

## **MEMORANDUM ON THE OBJECTS OF THE TRADITIONAL AND KHOI-SAN LEADERSHIP BILL, 2015**

### **1. BACKGROUND AND OBJECTS OF BILL**

- 1.1 Section 211 of the Constitution of the Republic of South Africa, 1996, makes provision for the recognition of the institution, status and role of traditional leadership according to customary law. It is further determined that a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs. Section 212 of the Constitution determines that national legislation may provide for a role for traditional leadership as an institution at local level, while matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities may be dealt with through national or provincial legislation that makes provision for the establishment of houses of traditional leaders. This resulted in the promulgation of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) (Framework Act), and the National House of Traditional Leaders Act, 2009 (Act No. 22 of 2009) (National House Act).
- 1.2 While certain traditional structures and leadership positions have therefore been recognised by law in compliance with the Constitutional prescripts, there has never before been statutory recognition of the Khoi-San. The formal recognition of the Khoi-San communities, leaders and structures is only possible through enabling legislation.
- 1.3 Subsequently, it was decided to prepare a single Bill—
- to make provision for the recognition of the Khoi-San;
  - to repeal and replace the Framework Act and the National House Act—
    - to ensure an integrated approach in dealing with all matters relating to traditional affairs;
    - to enhance the uniform manner in which matters relating to traditional affairs are dealt with across the country;
    - to address legal uncertainties and gaps that have been identified in the two pieces of legislation; and
  - to amend the Independent Commission for the Remuneration of Public Office-bearers Act, 1997 (Act No. 92 of 1997), the Remuneration of Public Office Bearers Act, 1998 (Act No. 20 of 1998), and the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), appropriately.
- 1.4 The principles on which the two existing pieces of legislation are based have been retained in the Bill. The majority of provisions of the said legislation have therefore been included in the Bill albeit in certain instances in an amended format.
- 1.5 Three of the key objectives of the Bill are—
- to transform the traditional and Khoi-San institutions in line with constitutional imperatives such as the Bill of Rights;
  - to restore the integrity and legitimacy of the institutions of traditional and Khoi-San leadership in line with customary law and practices; and
  - to protect and promote the institutions of traditional and Khoi-San leadership.

- 1.6 The Bill is based on specific principles in terms of which it is important that the institutions of traditional and Khoi-San leadership—
- promote democratic governance and the values of an open and democratic society;
  - advance gender equality within the institutions of traditional and Khoi-San leadership;
  - promote freedom, human dignity and the achievement of equality and non-sexism;
  - derive their mandate and primary authority from applicable customary law and customs;
  - strive to enhance tradition and culture;
  - promote nation building and harmony and peace amongst people; and
  - promote the principles of co-operative governance in their interaction with all spheres of government and organs of state.

## 2. ANALYSIS OF BILL

- 2.1 Clause 1 of the Bill contains the definitions of certain terms and phrases used in the Bill. The definitions of “principal traditional community” and “principal traditional leader” seek to address any uncertainty in respect of who exactly are or can become principal traditional leaders. The two definitions make it clear that it is not a category of traditional leadership for which anyone can apply, but that it relates only to persons who by operation of law become principal traditional leaders.
- 2.2 Clause 2 of the Bill confirms that traditional and Khoi-San communities must promote Constitutional principles and may not use any official resources to the benefit of political parties.
- 2.3 Clause 3 of the Bill deals with the recognition of kingships or queenships, traditional communities and headmanship or headwomenship, while clause 4 deals with the withdrawal of such recognition.
- (a) A number of traditional communities which are recognised as such and are grouped together may be recognised as a kingship or queenship if they meet a certain criteria. Such communities must have recognised traditional councils, senior traditional leaders and they must recognise a king or a queen in terms of customary law and customs. They must also have a system of traditional leadership at a kingship or queenship level. An application for the recognition of a kingship or queenship must be submitted to the President who may recognise such kingship or queenship after consultation with the Minister responsible for traditional and Khoi-San matters. The President may have an investigation conducted to determine whether the relevant traditional communities comply with the criteria for recognition as a kingship or queenship and may also direct the Minister to conduct certain consultations in this regard. The provisions of this clause are more consultative and inclusive in nature than those in existing legislation. This will ensure that the President makes an informed decision and is not dependent only on the recommendation of the Minister as is currently the case.
- (b) In terms of clause 4 of the Bill the President may withdraw the recognition of a kingship or queenship. This may be considered where the majority of traditional communities under the jurisdiction of a kingship or queenship request the President to withdraw such recognition. Such a request must be accompanied by the grounds on which it is based. Clause 4 also contains provisions relating to investigations and consultations in respect of requests for the withdrawal of the recognition

of a kingship or queenship, similar to those provided for in respect of the recognition of a kingship or queenship.

- (c) In the case of the recognition of a community as a traditional community, the community must have a system of traditional leadership at a senior traditional leadership level and may have a number of headmanship or headwomanship. The community must also occupy a specific geographical area. The recognition is done by the relevant Premier after consultation with the relevant provincial house.
- (d) In terms of clause 4 a Premier may consider the withdrawal of the recognition of a traditional community on request of such a community, on request of the relevant kingship or queenship or principal traditional council, or where two or more recognised communities request the Premier to merge them into a single traditional community.
- (e) A headmanship or headwomanship may be recognised as such if it, amongst others, has a system of traditional leadership at a headmanship or headwomanship level and if it will contribute to the more effective and efficient administration of the relevant traditional council. This is a new provision as current legislation does not make provision for the recognition of a headmanship or headwomanship. The Bill, through clause 3, addresses this oversight and provides for the recognition criteria of a headmanship or headwomanship. A portion of a traditional community that is of the view that it meets the criteria for recognition as a headmanship or headwomanship may request the relevant traditional council to apply to the Premier concerned for such recognition.
- (f) In terms of clause 4 the withdrawal of the recognition of a headmanship or headwomanship may only be considered where the relevant traditional council requests the Premier concerned to withdraw such recognition. The Bill makes provision for the Premier to cause an investigation to be conducted in order to establish whether there is sufficient cause for the withdrawal of the recognition of a headmanship or headwomanship.
- (g) It should be noted that all the provisions in the Bill relating to the recognition of communities and leadership positions or the withdrawal of such recognitions, seek to ensure that the relevant criteria are as far as possible aligned in respect of the different communities or leadership positions. The various provisions in respect of investigations and specific types of consultations furthermore seek to ensure that informed decisions are taken.

2.4 As mentioned under paragraph 2.1, the definitions of “principal traditional community” and “principal traditional leader” in clause 1 of the Bill provide clarity on which communities and leaders are or are to become principal traditional communities or leaders. It is therefore also important that the Bill makes provision for the withdrawal of the recognition of a principal traditional community. Clause 4 of the Bill contains the relevant provisions. The withdrawal of the recognition of a principal traditional community may be considered by the relevant Premier where the majority of traditional communities under the jurisdiction of the principal traditional community request such a withdrawal and provide the Premier with the grounds on which the request is based. Provision is also made for an investigation and consultations.

2.5 Clause 5 of the Bill makes provision for the recognition of Khoi-San communities and branches (please also see clauses 64 and 66 of the Bill). As mentioned earlier, this is the first time that statutory provision is made for the Khoi-San and therefore this provision and others in the Bill relating to the Khoi-San are all new. A community may apply to the relevant Premier to be recognised as a Khoi-San community if it meets certain criteria. The community must have a history of self-identification by members of the community as belonging to a unique community distinct from all other communities. It must observe distinctive established Khoi-San customary law and customs and has to be subject to a system of hereditary or elected Khoi-San leadership. Furthermore, the community must have existing

distinctive cultural heritage manifestations and a proven history of coherent existence of the community from a particular point in time up to the present. The relevant community must also occupy a specific geographical area or various geographical areas together with other non-community members. These criteria differ slightly from the criteria for traditional communities mainly due to the unique circumstances and history of the Khoi-San. However, the criteria are necessary to ensure that only legitimate Khoi-San communities in terms of customary law and customs are considered for recognition.

- 2.6 A Premier may have an investigation conducted to determine whether a community does indeed comply with the criteria for recognition and must also consult the relevant provincial house. Furthermore, since the members of Khoi-San communities may be residing in various geographical areas, an application for recognition of such community must be accompanied by a list of the community members.
- 2.7 It is also important to note that all initial applications for the recognition of Khoi-San communities must be referred to the Advisory Committee on Khoi-San Matters to be established under clause 59 of the Bill. These initial applications will be dealt with in accordance with the provisions of clauses 64 and 66.
- 2.8 The Bill also makes provision for the recognition of Khoi-San branches. Certain Khoi-San communities do not occupy a single definable geographical area but a number of geographical areas that may be situated in more than one province. These communities have a “main community” where the leader of that community resides and one or more smaller communities that recognise such leader but which are situated in other geographical areas. These smaller communities are known as branches and provision is made for their recognition. A branch must comply with certain criteria, one of which is that it should consist of at least 10% of the total number of community members.
- 2.9 In cases where a branch is situated in a province other than the province where the Khoi-San council is situated, the Premier of the province where the council is situated has to request the Premier of the province where the branch is situated to recognise that branch. Clause 6 of the Bill makes provision for the withdrawal of the recognition of a Khoi-San community or branch where the council requests such a withdrawal or where the Khoi-San councils of two or more communities request the Premier to merge such communities into a single Khoi-San community.
- 2.10 The following traditional leadership positions are provided for in clause 7(1) of the Bill: king or queen, principal traditional leader, senior traditional leader, headman or headwoman. This clause also makes provision for the following Khoi-San leadership positions: senior Khoi-San leader and branch head. Clause 7(2) contains the generic criteria that apply in respect of all leadership positions. An application for the recognition of the position of a king or a queen must be submitted to the President, while applications for the recognition of all other leadership positions must be submitted to the relevant Premier. Provision is also made for investigations to be conducted in cases where there is evidence or allegations that a leadership position does not comply with the criteria contained in clause 7(2).
- 2.11 Clause 7(7) furthermore deals with instances where a senior traditional leader is recognised as a king or a queen, while clause 7(8) makes provision for a recognised traditional leader to resign and the consequences of such resignation. Clause 7(9) states that it will be an offence for any person to pretend to be a recognised traditional or Khoi-San leader if it is not the case.
- 2.12 Clause 8 of the Bill makes provision for the recognition of kings or queens, principal traditional leaders, senior traditional leaders and headmen or headwomen. Clause 9 makes provision for the withdrawal of such recognition

(the term “withdrawal” replaces the term “removal” which is used in the Framework Act).

- (a) When the position of a king or queen has to be filled, the royal family must identify a person who qualifies in terms of customary law to assume the position of a king or a queen and then apply to the President for the recognition of the person so identified as a king or a queen. The application must be accompanied by the particulars of the identified person and the reasons for the identification. The President may recognise the person as a king or a queen after consultation with the Minister and the relevant Premier. If there is an allegation that the identification of the person was not done in terms of customary law and customs, the President may cause an investigation to be conducted by an investigative committee which must include at least one member of the National House of Traditional and Khoi-San Leaders (hereinafter referred to as the National House) in order to establish whether the identification was done in accordance with customary law and customs or not. If the investigative committee’s report indicates that the identification was not done in accordance with customary law and customs, such report must be referred to the royal family for its comments.
- (b) In terms of clause 9 of the Bill the recognition of a king or a queen must be withdrawn by the President if the person has been convicted of an offence with a sentence of imprisonment for more than 12 months without the option of a fine, if the person suffers from a physical incapacity or mental infirmity which makes it impossible for him or her to function as a king or queen and if the person no longer permanently resides within the area of the kingship or queenship council. The recognition may also be withdrawn if the person has been removed from office in terms of the code of conduct or has transgressed customary law or customs on a ground that warrants such withdrawal. The royal family may recommend the withdrawal of the recognition of a king or a queen and must provide reasons to the President. However, if there is evidence or an allegation that the recommendation of the royal family is not based on the grounds provided for in clause 9, the President may cause an investigation to be conducted by an investigative committee which again must include at least one member of the National House. The final decision is therefore vested in the President and not in the royal family. Where the recognition of a king or queen is withdrawn, a successor may be identified in accordance with the provisions of clause 8.
- (c) In the case of the recognition of a successor to the position of principal traditional leader the process to be followed is the same as the process for the recognition of a king or a queen as discussed under paragraph (a) above. The only difference is that the relevant authority is not the President but the Premier of the province concerned, while in the case of investigations the Premier must include a member of the provincial house of traditional and Khoi-San leaders on the investigative committee. Also take note of clause 70(8)(c) of the Bill.
- (d) Clause 9 of the Bill makes provision for the withdrawal of the recognition of principal traditional leaders based on the same grounds and process as discussed under paragraph (b) above.
- (e) In terms of clause 8 of the Bill, a royal family must, in the case of hereditary succession, identify a person who qualifies in terms of customary law or customs to assume the position of a senior traditional leader, headman or headwoman. If hereditary succession is not applicable, the person to assume the position of a headman or headwoman must be identified or elected by the relevant community. The royal family, in the case of hereditary succession, or the traditional council, in the case of an identified or elected headman or headwoman, must apply to the Premier concerned for the recognition of such person. If there is evidence or an allegation that the identification or election of the relevant person was not done in terms of customary law and customs, the Premier may have an investigation conducted by an investigative committee. At least one member of the relevant provincial house must be part of such an

investigative committee. Where necessary, the report of the investigative committee must be referred to the relevant royal family or traditional council for its comments.

- (f) Clause 9 makes provision for the withdrawal of the recognition of a senior traditional leader, headman or headwoman on the same grounds as those mentioned earlier in respect of other leadership positions.

2.13 The recognition of senior Khoi-San leaders and branch heads is dealt with by clause 10 of the Bill. When such positions are to be filled the royal family, in the case of hereditary succession, must identify a senior Khoi-San leader as the hereditary successor, with due regard to applicable customary law and customs. In the case of succession by election, the relevant Khoi-San council must elect a senior Khoi-San leader or branch head to assume the position in question. Elections must be conducted in terms of rules and procedures adopted by the Khoi-San council concerned. The royal family or Khoi-San council, as the case may be, must apply to the Premier concerned for the recognition of the person so identified or elected. The Premier must recognise the person by notice in the Provincial *Gazette* and must issue a certificate of recognition to such person. If there is evidence or an allegation that the identification or election of a person was not done in accordance with such rules and procedures or such customary law or customs, the Premier may cause an investigation to be conducted by an investigative committee. At least one Khoi-San member of the relevant provincial house must be part of such an investigative committee. Where necessary, the committee's report must be referred to the royal family or Khoi-San council, as the case may be, for comments.

2.14 The provisions relating to the withdrawal of the recognition of a Khoi-San leader or branch head, as contained in clause 11 of the Bill, are in line with similar provisions in respect of the withdrawal of the recognition of other leadership positions as already discussed. Where such a withdrawal has been done, a successor must be identified or elected, as the case may be, in accordance with the provisions of clause 10.

2.15 In cases where the hereditary successor to the position of a king, queen, principal traditional leader, senior traditional leader, headman, headwoman or senior Khoi-San leader is a minor, a regent may be identified by the royal family to assume leadership on behalf of the minor. This is provided for in clause 12 of the Bill. If the relevant royal family fails to identify a regent, the Premier concerned may do so after consultation with the royal family. Provision is made for the position of a regent to be reviewed at least every two years. Provision is also made for investigations in instances where there is evidence or an allegation that the identification of a regent was not done in accordance with customary law or customs. As soon as the successor to the relevant position ceases to be a minor, the regent must relinquish the position and the rightful successor must be recognised appropriately. The circumstances for the recognition of a regent are therefore uniform and apply to all hereditary traditional and Khoi-San leaders.

2.16 Clause 13 of the Bill makes provision for acting traditional and Khoi-San leaders. This is necessary where a successor to the hereditary position of a king, queen, principal traditional leader, senior traditional leader, headman, headwoman or senior Khoi-San leader has not yet been identified by the royal family or a person has not yet been elected to the position of senior Khoi-San leader or branch head. It is also necessary in cases where the identification of a successor is subject to an investigation or where the particular leader will be absent from his or her area of jurisdiction for more than three months for the treatment of an illness, study purposes or any other lawful purpose, including imprisonment for more than 12 months.

2.17 In terms of clause 14 of the Bill, a king, queen, principal traditional leader, senior traditional leader, headman or headwoman who occupies a hereditary position, may with the concurrence of the royal family, identify a deputy to act

in his or her stead whenever the particular leader becomes a full-time member of a municipal council, is elected as a member of the National Assembly or a provincial legislature, is appointed as a permanent delegate of the National Council of Provinces, is elected or appointed in a full-time position in any house of traditional and Khoi-San leaders, or is employed on a full-time basis. The same principles apply in respect of hereditary senior Khoi-San leaders. The recognition of any such deputy traditional or Khoi-San leader is to be done by the relevant Premier who must issue a certificate of recognition to such deputy.

- 2.18 Clause 15 of the Bill determines that a traditional or Khoi-San leader may perform the functions provided for in terms of customary law and customs or relevant national or provincial legislation.
- 2.19 Once a kingship or queenship, principal traditional community or traditional community has been recognised, such community must establish an appropriate council.
- (a) In the case of the recognition of a kingship or queenship by the President, that kingship or queenship must within one year of such recognition establish a kingship or queenship council. This provision is contained in clause 16 of the Bill. A kingship or queenship council consists of the number of members determined by the Minister by formula published in the *Government Gazette*, after consultation with the king or queen, a forum of not more than five members of the royal family and a forum of not more than 20 senior traditional leaders under the kingship or queenship. It is therefore a very inclusive consultation process. At least a third of the members of such council must be women, although the Minister may determine a lower threshold if this requirement cannot be met. The membership of a kingship or queenship council comprises 60% of traditional leaders including the king or queen who is an ex officio member and chairperson of the council. These traditional leaders must be members of the traditional community and must be selected by the king or queen in terms of that community's customs. The king or queen must do so with the concurrence of a forum of not less than five and not more than ten members of the royal family. The decision is therefore not left to the sole discretion of the king or queen, but involves the royal family. The other 40% members are to be elected. For this purpose each traditional council falling within the area of jurisdiction of the kingship or queenship must elect one person from the elected members of such council. Should the number of persons so elected be more than the required number, the persons so elected must elect from amongst themselves the number of persons needed. The term of office of a kingship or queenship council must be aligned with that of the National House. Clause 16 also determines under which circumstances a member of a kingship or queenship council must vacate his or her office, which includes removal from office in terms of the code of conduct provided for in the Bill.
  - (b) As far as the establishment of a principal traditional council is concerned, the same principles apply as discussed under paragraph (a) above. In this case, the Minister must consult the principal traditional leader and a forum of not more than five members of the royal family and a forum of not more than 20 senior traditional leaders under the principal traditional community, before publishing the formula for the composition of a principal traditional council.
  - (c) Clause 16 of the Bill also deals with the establishment of traditional councils. Once a traditional community has been recognised, such community must within one year of such recognition establish a traditional council. To ensure uniformity in the composition of these councils, the number of members is to be determined by the Minister by formula published in the *Government Gazette*. Traditional councils must comprise of 60% traditional leaders and members of the traditional community selected by the senior traditional leader concerned with the concurrence of a forum of not less than five and not more than ten

members of the royal family, as well as 40% members elected by the traditional community. The principles on which these provisions are based are therefore also in line with those applicable to other councils as discussed above and seek to ensure that the selection is not left to the discretion of a single person, but that a more inclusive process is followed.

- (d) Clause 16 determines that when the recognition of a kingship or queenship, principal traditional community or traditional community is withdrawn in terms of clause 4, such withdrawal will automatically result in the disestablishment of the councils referred to above as well as the withdrawal of recognition of the particular leader. Please also see the comments regarding the alignment of terms under paragraph 2.30 hereunder.

2.20 Where a traditional community occupies two or more geographical areas within a province, the traditional council may, in terms of clause 17 of the Bill, request the Premier to establish a traditional sub-council for the area which is located outside the area where the seat of the traditional community is located. One of the considerations to be taken into account is whether the establishment of such a sub-council will improve the effective administration of the traditional community. A sub-council consists of the number of members as determined by the Premier after consultation with the main traditional council. A Premier may withdraw the recognition of a traditional sub-council if it no longer contributes to the effective administration of the traditional community.

2.21 Clause 18 of the Bill makes provision for the establishment of Khoi-San councils. A Khoi-San community must within one year of being recognised establish a Khoi-San council. A Khoi-San council shall consist of the number of members determined by the Minister by formula published in the *Government Gazette*. The composition of a Khoi-San council is based on the same principles as traditional councils. However, in respect of the 60% component of the Khoi-San council, branch heads may also be part of the council if there are branch heads. If there are no branches, the senior Khoi-San leader must select the number of members from the members of the main community and also, where applicable, from the members of the royal family. This must be done with the concurrence of a forum of not less than five and not more than ten members designated by the royal family.

2.22 Clause 19 of the Bill makes provision for the functions of kingship or queenship councils and principal traditional councils. These councils have to administer the affairs of the kingship or queenship or principal traditional community and guide the relevant traditional leaders in the performance of their functions. They furthermore have to assist the king or queen or principal traditional leader in the performance of their customary functions in relation to the recognition of senior traditional leaders and in mediating disputes between senior traditional leaders. The councils also have to promote unity between traditional communities. The councils must keep proper records and their financial statements must be audited. The councils (and thus the members) must adhere to the code of conduct provided for in this Bill.

2.23 The functions of traditional councils, traditional sub-councils, Khoi-San councils and branches, as contained in clause 20 of the Bill, are similar to those contained in clause 19 as discussed above, but also include additional functions relating to interaction with the national, provincial and local spheres of government. These councils may recommend appropriate interventions that will contribute to development and service delivery within their communities. They may also participate in the development of policies and legislation at a municipal level, as well as in development programmes. All of these councils must keep proper records and their financial statements must be audited. The councils must at least once a year meet with their respective communities to give account of its activities and finances.

- 2.24 In terms of clause 21 of the Bill, the election of members of councils may be conducted by the Electoral Commission, by means of a community meeting or by means of a body consisting of one or more persons appointed by the relevant Premier. This clause seeks to ensure that the election of members is done in an effective manner. A Premier may make regulations in respect of such elections and the filling of vacancies.
- 2.25 Clauses 22, 23 and 24 of the Bill make provision for the administration of councils, support to such councils, partnerships and agreements. The Premiers must monitor councils so as to ensure the efficient and effective performance of their statutory and customary obligations. If a Premier is of the view that a council cannot or does not fulfil its statutory or customary obligations, the Premier must request the council to provide him or her with information relating to its performance of the relevant obligation or designate a person to investigate the matter. Subsequently the Premier, if he or she is satisfied that the council cannot or does not fulfil its statutory or customary obligations, may intervene by appointing a suitable person to assist the council or to assume responsibility for its statutory or customary obligations. Such appointments must be reviewed after a period of 180 days.
- 2.26 As far as partnerships and agreements are concerned, clause 24 determines with who a council may enter into a partnership or agreement. The clause also contains specific requirements and makes provision for monitoring by the provinces.
- 2.27 Clause 25 of the Bill makes provision for the allocation of roles to councils and traditional and Khoi-San leaders. Any department within the national or provincial sphere of government may through legislative or other measures and in respect of any functional area of such department, provide a role for kingship or queenship councils, principal traditional councils, traditional councils, Khoi-San councils, traditional sub-councils or traditional and Khoi-San leaders. Such departments may determine the process and procedure to be followed for the provision of such roles, as well as the extent of or conditions attached to any such provision. The relevant department must monitor the execution of any such role to ensure it is consistent with the Constitution and that it is executed efficiently and effectively.
- 2.28 Clause 26 of the Bill refers to the different houses of traditional and Khoi-San leaders namely a National House, provincial houses and local houses.
- 2.29 The National House is established by clause 27 of the Bill for a term of five years. In terms of clause 28, the National House consists of three persons elected by each provincial house. Specific provision is made for instances where there are no provincial houses. The clause specifically states that where there are senior Khoi-San leaders in a provincial house, at least one senior Khoi-San leader must be elected as a member of the National House. At least a third of the members of the National House must be women although a lower threshold may be determined if it is not possible to reach this target.
- 2.30 It should be noted that while the terms of the National House, provincial houses and local houses should be aligned, a precise alignment has been found to be impractical. For example, before the National House can be constituted, the provincial houses have to be constituted to enable them to elect the representatives to the National House. The Bill therefore determines that all the houses will have terms of five years however such terms are to end on specific dates in 2017 which dates are one month apart. This will allow sufficient time for the provincial houses to be constituted before the National House and for local houses to be constituted before the provincial houses. From 2017 onwards, the terms of the respective houses will therefore continue to end one month apart. For this purpose clause 27(2) determines that the term of the National House as established in terms of the National House Act, prior to the enactment of this Bill, will expire on 31 May 2017. The same principle applies to the term of kingship or queenship councils, principal traditional

councils, traditional councils and Khoi-San councils [please see clauses 16(4)(a), 18(5), 49(2)(b) and 50(8)].

- 2.31 The provisions relating to the election of members of the National House by provincial houses are contained in clause 29 of the Bill. Should a provincial house fail to elect members to serve in the National House, the relevant Premier will have the authority to designate the required number of members from amongst the members of the provincial house. A member of the National House may not serve more than two consecutive terms. Clause 30 determines the circumstances under which a person will not be eligible to serve as a member of the National House.
- 2.32 Clause 31 of the Bill sets out the circumstances under which the seat of a member of the National House will become vacant, while clause 32 determines how a vacancy must be filled. In terms of clause 33 the administrative seat of the National House is at the same place where the national Department of Traditional Affairs (DTA) is located, but meetings of the National House may take place where the administrative seat is or at the seat of Parliament.
- 2.33 The National House must elect one of its members as chairperson and another member as deputy chairperson in accordance with the provisions of clause 34 of the Bill. In cases where both the chairperson and deputy chairperson are absent, the National House may designate another member to act as chairperson and this must be done in accordance with the rules and orders of the House. The chairperson and deputy chairperson shall be full-time members of the National House and the Minister may also determine that certain other members be full-time members. This is provided for in clause 35.
- 2.34 The duties of the National House are contained in clause 36 of the Bill. It is clear from this clause that cooperation between the National House and provincial houses is essential for their proper functioning and there is also an emphasis on service delivery and the promotion of constitutional principles. The National House will be required to consider any Bill referred to it by the Secretary of Parliament. The National House must be supported by a Secretary to be appointed in accordance with the provisions of clause 37 and other officials of the Department who are to be seconded to the House.
- 2.35 In terms of clause 38 of the Bill, the National House must prepare a strategic plan for a period of five years and annual performance plans. These plans must be submitted to the Minister for approval and the strategic plan must also be tabled in Parliament. The National House will have to submit quarterly reports on their performance to the Minister. These provisions will enhance the monitoring of the performance of the House and will furthermore ensure greater accountability of the House. It is further expected of the National House to enforce the code of conduct provided for in the Bill.
- 2.36 Clause 39 of the Bill determines that any Parliamentary Bill pertaining to customary law or customs of traditional and Khoi-San communities must be referred to the National House for its comments. This also applies to any Bill dealing with a matter referred to in section 154(2) of the Constitution, therefore legislation that affects the status, institutions, powers or functions of local government. The National House must provide the Secretary to Parliament with its comments within 60 days from the date of such referral. If the National House has no comments on a Bill, they must inform the Secretary to Parliament accordingly.
- 2.37 In terms of clause 40 of the Bill, the National House may meet with recognised kings and queens to discuss the activities and programmes of the House and matters of interest to the kings and queens. The National House may also meet with a provincial house as determined by clause 41. The National House is allowed to interact with a local house or a traditional or Khoi-San council provided it is done in consultation with the relevant

provincial house. To strengthen the interaction with provincial houses, the chairperson of the National House must establish a body of chairpersons of provincial houses to regularly interact with the National House on matters of mutual interest. The Secretary of the National House must also establish a body of Secretaries of provincial houses.

- 2.38 Clause 42 of the Bill deals with the provision of administrative and financial support to the National House. The House is required to submit annual estimates of expenditure for the next financial year to enable the Department to budget for the estimated expenditure of the House, taking into consideration the overall allocation of the Department.
- 2.39 In terms of clause 43 of the Bill, the National House must annually prepare an annual report for the preceding financial year. This report must be approved by the Minister and tabled in Parliament. To ensure more certainty as to the contents of such a report, the clause sets out the minimum information and issues to be contained or addressed in the report.
- 2.40 Clause 44 of the Bill determines that the National House has the privileges and immunities as may be prescribed. Clause 45 determines that members of the National House will receive the remuneration and benefits as may be determined in accordance with the provisions of the Remuneration of Public Office Bearers Act, 1998 (Act No. 20 of 1998).
- 2.41 Clause 46 of the Bill empowers the National House to make rules and orders relating to the conduct of its business and proceedings. This includes rules and orders regulating the establishment, constitution, powers and functions, procedures and lifespan of committees of the National House. The National House may also make rules and orders in respect of the attendance of meetings by non-members as well as the status of such persons at any such meeting.
- 2.42 In terms of clause 47 of the Bill, the National House must be dissolved on the expiry of its term of office or after a vote supported by a two-thirds majority of the members. It should however be noted that the Minister may summon the National House to an extraordinary meeting to attend to any urgent business, notwithstanding the dissolution of the House.
- 2.43 Clause 48 of the Bill determines that all members of the National House must take an oath or solemn affirmation as set out in Schedule 2 to the Bill.
- 2.44 Section 212(2)(a) of the Constitution determines that national or provincial legislation may provide for the establishment of houses of traditional leaders. Provincial houses are currently established in accordance with provincial legislation. Clause 49 of the Bill extends the composition of provincial houses to include both traditional and Khoi-San leaders in substantially the same proportion as they are represented in local houses. With reference to paragraph 2.30 above, clause 49(2)(b) determines that the term of a provincial house that was established and constituted prior to the enactment of this Bill, will expire on 30 April 2017.
- 2.45 Clause 50 of the Bill authorises a Premier to establish a local house of traditional and Khoi-San leaders for the area of a local, district or metropolitan municipality where there are one or more traditional or Khoi-San councils. A local house must consist of not less than five members of which at least one member must be a senior traditional leader or a senior Khoi-San leader. All senior traditional leaders and senior Khoi-San leaders who reside within the area of jurisdiction of a local, district or metropolitan municipality are members of the local house established for the specific area. For the purposes of the composition of local houses, there is no one-size-fits-all model. Clause 50(4) therefore makes provision in detail for all the different permutations that may be applicable when establishing such houses, thus based on the unique circumstances of each local, district or metropolitan municipal area. A local house must meet at least four times per year.

- 2.46 The term of a local house is five years. With reference to paragraph 2.30 above, clause 50(8) determines that the term of a local house that was established and constituted prior to the enactment of this Bill will expire on 31 March 2017.
- 2.47 Clause 51 of the Bill establishes the Commission on Traditional Leadership Disputes and Claims. The provisions of the Bill relating to this Commission such as the provisions dealing with the appointment of members of the Commission (clause 52), vacancies (clause 53), conditions of appointment of members (clause 54), support to the Commission (clause 55), functions of the Commission (clause 56) and recommendations of the Commission (clause 57) are basically a re-enactment of the provisions contained in the Framework Act. In clause 52, an additional ground for the removal of a member of the Commission is added, namely the ground of misconduct, incapacity or incompetence. The procedure for the removal of a member now also makes provision for an appropriate investigation to be conducted and the suspension of a member who is under investigation. Clause 58 makes provision for the establishment of provincial committees of the Commission. In terms of existing legislation there has to be a provincial committee in each province. However, it has been realised that this may not be necessary and therefore clause 58 provides for a discretion in this regard. A Premier, when considering whether a provincial committee is needed or not, must take into consideration any relevant factors including the number of disputes and claims lodged and the complexity thereof. Provision is now also made for the disestablishment of a provincial committee. In cases where there is no provincial committee, the Commission will deal with the relevant disputes and claims.
- 2.48 Clause 70(10) determines that the term of office of the Commission referred to in clause 51 shall be the unexpired portion of the term of office of the Commission established under the Framework Act.
- 2.49 Since this is the first time that statutory provision is made for the recognition of the Khoi-San, it is proposed in clause 59 of the Bill to establish an Advisory Committee on Khoi-San Matters. The Advisory Committee will consist of not more than seven persons and will exist for a period of three years. In terms of clause 60 these persons must have qualifications or experience in or knowledge of anthropology, law, the history of the Khoi-San or the customs and customary law of the Khoi-San. To ensure public participation in the appointment of such members, clause 60 determines that the Minister must invite nominations from the general public. The Minister may also appoint a selection panel to assist him or her with the identification of the most suitable candidates to be appointed as members of the Advisory Committee. Clause 60 also contains provisions relating to the removal of a member of the Advisory Committee, while clause 61 determines when vacancies will occur. In terms of clause 62, the conditions of appointment of members of the Advisory Committee are similar to those applicable to the Commission on Traditional Leadership Disputes and Claims. Clause 63 determines that the national DTA must provide administrative and financial support to the Advisory Committee.
- 2.50 In terms of clause 64 of the Bill, any community that believes that it complies with the criteria for recognition as a Khoi-San community or branch, as provided for in the Bill, may lodge an application with the Advisory Committee. Applications must be submitted within two years from a date to be determined by notice in the Government *Gazette* in terms of clause 65(2)(a). In practice this will mean that once the members of the Advisory Committee have been appointed, all the necessary administrative arrangements and support can be put in place before the notice is issued.
- 2.51 The functions of the Advisory Committee are set out in clause 65 of the Bill. In brief, the Advisory Committee has the authority to investigate and make recommendations on the recognition of Khoi-San communities, hereditary senior Khoi-San leaders and elected senior Khoi-San leaders. The recommendations of the Advisory Committee must, in terms of clause 66, be submitted

to the relevant Premier for comments and thereafter to the Minister who has the authority to officially recognise the Khoi-San communities or leaders.

- 2.52 Clause 67 of the Bill authorises the Minister to make regulations. In the case of regulations concerning the roles and functions of a king, queen or principal traditional leader, the Minister must consult the relevant Premiers, MECs responsible for traditional and Khoi-San leadership matters, the National House and relevant provincial houses. All draft regulations must be published in the Government *Gazette* for public comment.
- 2.53 In terms of clause 68 of the Bill, a Premier may delegate any power or duty conferred on him or her by this Bill to the member of the Executive Council responsible for traditional affairs in the particular province, excluding the power to recognise a community or leader or to withdraw such recognition.
- 2.54 Clause 69 of the Bill requires of the national DTA to monitor the implementation of the Bill, any regulations made in terms of the Bill and the implementation of section 81 of the Local Government: Municipal Structures Act, 1998, as it is to be amended by this Bill.
- 2.55 Clause 70 of the Bill contains transitional provisions.
- (a) Provision is made for the continued recognition of all traditional leaders, regents, acting traditional leaders or deputy traditional leaders. However, in the case of headmen and headwomen, clause 70(1)(c) requires of Premiers to conduct investigations within three years from the commencement of this Bill to determine whether headmanships and headwomenships as well as recognised headmen and headwomen do in fact meet the criteria for recognition. This is necessitated by the increase in the number of recognised headmen and headwomen in recent years which could be attributed to an apparent ambiguity in the Framework Act. The fact is that the Framework Act does not provide for the establishment of a headmanship or headwomanship and therefore there is legal uncertainty in respect of certain “recognitions” that took place since the commencement of the Framework Act in 2004. Clause 70(1)(c) of the Bill also determines what the consequences will be of cases where it is found that a headman or headwoman does not meet the said requirements.
  - (b) As far as tribal authorities are concerned, clause 70(4) determines that such authorities are deemed to be traditional councils. However, such traditional councils must, within one year from the commencement of this Bill, meet the requirements of clause 16(2) of the Bill relating to the constitution thereof. If the timeframe of one year is not met, the Minister may take the necessary steps to ensure that the provisions of clause 16(2) are met.
  - (c) Provision is also made for a paramount chief, regent or acting paramount chief, that does not qualify to be recognised as a king or queen, to be deemed to be recognised as a king or queen or regent or acting king or queen. However, provision is also made that the recognition of a deemed kingship or queenship and a deemed king or queen lapses if, on the date of coming into operation of the Traditional Leadership and Governance Framework Amendment Act, 2009 (1 February 2010), the position is vacant, or on the death of the permanent incumbent king or queen, or where the position of the incumbent king or queen is occupied by a regent or acting king or queen, on the death of the regent or acting incumbent or on the date of the recognition of a successor, whereafter the kingship or queenship or king or queen is deemed to be a principal traditional community and principal traditional leader.
  - (d) As far as the Commission on Traditional Leadership Disputes and Claims is concerned, it is stated that the Commission contemplated in the Bill is in fact a continuation of the Commission established in accordance with the Traditional Leadership and Governance Framework Act, 2003.
  - (e) Furthermore, provision is made for all disputes and claims that were not disposed of on 1 August 2010, to be deemed to comply with the

provisions of section 21 of the Traditional Leadership and Governance Framework Act, 2003. The reason for this transitional provision is that section 21 determines that a dispute or claim concerning customary law or customs that arise within traditional communities should be resolved internally, therefore by the traditional communities themselves. Should this fail, the dispute or claim may be referred to the relevant provincial house of traditional leaders and they should try to resolve it in accordance with its internal rules and procedures. If such a provincial house is unable to resolve the matter, it must be referred to the Premier of the province concerned. Should the Premier also not be able to resolve the matter, it must be referred to the Commission. This section must be read with section 28(10) of the Framework Act which is a transitional provision. Section 28(10) determines that the Commission must review claims and disputes that were not finalised prior to the coming into operation of the Traditional Leadership and Governance Framework Amendment Act, 2009. If the Commission is of the opinion that any claim or dispute should not be dealt with by the Commission, they should “. . . , subject to section 21 refer the claim or dispute to the relevant province . . .”. It is uncertain what the intention of the underlined part was, namely whether the reviews are subject to section 21, whether the referral processes are subject to section 21 or whether the process to be followed once a claim or dispute has been referred is subject to section 21. It would appear that it could not have been the intention to repeat the whole section 21-process once a dispute or claim has been referred as that could lead to a duplication of the process and it would also be unfair to claimants who have patiently been waiting for their disputes and claims to be addressed. Nevertheless, the Department agrees that this section is ambiguous. The majority of disputes and claims that have been lodged with the Commission, have been dealt with. The remaining disputes and claims are already with the Commission and there is thus no need to retain the provisions of the said section 21 in this Bill.

- (f) Lastly, provision is made for—
- the terms of the National House, provincial houses and local houses to expire on 31 May 2017, 30 April 2017 and 31 March 2017 respectively. Notwithstanding the repeal of the National House Act by this Bill once enacted, the National House constituted in terms of that Act will continue to exist until 31 May 2017. Similar provision is made in respect of provincial and local houses; and
  - the continued application of any formula or guidelines determined in terms of the Framework Act prior to the repeal of that Act by this Bill.

2.56 Clause 71 of the Bill provides for the amendment of certain legislation and must be read with Schedule 3 to the Bill. Clause 72 provides for the repeal of existing legislation and must be read with Schedule 4 to the Bill.

2.57 Clause 73 contains the short title of the Bill.

2.58 Schedule 1 to the Bill contains a code of conduct which is applicable to all members of the National House, provincial houses, local houses, a kingship or queenship council, a principal traditional council, a traditional council, a traditional sub-council, a Khoi-San council and a branch. The provisions of the code of conduct are standard and in line with similar codes for other bodies. It deals with the general conduct of members, attendance of meetings, disclosure of interests, personal gain, declaration of interests, unauthorised disclosure of information, as well as rewards, gifts and favours. The code of conduct also contains more detailed provisions in respect of an alleged breach of the code by members of the National House. Specific provision is made for the investigation of alleged breaches of the code of conduct to ensure that a fair process is followed and that informed decisions are taken.

- 2.59 Schedule 2 to the Bill contains the oath and affirmation that members of the National House, provincial houses and local houses must take.
- 2.60 Schedule 3 to the Bill contains proposed amendments to the Independent Commission for the Remuneration of Public Office-bearers Act, 1997, the Remuneration of Public Office Bearers Act, 1998, and the Local Government: Municipal Structures Act, 1998, as follows:
- (a) Paragraph (e) of the definition of “office-bearer” in section 1 of the Independent Commission for the Remuneration of Public Office-bearers Act is to be amended to ensure that the Commission is authorised to make recommendations in respect of the salaries, allowances, benefits and enabling resources of all existing traditional leadership positions and the Khoi-San leadership positions envisaged in this Bill.
  - (b) The Remuneration of Public Office Bearers Act is to be amended to provide for the remuneration of senior Khoi-San leaders.
  - (c) Section 81 of the Local Government: Municipal Structures Act is to be amended, to provide for the participation of traditional and Khoi-San leaders in the proceedings of a municipal council. The proposed amendments make provision for—
    - instances where a local house has been established for the area of jurisdiction of a local or metropolitan municipality;
    - instances where a local house has been established for the area of jurisdiction of a district municipality; and
    - instances where there are no local houses. In the case of the latter the traditional and Khoi-San leaders who may participate in the proceedings of municipal councils are to be nominated from amongst the members of the traditional and Khoi-San councils.
- 2.61 Depending on the different permutations, the number of traditional and Khoi-San leaders who will participate in the various municipal councils will be between one and three. It should also be noted that such participating leaders are not municipal councillors and may therefore not vote in municipal meetings.
- 2.62 The existing legislation which will be repealed by the Bill, are listed in Schedule 4 to the Bill.

### 3. FINANCIAL IMPLICATIONS

- 3.1 The Bill makes provision for new structures and leadership positions in respect of the Khoi-San which will have additional financial implications. It should be noted that the salaries, allowances and benefits of traditional and Khoi-San leaders are to be determined in accordance with the provisions of the Remuneration of Public Office Bearers Act, 1998 (Act No. 20 of 1998) (Remuneration Act).
- 3.2 The following paragraphs provide more clarity with regard to the additional financial implications:
- (a) Recognition of senior Khoi-San leaders (clause 10): It is not possible to predict how many Khoi-San communities and leaders will eventually be recognised in accordance with the criteria for recognition provided for in the Bill. It is therefore not possible to even estimate with any degree of accuracy, what the financial implications may be. The salary of recognised Khoi-San leaders will depend on the Remuneration Commission’s recommendation and the subsequent Presidential determination.
  - (b) Establishment and recognition of Khoi-San councils (clause 18):
    - (i) The number of Khoi-San councils to be established and recognised in terms of clause 18, will depend on the number of Khoi-San communities that are recognised in terms of clause 5.
    - (ii) As indicated under paragraph (a) above, it is not possible to estimate how many Khoi-San communities will be recognised and

- consequently also not possible to estimate what the financial implications will be in respect of Khoi-San councils.
- (iii) As far as the members of Khoi-San councils are concerned, the recognised senior Khoi-San leaders will be remunerated in accordance with a determination made in terms of the Remuneration Act. It is therefore only the other members of such councils that may receive an allowance if so determined. It is envisaged that these members will receive an allowance similar to that of non-traditional leader members of traditional councils. However, it must be noted that such a determination has not yet been made.
- (c) Support to Khoi-San councils (clause 23):
- (i) In terms of clause 23, the national and provincial governments may adopt such legislative or other measures as may be necessary to support and strengthen the capacity of Khoi-San councils to fulfill their functions.
- (ii) Currently provincial governments provide support to traditional councils by way of infrastructure (offices and meeting facilities), staff, transport and other tools of trade. It is envisaged that provincial governments will have to provide equivalent support to Khoi-San councils.
- (d) Advisory Committee on Khoi-San Matters (clauses 59 and 60): The DTA will have to budget for the establishment of the Advisory Committee on Khoi-San Matters as envisaged by Part 2 of Chapter 4 of the Bill. This will include the remuneration of the members, office accommodation, provision of the necessary office equipment and other conditions of employment such as travel and accommodation privileges. Using the budget of the existing Commission on Traditional Leadership Disputes and Claims as a guideline, it is estimated that the Advisory Committee would need a budget of approximately R15 million per annum.
- (e) Composition of provincial houses of traditional and Khoi-San leaders (clause 49):
- (i) Clause 49 determines that if a provincial house is to be established, it must be established in terms of provincial legislation. Such legislation must provide for the membership of both traditional and Khoi-San leaders. The relevant existing provincial legislation will therefore have to be revised to ensure alignment with the provisions of this Bill once enacted.
- (ii) If the provincial legislation makes provision for more members than is currently the case, it may have additional financial implications for the provincial governments. However, there will be no additional remuneration implications as the persons who will serve as members of provincial houses will already receive salaries on account of being recognised leaders.
- (f) Local houses of traditional and Khoi-San leaders (clause 50):
- (i) The current legislative dispensation provides for the establishment of local houses within district and metropolitan municipalities. This position is retained in the Bill, but the option is added to establish such houses for the areas of jurisdiction of local municipalities. It should be noted that it is not compulsory to establish local houses and that such houses can only be established in municipal areas where there are one or more recognised traditional or Khoi-San councils. In other words, a local house cannot be established for a municipal area where there are no traditional or Khoi-San councils. As the membership of local houses in the main, will consist of recognised leaders who are already remunerated, it is envisaged that the additional financial implications will be limited to sitting allowances for the few members referred to in clause 50(4)(a) of the Bill.
- (ii) The provisions of the Bill in respect of the establishment of local houses have to be read together with Schedule 3 to the Bill, in particular the proposed amendments to section 81 of the Local Government: Municipal Structures Act, 1998. In terms of the current section 81 traditional leaders can be identified for the

purposes of participation in the proceedings of municipal councils. The section determines that the number of traditional leaders to be identified may not exceed 20% of the total number of councillors. Therefore the number of traditional leaders so identified differs between municipal councils and may be quite large in some instances. The Bill however proposes amendments to section 81 which will provide a much more streamlined system in terms of which not less than one but not more than three members of a local house (or members of a traditional or Khoi-San council in instances where there are no local houses) will participate in the proceedings of a municipal council.

#### **4. DEPARTMENTS/BODIES/PERSONS CONSULTED**

4.1 On 27 June 2011, the DTA referred the National Traditional Affairs Bill (as it was known at the time) to the following national departments for comment:

- Agriculture, Forestry and Fisheries
- Arts and Culture
- Communications
- Cooperative Governance
- Correctional Services
- Basic Education
- Defence
- Economic Affairs
- Energy
- Environmental Affairs
- Health
- Home Affairs
- Human Settlements
- International Relations and Cooperation
- Justice and Constitutional Development
- Labour
- Mineral Resources
- National Treasury
- Presidency
- Public Works
- Rural Development and Land Reform
- South African Police Services (SAPS)
- Science and Technology

- Social Development
- Sport and Recreation
- Tourism
- Trade and Industry
- Transport
- Women, Children and People with Disabilities.

4.2 On 15 July 2011, the Bill was referred to all nine provincial governments.

4.3 On 27 June 2011, the Bill was also referred to the following institutions:

- Commission on Gender Equality
- Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- Demarcation Board
- ESCOM
- Human Rights Commission
- Human Science Research Council
- Independent Electoral Commission
- Ingonyama Trust Board
- Institute of People Management
- Landbank
- Pan South African Language Board
- South African Local Government Association
- STATSSA
- Telkom.

4.4 The Bill was referred to the National House of Traditional Leaders and the House received a briefing on the Bill on 24 June 2011. The chairpersons of the provincial houses were also briefed on the Bill on 24 June 2011 and the Bill was subsequently referred to all provincial houses of traditional leaders on 6 July 2011. The provincial houses received briefings on the Bill on the following dates:

- Eastern Cape Provincial House of Traditional Leaders: 25 July 2011
- Northern Cape Provincial House of Traditional Leaders: 25 July 2011
- Limpopo Provincial House of Traditional Leaders: 02 August 2011
- Mpumalanga Provincial House of Traditional Leaders: 02 September 2011
- Free State Provincial House of Traditional Leaders: 14 September 2011
- KwaZulu-Natal Provincial House of Traditional Leaders: 07 October 2011

- North West Provincial House of Traditional Leaders: 25 January 2012

Following the briefings of the National and provincial houses, the houses decided to submit a consolidated written input on the Bill to the Department. This input was considered during the analysis of all inputs and comments. On 26 April 2013, the Bill was presented to a joint meeting of the National House, Contralesa and the National Khoi-San Council. The National House furthermore received a briefing on 1 July 2013.

- 4.5 Two consultation teams of the DTA conducted extensive community consultation sessions on the Bill. Since this is the first time that provision is to be made in legislation for the recognition of the Khoi-San, the community consultation sessions focused on the Khoi-San. The sessions were however open for any person to attend. The following sessions were conducted in the following cities or towns on the following dates:

- 20 August 2011: Kimberley
- 22 August 2011: Calvinia and Kuboes
- 23 August 2011: Vredendal
- 24 August 2011: Vioolsdrif
- 25 August 2011: Caledon and Springbok
- 26 August 2011: Pella
- 27 August 2011: Cape Town and Kakamas
- 29 August 2011: George and Andriesvale
- 30 August 2011: Joubertina and Upington
- 31 August 2011: Willowmore and Groblershoop
- 01 September 2011: Graaff-Reinet and Griekwastad
- 02 September 2011: Fort Beaufort
- 05 September 2011: Kokstad
- 06 September 2011: Durban and Victoria-West
- 08 September 2011: Klerksdorp and Uitenhage
- 09 September 2011: Vryburg and Hankey
- 12 September 2011: Colesberg
- 13 September 2011: Bloemfontein
- 16 September 2011: Johannesburg

- 4.6 The Bill was discussed in detail with the National Khoi-San Council (NKC) during a meeting held from 30 June 2011 to 2 July 2011. The members of the NKC also accompanied and supported the Departmental consultation teams during the community consultations referred to in paragraph 4.5.

- 4.7 The Bill was also presented to officials from the provincial governments and the secretaries of the provincial houses of traditional leaders on 13 July 2011.

- 4.8 The Bill was presented to Contralesa on 29 July 2011 and again on 20 September 2011 (which was a joint session with the National House of Traditional Leaders).
- 4.9 Written inputs were received from the following departments/institutions/ persons:
- !Xum-Kumisila Kingdom
  - Adrian Peters
  - Amaryllis Williams
  - Chief Deon Zenza
  - Chief Elwin White
  - Chief Margaret Coetzee-Williams
  - Cobaqua Ennerdale Branch
  - Colin Papier
  - Commission for Gender Equality
  - Congress of the First Indigenous Leaders of Southern Africa
  - Damaqua Kei Korana Nation
  - Dr William Langeveldt
  - East Griqua Traditional Council
  - First Nation Liberation Alliance (FINLA)
  - Free State Griqua Council
  - Gamtkwa Khoi-San Council
  - Gauteng Provincial Griqua Council of the Royal House of His Majesty Adam Kok V
  - Griqua National Conference of South Africa
  - Griqua Royal House
  - Hessekwas (R Josephs)
  - Indigenous Development Foundation
  - Institute for the Restoration of the Aborigines of South Africa
  - Johnson Tobias
  - Kabaqua Ennerdale Branch
  - Kai! Korana Royal Council (Western Cape)
  - KCHDC-SA
  - Kei Korana-Camdeboo Municipality and Districts
  - Khara Hais! KhoeSan Community Association: Upington Northern Cape

- Khoi-Bushman Kingdom National Royal Council
- Khoisan A
- Khoi-San Aboriginal Peoples of South Africa
- Khoi-San Angelin Abrahams
- Khumisoaqua Khoi-San Tribal House of Tshwane
- Kruipers of Southern Africa
- Leonard John Sayster
- Matthee S G
- National Association for the Advancement of Khoi-San People
- National House of Traditional Leaders
- National Khoi-San Council (NKC)
- Niewoudt T C
- Provincial Government: Eastern Cape: Department of Local Government and Traditional Affairs
- Provincial Government: Free State
- Provincial Government: Gauteng: Office of the Premier
- Provincial Government: KwaZulu-Natal
- Provincial Government: Limpopo: Office of the Premier
- Provincial Government: Mpumalanga: Department of Cooperative Governance and Traditional Affairs
- Provincial Government: Western Cape: Ministry for Local Government, Environmental Affairs and Development Planning.
- Richard Plaatjies
- South African Human Rights Commission
- South African Unintegrated Forces United Front
- Southern Kalahari Bushmen Tribe
- SuidKaap Khoi Raad
- Sydney Opperman
- Taaibosch-Davids Kei Korana Royal House (inputs submitted at the community consultations held at Johannesburg, Bloemfontein, Colesberg and George)
- Toetie Dow (2 inputs)
- Uitenhage and Districts Kei-Koranna Culture and Heritage Indigenous Traditional Community
- Witbooi's Nama Khoi-Khoi Traditional House of South Africa

- Anonymous (1 input).

4.10 The Department carefully analysed all the comments made during briefing sessions as well as all written comments received. Where appropriate, the Bill was refined accordingly. The Bill was on two occasions discussed in detail with the Office of the Chief State Law Adviser.

4.11 The Bill was presented to the Governance and Administration Working Group on 18 July 2013 and to the Directors-General Governance and Administration Cluster on 1 August 2013. It was considered and recommended by the Governance and Administration Cabinet Committee on 27 August 2013. On 4 September 2013, the Cabinet approved that the Bill be published in the Government *Gazette* for public comments. The Bill was subsequently published for public comments under General Notice No 947 in Government *Gazette* No 36856 of 20 September 2013. A period of 60 calendar days was allowed for written comments which period was extended to 31 December 2013.

4.12 Following the publication of the Bill as mentioned in paragraph 4.11, the DTA—

- on 11 and 12 October 2013, briefed the NKC on all clauses relevant to the Khoi and San;
- on 1 November 2013, met with officials from all provincial governments and houses of traditional leaders, with a view to address any questions of clarity they may have on the provisions of the Bill; and
- on 4 November 2013, briefed the National House of Traditional Leaders on all clauses that are different from the consultation version of the Bill that was made available in 2011.

4.13 Following the publication of the Bill in the Government *Gazette* for public comment, written inputs were received from the following departments/institutions/persons:

- Activist for the Liberation of RSA's Indigenous First Nation Peoples (Billy Steenkamp)
- Ada Koert
- BJ Marsala
- Christo C Frantz
- Claudine Fourie-Grosvenor
- Cobequa Community of the Transkei (Joseph Wade)
- Cochoqua Tribe (Gerome Daniels)
- Colleen Mary Fynn
- Commission for Gender Equality
- Council of Nguni Chiefs (Chief Lungelo Nokwaza)
- De Wee Dynasty (Niklasoa Cocho Ilanais Culture Heritage Development Council)
- Dr William Langeveldt
- East Griqualand Pioneer Council (Paul Pienaar)

- Foundation Nation Restoration Network (Hillary-Jane Solomons)
- Helen Suzman Foundation
- Hessequa Indigenous Traditional Council (Brain de Silva)
- Joseph Wade
- Kammanassie Booyens (Sydney Opperman)
- Khoi and Bushmen National Assembly (Ron Martin)
- Khoi-San Kingdom (Marius Roos)
- Korana First Nation SA (R Hoogstander)
- Legal Resource Centre
- Nama Gauteng (Moirira Daya)
- National House of Traditional Leaders
- North West House of Traditional Leaders
- Overberg Khoi-San Cahinokwas (Chief Daniel Louw)
- PJ Samuels
- Provincial Government: Eastern Cape
- Provincial Government: Free State (Office of the Premier)
- Provincial Government: KwaZulu-Natal
- Provincial Government: Limpopo
- Provincial Government: Mpumalanga
- Provincial Government: Western Cape
- Saarah Kellerman
- South African Local Government Association (SALGA)
- The Indigenous Royal House of Raamamidiam (Diau Ramatsebe)
- The Sabaim (Edgar Yochanan Phillips)
- Toetie Dow (3 inputs)
- UN Office of the High Commissioner for Human Rights (Samia Slimane)
- Vhavenda Kings Council (Kgosi Ramovha)
- Women's Legal Centre.

4.14 On 26 August 2015, the Cabinet approved that the Bill be tabled in Parliament.

## **5. CONSTITUTIONAL IMPLICATIONS**

The Bill deals with matters of traditional leadership and institutions as referred to in sections 211 and 212 of the Constitution. The Bill furthermore makes provision for the official recognition of Khoi-San communities and leaders, as well as for the

establishment of Khoi-San structures. Constitutional principles such as those contained in the Bill of Rights are promoted and emphasised throughout the Bill. The State Law Advisers certified the Bill as constitutionally sound.

## 6. COMMUNICATION IMPLICATIONS

Due to the extensive consultation process that has been followed as set out in paragraph 4, relevant stakeholders are aware of the Bill, its content and its implications. Once enacted, the Department will inform relevant stakeholders of the enactment and will liaise with provincial governments and other relevant institutions in respect of the implementation of the Bill.

## 7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the national Department of Traditional Affairs are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 76(1) or (2) of the Constitution, since it deals with “traditional leadership” and “indigenous law and customary law” which are both matters listed in Schedule 4 to the Constitution.

7.2 The State Law Advisers considered the tagging of the Bill in light of Chapter 4 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), which provides for procedures that Bills must follow in Parliament. Section 76 of the Constitution provides for the parliamentary procedure for ordinary Bills affecting the provinces. In terms of section 76(3) a Bill must be dealt with in accordance with the procedure established by either section 76(1) or section 76(2) if it falls within a functional area listed in Schedule 4.

7.3 In **Stephen Segopotso Tongoane and Others v Minister for Agriculture and Land Affairs and Others**, CCT100/9 [2010] ZACC 10 the Constitutional Court stated that:

*“the test for determining how a Bill is to be tagged must be broader than that for determining legislative competence<sup>1</sup>. Whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in section 76(3), and second by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence<sup>2</sup>.”*

7.4 This test compels us to consider the substance, purpose and effect of the subject matter of the proposed Bill.

7.5 This Bill deals with “traditional leadership” and “indigenous and customary law” which are matters listed in Part A of Schedule 4 to the Constitution. Part A lists functional areas of concurrent national and provincial competence. We are therefore of the view that the Bill should be dealt with in accordance with the procedure established by section 76(1) or (2) of the Constitution.

7.6 The State Law Advisers are of the opinion that it is necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains provisions pertaining to customary law or customs of traditional communities.

<sup>1</sup> At paragraph 70.

<sup>2</sup> At paragraph 72.

