

Traditional and Khoi-San Leadership Bill (TKLB) [B 23B-2015]: NCOP: Negotiating mandates

Item	Clause of Bill	Provincial comment/proposed amendment	DTA view
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EASTERN CAPE: "The province votes in favour of the Bill and mandates the Eastern Cape delegate to the NCOP to negotiate within the following parameters."

1.	Name of Bill	<p>Amendment proposed by province.</p> <p>The name of the Bill should remain Traditional Leadership and Governance Framework Bill. Stakeholders were of the view that Khoi-San leaders are themselves traditional leaders of the Khoi-San community.</p>	<p>Over the many years that the Bill was drafted and consulted on, there were numerous proposals on the title of the Bill. The title of any bill must be indicative of the contents thereof. The title of the Bill was carefully considered over the years and has changed a few times. The current title is the one that was most acceptable to the majority of people.</p> <p>It should be noted that in South Africa traditional leadership as contemplated in Chapter 12 of the Constitution refers to those traditional leaders who were recognised in accordance with law prior to the commencement of the Constitution. Khoi-San leaders were never before recognised in terms of statutory provisions and therefore there is a view that they may not necessarily be part of traditional leadership as contemplated in the said Chapter 12. The TKLB is therefore not only a Bill relating to traditional leadership as referred to in Chapter 12, but also dealing with Khoi-San leadership and it was the view of various stakeholders that it should be clearly reflected in the short title (name) of the Bill.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
2.	Names of structures	<p>Amendment proposed by province.</p> <p>The structures should remain as they are in the Framework Act i.e. National House of Traditional Leaders etc for the same reasons advanced above.</p>	<p>See DTA comment under item 1 above. With the inclusion of recognised Khoi-San leaders in the existing houses of traditional leaders, it is appropriate to change the names of these houses accordingly.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
3.	7	<p>Amendments proposed by province.</p> <p>(a) Position of principal traditional leader must be abolished.</p>	<p>(a) The position of principal traditional leader was already provided for in the existing Framework Act (not by the TKLB), to make provision for those paramountcies that were found not to meet all the criteria for kingships (Nhlapo-Commission decisions). If the position of principal traditional leader is removed, the successors to the relevant "paramount chiefs" as they were referred to at the time, will have no status and position because they will not be kings and also not senior traditional leaders.</p>

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		(b) The leadership positions are demeaning to the status of traditional leaders; "headman and headwoman" and "senior traditional leader" must be done away with and replaced by "chief" and "senior chief" respectively.	(b) The titles proposed by the province are generally regarded as derogative and were therefore replaced by the existing Framework Act. These old titles also no longer appear in provincial legislation dealing with traditional leadership. <i>DTA: Proposed amendments not supported.</i>
4.	28	Amendment proposed by province. Representation to the National House should be on proportional representation since other provinces have fewer senior traditional leaders than others.	The principle which was followed with the representation of members in the existing legislation, which principle was kept in the TKLB, is the same that applies to the NCOP where provinces have an equal number of representatives irrespective of the total population of a particular province. This principle currently works very well in the existing legislation. In an input received from the National House during the 2011-2012 consultations on the first draft of the Bill, they indicated their support for the NCOP model. <i>DTA: Proposed amendment not supported.</i>
5.	Khoi-San branch	Amendment proposed by province. The Bill should use the term "clan council" instead of branches.	The dictionary meaning of the term "branch" is a "subdivision". In the context of the Khoi-San communities it therefore refers to a subdivision of the main community. It is the DTA's view that this is the correct term. Soon after the establishment of the National Khoi-San Council (NKC) in 1999, the then DPLG together with the NKC and in collaboration with Khoi-San communities did research on the Khoi-San communities in South Africa. This research focussed on the origin and subdivisions that developed, as well as leadership and structures of governance, the residence and movement of the Khoi-San. The research found that persons owing allegiance to a specific Khoi-San community did not all reside in the same geographical area as the main community but in different areas away from the main community and are intermingled with other people. The word "clan" in anthropological context refers to persons who are closely related and has a more limited meaning than the word "branch". <i>DTA: Proposed amendment not supported.</i>

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<p align="center">FREE STATE: "The Portfolio Committee on Cooperative Governance and Traditional Affairs, Office of the Premier and Legislature as designated by the Free State Legislature votes in favour of the Bill without amendments."</p>			
6.	NA	None	NA
<p align="center">GAUTENG: "The Gauteng provincial legislature votes in favour of the Bill, with proposed amendments and mandates the permanent delegate to the NCOP to negotiate in favour of the Bill."</p>			
7.	5	<p>Amendment proposed by province.</p> <p>Delete the word "coherent" in clause 5(1)(a)(v) so that it reads as follows: "A community may ... apply to the Premier concerned to be recognised as a Khoi-San community if it ... has a proven history of [coherent] existence of the community from a particular point in time up to the present".</p>	<p>The DTA has reconsidered the use of the word "coherent" in the clause and has no objection to it being deleted.</p> <p><i>DTA: Supports the proposed amendment.</i></p>
8.	7	<p>Comment by province – no specific amendment proposed.</p> <p>The Bill fails to recognise Khoi-San kings and queens and principal traditional leadership positions of Khoi-San.</p>	<p>No evidence has ever been provided by Khoi-San communities or leaders that there is conclusive proof of the existence of Khoi-San kings or queens. This was confirmed by the National Khoi-San Council during the drafting stages of the Bill. During public consultations over the years many Khoi-San communities and their representatives also confirmed that there is no proven history of Khoi-San kings or queens. It is for this reason that the Bill does not make provision for such positions.</p> <p>The position of principal traditional leader applies only to a few "paramount chiefs" as explained under item 3 above. It is not a position that even traditional leaders can apply for and only caters for those specific paramountcies. It is not a position found in Khoi-San leadership. However, note should also be taken of clause 1(2) of the Bill which states that nothing contained in the Bill may be construed as precluding people from referring to their leaders by their customary titles.</p> <p><i>DTA: No amendment needed.</i></p>

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9.	31(d)	<p>Amendment proposed by province.</p> <p>Delete the words “full-time” so that the clause reads as follows: “The seat of a member of the National House becomes vacant ... if the member becomes a [full-time] member of a municipal council, a member of the provincial legislature or a member of Parliament”.</p> <p>The words full-time in the above clause can potentially create undesired ambiguity. Clause 30 makes it clear that a person is disqualified from becoming a member of the National House if that person is a member of a municipal council, provincial legislature or Parliament. When these clauses are read together, they should make it clear that once a member of the National house becomes a member of a municipal council, provincial legislature, Parliament then their seat in the National House becomes vacant.</p>	<p>The DTA agrees.</p> <p><i>DTA: Supports the proposed amendment.</i></p>
10.	32(2)	<p>Amendment proposed by province.</p> <p>Insert a new subclause to address situations where the 45 days lapse without the vacancy being filled. Give the Minister a discretion to extend the 45 days: Proposed subclause: “(3) The Minister may extend the 45 days contemplated in subsection (2) with a further 45 days should that period lapse without the vacancy being filled”.</p>	<p>The period of 45 days is in line with section 7 of the existing National House Act. It is the view of the DTA that this period is reasonable and any provincial house should be able to elect a person to fill such vacancy within 45 days. It is important that any vacancies be filled as soon as possible to ensure that provinces are adequately represented in the National House.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
11.	34	<p>Amendment proposed by province.</p> <p>Delete the word “consecutive” so that it reads as follows: “(12) A chairperson or deputy chairperson is eligible for re-election: Provided that no member may serve as chairperson of the</p>	<p>The wording of clause 34(12) is the same as the wording of section 9(13) of the existing National House Act. This existing section has not been raised as a concern by the National House or, to the best of our knowledge, a provincial house. The clause should therefore remain as it is.</p>

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		National House for more than two [consecutive] terms.”	<i>DTA: Proposed amendment not supported.</i>
KWAZULU-NATAL: “The Portfolio Committee on Co-operative Governance & Traditional Affairs met today, Tuesday 24 th of July 2018, and agreed to mandate the KwaZulu-Natal delegation to support the Traditional and Khoi-San Leadership Bill [B23B-2015]; with the following proposed amendments as outlined in the Committee Report, attached hereto.”			
12.	Title of Bill	<p>Amendment proposed by province.</p> <p>Why is the Khoi-San singled out? Title should be “Traditional Leadership Bill” so that it can be inclusive and under definitions the term “traditional” must be inserted to include the Khoi-San.</p>	<p>See the DTA view under item 1 above.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
13.	16(2)(a)(i)(bb)	<p>Amendment proposed by province.</p> <p>Members of imiNdeni yamaKhosi do not get involved in decisions of traditional councils, therefore the involvement of royal families will destabilise ubuKhosi in the province. Clause 16(2)(i)(bb) must therefore be deleted.</p>	<p>The clause does not deal with “decisions of traditional councils” as referred to in the comment. The clause deals with consultations on the formula to be issued by the Minister in respect of the number of members of kingship, queenship or principal traditional councils (not traditional councils). The purpose of the forum is to ensure an inclusive consultation process.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
14.	General	<p>Comment by province – no specific amendment proposed.</p> <p>Exclusion of iziNduna in the traditional councils will not be welcomed in KZN as most tc’s consist of iziNduna and other persons selected by amaKhosi and elected by communities.</p>	<p>The following should be noted: In terms of the KZN Traditional Leadership and Governance Act, 5 of 2005, iziNduna are headmen. The definition of “Induna” reads as follows: “<i>Induna</i>” means a traditional leader who is under the authority of, or exercises authority within the area of jurisdiction of, an <i>Inkosi</i> in accordance with customary law, and who is recognised as such in terms of section 27, and “<i>Izinduna</i>” and “<i>Ubuduna</i>” have a corresponding meaning;” This definition corresponds with the definition of headman in the TKLB. In terms of clause 16 of the Bill, a traditional council shall consist of a 60% selected and a 40% elected component. The total number of members is also subject to a formula to be</p>

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			<p>issued by the Minister. This formula will be similar to the ministerial guidelines issued in terms of the existing Framework Act. These guidelines make specific provision for headmen and headwomen to be part of the selected component. Also, anyone from the community can be elected as part of the elected component.</p> <p>Headmen and headwomen are therefore not excluded from becoming members of the traditional councils.</p> <p><i>DTA: No amendment needed.</i></p>
15.	Section 81 amendment	<p>Comment by province – no specific amendment proposed.</p> <p>The reduction of the number of amaKhosi to sit in municipal council meetings from the current 20% to only 3 is not welcomed.</p>	<p>The proposed section 81 of the Structures Act as contained in Schedule 3 of the Bill, was developed by the DTA in consultation with SALGA and provinces. Houses of traditional leaders were also consulted. The proposal does away with the current cumbersome system of identifying traditional leaders who may participate in municipal proceedings. Participating leaders will be as follows:</p> <ul style="list-style-type: none"> • In cases where a local house of traditional leaders has been established in a local or metropolitan municipal area, it will be the chairperson of such house and two members elected by the house that will participate. • In cases where the local house is established for a district municipal area, the chairperson plus two members elected by the house will participate in the district municipal council. In addition, for each local municipal council in such district municipal area, the local house may elect two other members in respect of each such local municipality to participate in the proceedings of such local municipalities. <p><i>DTA: No amendment needed.</i></p>
16.	Section 81 amendment	<p>Comment by province – no specific amendment proposed.</p> <p>The lack of voting rights by amaKhosi is still not welcomed.</p>	<p>It should be noted that municipal councillors are elected representatives as contemplated in section 157 of the Constitution. Traditional leaders who are identified or chosen to participate in the proceedings of municipal councils are not elected representatives as referred to in the Constitution. Therefore their role in such proceedings will be of an advisory nature (as proposed in the new section 81 of the Municipal Structures Act – see Schedule 3 of the Bill). Participating traditional leaders may therefore not vote in municipal council proceedings.</p> <p><i>DTA: No amendment needed.</i></p>

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17.	General	<p>Comment by province – no specific amendment proposed.</p> <p>The lack of the clarification of protocol is not welcomed.</p>	<p>It is uncertain what protocol the comment refers to.</p> <p><i>DTA: No amendment needed.</i></p>
LIMPOPO: "Provincial NCOP permanent delegates to negotiate in favour of the Bill" ("with the above inputs").			
18.	General	<p>Comment by province – no specific amendment proposed.</p> <p>The traditional council must be constituted to serve the traditional Authority, as a council represent an ordinary seating for discussing issues and is never a legal entity. In the light of the above statement, the promulgation of the Act as a derivative from this Bill should be unconstitutional as it contravenes the prescript as contained in Section 211(2) by removing traditional authority status into a traditional council status.</p>	<p>Section 211(2) of the Constitution reads as follows: “(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.”</p> <p>The term is interpreted as referring to all traditional authorities that existed at the time (paramountcies, tribal authorities, community authorities, regional authorities, councils of chiefs, Ibandla Lamakhosi, ward authority, etc) and not to only one of those authorities such as tribal authorities. A State Law Advisers opinion confirms this view.</p> <p>The term “traditional council” as it is used in the existing laws, replaced the term “tribal authority” (thus only one specific structure) and did not replace the term “traditional authority”. It should also be noted that the term “traditional council” is not introduced by this Bill but was already introduced by the Framework Act of 2003. The term is also found in provincial legislation.</p> <p><i>DTA: No amendment needed.</i></p>
19.	General	<p>Comment by province – no specific amendment proposed.</p> <p>The Bill is silent on definition of a candle wife and a Kgoshigadi. The Bill should note that these two titles can never be defined as regents, and the Bill must accord them the same status of a senior traditional leader.</p>	<p>The TKLB re-affirms the existing traditional leadership positions as already provided for in law. It does not introduce any new positions as far as traditional leadership is concerned. It should also be noted that the Limpopo Traditional Leadership and Institutions Act, 2005 (Act No. 6 of 2005), does not make provision for the positions referred to in the comment.</p> <p><i>DTA: No amendment needed.</i></p>

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20.	12 (1) (b)	<p>Amendment proposed by province.</p> <p>Section 12 (1) (b) indicates that the Regents be reviewed every 2 years by the Premier. Traditional leadership is not rotational and by rotating Regents every second year defeat the objectives of the institution of traditional leadership as long as the incumbent is still a minor and might dilute the status of the senior traditional leadership position through leadership instability within the royal council. This provision is not part of our culture and custom and infringes on our customary rule rights and should therefore be removed.</p>	<p>The clause requires that the recognition of a regent be reviewed. This is <i>inter alia</i> to ensure that the reasons for appointing a regent still exist and to make sure that the regent is still acting in the best interest of the minor and community. The clause does not provide for a rotational system as mentioned in the comment.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
21.	23(1) (b)	<p>Amendment proposed by province.</p> <p>Section 23(1) (b) insists that the Premier must manage traditional council finances. This is fundamentally wrong as the Section takes away traditional council powers in managing its affairs independently. The Premier can monitor the spending of budgets to ensure compliance by the Traditional councils to applicable legislations such as PFMA. This Section must be amended to reflect that the Premier must monitor the budgets and accounts spending by Traditional councils and not managing them.</p>	<p>It would seem that this comment is based on a misinterpretation of the clause. The clause does not require the Premier to manage traditional council finances. The clause requires of national and provincial governments to provide for legislative or other measures in respect of the monitoring and management of the finances of such councils. In other words, it is an enabling provision.</p> <p>The clause does however go further and requires of the national DTA (not the province) to monitor the management of the finances of the councils in accordance with the monitoring clause (clause 62); this is to ensure that councils meet the requirements of the Bill once enacted and to provide relevant advice to both government and the councils.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
22.	23(3) (a) (i)	<p>Amendment proposed by province.</p> <p>Section 23(3)(a)(i) must be completely removed. There is no way that monies and presents that come by way of Madume or tama Morena (traditional greetings) to a traditional leader could be recorded in the traditional office accounts. In terms of customary law, money or present irrespective</p>	<p>This clause deals with monies to be paid into the account of a traditional council and includes voluntary contributions by community members to the council, not to the individual. The clause therefore does not apply to gifts to the leader. However, a council (not the individual) must disclose gifts received – see clauses 19(2)(c) and 20(2)(c). The value of gifts to be disclosed must be determined by the Minister by notice in the Gazette.</p> <p><i>DTA: Proposed amendment not supported.</i></p>

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		of its value or size, given to the traditional leader in this way should never be recorded in office finance records as it will violate culture.	
23.	24(3) (d)	<p>Amendment proposed by province.</p> <p>Section 24(3)(d) is questionable. The Premier must play oversight role and not necessarily ratifying agreements first before their implementation. This clause is completely removing the remaining traditional leaders powers to administer the affairs of their communities. It cannot be right for the Premier to be the determinant of every agreement between communities and third parties. This Section must be amended or be removed completely.</p>	<p>The purpose of this clause is to ensure that agreements are in fact beneficial to the communities and not to individuals. It should be noted that this particular part of the clause was in fact inserted by the CoGTA Portfolio Committee following concerns raised by communities during consultations.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
24.	39(1)(b)	<p>Amendment proposed by province.</p> <p>Section 39(b) talks to the fact that the National House of Traditional Leaders 'may' refer the Bills to Provincial or regional houses of Traditional leaders. The 'May' must be removed and replaced with 'Must'. All the structures in our organogram must provide inputs that will find expression in the final Act. Traditional leaders must be involved on any Bill that affects their welfare and that of their communities.</p>	<p>This clause deals with the referral of bills by Parliament to the National House. The National House must comment on such bills and even if they have no comment, they must inform the Secretary of Parliament accordingly. The clause provides a discretion to the National House ("may") to refer bills to provincial houses. In practice, the National House will consider such bills and then decide whether it is something that provincial houses should provide an input on at this stage. It must be remembered that provincial houses will get the opportunity to provide inputs when the bill is dealt with by the NCOP. Furthermore, the National House consists of members elected by provincial houses and the National House members therefore also represent their respective provincial houses on the National House.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
25.	25	<p>Comment by province – no specific amendment proposed.</p> <p>Section 25 of the Bill is vague in terms of providing sufficient guidance on what roles are given to traditional councils.</p>	<p>It is correct that the Bill does not mention which roles should be allocated to traditional leaders or their councils. The reason for this is that possible roles are contained in laws administered by other departments (including provincial departments). It is for this reason that clause 25(1) makes provision for such departments to consider which roles can be allocated and to then do so either through amendment of their legislation or through any other permitted measure.</p>

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			<p>Clause 25 is therefore an enabling provision.</p> <p><i>DTA: No amendment needed.</i></p>
26.	Auditing	<p>Amendment proposed by province.</p> <p>The bill must provide for financial accountability and transparency by traditional leaders to their subjects by allowing the auditor-general to audit their financial statements instead of any registered auditor appointed by traditional leaders.</p>	<p>Originally the Bill required the AG to audit the financial statements of the councils. However, the AG made a presentation to the CoGTA Portfolio Committee during 2017 and mentioned that they do not have the capacity for this task. They requested that the relevant clauses (19 and 20) be changed to allow any registered auditor to be appointed, but with the AG having the authority to review any such audit. The Portfolio Committee agreed and clauses 19(2) and 20(2) were amended, while clauses 19(3)(a) and 20(4)(a) were added.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
27.	Punitive measures	<p>Amendment proposed by province</p> <p>While the bill states that it is a punishable offense for someone to claim to be a traditional leader whereas they are not, the bill should clearly state what punitive measures will be undertaken in such cases.</p>	<p>This comment refers to clause 7(9) of the Bill. If a person is pretending to be a recognised leader but is not, it is a case of deception. The clause does in fact make provision for punitive measures and states that such a person is "... liable upon conviction to a fine or imprisonment not exceeding three years."</p> <p><i>DTA: Proposed amendment not supported.</i></p>
28.	Land	<p>Comment by province – no specific amendment proposed.</p> <p>While the recognition of the Khoi-San into traditional leadership was acknowledged, their territory was questioned. Further, it was deemed unfair by the Vhangona who have territory but their recognition remains unaddressed despite several attempts made to that effect.</p>	<p>It is unclear what exactly the comment refers to.</p>

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<p>MPUMALANGA: "The Portfolio Committee on Human Settlements, Co-operative Governance and Traditional Affairs ("the Committee"), after considering the Traditional and Khoi-San Leadership Bill [B23B-2015] confers on the permanent delegate representing the Mpumalanga Provincial Legislature in the NCOP, the mandate to negotiate in favour of the Bill without any proposed amendments, and taking into consideration the views of the community members as contained in the attached report."</p>			
29.	NA	None	NA
<p>NORTHERN CAPE: "The Legislature vote in favour of the Bill."</p>			
30.	NA	None	NA
<p>NORTH WEST: "The Portfolio Committee on Culture, Arts and Traditional Affairs mandates the North West NCOP permanent delegate to vote against the Traditional and Khoi-San Leadership Bill [B6B-2016], considering the attached proposed amendments."</p>			
31.	<p><i>Kindly note that B6B of 2016 to which this negotiating mandate refers, is in fact the Indigenous Knowledge Bill and not the TKLB.</i></p>		
32.	Title of the Bill	<p>Amendment proposed by province.</p> <p>Traditional and Khoi- San Leadership Bill. It is proposed that the name of the Bill to be changed to become Traditional Leadership Bill and not for a specific group. Khoi San leaders are considered as Traditional Leaders and therefore it's not necessary to be specifically mentioned. Retaining the title in its current form has the potential of entrenching segregation maintained by the Group Areas Act.</p>	<p>See our comment under item 1 above.</p> <p>DTA: Proposed amendment not supported.</p>
33.	Recognition of the kingship and traditional community. 3. (8) (a)	<p>Amendments proposed by province.</p> <p>3. (8) (a) provides that a Traditional Council may apply to the Premier for the recognition of the Traditional community as Headmanship</p>	<p>It should be noted that in terms of clause 3(8)(a) of the Bill the traditional council does not act on its own initiative, but must in fact be requested by a portion of the relevant community to apply for recognition as headmanship/headwomanship.</p>

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	3. (11)	<p>/Headwomanship. It is proposed that it is the Kgosi that should apply for the recognition of headmen after consultation with the royal family.</p> <p>3. (11) provides that the Premier may cause the MEC to investigate compliance with (1), whereas clause 5 (2) does not involve the MEC. It is proposed that Dikgosi as an institution should be the ones mandated to process any investigation for compliance with Traditional Leadership and recommended appropriately in terms of their respective delegation.</p>	<p>The Premier is the person with the authority to recognise and in order to ensure that he/she takes an informed decision, it should be the Premier who may cause an investigation on whether a traditional council or portion of a traditional community actually complies with the criteria for recognition. It is thus a responsibility of government to ensure that criteria are met.</p> <p><i>DTA: Proposed amendments not supported.</i></p>
34.	Function and resources of Traditional and Khoi- San leadership 15. (2)	<p>Amendment proposed by province.</p> <p>15. (2) provide that the Minister may determine the resources to be made available to leadership as may be needed to enable them to perform their function It is therefore proposed that it should not be the prerogative of the Minister to determine the resources for the leaders but it should be compulsory for him to ensure uniformity in respect of resources for traditional leaders. Maybe therefore the word "ought to be" replaced by "must".</p>	<p>The reason why this is not "must", is the following: Currently the President makes a determination on salaries, allowances and benefits of traditional leaders based on recommendations made by the Remuneration Commission. In the case of resources (tools of trade), there is no requirement for the President to make a determination; however, the Remuneration Commissions still has to make recommendations in this regard. The relevant laws in terms of which the Remuneration Commission operates may be changed in future to require a determination by the President. Therefore, if those laws are changed and the TKLB also makes it mandatory, the laws will be in conflict with each other. It should also be noted that the Minister may only make a determination after consultation with all Premiers and he/she has to take into consideration any recommendations made by the Remuneration Commission.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
35.	16. (9)	<p>Amendment proposed by province.</p> <p>16. (9) The meeting of the Traditional Court must be held once per month. It is proposed to insert a sub-clause on establishment of committees for the traditional council.</p>	<p>Kindly note that the province is referring to the traditional <u>court</u> which probably should be council.</p> <p>During the drafting stages of the Bill, provinces advised that it is more cost effective for traditional councils to meet once every two months. It should also be noted that the proviso to clause 16(9) does make provision for additional ordinary meetings or any special meeting of the relevant council.</p>

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			<p>As far as committees of councils are concerned, the Bill does not prevent a council to form committees if such council considers it necessary. It is not something that has to be prescribed in the Bill.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
36.	19. (2) (c)	<p>Amendment proposed by province.</p> <p>19. (2) (c) Proposed amendment from Premier to the Traditional Council, but any gift of traditional in nature shall not be declared because it is in terms of culture.</p>	<p>See our comment under item 22 above. Furthermore, it would be improper for a council to declare gifts to itself.</p> <p><i>DTA: proposed amendment not supported.</i></p>
37.	20. (1) (m)	<p>Amendment proposed by province.</p> <p>20. (1) (m) Perform function of managing on behalf of the community.</p>	<p>The proposal is not clear. Nonetheless, the functions of councils as listed in clause 20(1)(a) to (l) are comprehensive and includes the responsibility to administer the affairs of the community in accordance with customs and tradition.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
38.	22(1)	<p>Amendment proposed by province.</p> <p>22(1) Proposal that Houses of Traditional Leadership must monitor the effectiveness of Traditional Councils</p>	<p>The comment refers to clause 22(2) and not (1). This clause deals with the administration of councils and provides the option to the Premier to intervene by providing expert assistance to a council, should a council not be able to perform its duties. Monitoring is a responsibility of government and the statutory authority in this regard should not be assigned to houses of traditional leaders. It must also be remembered that not all provinces have houses of traditional leaders.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
39.	Support to Kingship/ Queenship Council principal Traditional Council, Traditional and Khoi-San Council 23	<p>Amendments proposed by province.</p> <p>Provision in clause 23 should make it obligatory for National and Provincial government to provide support to the councils; it is therefore proposed that the word "may" in clause 23 to be replaced by "must".</p>	<p>The support to traditional leadership councils has always been the responsibility of provinces and therefore the clause uses the term "must" where it concerns support to be provided by provinces. The national DTA is responsible for the National House and the Bill states that clearly. However, this clause also creates the option for national government to support the councils. This should however be discretionary and therefore the word "may" is used where it concerns national government.</p>

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Item	Clause of Bill	Provincial comment/proposed amendment	DTA view
	23(b)(vi)	Proposal that clause 23(b)(VI) be revisited as it has a potential of being subsumed for administrative purposes. The Traditional Court shall have accounts and declare them accordingly.	The comment (and reference to the clause) is not clear. (Again, the reference is to traditional <u>court</u> instead of council). <i>DTA: Proposed amendments not supported.</i>
40.	Allocation of roles to council and leaders 25 (1)	Amendment proposed by province. Department (national or provincial) may, in respect of any functional area for such department, through legislative or other measures provide a role for any council or leader. It is proposed that it should be mandatory for national or provincial department to allocate roles to councils or leaders, therefore "may" should be changed to "must".	Please see our comment under item 25 above. As mentioned earlier, this Bill cannot force other departments to amend their laws to provide roles for leaders and councils. However, it is something that is continuously being encouraged by the national DTA in its engagements with other national departments. In addition, it should be noted that section 20 of the existing Framework Act actually limits the functional areas in respect of which roles may be allocated to traditional leaders and their structures by providing a list of such functional areas. The TKLB changes this and does not impose such a restriction. <i>DTA: Proposed amendment not supported.</i>
41.	Women threshold requirements 28 (3)	Amendment proposed by province. 28.(3) At least a third of the members of National House must consist of women: Provided that if this requirement cannot be met, the minister must, after consultation with the Premiers concerned and relevant Provincial houses, determine a lower threshold in respect of the representation on women in the National House It is proposed that the above clause should read. "of the three persons who are senior traditional leaders elected by each province to represent them in the National House, one of them should be a female senior traditional leader, to the extent to which they are available.	The DTA does not agree. The clause currently states that only if the requirement of female representation cannot be met, the Minister has to determine a lower threshold after consultation with the relevant Premier and provincial house. This clause therefore requires of the Minister, relevant Premier and provincial house to be involved in the process; they have to ensure that women are not deliberately excluded. The risk of the proposal made by the province to state that this should depend on "the extent to which they are available" is that it could be used to circumvent the statutory requirement. <i>DTA: Proposed amendment not supported.</i>

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Item	Clause of Bill	Provincial comment/proposed amendment	DTA view
42.	30. (a) 30. (e)	<p>Amendments proposed by province.</p> <p>30. (a) full time to be added. (b) presidential pardon - take it as is.</p> <p>30. (e) The period of incarceration if it exceeds a period of five years in jail, that person will not be allowed to hold any position of traditional leadership</p>	<p>It is not necessary to add the words “full-time” as a person cannot be a part-time member of Parliament, a provincial legislature or a municipal council. The comment about a Presidential pardon is not clear. Nonetheless, a Presidential pardon is not relevant in this instance as the clause refers to imprisonment at the time of election of members to the National House. As far as imprisonment is concerned, please see clause 9(1) of the Bill which already makes provision for the withdrawal of recognition of a leader if he or she has been imprisoned for a period of more than 12 months without the option of a fine.</p> <p><i>DTA: Proposed amendments not supported.</i></p>
43.	33. 33. (5)	<p>Amendment proposed by province.</p> <p>33. the seat of the House must be at Parliament precinct, change sitting to session of Parliament. (clause 33 (4))</p> <p>33.(5) add must and take away administrative seats.</p>	<p>Clause 33(5) determines that the administrative seat of the National House is where the DTA is, thus Pretoria. However, the House may meet in either Pretoria or at Parliament. It is not cost-effective for the House to hold all its meetings at Parliament as that would mean that all support staff must also travel to Cape Town and be accommodated in hotels for the duration of the sitting of the House.</p> <p>The word “sitting” is the one used in the Constitution and therefore the Bill uses the same terminology.</p> <p>However, after careful consideration of clause 33(4) of the Bill, the DTA is of the view that the words “during the sitting of Parliament” could be deleted. The clause will then read as follows:</p> <p>“(4) The National House must meet at least once in every quarter [during the sitting of Parliament].”</p> <p><i>DTA: Proposed amendment listed above.</i></p>
44.	36. (2)b	<p>Amendment proposed by province.</p> <p>36 (2)(b) may advice to be removed and replaced by must</p>	<p>The DTA does not agree with the proposal. Clause 36(2)(b) refers to advice to be given by the National House to government on its own initiative. Clause 36(2)(d) however makes it obligatory for the House to provide advice to any Minister when so requested.</p> <p><i>DTA: Proposed amendment not supported.</i></p>

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Item	Clause of Bill	Provincial comment/proposed amendment	DTA view
45.	Chairperson and Deputy of National House Proposed insertion in clause 34 (13)	<p>Amendments proposed by province.</p> <p>Proposed insertion in clause 34 (13)</p> <p>(a) A Chairperson or a deputy Chairperson of the National House may be removed from office by the House through a vote supported by a two thirds majority of the full complement of the membership of the House, and thereupon such chairperson or deputy chairperson must vacate office.</p> <p>(b) A chairperson or a deputy chairperson may be removed from but the House on the grounds of misconduct, incapacity or incompetence.</p> <p>(c) A decision to remove a chairperson or a deputy chairperson must be based on a finding to that effect by investigative committee appointed by the House.</p>	<p>The removal of any member of the National House, including the chairperson and deputy chairperson, is dealt with comprehensively in the Code of Conduct contained in Schedule 1 of the Bill – see especially item 10 of the Schedule. The procedures provided for in this Schedule are aligned with the principles of administrative justice.</p> <p><i>DTA: Proposed amendments not supported.</i></p>
46.	Administration of National House 39 (1) (b) 39 (2)	<p>Amendments proposed by province.</p> <p>Appointment of the Secretary by the Director General - Proposed amendment to remove the word may and replace it with must.</p> <p>39 (1) (b) "may" to be removed and replace it with "must Secretary of the House to refer the Bills to the Provincial House"</p> <p>39 (2) Proposal that the word "may" be replaced by "must".</p>	<p>This comment refers to clause 37 of the Bill. The Bill does in fact make it compulsory for the DG to appoint a Secretary to the National House. The wording of clause 37(2) reads as follows: "The Director-General of the Department <u>must</u>, in terms of the laws governing the public service and in consultation with the chairperson of the National House, appoint a person as Secretary to the House." It is in the case of the secondment of other staff where there is a discretion – see clause 37(1).</p> <p>See our comment under item 24 above.</p> <p>The clause reads as follows: "A provincial legislature or a municipal council may adopt the same procedure referred to in subsection (1) in respect of the referral of a provincial Bill or a draft by-law to a provincial house or a local house, as the case may be." This clause is merely an enabling clause. A provincial legislature or a municipal council will have to provide for a specific procedure in its own legislation/by-laws and may choose to provide a different mechanism than the one provided for in the TKLB in respect of the National House.</p> <p><i>DTA: Proposed amendments not supported.</i></p>

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47.	Annual report of National House 43	<p>Amendment proposed by province.</p> <p>The word "approved" need to be replaced by "note" the section should read as follows: 43. (1) The National House must not later than 30 June of each financial year, submit to the Minister a report in respect of the previous financial year, complying with the provisions of subsection (2), in respect of the activities and programmes and must within 30 days after the Minister has received the report, table it in parliament.</p>	<p>The National House does not report directly to Parliament as is the case with Chapter 9 institutions. It reports to the Minister and is supported by the DTA, both financially and in respect of support staff. Therefore the Annual Report of the National House must first be approved by the Minister before it can be tabled in Parliament.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
48.	Establishment of the Commission 51.	<p>Amendment proposed by province.</p> <p>It is submitted that sub clause 3 be added which will read as follows; "if at the expiry of the term of the commission, there are claims and disputes outstanding, any extension should not be more than twelve (12) months.'</p>	<p>It should be noted that clause 51 deals with the establishment of the Commission on Khoi-San Matters and not the previous Commission on Traditional Leadership Disputes and Claims. As far as the Commission on Khoi-San Matters is concerned, the Bill already, in clause 52(1)(a), makes provision for the possibility of extending the term of the Commission. The clause states that the Minister must appoint the Commission "for a period not exceeding five years or any such further period as the Minister may determine by notice in the Gazette." Furthermore, it should be noted that at this stage no-one can predict how many applications for recognition of Khoi-San communities and leaders will be lodged with the Commission. It would therefore not be wise to limit the extension of the term to 12 months. Any possible extension will have to be based on the number of applications received and more so, the number of outstanding applications (if any) once the original term comes to an end.</p> <p><i>DTA: Proposed amendment not supported.</i></p>
49.	General	<p>Comment by province – no specific amendment proposed.</p> <p>It is our submission that the same approach be adopted in the Traditional and Khoi-San Leadership Bill and that it must explicitly incorporate provisions which acknowledge and protect the principle of voluntarily affiliation.</p>	<p>It should be noted that in the North West negotiating mandate report, this particular comment is preceded and followed by comments relating to clause 25 of the Bill which has been dealt with earlier. The issue raised in the comment is not related to the section 25 matters.</p> <p>Nonetheless, kindly note that section 18 of the Constitution, 1996, states that everyone has a right to freedom of association while section 21 determines that everyone has the right to freedom of movement. There is no provision in the Bill which prohibits any person to leave a</p>

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			<p>traditional council area, neither is there any provision that forces a person to stay in such an area or to associate himself or herself with the particular structure in the area.</p> <p><i>DTA: No amendment needed.</i></p>
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WESTERN CAPE: "The Standing Committee on Local Government reports that it confers on the Western Cape's permanent delegate in the NCOP the authority to support the Bill subject to the following amendments."

50.	Clauses 5, 6 and 7	<p>Comments by province – no specific amendments proposed.</p> <p>The Western Cape acknowledges the importance of recognising Khoi-San communities, leaders and structures, however the Bill appears to differentiate between traditional communities and Khoi-San communities in various respects, including:</p> <ul style="list-style-type: none"> • Recognition requirements • Leadership hierarchies and structures • Control of land, and • Territorial authority for traditional leaders compared to authority based on self-identification for Khoi-San leaders, and so forth. <p>While historical, cultural and geographical differences must be recognised, the principles of equality expressed in section 9 of the Constitution of the Republic of South Africa, 1996 must be maintained. These provisions of the Bill discriminate between traditional communities and Khoi-San communities.</p> <p>The general view expressed by the residents of the Western Cape who participated in the public participation processes of the Committee on this Bill, is that this</p>	<p>It is true that the Bill provides different leadership positions for traditional leaders and the Khoi-San. This is because there is a difference in the sense that the Khoi-San does not have a history of kings and queens as stated earlier and therefore no provision is made for Khoi-San kings and queens. There is also no position of principal traditional leader amongst the Khoi-San; as stated earlier, the position of principal traditional leader was created to accommodate those "paramountcies" that do not meet all the requirements of kingships/queenships.</p> <p>It is also true that historically traditional councils (or traditional authorities as they were previously known) have areas of jurisdiction while this is not existing in the case of the Khoi-San.</p> <p>These differences are in fact acknowledged by the Bill and cannot be regarded as discrimination.</p> <p><i>DTA: No amendment needed.</i></p>
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		discrimination is unfair and unjustifiable and, therefore, unlawful.	
51.	24	<p>Comments by province – no specific amendments proposed.</p> <p>The Western Cape is concerned that traditional councils and leaders are still able to transact and enter into partnerships and agreements regarding communal land contrary to the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996).</p> <p>The risk of a conflict of laws between clause 24 of the Bill (which provides for agreements entered into on behalf of communities by councils), and section 2 of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1995) (which requires consent from the majority of a community for the alienation of informal land rights) must be addressed.</p> <p>In terms of Constitutional Court case law, traditional leadership structures should be held to at least the same standard as government in terms of meaningful engagement with communities affected by decisions.</p>	<p>Although there is no amendment proposed by the province, the DTA, after careful consideration of the comments, suggest that the Select Committee considers the amendment of the introductory part of clause 24(3) and paragraph (c) of the subclause.</p> <p>The proposed amendment to paragraph (c) has been proposed in the past by many commentators and would require not only consultation with the relevant community before any partnership or agreement is entered into, but also a majority decision by the community itself to enter into the partnership or agreement. To ensure that these requirements are complied with, it is also necessary to state in the introductory part that even partnerships and agreements entered into in terms of other laws will still have to meet these requirements.</p> <p>The relevant parts of the clause will therefore read as follows:</p> <p>“(3) Any partnership or agreement entered into by any of the councils contemplated in subsection (2) must be in writing and, <u>notwithstanding the provisions of any other national or provincial law,—</u></p> <p>(a) ...</p> <p>(b) ...</p> <p>(c) is subject to—</p> <p>(i) a prior consultation with the relevant community represented by such council;</p> <p>(ii) <u>a decision in support of the partnership or agreement taken by a majority of the relevant community members present at the consultation contemplated in subparagraph (i); and</u></p> <p>(iii) a prior decision of such council indicating in writing the support of the council for the particular partnership or agreement;”.</p> <p>Clause 63(22) is a transitional clause that requires of all existing partnerships and agreements to be reviewed in order to ensure that they meet the criteria stipulated in clause 24. As a consequence of the proposal to amend clause 24(3), clause 63(22)(b) should also be amended to read as follows:</p> <p>“(b) If a Premier is of the opinion that a partnership or agreement contemplated in paragraph (a) does not meet such requirements, the Premier must refer such partnership or agreement to the parties who entered into such partnership or agreement and request</p>

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			<p>them to <u>either</u> amend <u>or re-enter into</u> such partnership or agreement to ensure compliance with section 24(3)(a), (b), (c), (e) and (4), or to cancel such partnership or agreement.”</p> <p>Furthermore, although all partnerships and agreements to be entered into after commencement of the Bill will be subjected to the provisions of clause 24 notwithstanding the provisions of other laws, it is our view that the review process provided for in clause 63(22) cannot apply retrospectively in instances where a partnership or agreement has been entered into in accordance with other enabling statutory provisions. It is therefore proposed that a new paragraph (d) be added to clause 63(22) to read as follows:</p> <p>“(d) The provisions of this subsection do not apply to any partnership or agreement which, at the commencement of this Act, has been entered into in accordance with any enabling provisions of any other national or provincial law.”</p> <p><i>DTA: Propose amendments listed above, subject to certification by State Law Advisers.</i></p>
	<p>Financial implications</p>	<p>Comments by province – no specific amendments proposed.</p> <p>A comprehensive cost analysis in respect of implementation of this Bill must be done by the Department of Traditional Affairs and National Treasury to determine the cost to provinces which must be a direct charge against the National Revenue Fund.</p> <p>This Bill has significant financial implications for provinces to support the recognised Khoi San leaders and structures administratively and financially. In this regard, this Bill is non-compliant with section 35 of the Public Finance Management Act, 1999 (Act 1 of 1999), which provides:</p> <p>"Unfunded mandates Draft national legislation that assigns an additional function or power to, or imposes any other obligation on, a provincial government, must, in a memorandum that</p>	<p>The Bill is accompanied by a Memorandum on the Objects of the Bill and addresses financial implications in paragraph 3 thereof (see pages 85 to 86 of the Bill). On these pages, all additional financial implications are highlighted. In the case of the Western Cape where there are no recognised traditional leaders and therefore also no traditional leadership structures to be supported, it will only be the possible recognition of Khoi-San leaders and communities in the province that will have financial implications for them.</p> <p>As mentioned in paragraph 3.2(a) of the Memorandum on the Objects of the Bill, no-one knows how many Khoi-San leaders and communities will apply for recognition and ultimately, how many will actually be recognised. Furthermore, the salaries of recognised Khoi-San leaders will be determined by the President based on recommendations made by the Remuneration Commission. This Commission will only commence with this task once the Bill is enacted.</p>

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		<p>must be introduced in Parliament with that legislation, give a projection of the financial implications of that function, power or obligation to the province.”</p> <p>Cognisance must also be taken of the financial implications of compliance with clauses 20(2)(b), 23 and 25.</p>	
53.	15	<p>Amendment proposed by province.</p> <p>Furthermore, the Minister of Cooperative Governance and Traditional Affairs must determine the resources to be made available in conjunction with Premiers, not after consultation.</p>	<p>The proposal is not supported. The purpose of clause 15(2) is to achieve uniformity. If the wording is changed to “in consultation” or “in conjunction”, it means that if one province does not support the proposed enabling resources (tools of trade), such province may delay the whole process and traditional and Khoi-San leaders are the ones who will not be able to perform their tasks.</p> <p><i>DTA: Proposed amendment not supported.</i></p>

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DTA: PROPOSED AMENDMENTS

54.	63(4)	<p>Honourable Members will remember that the Traditional Leadership and Governance Framework Amendment Bill (FAB) was introduced to Parliament to address the immediate concern with regards to timeframes that have lapsed for the constitution/reconstitution of traditional leadership structures. It should also be remembered that the TKLB was introduced long before the FAB.</p> <p>Since the FAB has taken much longer than expected, the DTA has carefully considered whether all provisions of the FAB are also covered in the TKLB. We found that one clause, namely clause 63(4) of the TKLB, does not cover all transitional aspects in relation to tribal authorities and traditional councils as provided for in the FAB. If the FAB was already law and implemented, this would not have been a concern. However, with the possibility of the TKLB also becoming law in the near future and repealing the Framework Act, the DTA proposes that the relevant transitional provision of the FAB be included in the TKLB.</p>	<p>The proposed amendment of clause 63(4) reads as follows [it will replace subsection (4) on page 51, from line 12, of the current TKLB].</p> <p>“(4)(a) A tribal authority that, immediately before 24 September 2004, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 16 of this Act and must perform the functions referred to in section 20: Provided that such a tribal authority must be reconstituted to comply with the provisions of section 16(2) within two years from the date of commencement of this Act.</p> <p>(b) If, prior to the commencement of this Act, any tribal authority was reconstituted as contemplated in paragraph (a), but such reconstitution did not comply with all the requirements of section 16(2), such tribal authority is deemed to be a traditional council and must, within two years of the commencement of this Act, be reconstituted in full compliance with the provisions of section 16(2).</p> <p>(c) If the timeframes contemplated in paragraph (a) or (b) are not met, the Minister may, within one year after the timeframes have lapsed and after consultation with the relevant Premier, apply the provisions of section 16(2) to ensure that such tribal authority or traditional council is constituted or reconstituted in accordance with the provisions of section 16(2).</p> <p>(d) The provisions of section 16(5) apply to any constitution or reconstitution contemplated in this subsection.”</p>
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