



**ROYAL BAFOKENG ADMINISTRATION**

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14 March 2017

Secretary: Portfolio Committee on Justice and  
Correctional Services

Cape Town

Att: Mr V. Rammano

Email: [vramaano@parliament.gov.za](mailto:vramaano@parliament.gov.za)

Dear Sir, Madam

**RE: COMMENTS ON THE TRADITIONAL COURTS BILL, 2017**

Please find enclosed the comments of the Royal Bafokeng Nation in respect of the Traditional Courts Bill, 2017.

We hereby request an opportunity to discuss these comments with the Portfolio Committee on Justice and Correctional and Correctional Services .

It would be appreciated if you could be so kind as to confirm receipt of our comments.

Yours sincerely

**Mr Aubrey Diswai**

**Executive: Shared Sevices**

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**TRADITIONAL COURTS BILL, 2017: PROPOSED AMENDMENTS**

NO.		CLAUSE	SHORT TITLE	ISSUE	PROPOSAL	EFFECT OF PROPOSAL
1		Bill as a whole		Members of the community should not have an option to elect to observe their custom, traditions and customary practices as that will as this will erode custom. If a community member were to decide not to observe the community's customs, traditions and customary practices, that person is in fact disassociating him-/herself from the community (and should, in principle not continue to reside on communal land)	Amend Bill as a whole to provide for exclusion relating to option to elect not to submit to the jurisdiction of a traditional court in all cases where the dispute focuses on an immovable community asset which the community member concerned is using, e.g. occupying, residing, or using, etc. a piece of communal land whether legally or illegally, irrespective of whether the person concerned is in possession of an authorisation	Amended Bill provides for the compulsory submission to jurisdiction of traditional court in all cases where the dispute focuses on an immovable community asset
2		Cl 2 Cl 2(b)(iii)	Objects of Act	Members of the community should not have an option to elect to observe their custom, traditions and customary practices as that will as this will erode custom. If a community member were to decide not to observe the community's customs, traditions and customary practices, that person is in fact disassociating him-/herself from the community (and should, in principle not continue to reside on communal land)	Amend clause 2(b)(iii) to provide for exclusion relating to option to elect not to submit to the jurisdiction of a traditional court in all cases where the dispute focuses on an immovable community asset which the community member concerned is using, e.g. occupying, residing, or using, etc. a piece of communal land whether legally or illegally, irrespective of whether the person concerned is in possession of an authorisation	Amended clause provides for the compulsory submission to jurisdiction of traditional court in all cases where the dispute focuses on an immovable community asset
3		Cl 2(c)(iii)	Objects of Act	Members of the community should not have an option to elect to observe their custom, traditions and customary practices as that will as this will erode custom. If a community member were to decide not to observe the community's customs, traditions and customary practices, that person is in fact disassociating him-/herself from the community (and should, in principle not continue to reside on communal land)	Amend clause 2(c)(iii) to provide for exclusion relating to option to elect not to submit to the jurisdiction of a traditional court in all cases where the dispute focuses on an immovable community asset which the community member concerned is using, e.g. occupying, residing, or using, etc. a piece of communal land whether legally or illegally, irrespective of whether the person concerned is in possession of an authorisation	Amended clause provides for the compulsory submission to jurisdiction of traditional court in all cases where the dispute focuses on an immovable community asset

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	<b>Cl 3</b>	<b>Guiding principles</b>			
4	Cl 3(3)(c)	Guiding principles	Minister has the power to amend Schedule 1 relating to prohibited conduct; this should rather be in the domain of the courts or the Legislature	Amend clause to provide for the Minister to request a declaratory court order	Amended clause provides for the Minister to request a declaratory court order
	<b>Cl 4</b>	<b>Institution of proceedings in traditional courts</b>			
5	Cl 4(3)(a)	Institution of proceedings in traditional courts	The clause should be rephrased to provide that the court has automatic jurisdiction on any person who resides, carries on business or is member of a particular traditional community concerned and that the said categories have no option to opt out. See note above in respect of Bill as a whole	Amend clause 4(3)(a) to provide for exclusion relating to option to elect not to submit to the jurisdiction of a traditional court in all cases where the dispute focuses on an immovable community asset which the community member concerned is using, e.g. occupying, residing, or using, etc. a piece of communal land whether legally or illegally, irrespective of whether the person concerned is in possession of an authorisation	Amended clause provides for the compulsory submission to jurisdiction of traditional court in all cases where the dispute focuses on an immovable community asset
6	Cl 4(3)(d)(i)	Institution of proceedings in traditional courts	The sub-clause provides for counselling, assisting or guiding the party in cases where the traditional court has no jurisdiction	Delete clause 4(3)(d)(i) as the court can only function when it has jurisdiction; it would, in addition, be a waste of time on the part of the court	Amended clause will not provide for the provision of counselling, assistance or guidance
7	Cl 4(3)(e)	Institution of proceedings in traditional courts	No party should be allowed to opt out during the course of proceedings as this will amount to a waste of the court's time	Amend clause 4(3)(e) to prohibit opting out during the course of proceedings	Amended clause provides for the prohibition of opting out during the course of proceedings
	<b>Cl 5</b>	<b>Composition of and participation in traditional courts</b>			
8	Cl 5(1)(b)	Composition of and participation	No provision is made for the convener to also chair the traditional court	Include the words "and chaired" after the words "be convened"	Amended clause provides for the convener also to chair the traditional court

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9	Cl 5(3)(a)(i)	Composition of and participation in traditional courts	Clause is contradictory as it provides for the voluntary participation of women; there is no arrangement in cases where women are not willing to volunteer to be members of the traditional court	Delete wording "and voluntary"	Amended clause provides for compulsory participation by women (as prescribed by Minister)
10	Cl 5(4)(b)	Composition of and participation in traditional courts	No provision for service of summons issued by the traditional court	Clause to be amended to provide for the process on the service of summons issued by the traditional court	Amended clause provides for the service of summons issued by the traditional court
11	Cl 8(1)(a)(iv)	Orders that may be made by traditional courts	No provision that the payment of damages must be to an appropriate body or organisation within the community (if there is such a body or organisation within the community concerned)	Amend clause to provide for the payment of damages to an appropriate body or organisation within the community (if there is such a body or organisation within the community concerned)	Amended clause provides for the payment of damages to an appropriate body or organisation within the community (if there is such a body or organisation within the community concerned)
12	Cl 8(1)(c)	Orders that may be made by traditional courts	No provision for orders for community service to determine that the community service must be rendered within the jurisdictional area of the traditional community concerned	Amend clause to provide for orders for community service to determine that the community service must be rendered within the jurisdictional area of the traditional community concerned	Amended clause provides for orders for community service to determine that the community service must be rendered within the jurisdictional area of the traditional community concerned
13	Cl 9(1) to (4)	Enforcement of orders of traditional courts	The clerk should not have powers to vary an order of the traditional court (as the clause currently provides). All variations of orders by a traditional court may only be made by the traditional court itself. All matters of non-compliance by an order of	Clause to be amended to determine that: <ul style="list-style-type: none"> <li>The clerk should not have powers to vary an order of the traditional court (as the clause currently provides).</li> </ul>	Amended clause provides that: <ul style="list-style-type: none"> <li>The clerk does not have powers to vary an order of the traditional court (as the clause currently provides)</li> </ul>

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14	Cl 9(4)(b)(ii)	Enforcement of orders of traditional courts	the traditional court must be referred to the Magistrates Court for enforcement  Matters finalised in the traditional court should not to be dealt with afresh by the Magistrates Court in case of non-compliance but should be referred to the Magistrate Court only for enforcement of the traditional court's decision	<ul style="list-style-type: none"> <li>All variations of orders by a traditional court may only be made by the traditional court itself</li> <li>All matters of non-compliance by an order of the traditional court must be referred to the Magistrates Court for enforcement</li> </ul>	<ul style="list-style-type: none"> <li>All variations of orders by a traditional court may only be made by the traditional court itself</li> <li>All matters of non-compliance by an order of the traditional court must be referred to the Magistrates Court for enforcement</li> </ul> <p>Amended clause provides that, in the case of non-compliance, the matter must be referred to the Magistrate's Court to ensure enforcement by officials of the Magistrate's Court</p>
	<b>Cl 11</b>	<b>Review by High Court</b>			
15	Cl 11(1)	Review by High Court	No provision that the State should provide financial assistance when matters are taken on review to the High Court	Amend clause 11(1) to provide for the compulsory provision of financial assistance by the State when matters are taken on review to the High Court	Amended clause provides that the State must provide financial assistance when matters are taken on review to the High Court
16	Cl 11(5)	Review by High Court	This sub-clause deals with the orders of traditional courts and should be moved to clause 8. In addition no explicit provision is made for the right of appeal to the Magistrate's Court (see discussion in respect of clause 12 below)	Amend clause 11 by moving clause 11(5) to clause 8 and expand such moved clause to include the reference to an appeal to the Magistrate's Court	Amended clause provides that an appeal may be lodged at the Magistrate's Court
	<b>Cl 12</b>	<b>Escalation of matters from traditional courts</b>			
17	Cl 12	Escalation of matters from traditional courts	Current wording of clause does not provide for appeals from the traditional court to the Magistrate's Court, and that such appeals should be heard afresh (de novo). In addition, reference should be made to the compulsory appointment of	Amend clause 12 to provide that: <ul style="list-style-type: none"> <li>Appeals from the traditional court to the Magistrate's Court, and that such appeals should be heard afresh (de novo)</li> </ul>	Amended clause provides that: <ul style="list-style-type: none"> <li>Appeals from the traditional court to the Magistrate's Court, and that such appeals should be heard afresh (de novo)</li> </ul>

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			<p>assessors to assist the Magistrate; these assessors must be independent and impartial, and must be knowledgeable in the customs of the traditional community concerned. Assessors to be paid by Government</p>	<ul style="list-style-type: none"> <li>Assessors must be appointed to assist the Magistrate</li> <li>Assessors must be independent and impartial, and must be knowledgeable in the customs of the traditional community concerned</li> <li>Assessors must be paid by Government</li> </ul>	<ul style="list-style-type: none"> <li>Assessors must be appointed to assist the Magistrate</li> <li>Assessors must be independent and impartial, and must be knowledgeable in the customs of the traditional community concerned</li> <li>Assessors must be paid by Government</li> </ul>
18	Schedule 1	<p><b>Prohibited conduct which infringes on the dignity, equality and freedom of persons</b></p>	<p>No provision is made for the inclusion of HIV/AIDS as part of the prohibited conduct</p>	<p>Amend Schedule to include "ill health, such as HIV/AIDS and other serious illnesses"</p>	<p>Amended schedule provides for ill health, such as HIV/AIDS and other serious illnesses</p>
19	Schedule 2	<p><b>Schedule 2</b> (no title)</p>	<p>Monetary value is too low. As indicated above, provision must be made for all community land-related and other community natural resource-related matters to be heard by traditional courts. The phrase "altercations between members of the community" is vague. References to advice (which is in fact non-binding) must be removed</p>	<p>Amend clause to:</p> <ul style="list-style-type: none"> <li>Increase monetary value to R10 000.00</li> <li>Provide for all community land-related and other community natural resource-related matters to be heard by traditional courts</li> <li>Clarify the meaning of alteration between members of the community</li> <li>Delete item (g)</li> </ul>	<p>Amended clause provides for:</p> <ul style="list-style-type: none"> <li>Increase monetary value (R10 000.00)</li> <li>All community land-related and other community natural resource-related matters to be heard by traditional courts</li> <li>The meaning of alteration between members of the community</li> <li>The deletion of item (g)</li> </ul>

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		<b>General comments</b>			
20			<p>Various other matters require clarification. These include, but are not limited to:</p> <ul style="list-style-type: none"> <li>• A sheriff of the traditional court must be appointed similar to the clerk of the court.</li> <li>• There must be consistent references to mediation, reconciliation, Ubuntu, restorative justice and peaceful co-existence in the Bill</li> <li>• Members and officials of the traditional courts must be trained</li> <li>• Traditional councils and members of traditional communities must be informed of the contents of the Traditional Courts Act (once enacted)</li> <li>• The role of the Justice of Peace must be clarified</li> <li>• The role of the paralegals and legal interns must be clarified</li> <li>• The clerk must be provided with assistants, appointed by Government.</li> <li>• Government/Department of Justice must provide all the necessary technical assistance and infrastructure to courts e.g. stationery, recording facilities, messengers of courts etc.</li> </ul>	<p>Amend Bill to provide that:</p> <ul style="list-style-type: none"> <li>• A sheriff of the traditional court must be appointed similar to the clerk of the court.</li> <li>• There must be consistent references to mediation, reconciliation, Ubuntu, restorative justice and peaceful co-existence in the Bill</li> <li>• Members and officials of the traditional courts must be trained</li> <li>• Traditional councils and members of traditional communities must be informed of the contents of the Traditional Courts Act (once enacted)</li> <li>• The role of the Justice of Peace must be clarified</li> <li>• The role of the paralegals and legal interns must be clarified</li> <li>• The clerk must be provided with assistants, appointed by Government</li> <li>• Government/Department of Justice must provide all the necessary technical assistance and infrastructure to courts e.g. stationery, recording facilities, messengers of courts etc.</li> </ul>	<p>Amended Bill provides that:</p> <ul style="list-style-type: none"> <li>• A sheriff of the traditional court must be appointed similar to the clerk of the court.</li> <li>• There must be consistent references to mediation, reconciliation, Ubuntu, restorative justice and peaceful co-existence in the Bill</li> <li>• Members and officials of the traditional courts must be trained</li> <li>• Traditional councils and members of traditional communities must be informed of the contents of the Traditional Courts Act (once enacted)</li> <li>• The role of the Justice of Peace must be clarified</li> <li>• The role of the paralegals and legal interns must be clarified</li> <li>• The clerk must be provided with assistants, appointed by Government</li> <li>• Government/Department of Justice must provide all the necessary technical assistance and infrastructure to courts e.g. stationery, recording facilities, messengers of courts etc.</li> </ul>