MEMORANDUM ON THE TRADITIONAL COURTS BILL WHICH IS DIRECTED TO THE DRAFTERS OF THE BILL.

1. INTRODUCTION

The advent of constitutional democracy in 1994 and the need to align the traditional court system with the Constitution, necessitated changes to the regulatory framework of Traditional Courts. After thorough investigations on what the Traditional Courts Bill should and should not incorporate, the 2003 Traditional Courts Bill emerged. This Bill was followed by further amendments to the Traditional Courts Bill in 2008, 2012 and the 2017. There were various areas of disagreement which were apparent in the submissions in the previous Bills which led to their deferment pending further public participation or submissions. It may be mentioned that the 2017 Bill is not exceptional in comparison to the earlier Bills unless the concerns and submissions tabulated hereunder, are addressed.

2. SUBMISSIONS / INPUTS / RECOMMENDATIONS

2.1 The 2017 Bill does not make provision for the appointment of Traditional Leaders to hear both criminal and civil matters.

This is a serious omission which may have serious or severe ramifications in the functioning of traditional courts since the traditional courts are in terms of Item 16 of Schedule 6 of the Constitution as quoted in the South African Law Commission Project 90 Report dated 21 January 2003, regarded as courts. This

may even result in unnecessary civil claims for damages against Traditional Leaders.

2.2 It does not state clearly how the jurisdictions of Traditional Leaders come about. As such the Bill states that the defendant or accused person has a choice to consent or not consent to jurisdiction of the Traditional Court. This deprives Traditional Leaders of their jurisdictional powers which they already possess in terms of the Constitution. The danger in this is that the Traditional Leaders could go underground and try cases without authority and jurisdiction. The previous Government attempted to take away the authority of the Traditional Leaders but those attempts failed. Reference can be made to 1983 5th Report of the Hoexter Commission of Enquiry into the Structure and Functioning of Courts.

2.3 It provides that the Traditional Leaders should take a pledge instead of an oath of office. Traditional Courts are recognised by an Act of Parliament and their legitimacy affirmed under section 166 of the Constitution. Traditional Leaders are accordingly presiding officers of the of the Traditional Courts. As such, there is no conceivable reason why Traditional Leaders should take a pledge instead of an oath of office like all other judicial officers are required to do. This proposed pledge has an unintended consequence of undermining the importance of Traditional Courts especially in a country like ours where the majority the rural population only access to justice is through these courts. Even the Chief Justice is on record in emphasizing the importance of Traditional Courts in our quest to enhance access to justice.

2.4 It does not deal with procedures that are and were applicable in trials at the Traditional Courts. This may lead to unnecessary confusion and lack of uniformity as parties would not know what to expect when they have to appear before the Traditional Courts. In this submission, both civil and criminal procedures which are currently utilized by Traditional Leaders in their courts, had to be dealt with extensively.

2.5 The Bill is silent on the appeal against the Traditional Court`s decision and the procedure to be followed. It then places a review of the Traditional Court decision or judgment to lie at the High Court. The appeals from the Traditional Courts should be heard at the magistrate's court of the Traditional Leader's district. On this aspect, the comments of the Deputy Judge President, KwaZulu-Natal, the Honourable Mr Justice Madondo, DJP, in the Provincial Efficiency Enhancement Committee Meeting where the Bill was discussed, were as follows:

"***Taking Traditional Court decision or judgment to the High Court, could be a very expensive exercise with negative results to the notion of access to justice , more particularly, for indigent rural people and women. This will amount to putting a cart before a horse and making it impossible for poor rural people to have access to justice. More so, such an exercise will tend to burden the judges unnecessarily, regard being had to the fact that the complement of judges in KwaZulu-Natal is 30, and already saddled with reviews from the magistrates` courts."***

2.6 It is recommended that the Minister should determine the monetary civil jurisdiction of Traditional Courts to be the same as that of the Small Claims Court which is currently R15 000-00. It is further recommended that the Minister should determine the maximum amount of fine that can be imposed by a Traditional Leader in criminal cases.

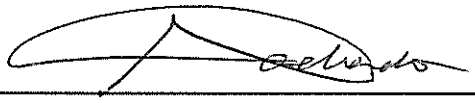
3. It should be considered that the Traditional Courts existed before the colonial rulers and after their failure to disregard the customary law and courts by imposing Western Common Law, the colonial rulers reduced the Traditional Courts Procedures in writing and promulgated such procedures in the form of codes and the Black Administration Act. Traditional Leaders were as far back as 1845 in Ordinance 12 of 1845, allowed to continue applying customary law in their courts as long as such law was not repugnant to the general principles of humanity observed throughout the

civilized world. Whilst it is accepted that the Black Administration Act cannot be sustained in view of our entrenched Bill of Rights in the Constitution, some of the procedures which are affirmed by the Traditional Leaders today as recognised living procedures in terms of customary law, should not be thrown away with all unacceptable procedures but must be moulded and enhanced to give better effect to the rights and justice visions articulated in the Constitution which does not discriminate against customary law. These procedures were confirmed by most of the Traditional Leaders who attended the Judicial Skills Workshops for Traditional Leaders which were sanctioned by the Chief Justice and organised by the South African Judicial Education Institute in collaboration with the Cooperative Governance and Traditional Affairs Department where magistrates, some of whom are involved in these submissions, were facilitators. The submissions expressed in this memorandum are among other sources, based on practical experience including the mock trials which were conducted by Traditional Leaders during the workshops where they exhibited how they were dealing with both civil and criminal trials in their courts.

4. The discussion on the current Bill which took place on 27 January 2017 in the Provincial Efficiency and Enhancement Committee Meeting (PEEC Meeting) which is chaired by the Judge President (JP) or the Deputy Judge President (DJP) at the request of the JP, resulted in the resolution to reduce all the above mentioned concerns in writing and to submit the proposed amendments to the Drafters of this Bill as a submission or input of the PEEC Stakeholders.

5. The Proposed Amendments to the Bill are contained in a separate document headed "Proposed Amendments". For convenience, the proposed amendments are also reflected in the Bill itself within brackets in bold after each relevant section.

Assented to by the Chairperson of the PEEC meeting which was held on 27 January 2017: the Deputy Judge President, KwaZulu-Natal, the Honourable Mr Justice Madondo, DJP and further assented to by members of the PEEC.



I MADONDO

DEPUTY JUDGE PRESIDENT, KWAZULU-NATAL DIVISION