interview: Madlingozi (CALS).

## STAFFING

*This section addresses trends in staffing of PILOs, including representivity, professional profiles/job categories and identified staffing needs.*

### **7.1 Representivity of staff**

The imperative to ensure that PILO top leadership is representative of the country's racial demographics had been a key focus of the sector over the past decade, with urgent calls from staff of PILOs, academics, and donors for sector leadership to be racially representative, in particular. As the recent review of the broader Social Justice sector observed:

*Representation is not a numbers game, and a truly representative sector across staff, leadership and governance is critical if the sector is to reflect the values and priorities of beneficiaries in terms of class, race and gender.<sup>71</sup>*

Although the core PILO heads had been majority women for over a decade, until around 2016 they remained majority white. While no one questioned the political commitment of these PILO leaders, many of whom had long histories in the freedom struggle and in contemporary struggles for human rights, it was deeply problematic that the leadership was largely white.

In the last decade, various groups within the PIL sector raised concern and pressed for the acceleration of racial transformation, especially at leadership level. The Black Workers' Forum (BWF) was established in 2016, initially calling themselves the Black Young Professionals and made up of approximately 45 young black professional staff across PILOs.<sup>72</sup> The BWF proceeded to engage with the leadership of the sector, collectively and at individual PILOs. At the 2016 Public Interest Law Gathering (PILG), the BWF presented a memorandum of demands to the PIL leadership, which related to transformation, workplace policies and institutional culture.<sup>73</sup>

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71 'Social Justice Sector Review Report: Critical Reflections on the Social Justice Sector in the Post-Apartheid Era' (n 1) 48.

72 See Palesa Madi 'Birth of the Black Workers Forum' *Bertha Foundation* 21 July 2017, available at < <https://berthafoundation.org/birth-black-workers-forum/>>; Jason Brickhill and Meghan Finn 'The Ethics and Politics of Public Interest Litigation' in Brickhill, *Public Interest Litigation in South Africa* (n 2) 109.

73 Ibid.

The BWF had a series of engagements with PILOs and the 2017 PILG had another panel on transformation in the sector, convened by BWF. The donor sector also engaged PILOs during this period on the need to ensure that the leadership was representative. From 2016 onwards, there was a period of accelerated transition in which the majority of existing PILO heads stepped down and new leaders took up those roles. Madlingozi described these events:

*I can go back to before I came to CALS, to a historic meeting that happened I think in 2017/2016, I think 2017, where I was asked to chair a meeting between Black staff members of PIL organisations and directors. This was held at the Nelson Mandela Foundation and was a very historic meeting where Black staff members, the most senior people but also CAs and some of them attorneys and so forth really wanted to say things to directors... these white directors. Except for one director, all of them said we see the need for succession we see the need for more diversity at the level of directors. And this was at the back of the Black Workers Forum disruption at the Public Interest Law gathering and subsequently we had that meeting we had very good resolution. As I said most of the directors agreed and some of them even gave timelines. At the same time that agitation also pushed donors.<sup>74</sup>*

**Table 7.1 below reflects the current position in respect of race and gender of the heads of the ten core PILOs:**

Race and gender	Number	Percentage
Black women (Black African)	6 (5)	60% (50%)
Black men (Black African)	3 (2)	30% (20%)
White women	1	10%
White men	0	0%

These figures for black leaders include one coloured woman and one Indian man, two leaders who are originally from other African countries, and at least one leader living with a disability. Accordingly, the top leadership of the 10 core PILOs is currently 90% black (70% black African), 70% women, and 60% black women (50% black African women).

These statistics do not track various other characteristics of PILO leaders, such as first language (and other languages spoken), whether they studied at a historically white university or a historically black university, class background, professional background, level of university qualification and other criteria that may be of interest. Nor do these statistics capture the political outlook or leadership approach of leaders, though some insights on those aspects may be gleaned from other parts of this report.

<sup>74</sup> Interview: Madlingozi (CALS).

As the statistics reveal and as interviewees acknowledged, the urgent imperative of ensuring that the top leadership of PILOs reflects the racial composition of the country has been met, and the leadership remains a majority of women. In this regard, from a position where it was lagging, the PILO sector now stands as an example to the rest of civil society. This is likely to contribute positive developments in institutional culture, credibility of the PIL sector internally and externally and more fundamentally to achieving substantive equality *within* the sector.

The rest of management across the sector, under the heads of PILOs, broadly follows the same pattern, constituted by a majority of black women. Similarly, the staff complements of PILOs overall are broadly representative of the country's racial and gender demographics. However, several PILO heads reflected on the fact that staffing across the sector skews towards the middle class, especially for lawyer positions, with the majority of staff recruited from elite, formerly white universities. From interviews overall, there is increasing awareness of these class dynamics and the need to ensure that people from less privileged economic backgrounds are recruited and progress within PILOs. The PIL sector has also adopted progressive positions regarding employing foreign nationals, especially from elsewhere in Africa, notwithstanding the rising tide of xenophobic attitudes to employment in South Africa.

**Table 7.2: Race and gender of staff of PILOs**

PILO	Total staff	Number (%) Women Staff	Number (%) Black Staff
CALS	27	20 (74%)	21 (78%)
CCL	9	7 (78%)	8 (89%)
CER	31	26 (84%)	23 (74%)
EELC	13	10 (77%)	11 (85%)
LHR	42	30 (71%)	38 (90%)
LRC	52	41 (79%)	45 (87%)
NU	17	11 (65%)	13 (76%)
SECTION27	37	29 (78%)	31 (84%)
SERI	19	15 (79%)	17 (89%)
WLC	15	15 (100%)	14 (93%)
<b>Total</b>	<b>263</b>	<b>204 (78%)</b>	<b>216 (82%)</b>

Sources: PILO websites and annual reports

As appears from *Table 7.2* above, the staff across the sector as a whole at present are **78% women** and **82% black**.

As discussed above in the context of distinguishing large (40+), medium (16-39) and small (1-15) PILOs in the sector, there have been two trends in relation to staff size. The two largest PILOs, the LRC and LHR, have contracted significantly over the decade. During the same period, several PILOs have grown from small to medium, and in general all the specialist PILOs have grown steadily. It is possible that in another year or two, only CCL will be in the 'small' category. Its capacity to grow is limited, in particular, by the available office space at the University of Pretoria.

The sector currently employs **263 staff**. The overall size of the sector has contracted slightly, mainly due to the reduction in size of the LRC and LHR, but counter-balanced to some extent by the establishment and growth of the seven smaller, specialist PILOs.

## **7.2 Staffing professional profiles**

PILOs currently have staff complements that include some or all of the following occupational categories:

- Management staff
- Attorneys
- Candidate attorneys
- Paralegals
- Advocates
- Researchers
- Finance, HR and other management
- Communications
- Reception / secretarial
- Cleaning
- Security

In relation to occupational categories at PILOs, there have been a number of trends over the last decade. These include the increased use of internal researchers and organisers or advocacy staff. CALS, for example, has created posts of Advocacy Co-Ordinator and Research Co-Ordinator in the last two years. Another trend is increased communications capacity, epitomised by SECTION27's substantial communications team but now reflected in the appointment of communications staff at most PILOs.

These trends tend to track the preferred working and litigation models of PILOs. PILOs with a preference for movement lawyering, such as NU, recruit organisers. Those that prioritise campaign-based litigation build strong communications capacity, most notably SECTION27. PILOs that prioritise research-based litigation, such as CALS, obviously secure researchers. Those that place emphasis on client-based litigation, such as LHR, retain



paralegals and candidate attorneys sufficient to manage high client numbers. However, as all the PILOs use all four models to varying degrees, the trend is towards building litigation, communications, organising and research capacity in ways best suited to the specific work of each PILO.

### 7.3 Counsel

As reflected in section 6.3 above and in *figures 6.3.1 to 6.3.10* representing the main costs of PILOs in 2020/21., the single largest expense for PILOs after salaries and operating costs such as rental is paying counsel fees

A previous study commissioned by the RAITH Foundation tackled this issue and made several recommendations, including consideration of either a cap on fees or general guidelines for counsel fees across the sector.<sup>75</sup> Action has not been taken to implement these recommendations at sector level, though individual PILOs have taken some of these steps in different combinations and ways. They remain sound proposals that warrant consideration. At present, the ten core PILOs use a number of different approaches to securing the services of counsel, including:

- Reduced rates and fee caps;
- Contingency agreements;
- Pro bono arrangements;
- In-house counsel, including retainers and attorneys with rights of appearance.

Each of these has its advantages and disadvantages, as PILO leaders reflected during interviews. Most, but not all, PILOs, have written briefing policies that capture these principles. There is not necessarily a single ideal model common to all PILOs.

#### 7.3.1 Reduced rates and fee caps

The most common arrangement for the use of counsel in the sector is engaging external counsel on brief in the ordinary way but at reduced rates. There is no uniformity across the sector. Some PILOs' reduced rates are significantly higher than others. There is also variation on how flexible the approaches are, with some PILOs having fixed rates for all junior counsel (as one category, covering advocates of potentially 1 to 20 years' experience) and all senior counsel (as one category), while other are more flexible, taking into account individual experience and expertise in more nuanced ways.

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75 SERI (n 1).

EELC, in addition to having reduced rates, also adopts maximum fee caps for types of matter, currently set at R50,000 for an opinion and R100,000 for any application (including appeals).<sup>76</sup> These caps are explained to counsel up front. They offer EELC the security of being able to budget without having to pay unanticipated fees and the caps also save money for EELC in absolute terms. They are not a flat fee guaranteed up front, but a maximum if the counsel concerned work enough hours at the agreed (reduced) rates to reach the cap. EELC does recognise the need for flexibility and may depart from the cap in appropriate circumstances, for example where a matter runs through several stages across the court hierarchy or where there are extensive and unexpected interlocutory proceedings. The fee cap is an innovative approach that other PILOs may wish to consider.

The study conducted by SERI and commissioned by the RAITH and Ford Foundation previously recommended consideration of a generally applicable set of guidelines for counsel fees for the PIL sector.<sup>77</sup> This recommendation has not yet been taken up at the level of the collective.

### **7.3.2 Pro bono arrangements**

Pro bono arrangements entail counsel appearing without charge, regardless of outcome. They share most of the advantages and disadvantages of contingency fee arrangements discussed below, but without the uncertainty. They, too, are best regarded as a last resort where funding is unavailable, but practices in the sector vary. Under NU's briefing policy, NU will 'first' attempt to secure pro bono counsel, failing which it will seek to brief counsel on contingency or at reduced rates.<sup>78</sup> EELC does the same, first seeking to secure pro bono counsel, then contingency arrangements and only subsequently engaging counsel on reduced fees and subject to fee caps.<sup>79</sup>

The major disadvantages of pro bono arrangements are that, in practice, they secure less commitment from counsel, many of whom tend to prioritise their more profitable work; and, secondly, that this approach does not promote transformation because less established advocates find it more difficult to act without charge because they require the income. For these reasons, pro bono arrangements are not ideal and ought not to be the norm in the PIL sector.

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76 Interview: Phala (EELC).

77 SERI (n 1).

78 NU Briefing Policy, extract provided by email from Govender (NU) dated 22 November 2021.

79 Interview: Phala (EELC).

### **7.3.3 Contingency agreements**

Contingency arrangements are used reasonably often in the sector. They entail an agreement that counsel will only charge fees if the matter is successful. If it is successful, they may recover at full commercial rates, rather than at reduced rates that might normally be paid by a PILO.

**The advantage of contingency arrangements for PILOs is that the advocate, not the PILO, takes the financial risk, and PILOs are able to proceed with litigation in the absence of funding for counsel.**

The disadvantages include that this may reduce the incentive or commitment to the work, and may make it more difficult for more junior (and especially black) counsel to take on the work because they cannot afford to go unpaid. An additional potential disadvantage is that contingency arrangements incentivise lawyers to pursue costs orders which may potentially be in tension with the interests of clients, for example where opponents offer settlement but without costs. Finally, contingency arrangements are particularly unsuited to certain areas of practice, such as evictions, where courts often do not grant costs and outcomes can be uncertain, but the need of clients is great.

**Overall, contingency arrangements have significant shortcomings and are best regarded as a last resort approach to securing counsel for public interest litigation.**

### **7.3.4 In-house counsel**

The final system is actually employing advocates in-house, rather than briefing externally. In-house counsel have been used over the last decade by over half the sector, including the LRC, LHR, SERI, SECTION27, CALS and CCL. Of these, SECTION27, CALS, CCL and SERI currently have in-house counsel, at present typically no more than one or two advocates. The other PILOs – NU, WLC, CER and EELC – have all considered, or are considering, recruiting in-house counsel, though they have opted not to do so at this stage.

PILOs have engaged in-house counsel either full-time or part-time. When engaged part-time, advocates continue to do other, private work, alongside their work for a PILO. Part-time arrangements have the advantage of attracting and retaining some of the best talent in the legal profession by enabling them to supplement their PILO salary with private income and allowing them to continue to develop in areas of the law other than the focus areas of the relevant PILO.

The disadvantage is that some individuals take on too much private work and neglect their PILO commitments. Govender (LRC) described this experience with one in-house advocate at the LRC.<sup>80</sup> By contrast, the CCL is very happy with its current part-time in-house counsel arrangement. Ozah (CCL) reflected that it matters enormously who the individual advocate is.<sup>81</sup>

Using in-house counsel has several advantages, most significantly in relation to internal capacity, expertise and cost-effectiveness.

**First, in-house counsel significantly increase internal capacity, with advantages for the quality of legal work, agility and responsiveness of PILOs, strategic planning and internal training.**

It enables a PILO to launch urgent proceedings without having to seek external counsel available and willing to act urgently. Employing in-house counsel also enables PILOs to contribute positively to the transformation of the legal profession, by exposing the relevant advocates to high-profile, complex work that significantly develops them as counsel. It also ensures that the advocates arguing PILOs' cases are steeped in the context of the work in ways that members of the Bar would not be. In-house advocates are also able to contribute to internal processes such as strategic planning and training. Madlingozi explained that part-time in-house counsel bring an extra advantage, namely that 'they are both insider and outsider', so 'they know where it fits in terms of litigation strategy and angles and focus' but also that 'they are exposed to other organisations, the Bar and so forth and they can curb our enthusiasm.'<sup>82</sup>

**Secondly, in-house counsel are significantly more cost-effective even than reduced rate arrangements.**

Paying in-house counsel a monthly salary within the pay scales of the sector is likely to cost approximately considerably less than half of what it would cost to brief them for the equivalent number of hours at a reduced rate. If, for example, the reduced rate a PILO would pay is R1,000/hour, it would cost R160,000/month to pay for the equivalent of an 8-hour day working month (160 hours). If fee recovery is added into this calculus, the cost saving increases because in-house counsel fees, when recovered under a costs order, are payable to the PILO itself, not the in-house advocate. The average cost recovery for an advocate in a High Court matter is likely

80 Interview: Govender (LRC).

81 Interview: Ozah (CCL).

82 Interview: Madlingozi (CALs).

to exceed R50,000 as a modest estimate for an average opposed application.<sup>83</sup> If an in-house advocate appears in just four matters that secure costs at this modest level in a year, the PILO would recover R200,000, which can effectively be off-set against the salary paid to the in-house advocate. LRC, LHR, SERI and CALS all have recent experience of recovering regular costs for in-house counsel in this manner.

Notwithstanding these significant advantages, in-house counsel arrangements also present significant challenges, and the varied experience of PILOs is instructive. First, it can be extremely difficult to attract top advocates to PILOs because many advocates prize their independence, earn far more in private practice and would have more diverse practices.<sup>84</sup> Second, some advocates are not a good fit for PILOs because they are used to levels of deference and special treatment that are in tension with the more egalitarian institutional culture of PILOs. A related challenge, highlighted by Rugege, is that in-house counsel may quickly become overloaded and potentially over-extended at PILOs with substantial caseloads.<sup>85</sup> However, to complicate this analysis, all three of these factors may also be reasons why an in-house role is attractive to some advocates, including the opportunity to work in a team setting, to focus on human rights issues and serve marginalised groups, to work in a more progressive setting than the bar and to get exposure to complex and nationally significant work.

Several respondents thus emphasised that the specific individual advocate, more than any other factor, determines how well in-house counsel arrangements work for a PILO.<sup>86</sup> Where the individual is committed, able and a good institutional fit, the arrangement may be ideal. Where the individual is distracted by more lucrative private work, lacks the confidence of PILO lawyers expected to work with them, or is aloof and lacks collegiality, it is a drain on PILO resources and does not improve impact. Relatedly, in-house advocates being paid at higher levels than attorneys may contribute to staff tensions. Even if it costs more financially, briefing externally may avoid this dynamic.

Another arrangement, akin to securing in-house counsel, is placing specific advocates on retainer. SERI has entered into such an arrangement with one of its former advocates, and is satisfied with the arrangement.<sup>87</sup> The retainer is being used extensively by SERI attorneys. LRC is considering setting up an 'expert panel' of counsel, consisting of advocates with suitable experience who commit to taking on LRC work at pre-defined rates.<sup>88</sup>

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83 Modest estimate based on a rate of R1,000/hour with approximately 20 hours of work settling papers, 10 hours of work drafting heads of argument, 10 hours of work preparing for argument and 10 hours (1 day) in court.

84 Interviews: Zondo (SERI), Rugege (SECTION27)

85 Interview: Rugege (SECTION27).

86 Interviews: Rugege (SECTION27); Zondo (SERI); Ozah (CCL); Govender (LRC).

87 Interview: Zondo (SERI).

88 Interview: Govender (LRC).

Attorneys with rights of appearance are another form of in-house counsel capacity that is effective at several PILOs. At SERI, three attorneys have rights of appearance and do appearance work, in particular in urgent proceedings.<sup>89</sup> Similarly at CCL, there has been a history of the attorneys doing regular appearance work.<sup>90</sup> Developing and encouraging attorneys to do appearance work will enable PILOs to maximise the use of existing staff and reduce the need to brief external counsel. In doing so, it will be necessary to manage the challenge of having a single attorney both build a case and argue it in complex cases, which usually require a team of lawyers to adequately cover all roles.<sup>91</sup> That said, in-house counsel are less likely to work according to the traditional division of labour across the split bar. The Legal Practice Act creates additional flexibility in this regard as it shifts away from the previous strict regulatory divide between attorneys and advocates.

**The PIL sector has the potential to be innovative and to lead the profession in this regard by having in-house lawyers (whether advocates or attorneys) working more flexibly to perform both traditional roles.**

Viewed at the level of the sector and the legal profession, there are several advantages to in-house counsel, but also strong reasons to brief externally. Employing in-house counsel contributes to building a cohort of advocates steeped in constitutional litigation and with a commitment to social justice that is mostly absent at the Bar. It also enables the PIL sector to contribute to transformation of the advocates' profession, as PILOs will be expected to employ a representative cohort of advocates. However, this is also the argument of some PILOs that have opted to stick to briefing externally – that it enables them to give good, well paid opportunities to black and female junior advocates in ways that give those counsel prominence and material support. WLC, EELC and CER have opted for external briefing at least partly for this reason.<sup>92</sup> WLC's 2020 Annual Report articulates this:

*During this period, we ensured that we briefed 16 womxn counsel at different bars across the country. It was important for us to build and co-create feminist jurisprudence and legal strategies with womxn counsel to ensure that the face of the advocates who appear before our Courts to argue matters are representative of the cases and matters before the Court. We have valued the skills transfer in the process and are indebted to the wonderful and inspiring female advocates who have co-created with us.<sup>93</sup>*

89 Interview: Zondo (SERI).

90 Interview: Ozah (CCL).

91 Interview: Zondo (SERI).

92 Interviews: Samaai (WLC); Phala (EELC); Fourie (CER).

93 WLC *Annual Report* (2020) 29.

To sum up, in-house counsel arrangements have the potential to work extremely well in PILOs, substantially increasing capacity (and therefore impact) in a cost-effective way. Whether they are successful depends on securing suitable individuals with the necessary commitment and ability and who are a good institutional fit.

### 7.3.5 Key staffing needs

PILO heads were asked to consider their key staffing needs. Answers varied across organisations. Their responses are reflected in *Table 7.3* below.

**Table 7.3: Staffing needs according to PILO heads**

Staffing need	CALS	CCL	CER	EELC	LHR	LRC	NU	SEC27	SERI	WLC
Attorneys	X	X	X	X	X	X	X		X	
Counsel	X								X	
Researcher (legal)			X	X			X			X
Researcher (non-legal, eg budget analysis, community fieldwork)								R*		
Organiser / community mobiliser	X			X			R*			
Project co-ordinators / administrative						X				
Finance										
HR					X					
Communications	X	X		X	X			X	X	
Fundraising/ development		X			X		X	R*		X

R\* represents a recently identified, and recently filled, staffing need  
(Source: Interviews with PILO heads)

Although the human resources needs of the PILOs, as perceived by their heads, do vary, the most commonly identified medium-term needs are for additional attorneys (8 out of 10 PILOs), communications personnel (6 out of 10) and fundraising staff (5 out of 10). Several PILO heads commented that more attorneys are always needed because of the often limitless demands of the work and the associated risk of burnout.<sup>94</sup> However, the identified need for more communications and fundraising personnel speaks to the increasing recognition that PILOs need to publicise their work effectively in order to increase its political impact and to secure funding. Interestingly, despite it being a uniformly high cost, most PILOs did not identify counsel as a staffing need.

94 Interviews: Phala (EELC); Madlingozi (CALS).

## LEVELS OF SUCCESS AND IMPACT

*There is limited quantitative data on levels of success in court, and even less on the big picture of levels of success in achieving objectives of litigation and in contributing to positive impact. The PILOs themselves do not retain data in ways that track levels of success in this way.*

It is difficult to ascertain the number of cases of public interest litigation that have been litigated by the sector during the constitutional era. Some donors, including the RAITH Foundation, maintain records of the cases litigated by grantees on the basis of their support.

The only academic publication to have attempted to cover the work of the sector as a whole so far is the edited volume *Public Interest Litigation in South Africa*,<sup>95</sup> with contributors from almost every PILO and covering ten substantive areas of practice. Its table of cases identifies which PILOs were involved in litigating specific cases. It lists 374 cases. This list also includes important constitutional decisions that may not have been public interest litigation but provided the legal context for it. It excludes unreported decisions. It also excludes several important areas of work, such as refugee and migrant rights and land reform. It is likely that the sector as a whole has litigated several thousand cases during the constitutional era if these categories were included.

For some of the newer PILOs, such as NU and EELC, it is easier to ascertain their completed reported cases to date as these are still few in number (though highly significant cases). The LRC has litigated more cases than any other PILO and has significantly more reported decisions as it long had the largest litigation capacity (though now substantially reduced) – likely to be over 500.<sup>96</sup> LHR, a similar age and also having a broad set of focus areas, has had the next highest number of completed cases, with a particularly high number of refugee and migrant rights cases (many unreported). In between, organisations such as CALS, SERI, CER, WLC, CCL and SECTION27 have litigated over 100 cases each and growing.

95 Brickhill, *Public Interest Litigation in South Africa* (n 2).

96 As at 1 June 2018, SAFLII reflected that the LRC had acted in 327 cases, including 97 Constitutional Court decisions. See *ibid* 24.



Levels of success in court vary primarily in relation to area of practice, rather than PILO. Overall, levels of success in South Africa are comparatively extremely high. In jurisdictions such as India, the UK, Canada, Zimbabwe and the United States, public interest litigation is a far more uncertain prospect, with levels of success on average slightly better than even (50%+). In South Africa, levels of success on average across all areas of practice could be estimated to be in the region of 75% or higher. This is attributable to the constitutional text, in particular the extensive Bill of Rights, justiciable doctrine of the rule of law; conducive procedural rules, especially relating to standing, costs and remedies; a receptive legal culture that accepts a significant level of judicial intervention; and finally to the sophisticated, committed and reasonably well-resourced PIL sector.

However, there is significant variation in success levels and impact depending on area of practice. For example, right to education litigation by the LRC, CCL and SECTION27 has enjoyed close to 100% success in court.<sup>97</sup> By contrast, levels of court success in evictions cases are generally far lower, especially for urgent applications resisting evictions or to restore residents to their homes. SERI is currently undertaking research to map evictions litigation by court and outcome.<sup>98</sup> Similarly, LHR (and, when it did work in this area, the LRC) experienced mixed success levels in relation to disputes over asylum seeker and refugee status, detention and deportation of foreign nationals.<sup>99</sup>

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97 Jason Brickhill and Yana van Leeve, 'From the Courtroom to the Classroom: Litigating Education Rights in South Africa' in Sandra Fredman, Meghan Campbell and Helen Taylor (eds), *Human Rights and Equality in Education* (Policy Press 2018).

98 SERI. "An analysis of eviction applications in the Johannesburg Central Magistrate's Court and their compliance with the law", in *Just and Equitable? Evictions Research Series Report 1*, Socio-Economic Rights Institute (SERI) (January 2022).

99 Amit (n 5).

## CONSTRAINTS AND CHALLENGES

*The constraints and challenges faced by PILOs vary from one organisation to another. Also, within PILOs perspectives differ based on the position and role of individuals. For example, individual attorneys might consider legal secretarial support a priority need, while finance managers might identify better accounting software. Through interviews with the heads of the ten core PILOs, certain common constraints and challenges emerged.*

### **9.1 Political and socio-economic context**

Zondo reflected on the general “anti-poor political outlook” in the State over the past decade, as well as specific capacity gaps such as the City of Johannesburg’s failure to appoint a permanent director of housing.<sup>100</sup> The only person to have occupied the post in the last 8 years held it for less than six months until he was assassinated.<sup>101</sup> CER’s Fourie reflected that threats to staff and partners present a particular threat in the context of climate justice work.<sup>102</sup> The horrific murder of community leader Fikile Ntshangase, who was opposing mining-related developments, has still not received adequate police investigation and no one has been charged. CER continues to press for justice for Mrs Ntshangase.

The current economic climate and government’s austerity policies also present significant challenges for PILOs, especially those working broadly in socio-economic rights. Relatedly, Phala of EELC identified the lack of political will to implement legal gains and threats to the rule of law as significant constraints.<sup>103</sup>

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100 Interview: Zondo (SERI).

101 Interview: Zondo (SERI).

102 Interview: Fourie (CER).

103 Phala (EELC).

## 9.2 Legal context

The legal context is regarded as generally conducive to public interest litigation. The possible exceptions are particular areas of practice that present challenges, such as litigation on positive duties to enforce socio-economic rights; refugee rights; and the new terrain of budget justice.

In some of these areas, the challenge is not the law itself, but the attitudes of some courts. PILO heads reflected on the problem that some High Court judges, in particular, remain unsympathetic to constitutional rights and to the claims of poor litigants. While there are many and notable exceptions across all High Court divisions, this risk does make some forms of public interest lawyering unpredictable, with urgent evictions work and refugee and migrant rights litigation standing out as difficult areas. Some PILO leaders, such as Zondo, commented that the risk of conservative or anti-poor judicial attitudes does not track race and gender, in their experience, but rather political outlook of judges. Judges who have done significant human rights work prior to appointment tend to have attitudes more resonant with constitutional values and more alive to experience of poor litigants. For example, Zondo (SERI) commented, with reference to Judge Jody Kollapen:

*Kollapen, I think, was the only judge in the High Court who ever addressed my clients in a hearing, who saw them. He is the only judge in the 8 years I have been here at SERI in the High Court who has done that. Of course, the Constitutional Court is a different scenario.<sup>104</sup>*

She went on to mention a housing case hearing before a judge (named) who had been a conveyancer, explaining SERI's concern that the judge would have an adverse attitude and that the experience bore out their concern. Zondo emphasised the need for the sector to engage with processes around judicial appointment with these experiences in mind. Other PILO heads shared this concern, which is that – notwithstanding notable exceptions at all levels of the judiciary – some judges are not sympathetic to poor litigants or genuinely committed to realising human rights.

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<sup>104</sup> Interview: Zondo (SERI).

### 9.3 Resource constraints

PILOs identified resource constraints as a significant challenge and impediment to extending their impact. This includes internal human resource constraints and funding for project expenses.

in *Table 7.3* above, the additional staffing needs identified by PILO heads are set out. A further dimension to this question is what each PILO head considers would be the ideal size for that PILO. Zondo responded that SERI would want to grow by about 20/30% if it had additional resources, from 18 to about 25 staff: 'That would enable us to provide more support to partners and focus on neglected areas, such as the criminal justice system.'<sup>105</sup> Rugege's view was that SECTION27 would ideally be between 40-49 staff, but not more.<sup>106</sup> Ozah considers CCL, which currently has 9 staff, to be close to ideal size and would stop at 10 – but largely because of funding constraints and limited office space.<sup>107</sup> Ncube would grow LHR back closer to its earlier size by a further 10%, if possible, and has short-term and medium-term targets relating to new appointments.<sup>108</sup> Govender responded that he sees the LRC, which had over 100 staff in the middle of the decade, levelling out at around 55 staff.<sup>109</sup> For Phala, EELC's ideal size would be about 15 staff, given the increasing demand for EELC's services and concerns about staff capacity and burnout.<sup>110</sup>

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105 Interview: Zondo (SERI).

106 Interview: Rugege (SECTION27).

107 Interview: Ozah (CCL).

108 Interview: Ncube (LHR).

109 Interview: Govender (LRC).

110 Interview: Phala (EELC).

## RECOMMENDATIONS FOR PILOS

*As emphasised in the Introduction, PILOs in South Africa operate in diverse ways with a range of different litigation and governance models. Their litigation models are tailored to their particular focus areas and strategies and there is no ‘best’ model in the abstract. Similarly, governance models are tailored to the size, geographical location and client and partner networks of PILOs.*

Some of the smaller PILOs have very limited administrative capacity and may not be equipped to implement resource-intensive systems. There is also a trade-off between delivering the substantive programmes of PILOs and internal administration and management. The recommendations offered in this section are made in that spirit, accepting that one size does not fit all in the sector.

### **10.1 Diversify funding sources**

PILOs have for some time been aware that their dependence on institutional donor funding puts them at risk when large donors cease their support.

#### **10.1.1 Legal aid – state funding**

Section 34 of the Constitution guarantees the right of access to courts, which includes a right to a ‘fair hearing’. The Constitutional Court in *Magidiwana* stated in an obiter dictum<sup>111</sup> that this right requires the provision of legal representation in civil matters at state expense (civil legal aid) where the failure to provide it would deprive a person of a fair hearing.<sup>112</sup> Although the Court refused leave to appeal because the particular matter was moot (because LASA had already provided legal aid), it approved the central principle established by the High Court. Despite this constitutional obligation, the state (through LASA) makes very limited provision for civil legal aid.<sup>113</sup>

<sup>111</sup> Non-binding statement of law.

<sup>112</sup> *Legal Aid South Africa v Magidiwana and Others* [2015] ZACC 28; 2015 (6) SA 494 (CC) at paras 22ff.

<sup>113</sup> Brickhill and Grobler (n 28); Jason Brickhill, ‘The Right to a Fair Civil Trial: The Duties of Lawyers and Law Students to Act pro Bono’ (2005) 21 South African Journal on Human Rights 293.

Over the next decade, civil society as a whole should engage with government – in particular the Department of Justice and Correctional Services and LASA – to increase the provision of civil legal aid funding, including support to PILOs that provide these services and reduce the burden on the state to do so. A paradigm shift is required of all these actors, both organs of state and PILOs, to recognise that the state bears an obligation to support the provision of free legal services by PILOs at scale, as these services constitute the realisation of the constitutional right to civil legal aid under s 34.

### **10.1.2 Individual giving**

Most PILOs do pursue individual giving as a supplementary source of income, either by seeking small individual donations from members of the public or by pursuing more substantial donations from 'high net worth individuals'. This has been attempted in various forms by different PILOs, unfortunately with limited overall success for all their efforts. Some, such as LRC, have invested significant time and resources in trying to attract individual donations, using methods such as special events targeting higher earners to stalls in shopping malls targeting small donations while disseminating information.<sup>114</sup> Some organisations, such as Lawyers Against Abuse, have used art auctions to raise funds, auctioning off donated art works at special events.

### **10.1.3 Crowd-funding**

A modern variant of individual giving is online crowd-funding. It is distinct from inviting individual donations to a PILO in person or online in that crowd-funding involves seeking funding for a specific case or area of work. This is deployed extremely successfully in the United States by the ACLU and, closer to home, has been used successfully to fund public interest litigation in Kenya. In South Africa, LHR has put the most effort into crowd-funding so far. LHR has used the Global Giving platform to raise funds for its law clinic and for specific projects.<sup>115</sup>

### **10.1.4 More efficient cost recovery**

Most PILOs have been able to supplement income with cost recovery when awarded costs following successful litigation. For some, such as LRC and LHR that have historically litigated frequently, this has been a regular additional income flow with cost recovery featuring as an income line item every year. For others, it is more irregular, but still a significant source of income when received.

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<sup>114</sup> Interview: Govender (LRC).

<sup>115</sup> See <https://www.globalgiving.org/donate/48248/lawyers-for-human-rights/>.

Occasionally, organisations have secured large cost recoveries after long-running litigation, such as the LRC in the *Richtersveld* litigation and the more recent silicosis litigation, in both of which it recovered costs of several million rands. However, often the benefit for these cost recoveries has been tempered by being required to repay these funds to LASA or donors. This issue is addressed below under recommendations to donors.

In order to improve cost recovery, PILOs should look to improve electronic time recordal systems so that they claim for all work done, seeking costs routinely where acting for primary litigants, and recovering efficiently by dedicating the necessary time and resources to preparing bills of costs.

### **10.1.5 Corporate funding**

The full spectrum of possible views regarding corporate funding was reflected in the views of heads of PILOs. Some, such as Shandu (NU) considered corporate funding to be fundamentally inconsistent with NU's mission and work, which is essentially anti-capitalist.<sup>116</sup> Others, such as Zondo (SERI) consider corporate funding tainted, but legitimately to be accepted by PILOs.<sup>117</sup> A third view, held for example by Rugege, was that corporate funding is potentially problematic, but many large institutional donors are themselves politically aligned and that it is an oversimplification to regard corporate funds as entirely different or necessarily more problematic.<sup>118</sup> Most PILOs were open to seeking and accepting corporate donations, but most have been relatively unsuccessful in doing so. The most successful appears to have been SECTION27, which has engaged effectively with Investec and other large corporations. SECTION27 does have certain 'red lines' in relation to what corporate funds it will accept as donations, excluding for instance arms companies and big pharma.<sup>119</sup>

### **10.1.6 Investment**

One area to increase resources is effective investment of those resources that PILOs already attract. SECTION27 has been particularly successful at earning interest on short-term investments of its funds. This is an area in which PILOs would benefit from sharing knowledge and expertise, and securing additional external advice where appropriate. It is a non-competitive aspect of their governance, as it is concerned with the use of existing resources rather than attracting new money from the same pool. PILOs should also develop policies on ethical investing, so that their investment is consistent with their values.

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116 Interview: Shandu (NU).

117 Interview: Zondo (SERI).

118 Interview: Rugege (SECTION27).

119 Interview: Rugege (SECTION27).

### 10.1.7 Sustainability funds / reserves

Most PILOs now have reserves or sustainability funds and work in various ways to build them up. This is clearly best practice in the sector. A challenge is identifying funds that can be placed in reserves or a sustainability funds, as most grants do not allocate funds for this purpose. Some organisations place cost recovery funds and interest earned on investments in reserves.

#### **RECOMMENDATIONS:**

- (i) **engage LASA and the Department of Justice to pursue state funding in support of PIL as one means of discharging the state's constitutional duty to provide civil legal aid;**
- (ii) **review investment policies to maximise returns on invested reserves and running capital;**
- (iii) **develop investment policies on ethical investing, and identify funds that invest ethically;**
- (iv) **ensure that there is a mechanism on websites and in hard copy publications to receive individual donations;**
- (v) **diversify funding sources and continuously explore the feasibility of non-traditional sources;**
- (vi) **improve efficiency of cost recovery.**

### 10.2 Reducing standing expenses

Different PILOs have found various ways to reduce recurring operating expenses. These include acquiring ownership of office space so that it is not necessary to pay rental (eg LHR in Pretoria) or operating from shared office space (eg LHR in Cape Town) and acquiring motor vehicles to reduce ad hoc transportation costs (eg SECTION27).

#### **RECOMMENDATIONS:**

**PILOs should take steps to reduce standing expenses by investing in immovable property, motor vehicles and other property where this is feasible and ultimately cost-effective.**



### 10.3 Collective tracking of PIL cases

Most PILOs do not maintain accurate lists of completed cases or judgments, especially those with longer histories and broad areas of work. Nor is there any collective database of public interest cases that have been litigated in South Africa.

#### **RECOMMENDATIONS:**

**The PIL sector should consider establishing a shared PIL Tracker, possibly in partnership with a university.**

### 10.4 Career pathing and succession planning

Several PILO heads raised the challenge of retaining skilled staff, especially in the middle levels of organisations. The best practice in the sector includes developing the structure of the organisation to ensure that there are meaningful opportunities for advancement for individuals.

Ncube, LHR's current head, personally exemplifies the benefits of career pathing, having entered the organisation as an intern, completed articles, practiced as an attorney, headed a programme, and acted as deputy director before being appointed director. Ncube explained that this is not unique at LHR, where all the current programme heads rose through the ranks to form a leadership cohort that is cohesive, united and steeped in the commitment to access to justice that is at the heart of LHR's value system. There are several other examples among current PILO heads, including Zondo (SERI), Shandu (NU), Rugege (SECTION27) and Ozah (CCL) and others, such as Samaai (WLC) who had previously worked elsewhere in the public interest sector. The important point that several of these leaders made is that there need to be similar opportunities for people joining the sector today.

Several also recognised that this is also a matter of producing future leaders for the sector as a whole, recognising that individuals will move across PILOs during their careers. Over the last decade, there has been increasing migration of staff across the sector, which interviewees generally viewed favourably.

One practical means of ensuring that there are opportunities for advancement is to have formalised intermediate structures below director level, including programme heads/leads and recognising 'senior' attorney or researcher positions. This can be done according to functional department, substantive theme or geographical area. For example, CALS has created positions of research and advocacy co-ordinators and programme heads;

SECTION27 has heads of programmes; SERI has directors of litigation and research; and ProBono.Org (and, until recently, the LRC) had regional directors. Another approach is to recognise ‘senior’ attorneys and ‘senior’ researcher positions, as SERI does, for example. All of these structures have added at least one and sometimes several career progression steps within PILOs’ organisational hierarchies. This will ensure that individual staff do not stagnate in flat structures and become frustrated. Importantly, this approach needs to extend to all staff, so that there are opportunities for progression for administrative staff, receptionists, cleaners and all categories of employees. This requires proactive management that focuses on career development for all employees in PILOs.

**RECOMMENDATIONS:**

**PILOs should, where applicable, review their organograms and take proactive steps to ensure positive career pathing and succession planning. In particular, they should ensure that staff structures provide opportunities for advancement to intermediate leadership and management positions.**

**10.5 Staff training**

Most PILOs provide training to legal staff in two main ways, namely on-the-job training and supervision, and formal seminars or training sessions. In addition, most PILOs offer some form of support to staff who wish to undertake formal courses of further study. In the past, some training initiatives have been offered at sector level, for example a programme on trial advocacy led by SERI over the last 5 years.

**RECOMMENDATIONS:**

**PILOs should continuously review staff training programmes, including formal and informal training, and explore opportunities to conduct sector-wide training programmes.**

## 10.6 Counsel

As reflected in section 7.3 above, PILOs adopt a range of mechanisms to secure counsel and counsel remain one of the highest regular line item costs for all PILOs. The range of approaches include pro bono and contingency arrangements; reduced fees and fee caps; and in-house counsel. For some PILOs, there are compelling reasons why they prefer to brief externally. It is clear, however, that where it works well, in-house counsel as a system is the most cost-effective and contributes significantly to increasing internal capacity and responsiveness.

### **RECOMMENDATIONS:**

- (i) **PILOs should adopt written briefing policies that guide their briefing decisions;**
- (ii) **PILOs should share their reduced fee tariffs and fee caps across the sector to enable greater consistency at sector level, even if uniformity is not feasible;**
- (iii) **PILOs that do not currently do so should explore the feasibility of retaining at least one in-house counsel, including on a part-time basis, or developing attorneys to do court appearances, in order to increase standing capacity and cut costs.**

## 10.7 Internal skills and capacity vs external consultants

One challenge for PILOs is to secure the skills and resources to perform several non-core, but essential tasks, such as evaluation reports, information technology services and training, etc. There are two possible approaches. The first is to try to build internal capacity, either by creating additional positions or training existing staff to add new skills. The second is to outsource. Some PILOs, such as SECTION27, have moved in the direction of building internal capacity. Others, such as the LRC, have recently opted to prefer external consulting arrangements so as to avoid increasing the salary bill. Madlingozi explained how CALS is attempting to get more out of existing staff by encouraging flexibility so that 'everyone does everything' across their thematic area, from research to advocacy to litigation.<sup>120</sup>

### **RECOMMENDATIONS:**

**Where possible, PILOs should enhance internal capacity through recruitment, up-skilling and staff flexibility to reduce the need to outsource to expensive consultants.**

<sup>120</sup> Interview: Madlingozi (CALS).

### 10.8 Possibility of ‘shared services’

Cawe’s recent report recommended that the PIL sector explore the possibility of ‘shared services’, following the model of many corporate groups that ‘share’ non-core support services, such as human resources, information technology or internal finance departments.<sup>121</sup> PILO leaders engaged thoughtfully with the possibility in interviews, but the general sentiment is that this approach may not work in the PIL sector. At most, some PILO heads thought that a shared messenger for PILOs in the same city might be feasible, but generally they did not consider this a workable solution for services such as human resources, finance, fund-raising and communications, as these services are too organisation-specific. Another possibility that may be viable is securing a shared building, a possibility that the RAITH Foundation explored in the past. There are already some buildings in Cape Town, Johannesburg and Durban that host several social justice organisations, including some PILOs. LHR owns a building that hosts its offices and has also installed solar power in the building.

**TENTATIVE RECOMMENDATION:**

**PILOs should continue to explore the possibility of shared services that will reduce running costs and increase collaboration.**

### 10.9 Improved referrals, collaboration and networks

The PIL sector already has extensive practices of collaboration, referral to other service-providers and various forms of networks. Some practices that are being used by particular PILOs may be of use to others, however.

SERI has developed a partnership with commercial firm, Bowmans, in terms of which Bowmans provides additional legal support for their work in Durban on a pro bono basis. This possibility, of a relationship with a commercial firm willing to provide significant additional capacity without charge, enables PILOs to expand their geographical reach and to bring more hands on deck in large cases.

ProBono.org operates as a clearing-house. It has developed a network of private lawyers to whom clients may be referred to provide pro bono legal services. Although ProBono.org has good relationships with most of the PILOs, there does not appear to be a clear system for PILOs to refer matters or vice versa.

<sup>121</sup> Ayabonga Cawe (n 52) 34–36.

A particularly positive new practice in the sector is that the PILO leadership have begun to convene regular meetings to discuss matters of joint concern and to share resources. This practice is less than 5 years old but several PILO heads reflected on how it has helped them in matters such as engagement with donors and drafting new policies based on best practice. These meetings are helping to build solidarity and increase strategic cohesion. This network has further potential, for example for PILOs to share all their policies in a single repository. Until now, such sharing has been ad hoc. Such a repository would require an investment of time and resources.<sup>122</sup> There seems to be broad consensus that such a repository of PILO policies would add value.

**RECOMMENDATIONS:**

- (i) Consolidate, strengthen and capacitate the PILO leadership collective, including possibly employing a co-ordinator, building a more effective IT infrastructure for the sharing of policies and resources;**
- (ii) Map the provision of walk-in services by PILOs to be able to provide a more up-to-date and accurate picture of what services are available and to improve the referrals system;**
- (iii) Strengthen collaboration between PILOs and ProBono.Org with a focus on referrals systems.**

**10.10 Produce and publish annual reports, AFS's and strategic plans**

Some organisations (NU) do not produce annual reports; others, like WLC, NU, CER, LHR and CALS, have not published their reports or annual financial statements. The PIL sector works tirelessly to secure openness and transparency from government and from corporate actors. They should honour the principle by publishing annual reports, including annual financial statements, on their websites.

**RECOMMENDATIONS:**

**PILOs should produce and publish on their websites annual reports and annual financial statements.**

<sup>122</sup> Madlingozi suggested that it would be preferable that the PILOs conduct this collaboration and resource-sharing themselves, arguing that it should not be done directly by donors. Interview: Madlingozi (CALS).

### **Wellbeing programmes to prevent staff burnout**

Almost every PILO head, mostly unprompted, raised concerns about employee burnout, in particular at leadership level. They reflected on the weight of the dual challenges of protecting clients' interests and sustaining and managing PILOs. Fund-raising pressure is a major source of stress for PILO heads. PILO heads should be encouraged to develop wellness programmes to care for all staff. This may include counselling services (especially following traumatic incidents but also generally), meditation or yoga sessions,<sup>123</sup> and generous provisions for leave. EELC, as an example, provides a 'wellness benefit' in the form of a R3,500 grant to all employees, which can be used for any wellness-related purpose such as yoga, counselling or coaching.<sup>124</sup>

Leave policies are important and various forms of leave contribute substantially to the well-being of staff. Policies on annual leave, sick leave and parental or family responsibility leave should be reviewed to ensure that they are generous and that they constitute best practice in terms of gender equality and recognising all family forms. Other less routine forms of leave may also assist. The LRC historically had a sabbatical leave policy for long-term staff, entitling them to 6 months of sabbatical leave after several years of service. This leave could be used, for example, to take up visiting lectureships/fellowships at universities, to write or simply to replenish energy reserves. The LRC removed this policy several years ago because it was not applicable to all staff and was too costly. However, it undoubtedly had benefits for staff. Several PILOs do not currently provide medical aid to staff and should consider introducing it.

#### **RECOMMENDATIONS:**

- (i) PILOs should review their leave policies and give consideration to a form of sabbatical leave for long-serving staff, for example 3 months of paid leave after 5 years of service**
- (ii) Consider providing free counselling to staff experiencing secondary trauma (or sometimes primary trauma) arising from the nature of the work;**
- (iii) Seek to implement medical aid for staff and consider establishing retirement or provident funds, if not currently done.**

123 CALS head Madlingozi has encouraged these for staff.

124 Interview: Phala (EELC).

## RECOMMENDATIONS FOR DONORS

*A number of recommendations emerge from the research for consideration by institutional donors supporting PILOs. These arise primarily from views shared by several PILO heads.*

### 11.1 Funding principles and criteria

- Emerging from this study, there are several findings that bear on the criteria and principles that govern decisions to fund PILOs.
- The ten core PILOs produce high-impact work and there is significant value in ensuring that they are sustained and able to continue to produce their work. They all have a proven track record.
- Public interest litigation in South Africa remains a highly effective strategy for social change and has comparatively high prospects of success and positive impact at scale in comparison to other constitutional democracies.
- There is no basis to suggest that either generalist or specialist PILOs produce higher impact and neither should be presumptively preferred.
- PILOs should be supported to engage in all three core activities of research, advocacy and litigation, as these complement and strengthen the overall work of PILOs.
- There is a need for strong support for clinical/walk-in services at PILOs and not to emphasise high-visibility, high-impact strategic litigation only. The two forms of legal service provide a healthy tension that best promotes constitutionalism.
- Since the typology of models of public interest litigation (whether client-based, movement lawyering, campaign-based or research-based) is not a clear predictor of impact, donors should be encouraged not to prefer or avoid funding PILOs or individual cases based on the model adopted by PILOs.

#### **RECOMMENDATION:**

**It is recommended that funding policies and criteria take into account these findings.**

### 11.2 Core, not programme or individual case funding

There are three main types of funding that PILOs receive in order to do their work: core funding, programme or project funding and individual case funding.

Across the sector, PILOs reaffirmed the strong preference for core funding in preference to more constrained programme funding. There are several clear reasons why core

funding is more appropriate than programme funding. First, public interest litigation is unpredictable and often (though not always) reactive, requiring a response to unanticipated threats to rights. Secondly, public interest litigation conducted by PILOs depends not only on the professional work of lawyers but on the work of every employee within a PILO and on its underlying operations, including having accessible premises, information technology and other infrastructure and support services. These aspects require core funding as outcome and activity-specific programme funding ordinarily will not cover these costs.

Individual case funding has similar drawbacks. It is administratively onerous in proportion to relatively limited resources, and generally does not cover core costs. The reason why it has been necessary is mainly because of unanticipated large cases that cannot be covered under existing core or programme costs. In particular, long commissions of inquiry, inquests and trials require such extensive resources that they generally entail seeking new, individual case funding. Recent examples include the silicosis litigation by LRC, the Marikana Commission (involving SERI, LRC and CALS), the Life Esidimeni inquest (involving SECTION27) and a torture trial currently being run by LHR. The largest cost in these big cases is invariably counsel's fees, so that this issue links to the lack of internal counsel capacity at PILOs, discussed above.

While individual case funding is onerous and generally undesirable, it will remain necessary in these circumstances unless PILOs can build internal capacity sufficient to run long, large trial-type proceedings without external counsel. In order for internal capacity to suffice for unanticipated, long trial-type proceedings, PILOs will have to have a cohort of in-house counsel (or attorneys who do appearance work) sufficient to enable them to deploy one or more such lawyers full-time without detracting from other commitments. Core funding is the best means to build this capacity, but most PILOs would still be some way away from being able to dedicate the necessary resources to a process such as the Marikana Commission without securing additional individual case funding.

**RECOMMENDATION:**

**Generally prioritise core funding over programme funding, but retain the flexibility for extraordinary individual case funding for high-demand, unanticipated cases.**



### **11.3 A perpetuity fund**

The PILOs covered in this study are well-established, highly impactful organisations. It is not currently foreseeable that there could cease to be a vital need for their services in contemporary South Africa. Simply put, they are not just needed now, but for the foreseeable future. Accordingly, what is ideally needed is a perpetuity fund that would provide a significant portion of funding to all ten core PILOs out of the interest on invested capital. The perpetuity fund might then fund all the PILOs in proportion to a fair metric, such as staff size or overall budget, without the need for any significant review or reporting process. This would provide a base level of security for PILOs. Relatedly, government (through LASA or the Department of Justice) might be approached to contribute to this fund, alongside entities such as the Legal Practice Council, Advocates for Transformation, Black Lawyers Association and National Association of Democratic Lawyers.

**RECOMMENDATION:**

**Explore the possibility of a sectoral perpetuity fund.**

### **11.4 Sustainability grants**

Marginally less ambitious than a sectoral perpetuity fund and more feasible for individual donors would the establishment of sustainability grants to the ten core PILOs. These would be one-off, large value grants that would enable PILOs, for example, to purchase their office premises or build their own reserves in ways that would help to secure their survival and generate investment income.

**RECOMMENDATION:**

**Consider one-off, high value sustainability grants to the ten core PILOs.**

### 11.5 Reporting flexibility

Donors should consider being less prescriptive about reporting requirements and being willing to accept substantive and financial reports from PILOs that are not directed to a specific donor, but encompass the relevant grant. This will enable PILOs to reduce duplication and, in the process, enhance the quality and comprehensiveness of reports. Of course, donors should not be burdened with irrelevant report content. The need for reporting flexibility is increasing as some of the largest donors cease funding PILOs, forcing most PILOs to manage a higher number of smaller grants.

**RECOMMENDATION:**

**Consider introducing more flexible reporting requirements that are minimalist, avoid duplication and permit multi-donor reporting where feasible.**

### 11.6 Do not reclaim recovered costs

LASA, when granting funding through its impact litigation fund, and some donors impose a condition on the grant of funds that, if litigation is successful and costs are recovered, PILOs must repay the funding originally received. This practice is onerous and detrimental for PILOs. First, cost recovery itself – especially on large matters – is time-consuming and therefore costly. Secondly, these funds could otherwise go towards PILOs' sustainability reserves to help to ensure long-term viability. The RAITH Foundation recently reviewed and changed its own policy in this regard, so that it now requires costs awards for core grants only to be reported, not returned. For LASA and institutional donors, funds awarded to PILOs are funds that have been disbursed, and there is no financial or operational reason why these funds must be recouped. LASA and such donors can have no strong expectation of a return, because public interest litigation is uncertain, though there may be some hope that litigation will recover costs. The key question is, as a matter of policy, whether recouped costs should be repaid to their source or left to PILOs to build sustainability. It is recommended that LASA and private institutional donors cease to require that recovered costs be repaid to them on funded litigation.

**RECOMMENDATION:**

**Litigation funders should review their policies regarding claiming repayment from PILOs that secure costs from successful litigation and rather require PILOs to invest such costs in their own sustainability funds or reserves.**

## CONCLUSION

*South Africa's PILOs and the organisations that support them make a vital contribution to realising access to justice and advancing the commitments of the Constitution. There is a need for closer and more sustained studies of how the activities of PILOs – research, advocacy and litigation – and their models of litigation contribute to success and impact.*

However, available data confirms high levels of success and impact across the full range of models deployed by PILOs. This means that client-based, research-based, campaign-based and movement lawyering models of public interest litigation have all been demonstrated to be successful (ie to achieve the objectives of the litigation) and to generate legal, material and political impact. While it appears that movement-based and campaign-based litigation are most effective at generating political impact (eg shifting the public narrative), all four models have been effective at producing legal impact (especially judicial precedent) and material impact (tangible change on the ground, such as delivery of goods or money). More in-depth socio-legal studies across different areas of public interest practice would help to deepen our understanding of these dynamics.

There remain major challenges in securing the substantial resources required to sustain the PILOs, which remain almost entirely dependent on a limited number of institutional donors. This report makes a number of recommendations that PILOs may consider – drawing on best practice among PILOs and beyond – to help to secure financial sustainability so as to maximise impact. It also makes certain recommendations to the donor community that supports the PILOs, many of which are already implemented in whole or part by some donor organisations.

Those recommendations are set out below.

## **SUMMARY OF RECOMMENDATIONS**

### **Recommendations for PILOs**

#### **1. PILOs should take steps to diversify funding sources**

- 1.1. engage LASA and the Department of Justice to pursue state funding in support of PIL as one means of discharging the state's constitutional duty to provide civil legal aid;
- 1.2. review investment policies to maximise returns on invested reserves and running capital;
- 1.3. develop policies on ethical investment and identify funds that invest ethically;
- 1.4. ensure that there is a mechanism on websites and in hard copy publications to receive individual donations;
- 1.5. diversify funding sources and continuously explore the feasibility of non-traditional sources;
- 1.6. improve efficiency of cost recovery.

#### **2. PILOs should take steps to reduce standing expenses by investing in immovable property, motor vehicles and other property where this is feasible and ultimately cost-effective.**

#### **3. The PIL sector should consider establishing a shared PIL Tracker, possibly in partnership with a university.**

#### **4. PILOs should, where applicable, review their organograms and take proactive steps to ensure positive career pathing and succession planning. In particular, they should ensure that staff structures provide opportunities for advancement to intermediate leadership and management positions.**

#### **5. PILOs should continuously review staff training programmes, including formal and informal training, and explore opportunities to conduct sector-wide training programmes.**

#### **6. Regarding counsel:**

- 6.1. PILOs should adopt written briefing policies that guide their briefing decisions;
- 6.2. PILOs should share their reduced fee tariffs and fee caps across the sector to enable greater consistency at sector level, even if uniformity is not feasible;
- 6.3. PILOs that do not currently do so should explore the feasibility of retaining at least one in-house counsel, including on a part-time basis, or developing attorneys to do court appearances, in order to increase standing capacity and cut costs.

7. **Where possible, PILOs should enhance internal capacity through recruitment, up-skilling and staff flexibility to reduce the need to outsource to expensive consultants.**
8. **PILOs should continue to explore the possibility of shared services that will reduce running costs and increase collaboration.**
9. **Regarding referrals, collaboration and networks, PILOs should:**
  - 9.1. consolidate, strengthen and capacitate the PILO leadership collective, including possibly employing a co-ordinator, building a more effective IT infrastructure for the sharing of policies and resources;
  - 9.2. map the provision of walk-in services by PILOs to be able to provide a more up-to-date and accurate picture of what services are available and to improve the referrals system;
  - 9.3. strengthen collaboration between PILOs and ProBono.Org with a focus on referrals systems.
10. **PILOs should produce and publish on their websites annual reports and annual financial statements.**
11. **Regarding staff well-being, PILOs should:**
  - 11.1. review their leave policies and give consideration to a form of sabbatical leave for long-serving staff, for example 3 months of paid leave after 5 years of service
  - 11.2. consider providing free counselling to staff experiencing secondary trauma (or sometimes primary trauma) arising from the nature of the work;
  - 11.3. consider introducing medical aid for staff and retirement/provident funds, if not currently provided.

### **Recommendations for donor sector**

12. **Donors should draw on the following findings of the study, among others, in developing principles and criteria to make funding decisions regarding PILOs**
  - 12.1. The ten core PILOs produce high-impact work and there is significant value in ensuring that they are sustained and able to continue to produce their work. They all have a proven track record.
  - 12.2. Public interest litigation in South Africa remains a highly effective strategy for social change and has comparatively high prospects of success and positive impact at scale in comparison to other constitutional democracies.

- 12.3. There is no basis to suggest that either generalist or specialist PILOs produce higher impact and neither should be presumptively preferred.
- 12.4. PILOs should be supported to engage in all three core activities of research, advocacy and litigation, as these complement and strengthen the overall work of PILOs.
- 12.5. There is a need strong support for clinical/walk-in services at PILOs and not to emphasise high-visibility, high-impact strategic litigation only. The two forms of legal service provide a healthy tension that best promotes constitutionalism.
- 12.6. Since the typology of models of public interest litigation (whether client-based, movement lawyering, campaign-based or research-based) is not a clear predictor of impact, donors should be encouraged not to prefer or avoid funding PILOs or individual cases based on the model adopted by PILOs.

**13. Donors should generally prioritise core funding over programme funding, but retain the flexibility for extraordinary individual case funding for high-demand, unanticipated cases.**

**14. Donors should explore the possibility of a sectoral perpetuity fund.**

**15. Donors should consider one-off, high value sustainability grants to the ten core PILOs.**

**16. Donors should consider introducing more flexible reporting requirements that are minimalist, avoid duplication and permit multi-donor reporting where feasible.**

**17. Litigation funders should review their policies regarding claiming repayment from PILOs that secure costs from successful litigation and rather require PILOs to invest such costs in their own sustainability funds or reserves.**

## Appendix I: Interviews

Name	Role	Date
1. Disha Govender	Head of Law Clinic, Ndifuna Ukwazi	10 November 2021
2. Nersan Govender	National Director, Legal Resources Centre	22 November 2021
3. Karabo Ozah	Director, Centre for Child Law	17 November 2021
4. Wayne Ncube	National Director, Lawyers for Human Rights	17 November 2021
5. Umunyana Rugege	Executive Director, SECTION27	15 November 2021
6. Mandisa Shandu	Director, Ndifuna Ukwazi	5 November 2021
7. Nomzamo Zondo	Executive Director, Socio-Economic Rights Institute of South Africa	9 November 2021
8. Tshepo Madlingozi	Director, Centre for Applied Legal Studies	11 January 2022
9. Seehaam Samaai	Director, Women's Legal Centre	17 January 2022
10. Tshegofatso Phala	Executive Director, Equal Education Law Centre	25 January 2022
11. Teresa Yates	National Director, ProBono.Org	26 January 2022
12. Melissa Fourie	Executive Director, Centre for Environmental Rights	28 January 2022

## **Appendix II:**

### **Topic guide for PILOs interviews (DRAFT)**

*Topics for PILO heads:*

1. Typology
  - a. Specialist/generalist – focus?
  - b. Urban/rural
  - c. Law clinic services
  - d. Model
2. Staffing
  - a. Change in last decade (stats?)
  - b. Current staffing profile – job types
  - c. Demographics – race, gender (anything else you think about in this regard)
  - d. Key needs – if had additional resources
3. Impact:
  - a. How many cases litigated in last decade? (List)
  - b. Success – in court; objectives
  - c. Material impact – beneficiaries, changes on ground
  - d. Political impact
  - e. Any publications/sources on overall impact of organisation?
  - f. Lessons learnt, reflections
4. Funding
  - a. Overall trajectory in last decade
  - b. Sources of funding
  - c. Proportions spent on
    - i. Operating costs, salaries, project expenses
    - ii. Internal counsel, if any
    - iii. External counsel
    - iv. Training of lawyers
  - d. Individual case budgets
    - i. Include proportion of salary.
5. Briefing policy
  - a. Does the organisation have one?
  - b. How implemented?
  - c. Core principles?
6. Precedent banks and data management
7. Training
8. Challenges – what most impedes impact and challenges sustainability of organisation?
9. Cost and resilience
  - a. Things organisation does
  - b. Things considering
  - c. Shared services?



*Topics for PILO staff:*

10. Typology
  - a. Specialist/generalist – focus?
  - b. Urban/rural
  - c. Law clinic services
  - d. Model
11. Budget
  - a. Overall trajectory
  - b. Proportions spent on
    - i. Operating costs, salaries, project expenses
    - ii. Internal counsel, if any
    - iii. External counsel
    - iv. Training of lawyers
  - c. Individual case budgets
    - i. Include proportion of salary.
12. Briefing policy
  - a. Does the organisation have one?
  - b. How implemented?
  - c. Core principles?
13. M&E:
  - a. How reflect on impact?
  - b. Lessons learnt, reflections
14. Precedent banks and data management
15. Training
16. Cost and resilience
  - a. Things organisation does
  - b. Things considering
  - c. Shared services?

*Topics for external counsel:*

1. What work did you do?
2. Who drafted founding papers, other affidavits, letters?
3. Reflection on subject-matter expertise of in-house lawyers, drafting skills, with a view to identifying any training or capacity needs.