

## **CENTRE FOR CHILD LAW & CHILDREN'S INSTITUTE**

### **JOINT SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES ON THE TRADITIONAL COURTS BILL [B1-2017]**

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#### **Structure of written submissions:**

1. Submissions on the Traditional Courts Bill [B1-2017]
2. Oral submissions

The Centre for Child Law, University of Pretoria (CCL), and the Children's Institute, University of Cape Town (hereafter: CI), and appreciate the opportunity to comment on the Traditional Courts Bill [B 1–2017] (“The Bill”).

The CCL and CI welcome numerous changes that have been made to the previous draft of the Bill. In particular, we note with appreciation that the latest version of the Bill (1) underlines that participation in traditional court proceedings is voluntary; and (2) creates mechanisms for ‘opting out’ of the traditional court system. This pays tribute to the fact that customary law is based on voluntary affiliation, which is now expressly recognised in the Preamble of the Bill. We also welcome the express commitment of the Bill to the constitutional rights enshrined in Chapter 2 of our Constitution in the Objectives of the Bill. We furthermore appreciate that Schedule 1 of the Bill outlines prohibited conduct and that Schedule 2 provides a list of matters that Traditional Courts can hear.

The CCL and CI submit that the Bill needs to be strengthened to ensure that children's rights are adequately protected in proceedings of Traditional Courts. In light of existing social norms and the profound violation of children's rights across the country, there is a need for vigilance and strong accountability systems to ensure that people tasked with protecting children do not abuse their position of power. We therefore kindly request that the Portfolio Committee on Justice and Correctional Services consider the recommendations made in this submission.

## **SUBMISSIONS ON THE TRADITIONAL COURTS BILL [B1-2017]**

### **1. INTRODUCTION**

The Bill and resultant legislation aims to provide a uniform legislative framework for the structure and functioning of traditional courts, in line with constitutional imperatives and values; and to provide for matters connected therewith.

The CCL and CI recognise the right, as set out in section 31 of the Constitution, for different communities to enjoy their culture. The formation of traditional courts comes out from this right. However practising this right should be done in manner consistent with the Bill of Rights which include rights promoting the best interest of children.

The CCL and CI, in these submissions, raise concerns related to the lack of intersection in the manner in which the Traditional Courts are regulated in the Bill and established systems set out in the Children's Act 38 of 2005, the Child Justice Act 75 of 2008 and the Sexual Offences Act 23 of 1957 (as amended) that ensure the protection and promotion of the rights of children in need of care and protection as well as the rights of children who are victims, witnesses, accused or offenders of crimes.

### **2. PROVISIONS OF CONCERN AND CCL and CI SUBMISSIONS**

#### **Definitions**

The Bill does not provide a definition of what a child is as aligned with the Constitution. The Constitution provides, in section 28(3), that a child is "a person under the age of 18 years". This exclusion is concerning as the Bill clearly gives Traditional Courts the power to carry out proceedings that involve children. Such definition is a necessary and helpful precursor to the rest of the Bill which will hopefully highlight how children should be treated differently from adults in Traditional Courts.

## Guiding principles

The CCL and CI applaud the deliberate effort made in the guiding principles of the Bill to align the functioning of the Traditional Courts with the principles and values in the Constitution. The CCL and CI submit that section 3(2) of the Bill should in addition to what is already set out in the Bill, include the fact that the in the application of the Act the section 28(2) right and principle set out in the Constitution should be recognised, which is that “[a] child’s best interests are of paramount importance in every matter concerning the child”. This will affirm the fact that Traditional Courts have the obligation to take into account the best interests of child victims, witnesses and offenders that they deal with.

The best interests of the child is not a new phenomenon to African custom and culture. The African Charter on the Rights and Welfare of the Child (ACRWC), which was developed as a regional human rights instrument dealing with issues pertinent to children in Africa, recognises that the —

*“the child occupies a unique and privileged position in the African . . . the child, due to the needs of [his/her] physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security”* (Preamble ACRWC).

The ACRWC also stipulates that “[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration” and that “[i]n all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard [...] and those views shall be taken into consideration” (article 4 ACRWC).

In South African law, both the Constitution and the Children’s Act recognise the best interest of the child principle and the Children’s Act requires that “**All proceedings, actions or decisions in a matter concerning a child must respect,**

*protect, promote and fulfil the child's rights set out in the Bill of Right [and] the best interests of the child standard'* (emphasis added). The Children's Act further provides details on factors that should be taken into consideration when determining a child's best interest (sections 6(2)(a), 7 of the Children's Act). We therefore believe that it is important for the Bill to explicitly acknowledge the best interest of the child principle as a guiding principle in all matters before a traditional court involving children.

### **Recommendation:**

- Include a provision on the best interest of the child principle in section 3 of the Bill.
- Include children in the list of prohibited conduct which infringes on the dignity, equality and freedom of person (Schedule 1) to avoid discrimination against children.

### **Institution of proceedings in Traditional Courts**

Section 4 of the Bill provides for the institution of proceedings in Traditional Courts in a manner that seeks to align such processes with the principles and values in the Constitution. The CCL and CI applaud the deliberate effort to ensure that the Constitution, as the supreme law, is the basis for such processes.

Section 4 provides that "any person may [...] institute proceedings in respect of a dispute in a Traditional Court. It goes on to discuss where sessions of Traditional Courts may be held; the jurisdiction of the Traditional Courts; procedure when a party elects not to have their dispute dealt with by a Traditional Court; additional functions of a Traditional Court; powers of the Traditional Court once a matter is before it; and functions of a clerk of the court if a party fails to attend a hearing. Section 4 of the Bill currently fails to address critical aspects relating to children.

#### *Child accused of crime*

The section is silent on requirements to be complied with if the person against whom proceedings are instituted is a child. The principles and guidelines contained in the

Child Justice Act 75 of 2008. The Child Justice Act “creates [...] a procedural framework for dealing with children who come into conflict with the law. It represents a right-based approach to children accused of crimes, but also seek to ensure accountability, respect for the fundamental freedoms of others and prevent crime and promote public safety through the use of diversion, alternative sentencing and restorative justice.”<sup>1</sup>

It is of importance to note the powerful influence that the South African, and broadly African, concept of *Ubuntu* has had on the formulation of the Child Justice Act. Section 2 of the Child Justice Act provides that the objects of the Act are to, amongst others, promote the spirit of *Ubuntu* in the child justice system by fostering children’s sense of dignity and worth; reinforcing children respect for human rights and fundamental freedoms of others by holding them accountable for their actions and safeguarding the interests of victims and communities; supporting reconciliation through restorative justice responses; and involving parents, families, victims and where appropriate members of the community affected by crime in procedures in the Act in order to encourage reintegration of children.

It is on the above basis of the importance of the contents of the Child Justice Act and how it relates to South African values and principles that the CCL and CI submit that the Bill should place an obligation on Traditional Courts to, when dealing with child offenders, take into account the guiding principles set out in section 3 of the Child Justice Act. The guiding principles provide as follows:

- (a) All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.

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<sup>1</sup> J Gallinetti ‘Child Justice in South Africa: The Realisation of the Rights of Children Accused on Crime’ in T Boezaart (ed) *Child Law in South Africa* (2009) 648.

- (b) A child must not be treated more severely than an adult would have been treated in the same circumstances.
- (c) Every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of this Act, where decisions affecting him or her might be taken.
- (d) Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.
- (e) Every child should be treated in a manner which takes into account his or her cultural values and beliefs.
- (f) All procedures in terms of this Act should be conducted and completed without unreasonable delay.
- (g) Parents, appropriate adults and guardians should be able to assist children in proceedings in terms of this Act and, wherever possible, participate in decisions affecting them.
- (h) A child lacking in family support or educational or employment opportunities must have equal access to available services and every effort should be made to ensure that children receive similar treatment when having committed similar offences.
- (i) The rights and obligations of children contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

It is further submitted that consideration should be had of the provisions in the Child Justice Act, section 7, how children of different ages should be dealt with. Children who are under the age of 10 years are considered not to have criminal capacity; children between the ages of 10 and 14 years are presumed to lack criminal capacity; and therefore the minimum age of criminal capacity is 14 years old. This ensures that the evolving capacity of the child is considered.

**Recommendation:**

- Include provision on guiding principles for dealing with child offenders that is in line with the Child Justice Act.
- Include provision on ages of criminal capacity reflecting the Child Justice Act.

*Provision of information on sections 4(3)(a), 4(3)(e) of the Bill*

The Bill stipulates that any person who has been summoned to appear before a traditional court has the right not to have his or her dispute heard and determined by that traditional court (section 4(3)(a) of the Bill). Given that customary law is based on consensual nature and voluntary affiliation, it is commendable that the Bill give individuals the choice to 'opt-out' of the hearings by a traditional court. However, the Bill fails to highlight that the person who has been summoned must be informed of the right not to have the dispute heard by that traditional court. The Bill should include an explicit legal duty for the clerk of the court to inform (1) the person who has been summoned to appear before the traditional court of their right not to have the dispute heard at that traditional court (section 4(3)(a) of the Bill); and (2) any person instituting proceedings and any person being summoned by the traditional court that once the proceedings have commenced, the party cannot abandon or withdraw from the proceedings of that traditional court (section 4(3)(e) of the Bill). People cannot exercise their rights if they are not informed of their rights. Without an explicit duty to inform people about their choices and the consequences of those choices, the rights envisioned in section 4 of the Bill are meaningless.

**Recommendation:**

- Amend section 4 of the Bill to include an explicit legal duty to inform individuals who have been summoned to appear before a traditional court of their right not to have the dispute heard and determined by that traditional court.
- Amend section 4 of the Bill to include an explicit legal duty to inform all parties of section 4(3)(e) of the Bill before commencement of the proceedings.
- Ensure that this information is available for children in a child-friendly format/language.

*Age from which children can opt-out of proceedings*

Another concern in terms of section 4(3)(a) of the Bill is that the provision fails to set an age from which a child can decide not to have his or her dispute heard and determined by the traditional court, if summoned to appear before a traditional court. We propose to align the Bill with the Children's Act which includes progressive norms in terms of children's age of consent. According to several provisions under the Children's Act children's age of consent is 12 years (sections 130, 134 of the Children's Act). For medical treatment and surgery, the requirement for consent is that the child is above 12 years and *'is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment'* (sections 129, 130 of the Children's Act).

**Recommendation:**

- Include a provision that children from the age of 12 years can exercise their right not to have a dispute heard at a Traditional Court.
- Include a provision that children under the age of 12 years should be assisted by their parents, caregivers or guardians in deciding whether they wish to have a dispute heard at a Traditional Court

### *Initiation of proceedings*

In addition, the Bill does not stipulate an age from which a child can *initiate* proceedings in a traditional court. Again, the Bill should be guided by the Children's Act. The Children's Act recognises children's right to participate in decisions that affect them in section 10: 'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration' (section 10 of the Children's Act). As noted above, the Children's Act regards the age of 12 years as appropriate for various health-related decisions, if the child has sufficient maturity and mental capacity to understand what he or she is consenting to.

The age of consent is also relevant in section 14(2) of the Bill which allows magistrates, commissioners of small claims courts and prosecutors to transfer a matter to a traditional court, *if the parties agree*. Again, it is important to stipulate from which age children would be able to consent to such a transfer.

### **Recommendation:**

- Include a provision in the Bill to specify that children from the age of 12 years can initiate proceedings in a Traditional Court.
- Include a provision that children from the age of 12 years can exercise their right not to have a matter transferred from a magistrate or small claims court to a traditional court.
- Include a provision that children under the age of 12 years should be assisted by their parents, caregivers or guardians in deciding whether they wish to initiate proceedings at a Traditional Court and whether they wish to have a matter transferred to a Traditional Court, respectively.

## Procedure in Traditional Courts

Section 7 of the Bill provides for the procedure in Traditional Courts when sessions are being held. It discusses, *inter alia*, how proceedings should be conducted; the participation of often marginalised and vulnerable groups of people; assistance provided to persons before the courts; application of two or more systems of customary law; who can attend the proceedings; and the provision of interpreters.

Section 7(6) of the Bill provides that Traditional Courts must be open to all the members of the community. There are no special provisions as to how proceedings which involve children will be held. This unfortunately creates the situation that child victims, witnesses and offenders, who are involved in proceedings in Traditional Courts, have less protection in this regard than children who are involved in proceedings regulated by the Children's Act, the Child Justice Act and the Criminal Procedure Act 51 of 1977.

The Children's Act, in section 56, provides that proceedings of a children's court are closed and may be attended only by a person performing official duties; the child and other party in the matter; a person instructed by the court to attend; the child's legal representative; a person who has obtained permission to attend; a social work managing the child's case.

The Child Justice Act, in sections 44 and 63(5), limits persons who can attend preliminary inquiries to the presiding magistrate; the child; the child's parent, appropriate adult or guardian; the probation officer; and if necessary a diversion service provider. The Criminal Procedure Act, in section 153, also provides for circumstances where a court can order that proceedings not occur in open court, if it is in the interests of justice and will protect the minor accused, witness or victim.

In light of the above the CCL and CI submit that cognisance should be taken of these protective measures and efforts should be made to align the proceedings in the Traditional Courts with such measures. It is necessary to draw similar requirements into the Traditional Courts to ensure that children are not victimised; that secondary

trauma of children is reduced as far as possible; and that children are heard in safe spaces that encourage transparency and openness.

**Recommendation:**

- Ensure that procedure in Traditional Courts is aligned with protective measures for children outlined in other legislation.

**Transfer of disputes/Schedule 2 – ‘assault’**

Section 14(1)(a) of the Bill allows a traditional court to transfer a dispute to a Magistrate’s Court or a small claims court. Such a transfer is optional and is envisioned if a traditional court is of the opinion that it is not competent to deal with the matter or if the matter involves difficult or complex questions of law or fact (section 14(1)(a) of the Bill). The CI and CCL submit that in certain matters involving children, the transfer should not be optional, but mandatory. This would for instance be the case if a matter involves the physical abuse of a child. Schedule 2 of the Bill allows traditional courts to hear matters involving assaults without grievous bodily harm. As a result, traditional courts can adjudicate assaults against children, which would include physical child abuse. Research shows that South Africa has extremely high rates of child abuse, including physical abuse. For instance, a study by Meinck et al. in Mpumalanga and the Western Cape found that 56.3% of 10-17 year olds reported lifetime physical abuse, 35.5% of participants reported lifetime emotional abuse and 9% reported lifetime sexual abuse.<sup>2</sup> Most of the abuse is perpetrated by the child’s caregiver.<sup>3</sup> Any form of child abuse is a serious violation of children’s rights and can lead to detrimental short- and long-term consequences. The Children’s Act takes child abuse seriously

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<sup>2</sup> Meinck et al (2016) Physical, emotional and sexual adolescent abuse victimisation in South Africa: prevalence, incidence, perpetrators and locations *Journal of Epidemiology and Community Health* 70(9):910–916.

<sup>3</sup> Ibid.

and creates a mandatory reporting obligation for certain professionals. Section 110(1) of the Children's Act reads:

*Any correctional official, dentist, homeopath, immigration official, labour inspector, legal practitioner, medical practitioner, midwife, minister of religion, nurse, occupational therapist, physiotherapist, psychologist, religious leader, social service professional, social worker, speech therapist, teacher, traditional health practitioner, **traditional leader** or member of staff or volunteer worker at a partial care facility, drop-in centre or child and youth care centre who on reasonable grounds concludes that a child has been abused in a manner causing physical injury, sexually abused or deliberately neglected, must report that conclusion in the prescribed form to a designated child protection organisation, the provincial department of social development or a police official.*

Traditional leaders are therefore required to report child abuse that has led to a physical injury. Social workers and, where necessary, the police are then tasked with investigating such cases. In some cases, these cases will be brought to the attention of children's courts. Children's courts can order caregivers to participate in early intervention courses or will remove a child from their caregiver, if this is necessary to protect the child from further harm. The Children's Act includes detailed provisions on how to assess whether a child should be removed from their caregiver. Given the clear guidelines for child protection matters under the Children's Act, the CI and CCL submit that traditional courts should not hear matters involving child abuse and that these case must be referred to a children's court.

Should a person approach a Traditional Court to hear a matter involving child abuse, Traditional Courts personnel, not just the traditional leader, should be obliged to refer the matter to a designated child protection organisation, the provincial department of social development or a police official. The Bill should thus create an obligation for the clerk of a Traditional Court and people convening the Traditional Court to refer any form of child abuse outlined in section 110(1) of the Children's Act.

### **Recommendation:**

- In Schedule 2, highlight that 'assault' excludes cases of physical child abuse; if during the proceedings the Traditional Court finds out that the matter involves child abuse, the case should be referred to the children's court/magistrate's court.
- Create a reporting obligation for Traditional Court personnel to report all cases of child abuse to a designated child protection organisation, the provincial department of social development or a police official.

### **Training**

The Bill requires the Minister to make regulations regarding the training of traditional leaders and persons designated by traditional leaders to convene traditional courts (section 17(1)(j) of the Bill). The Bill does not specify what kind of training is deemed appropriate. The CI and CCL submit that it would be preferable for section 17(1)(j) of the Bill to outline areas of training that are deemed essential. In our view, this would include training on children's rights under the Constitution, Children's Act and Child Justice Act.

### **Recommendation:**

- Make explicit reference to training that is deemed essential, such as training on South Africa's legal framework on children's rights

### **Schedule 2 – 'advice'**

Schedule 2(g) provides that the traditional courts are competent to give advice relating to customary law practices in respect of—

- (i) ukuThwala;
- (ii) initiation;
- (iii) customary law marriages;

- (iv) custody and guardianship of minor or dependent children;
- (v) succession and inheritance; and
- (vi) customary law benefits.

The CCL and CI are particularly concerned about matters relating ukuthwala, initiation, customary law marriages and custody and guardianship of minor or dependent children. These matters in some instances involve children who are potentially in need of care and protection as provided for in the Children's Act and who may need to be provided with assistance through the care and protection system. They also involve children who are victims of sexual offences, and other crimes such as assault and kidnapping, whose cases will need to be dealt with by the criminal justice system

The Bill does not explain what "advice" means in the context of Traditional Courts and what the effect of this advice will have on the ability of children and/or parents, caregivers or guardians of the children to seek assistance from children's courts; sexual offences courts or any other courts of law.

**Recommendation:**

- The Bill must clearly set out what "advice" means in the context of Schedule 2(g)
- The definition of "advice" may include provisions for referral to the Children's Court, the Department of Social Development, the South African Police Services or any other suitable public service provider.

**ORAL SUBMISSIONS**

The CCL and CI request an opportunity to make oral submissions to the Portfolio Committee on these submissions.