

The Standing Committee on Premier and Constitutional Matters resolved to undertake public hearings for the Traditional Courts Bill [B 1B-2017](s76) on Tuesday, 5 November in Oudtshoorn; Wednesday 6 November in Hermanus; Thursday 7 November in Clanwilliam; and Friday 8 November 2019 in Cape Town at the Provincial Parliament Chambers.

During the public hearings the following oral and written submissions were received.

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| SUBMMISSION NO. | COMMENTATOR | CLAUSE | COMMENT | SUGGESTED IMPROVEMENTS | COMMENT LEGAL WCPP ADVISOR | COMMENT FROM THE DEPARTMENT THE JUSTICE | COMMENT FROM COMMITTEE |
| 1 | Oudtshoorn  Jongilizwo Tyatya | Schedule 2 | African Communities in the Western Cape does not have Traditional Leaders. It will be important that the definitions section of the Bill should be revised so it can accommodate the Western Cape setup.  Schedule 2 of the Bill to be structured immediately for a better formation of these courts. Workshops for such needs to be initiated. Standard operating procedures for the court to be developed or drawn if necessary. |  |  |  |  |
| 2. | Oudtshoorn  Chief Eben  T Basson Gonqua  Cape Khoi Tribe.  Tbasson71@gmail.com |  | All protocols observed, Wrong process, short notice, unanswered questions regarding safety of Traditional Leaders after judgement have been made. Lack of co-operation and total disrespect of DA mayors and administration, starting municipal manager and CEO’s, disrespect from Premier and her Parliamentaries. |  |  |  |  |
| 3. | Oudtshoorn  Lizo Cecil Dani |  | In Oudtshoorn we have an organisation called Oudtshoorn Initiation Forum which affiliates to the Western Cape Cultural Commission for circumcision. There are approved policies that are in operation like consent forms that must be signed by boys and parents before undergoing initiation and medical screening falls part of the compliance. | We support the signing of the Bill to regulate, protect human beings and human rights of people from those that are in contradiction with the stipulated law. We recommend that the NCOP, must come back to communities and give awareness and road shows on the Traditional Courts Bill passed through cultural council that are currently active as well as forums. |  |  |  |
| 4. | Hermanus Baatjies  [Hermanus6@gmail.com](mailto:Hermanus6@gmail.com) |  | Minors: The bill must review customary law. Community and members should refer to minors being up until the age of 14 years old. | Consult Communities and societies offices. |  |  |  |
| 5. | Siboniso C Malanga |  | The Bill came on short notice. |  |  |  |  |
| 6. | Lindiwe Tenge |  | Schedule 2 Section 4 (2) (a) is not clear. |  |  |  |  |
| 7. | Koos Pietersen Traditional Doctor |  | How is the court going to be constituted in terms of race, creed colour, culture and tradition? Who is responsible in the constitution of this traditional court? | Acknowledgement of the Khoi-Khoi must first be concluded. This Traditional Courts Bill is ahead of proceedings while others issues have not been concluded. |  |  |  |
| 8. | Gido Nathan |  | National Government must first give recognition of our status of our Traditional Leaders.  Oppose the Bill. |  |  |  |  |
| 9 | Phindice Mkwambi |  | How is this matter going to be resolved as we are not under the rule of Chiefs and/or our regions are under municipalites. We are so many diversified by customs and traditions, therefore this does not mean that we are going to have many different chiefs because of our diversity here in the Western Cape. |  |  |  |  |
| 10. | Hermanus  Archie Klaas |  | The Bill is key to ensure that our existing Traditional Courts be empowered. I welcome the training clerks.  The Bill does not cover any notice period. Traditional Courts are highly criticised for not giving reasonable notice.  The Bill does not streamline reporting. Reporting should be linked to courts, traditional leaders in more rural areas like Swellendam.  The Tradional Courts in Zwelihle, headed by Elder Tshona, struggles to use community halls. |  |  |  |  |
| 11. | Siphiwo Beyi |  | The Bill itself is fine but there is no proper public consultation and indigenous people has not been getting the recognition they deserve. Parliament has not finalised the recognition Bill. |  |  |  |  |
| 12. | Anthony John Louw |  | In regards to recognition of the Khoisan people, there should be a quality of rights, quality of peaceful developments and a mandate for equal opportunities. |  |  |  |  |
| 13. | King Earnest Solomon |  | Most of the Khoi Leaders are welcoming the Bill, however there are some that are in disagreement. The former Government and the present Regime have left the Khoi Nation in the lurch. We are experiencing difficult times. Therefore the State President should listen to the outcry of the Khoi people. People are coming from far and near and do as they please. They do not pay electricity. They cut down trees and bushes in Hermanus and nothing happens to them. Traditional Courts will be a good concept for our communities. Less of our Membsr will be imprisoned for small matters. |  |  |  |  |
| 14. | Xolani Tshetu  Clanwilliam |  | How are these Traditional courts going to weigh the crimes (serious vs petty crimes)  Are these courts accommodating other race? If it happen that the perpetrator may speak other languages?  How will these courts function if the government did not make provision to fund them? |  |  |  |  |
| 15. | Elder Hydrick  Abbaquar Royal House – Sir Lowrys Pass |  | It is the poor and uneducated that attend the public hearings and meetings but the rich and educated that gets the jobs. Our Chief Louis went to courts to assist the community with criminal court cases but he is not trained. Since 2011 he has done voluntary secretarial work. This Bill should recognise people like this. |  |  |  |  |
| 16. | Chief Susan Sheldon  Hawequa Abiriqaniol Xam |  | It would be great if there was a workshop on this Bill. |  |  |  |  |
| 17. | Susara Albertus |  | Don’t implement a Bill that is not going to work for our indigenous people that suffer at the hands of injustice. No is justice is served currently by National Government so how we be governed by the Tradtional Courts. |  |  |  |  |
| 18. | Abe Braaf | Clause 9 | I am concern about the non-appointment of Justices of the Peace as from the year 2000. People with these expertise are dying out, old or not healthy. Is there a consideration to upgrade the appointed Commissioner of Oaths to also be Justice of the Peace. |  |  |  |  |
| 19. | Mzwandile Mfazwe  Overberg Region Traditional Council |  | THE OVERBERG TRADITIONAL COUNCIL WELCOMES THE TRADITIONAL COURTS BILL   1. AREA COMMITTEE – LED BY THE BOARD 2. WARD – LED BY THE HEADMAN / HEAD WOMAN / CEBA 3. SENIOR CHIEF – WORKING IN THE SUB-COUNCIL 4. PRICIPAL CHIEF – WORKING IN THE DISTRICT MUNICIPALITY & THE REGIONAL COURT  * The cases start at the area committee in the BOARD COURT. * When someone has appeals to the BOARD COURT they go to the court of the Headman/Headwoman. * When the court of the Headman / Headman is unable to deal with the case, it is then transferred to the Regional Court (SENIOR CHIEF). * The Regional Court is where the Headman / Headwoman meets with the Senior Chief, Elders (Old men with experience. * It is where all the appeals cases are dealt with. * The Senior Chief works in collaboration with the District Magistrate where the sanction is handed. * The Principal Chief – works in the District where he works with Regional Court.   CASES DEALT WITH BY THE CHIEFS FIRST   1. Family conflicts 2. Inheritance conflict 3. Lobola, payment of damages (when a girl has been impregnanted) 4. Stock theft 5. House breaking 6. Fighting among boys (gangsterism) in the neighbourhood 7. Accusing one another for witchcraft 8. Circumcising boys without the consent of the parents and the chiefdom 9. Ukuthwala – the practice of kidnapping young girls with the aim of making them wives. 10. Domestic violence 11. Child neglect at home   N.B. \* We do not handle rape cases, murder cases, but we only work in collaboration with the courts to submit evidence.  \* The Principal Chief collects all the work done in six months and sends it to the Kingdom & the District Magistrate.  The Principal Chief ensures the training of Traditional Leaders (Chiefs) who handle cases in lower courts. |  |  |  |  |
| 20. | Senior Chief Kupa  Chief Mbangata  The Southern Peninsula Traditional Leaders |  | The Southern Peninsula Traditional Leaders recognise the importance of our history as traditional/indigenous people of Africa. We represent Subcouncil 18, 19 and 20 in the Cape Metro Region. The head office is based in the Vrygrond Community, Ward 67, Subcouncils 18. Vrygrond is the main community witht eh longest and richest history in the Western Cape (WC). Establised prior 1941 and has given birth to many communities extending in the WC. Traditional leadership is in Vrygrond was never clear due to the differenct races that lived in the community and is still the case today. The Magistrate of the Muizenberg Court recognises the traditional leaders tha exist in Vrygrond and has previously referred cases to this institution. Traditional Leaders can handle the following:  Customary marriages where there are disputes relating to housing, family, marital rape, birth certificates in terms of issuing testimonial history of an individual to prove residence, health issues, social development, conflict in the community, initiation schools, community morals in restoring Ubuntu and traditional laws.  The Traditional Court Bill is highly recommended by this structure. The Bill will ensure that the right of all indigenous Africans are covered. The traditional system should be protected in traditional communities. The land occupied by traditional people belongs to them and must be administered in accordance with the relevant traditional system. The land should be redistributed among the people in a fair and equitable manner. Traditional courts must exist in all townships, villages and suburbs. This will restore the dignity of the leaders. South Africa is recognised as leading in law making and retaining peace. Recognising that together with our people, economic and social right of our land. |  |  |  |  |
| 21. | The Kingship of MaDumisa tribe of Western Cape accepts the Traditional Court Bill of the Province. |  | The Governing Executive of the Kingship of MaDuma in Western Cape is made of 6 Regions of the Province. Whereby each region is led by the Principal Chief. Then the Principal Chief has chiefs who control sub-regions. Headman/Headwoman controls wards. Then Board Members control streets in each region of the ward. Street Committees work with Board Members responsible for controlling the area, streets are included in that.  **Kingship court cases**  By the Policy of Chieftaincy of the MaDumisa Nation it is Kingship Palace who explains a way forward on the discussions of cases with regards to the original practice.  Case starts to be listened to by the Board and end up with the Senior Chief who is responsible to give report of all the work done in his area to the affected Principal Chief of the Region. Then the Principal Chiefs with its Committees give their reports once in 3 months to the Governing Executive of the Province, with the King (Principal Traditional Council) present in that meeting. If there is a matter that is difficult to solve the executive and the king rely on the Government of the Province to resolve the conflict. |  |  |  |  |
| 22. | Boland Traditional Council |  | We would love to add the following matters in this Bill  **Stages of the Chief’s Courts**   1. Board Court-Area/ Block level 2. Headman/Headwoman Court 3. Rural Locations Central Court (Senior Chief)-District/ Sub-Council 4. Regional Traditional Court ( Principal Chief) Regional 5. Kings Palace (where King stays) oversee how the courts below work-it is where laws are established and cases referring to Chiefs are discussed.   TRADITIONAL COURTS WORK  Cases starts in the Board Court—then to Headman Court—then to Rural Locations Central Court—then to the Regional Court.   * When a person appeals –the case is passed to the upper court. * When a charge is laid against the chief, the case is passed to the King’s Palace. * Each Court has a clerk, a prosecutor as well as a judge (chief) who is working with advisers. * Principle Chief collects all the work done in 6 months and took it to the King and Regional Magistrate. * Principle Chief ensure that training of chiefs responsible for discussions of cases in the following Courts.   Cases discussed by the Chiefs are as follows:   1. Family conflicts 2. Disagreements with inheritance. 3. Bride price, Payment 4. Stock theft 5. House Breakings 6. Fighting of boys in communities 7. Accusing each other of witchcraft. 8. Taking boys for initiation without the knowledge of their parents and the Palace. 9. Abduct young girls, to be wives for men. 10. Abuse at Homes. 11. We don’t discuss a rape case. 12. We don’t discuss a murder case but we work with the Magistrate to find the perpetrator. 13. It is an offence to neglect children at home. |  |  |  |  |
| 23. | The Trust for Community Outreach and Education  Annuschka Williams |  | The Trust for Community Outreach and Education (TCOE) is a non-government organisation, which supports rural communities across the country to build their voice and agency in an effort for rural communities to defend their rights to the land, the oceans and a dignified life.  TCOE supports Inyanda National Land Movement – a membership-based organisation  consisting of associations and collectives of farm workers, farm dwellers, rural dwellers, the  landless, the unemployed, women and youth. Inyanda National Land Movement has  membership in the Western Cape, Eastern Cape, Free State, Northern Cape and Limpopo. The  TCOE and Inyanda National Land Movement along with other rural based organisations have  actively participated in public participation processes related to policies and legislation which  affects the lives of rural people. The comments below are part of a response to the Traditional  Courts Bill in the Western Cape Legislature.  **Women, the vulnerable and LGBTI**  We are pleased that the Bill takes into consideration and has integrated women, the vulnerable and the LGBTI community into the structure and made provision for full participation of these in Traditional Courts. We also acknowledge the provisions in the Bill for taking into account the needs and requirements and the support to be provided to vulnerable groups who participate at the Traditional Courts and accountability measures put in place with the Commission for Gender Equality and Department of Justice and Correctional  Services.  **Governance**  The Bill (section 4(b)) stipulates that the Presiding chief is able to “delegate a person or persons to preside over” the Traditional Court but is silent about the circumstances and standards in which this is delegation is applicable. This gap can allow for arbitrary delegation of authority as the Bill does not clarify the degree of training or experience the presiding officer of Traditional Courts require. Beside the provision that women must be included in constituting the Traditional Court, it does not stipulate the percentage or representation nor the inclusion of vulnerable groups.  **Monitoring**  The Bill does not clarify the mechanisms to guide and monitor the relationship between Traditional Courts and the South African Police Service (SAPS) and other bodies as stipulated in section 4(2) which indicates that a Traditional Court can only deal with matters which are not being dealt with in other structures or by SAPS. In addition, the monitoring role that will ensure that traditional councils do uphold principles of the Bill of Rights and the principles of inclusion of women and other vulnerable groups are not included.  In section 7(3)(b)(ii) the Bill stipulates that all decisions in the Traditional Court be impartial, but it fails to provide mechanisms to curtail prejudice or bias. Section 7(4)(12) requires for “a member of a Traditional Court to declare any direct personal interest” – in the absence of this which external monitoring structures or mechanisms will ensure fair proceedings and or provide processes for redress where subjective discrimination and unfair decisions are taken?  **Opportunity for exclusion and corruption**  Section 7(11) notes “determined fees payable to a Traditional Court in terms of customary law” – this section creates opportunity for corruption and limits access to justice for those who are unable to pay the prescribed fees. Furthermore, the current existence and practice of patronage networks could entrench control and corruption and distort the principles of the Traditional Court. This is highly likely in cases where a traditional council is not constituted  according to the principles of this and other legislation guiding the establishment of traditional councils.  **Educating communities**  For the Bill to be implemented in a manner that is true to the principles it espouses, the broader community must be informed and aware of the provisions in this Bill. South Africa is well known for producing high quality legislation but sorely lack in implementation of these –  the Minister and Department of Justice and Correctional Services must ensure that there is broad awareness, information and public education where Traditional Courts are in existence.  The TCOE and Inyanda National Land Movement strongly support the inclusion and representation of women and LGBTI in constituting Traditional Courts to ensure that the rights of these and other vulnerable groups are upheld. In addition to the mechanisms of accountability included in the Bill, we advocate for stronger and possibly separate structures for observing and monitoring the operations of Traditional Courts and to provide more clarity on the link between traditional councils and the SAPS. Generally, we advocate for co-governance in local communities, where the state, and in this case the traditional leaders and council share the responsibility for governance, decision making and responsibility for the well-being of the community. Only when communities are well informed and understand the policies which give authority to Traditional Councils can they play a stronger role in holding these accountable and ensuring transparency; therefore, community education is important in ensuring effective implementation of this Bill and the resultant justice it is to ensure. |  |  |  |  |
| 24. | Land and Accountability Research Centre (LARC) |  | 1. All legislation related to customary law, including this Bill should incorporate explicit acknowledgements of both the consensual and living nature of customary law. At present the Bill denies that the use of dispute resolution forums in terms of customary law is voluntary and consensual.  2. An opting out mechanism is a minimum requirement for ensuring that the Traditional Courts Bill complies with the rights and freedoms set out in the Constitution and customary law. To be consistent with the consensual nature of customary law the Bill should preferably be reconfigured to require that both parties expressly opt in.  3. The Bill must furthermore impose an explicit duty on the clerk of a traditional court to inform all parties who are summoned to the court, and also those who bring cases to the court, that it is their choice whether to participate in proceedings.  4. Where an opt-out mechanism is included, grounds for review should be added in clause 11 to address situations where: a person’s right to opt out has been impeded or denied; the clerk fails to inform any party of the right to opt out of traditional court proceedings; or a person has experienced intimidation, manipulation, threats or denigration for trying to opt out.  5. Unless and until resources are set aside to ensure that sufficient clerks and Justices of the Peace are put in place, the Bill should not be further considered. Without such officials being in place widely across forums, traditional courts are likely to default to forums convened by senior traditional leaders. This contradicts the purpose of the Bill to regulate customary dispute resolution, and will, in practice, inevitably elevate the courts of senior traditional leaders over the myriad of other lower level forums that dispense justice on a day to day basis.  6. The status of traditional courts as courts of law at clause 6 results in unconstitutionality on at least two fronts: it denies accused persons the right to a fair trial and also discriminates against persons based on their geographic location. This denial of rights is particularly exacerbated with no mechanism for opting out of a traditional court’s jurisdiction.  7. It will be impossible to effectively implement the Traditional Courts Bill in a manner that honours even its positive intentions until fundamental problems with the 2003 Traditional Leadership and Governance Framework Act’s implementation have been resolved legislatively and politically.  8. Serious abuses could emanate from the advisory or guiding powers that the Bill grants to traditional courts. Whether this advisory role is consistent with the Constitution is questionable. The powers to counsel, guide or assist should be removed from clauses 4(3), 16 and Schedule 2(g) of the Bill. The traditional court should only be granted the power to facilitate the referral of a matter elsewhere where it is not competent to hear the matter. 9. Remedies should be clarified and expanded to ensure implementation of the provisions that aim to protect traditional court participants against discrimination, beyond High Court review. This could be achieved through an ombud or complaints mechanism, separate from the clerk’s role. The composition and procedures of traditional courts need to be considered in relation to the current realities of customary law contexts. Without clear and practical implementation mechanisms these protections will be rendered null and void.  10. We note with concern that various categories of vulnerable groups are not included in those listed by the Bill, and recommend that these groups be included in the Bill.  11. Corporal punishment, banishment and cruel, inhuman and degrading punishment should be explicitly excluded from the permissible orders listed in clause 8 of the Bill.  12. The consent of both parties should be required before any order to perform services in lieu of compensation can be granted. In other words, in respect of both clauses 8(1)(b) and (c).  13. Traditional courts should be able to grant the orders listed in paragraphs (a) to (c) of clause 8(1) in favour of any party to the dispute, as with the other orders listed in clause 8, not just in favour of the person who institutes proceedings.  14. The enforcement procedure in clause 9(4) should be clarified, preferably to align with the similar procedure contained in clause 4(4).  15. The Bill should put in place an express provision that grants persons access to legal aid if they want to bring a review in terms of clause 11.  16. Clause 15 should also explicitly prohibit abusive and harmful conduct by traditional court members.  17. Clause 16(1) should be amended to additionally require the Minister of Justice and Correctional Services to consult with ordinary people about the content of the Code of Conduct. As the primary users of traditional courts, ordinary people are best placed to comment on the kinds of abuses that should be prevented by the Code of Conduct.  18. Responsibility for enforcement of the Code of Conduct in terms of clause 16(5) and (6) should remain with provincial MECs as originally envisioned in the first version of the 2017 Bill.  **NOTE ABOUT PROCESS**  LARC appeals to the Provincial Legislatures and National Council of Provinces to permit additional time for the receipt of submissions on the B version of the 2017 Traditional Courts Bill and for further direct engagement with the public. The voices of ordinary South Africans, in particular those living in customary law and rural contexts, are crucial to understanding the impact of the Bill in people’s lives. To this end, lawmakers should ensure that a thorough consultation process is conducted on this Bill, with sufficient prior notice and information for people to attend and contribute meaningfully. This will facilitate participation in the law-making process by the rushing the legislative process will only deprive the process of these valuable inputs. LARC is concerned that the National Council of Provinces and Provincial Legislatures appear to be rushing the processing of the Bill with no apparent reason for the urgency. After the Bill’s revival in national Parliament on 17 October 2019, Provincial Legislatures were initially required to conduct public participation in time for submitting final mandates by 27 November. Even with an extension granted to the NCOP’s Select Committee on Security Justice, Provincial Legislatures have only until 13 December to conduct public participation. This is little time for proper engagement with a Bill that will directly affect millions of historically marginalised South Africans – especially given its contentious legislative journey thus far and the unusual manner in which it was passed by the National Assembly just before national elections.  LARC notes further that the time frames set by the NCOP have created confusion and meant that Provincial Legislatures have been providing short notice about public hearings, and there have been constraints around public education and the provision of transport in some provinces. These factors call into serious question the legitimacy of the parliamentary process thus far.  **CONCLUSION**  LARC is grateful for the opportunity to present comments on this important Bill, and would be amenable to requests for further details on our submissions if deemed necessary. |  |  |  |  |
| 25. | Western Cape Government | **Language and drafting practices** | The Bill requires language editing and formatting. Further, the Commonwealth conventions on legislative drafting apply to all forms of legislation, including Bills. The Bill does not comply with these conventions. Some of the errors or problematic drafting practices contained in the Bill are the following:   1. Superfluous words should be deleted, e.g. “the provisions of” in clause 3(2)*(c)*; 2. Provisos should be avoided, e.g. clause 4(3); and 3. Punctuation marks should be used correctly, e.g. clause 8(1)*(f)*.   The passive voice should be avoided throughout the Bill, and changed into the active voice in order to identify the person responsible.  Please note that these are not the only types of errors that appear in the Bill. Further, the provisions mentioned above are not the only provisions in which these or other errors appear. | The Bill should be amended to ensure consistency with accepted legislative drafting practices and Commonwealth conventions. |  |  |  |
|  |  | **Clause 1: Definitions** | The definition of “court” contains a cross-reference to section 166 of the Constitution. See our cover letter for a discussion of our concern in this regard. |  |  |  |  |
|  |  |  | * Paragraph *(a)* of the definition of “restorative justice” refers to an approach to the *resolution* of disputes that aims to involve all parties, families and community members to collectively identify and address harms, needs and obligations. However, the Bill only specifically provides for active involvement by the traditional leader and members of the traditional court. See discussion in our cover letter regarding presiding officers.   In addition, the entire definition is problematic as it contains substantive provisions. | Redraft the definition. |  |  |  |
|  |  |  | See our cover letter for a discussion of our concern regarding the definition of “traditional court”. |  |  |  |  |
|  |  |  | The definition of “traditional leader” is problematic as it refers the TLGFA, which will be repealed by the TKSLA when it commences. In the TKSLA, a distinction is made between traditional leaders (which is limited to “black” leaders), and Khoi-San leaders. As a result, all references to traditional leaders in the Bill will be to “black” leaders and will not include Khoi-San leaders. | Redraft the definition. |  |  |  |
|  |  |  | Definition of Traditional Leadership and Governance Framework Act: the TLGFA will be repealed as soon as the TKSLA commences. It is vitally important that this Bill is aligned to the TKSLA (the commencement of which is imminent). Referencing legislation which is about to be repealed is not good practice. | Align the Bill to the TKSLA. Also ensure that their commencement is aligned. |  |  |  |
|  |  | **Clause 2: Objects of Act** | Paragraph *(c)*: it is unclear whether a uniform approach is viable as there is a real possibility that the traditional justice systems of traditional (“black”) communities differ significantly from the traditional justice systems of Khoi-San communities. | Reconsider. |  |  |  |
|  |  |  | Paragraph *(b)*(iii) refers to the promotion and preservation of those traditions, customs and cultural practices that are beneficial to communities, in accordance with constitutional imperatives and values. As indicated in our cover letter, some communities argue that the traditional leaders and the system of traditional leadership reflect interference by the colonial and apartheid governments, and that they are not beneficial to communities. | Reconsider. |  |  |  |
|  |  | **Clause 3: Guiding principles** | It is recommended that clause 3 be reworded to state that in any proceeding before a traditional court, the principles *apply* (instead of *should* apply) and the factors set out *must* be recognised and taken into account, in order to specifically bind the traditional courts and their members. These provisions could then be combined with those in clause 6. | Reword clause 3 and consider combining it with clause 6. |  |  |  |
|  |  |  | Sub-clause (1)*(a)*(ii) provides for embracing the constitutional values, including the achievement of equality and advancement of human rights and freedoms. However, as stated above, the Bill limits a number of rights in the Bill of Rights, which means that this principle is not entirely adhered to in the rest of the Bill. | Align the remainder of the Bill with *all* the constitutional values. |  |  |  |
|  |  |  | Sub-clause (1)*(c)* states that development of skills and capacity of members of traditional courts is a principle. However, only clause 17(1)*(k)* refers to training, and states that regulations must be made relating to the training of traditional leaders and designated persons only, and not all members of traditional courts. | Detailed provision should be made for the compulsory training of all members of traditional courts. |  |  |  |
|  |  |  | Sub-clause (2)*(a)* refers to tribunals and forums, which are not defined in clause 1. | Define tribunals and forums in clause 1 and ensure references to these terms throughout the Bill. |  |  |  |
|  |  |  | Sub-clause (2)*(b)* limits the discrimination to that brought about by colonialism, apartheid and patriarchy. It is proposed that this limitation be deleted, as it does not add value and narrows the grounds of discrimination – e.g. negative attitudes towards sexual orientation cannot only be attributed to colonialism, apartheid or patriarchy. There may be other contributing factors. | Discrimination in a broader sense must be included. |  |  |  |
|  |  |  | Sub-clause (2)*(e)* refers to voluntarily subjecting oneself to customary law. This is not identical to opting in to the jurisdiction of a traditional court. The Bill currently provides that once a person has subjected him-/herself to customary law, he/she may not opt out of traditional court proceedings. It is, however, unclear when a person should subject him-/herself and how a person should go about to do this. If there isn’t a formal process to subject oneself, will this mean that all community members are deemed to subject themselves unless the contrary is clear? | Clarify what voluntarily subjecting oneself means. Provide for opting-out (see discussion in our cover letter). |  |  |  |
|  |  |  | Sub-clause (3) refers to Schedule 1, which lists conduct which is intended to illustrate and emphasise customs and practices which infringe on the dignity, equality and freedom of persons and which are prohibited. This sub-clause is not worded strongly enough. | In order for it to be an enforceable provision, it must be drafted in the active voice (identifying who is bound by it, e.g. all members of a traditional court), and should specifically state that they may not conduct themselves in a manner that results in such conduct (it must contain a prohibition). There should also be a link to an offences and penalties clause, which states that such conduct is an offence and what the penalty is. |  |  |  |
|  |  |  | Sub-clause (3)*(d)* states that the list of practices (conduct) must be considered and revised, but does not identify who the subject responsible is. | Redraft in active voice and identify the responsible person. |  |  |  |
|  |  | **Clause 4: Institution of proceedings in traditional courts** | Sub-clause (1)*(a)* states that any person may institute proceedings in respect of a dispute in any traditional court. This provision is very wide, and does not specify that the person instituting proceedings must have voluntarily subjected him-/herself to customary law (clause 3(2)*(e)*), and that he/she must institute it in the traditional court in whose area he/she resides / where the dispute originated / where the other party resides. The Bill is therefore not clear regarding jurisdiction. Jurisdiction regarding the parties involved is also unclear. | The jurisdiction of traditional courts should be spelled out in detail. |  |  |  |
|  |  |  | Sub-clause (1)*(b)* is specific in nature and should be moved to later in clause 4 or to clause 7. It currently states that *only* if the venue is moved, a traditional leader may delegate a person to preside over a session and indicate who may participate therein. It is unclear whether this was the intention. | Consider rephrasing the paragraph to empower the traditional leader to delegate even if the session is held at the ordinary place, as seems to be the intention in clause 5(1)*(b).* |  |  |  |
|  |  |  | Sub-clause (2)*(b)*: it is unclear what will happen if SAPS starts to investigate a matter, or proceedings in another court commences, after proceedings have already commenced in a traditional court. | Add provisions to clarify what will happen if SAPS starts to investigate a matter, or proceedings in another court commences, after proceedings have already commenced in a traditional court. |  |  |  |
|  |  |  | * Sub-clause (3): the word “traditional” should be inserted before “court” in the introductory part.   The meaning and status of “counselling, assisting or guiding” is unclear. | * Insert “traditional” before “court” in the introductory part.   The meaning and status of “counselling, assisting or guiding” should be clarified. |  |  |  |
|  |  |  | * Sub-clause (4)*(a)* states that justices of the peace must be appointed by the Minister specifically for purposes of this Bill. Until such appointment, the clerk will not be able to refer matters. * The Justices of the Peace and Commissioners of Oath Act should be defined as it is referred to more than once. * It seems as though there will not be any other repercussions if a party fails to attend the proceedings of a traditional court due to his/her own fault, except that the matter may then be transferred to the Magistrate’s Court.   There should be a cross-reference to clause 5(4) where the clerk of the court is first mentioned. | * Appointments should be finalised before the Bill, if enacted, commences. * Define the Justices of the Peace and Commissioners of Oath Act. * Clarify whether there will be any other repercussions.   Add cross-reference. |  |  |  |
|  |  | **Clause 5: Composition of and participation in traditional courts** | Sub-clause (2) should be worded more strongly to ensure that women are treated equally to men. | Reword. |  |  |  |
|  |  |  | * Sub-clause (3)*(a)*(i) refers to the voluntary participation of women, which *could* be interpreted as meaning that the Minister must put measures in place … to create an environment that promotes and facilitates … the voluntary participation of women - and that women would then be able opt out of proceedings of a traditional court.   “Minister” is defined in clause 1, and as a result, the references to “the Cabinet member…” must be deleted. | * Sub-clause (3)*(a)*(i) must be aligned to the rest of the Bill. As stated in our cover letter, the Bill should contain the option to opt-out to all parties involved.   Replace references to “the Cabinet member…” with “Minister”. |  |  |  |
|  |  |  | Sub-clause (3)*(b)*: Reference to the Constitution should include a specific reference to section 181(1)*(d)*, instead of to Chapter 9. | Add a specific reference to section 181(1)*(d)* of the Constitution. |  |  |  |
|  |  |  | Sub-clause (4)*(a)*: It is unclear who is responsible for the appointment, designation or secondment. | Amend to clarify who is responsible. |  |  |  |
|  |  |  | Sub-clause (4)*(b)* must be amended to refer to “*the* traditional court” in subparagraphs (ii) to (vi), as a particular clerk will only have responsibilities regarding the court where he or she works. | Amend in line with comment. |  |  |  |
|  |  |  | Sub-clauses (4)*(b)*(vi) and (vi) do not refer to tribunals and forums, as is the case in clause 3(2)*(a).* | Ensure consistency throughout the Bill. |  |  |  |
|  |  |  | * Sub-clause (5) states that before every session, the traditional leader must say the pledge. It is unclear why this has to be done before every session, and not just once (as is the case in other courts). It is also unclear why the oath in the Constitution is not used (see our cover letter).   The pledge relates to the promotion and protection of the values enshrined in the Constitution. Traditional leaders will therefore need to be trained regarding the Constitution, as well as the interpretation of law (see also clause 3(2)*(a)*). It must be kept in mind that some traditional leaders do not have legal qualifications.  This sub-clause only refers to the pledge, whilst the other clauses dealing with the pledge also provides for an affirmation. | * Reconsider the provisions dealing with the pledge. * Measures need to be put in place to ensure traditional leaders are trained before the Bill, if enacted, commences.   Ensure consistency. |  |  |  |
|  |  | **Clause 6: Nature of traditional courts** | * Sub-clause (3): as indicated in our cover letter, the levels of traditional courts are not applicable to the Khoi-San communities. The Bill should accommodate levels of courts in Khoi-San communities too in order to make the Bill’s implementation effective.   There should be a relationship between the definition of a traditional court and clause 6(3) so that it is clear that the term “traditional court” refers to any and all of these courts. The Bill does not contain detailed provisions relating to these different courts. | * List the different Khoi-San courts (if applicable).   Add detail regarding the different courts and amend the definition of a traditional court. |  |  |  |
|  |  | **Clause 7: Procedure in traditional courts** | Sub-clause (2): it is suggested that a reference to the Constitution be added after the reference to customary law and custom. | State that this is subject to the Constitution. |  |  |  |
|  |  |  | Sub-clause (2): it is unclear in which instances a summons will be issued, and in which a notice to attend will be issued. Clause 4(4)*(a)* refers to a summons, and clause 7(2) to a notice to attend. It is unclear what the difference is, if any. | Clarify the difference between a summons and a notice to attend. |  |  |  |
|  |  |  | Sub-clause (3)*(b)*(i): it is unclear what a fair hearing refers to. The right to a fair trial is enshrined in section 34(3) of the Constitution, which includes to be represented by a legal representative (which is not included in a “fair hearing” in terms of the Bill). See our cover letter in this regard. | It is suggested that the minimum contents of the right to fair hearing be set out, in line with the right to a fair trial in the Constitution. |  |  |  |
|  |  |  | Sub-clause (4)*(b)*: see our cover letter regarding the right to a fair trial.  In addition, it is unclear whether a person (A) can be represented by a person (B) who represents A in his/her personal capacity, but who by profession is a legal practitioner. | Clarify whether A can be represented by B who represents A in his/her personal capacity, but who by profession is a legal practitioner. |  |  |  |
|  |  |  | Sub-clause (5)*(b)*: it is unclear what will happen if the systems of customary law in subparagraphs (i) and (ii) differ. | Clarify which system will be used. |  |  |  |
|  |  |  | Sub-clause (6) should be amended to state that *sittings / proceedings* (instead of *traditional courts*) should be open to all members of the community. | Amend sub-clause (6) to state that *sittings / proceedings* should be open. |  |  |  |
|  |  |  | Sub-clause (7): it is unclear why the grounds in clause 3(2)*(b)* are not also included here, e.g. gender identity. | Clarify or amend sub-clause (7). |  |  |  |
|  |  |  | Sub-clause (10): it is unclear who must provide an interpreter, who will be responsible for remunerating him/her and whether he/she should have any qualifications. | Insert details regarding interpreters. |  |  |  |
|  |  |  | Sub-clause (11): It is unclear what these fees refer to – are they fees payable by the parties to the dispute? The Bill does not provide for the auditing of fees paid to the traditional court, the compulsory payment into a specific bank account, or details regarding what the money may be used for. See in this regard the TKSLA, in which provision is made for regulating monies. | Insert details regarding fees. |  |  |  |
|  |  |  | Sub-clause (12): “where appropriate” is vague and should be reworded. The member with the interest should not be the one to decide on whether or not he/she should withdraw. | Reword sub-clause (12). |  |  |  |
|  |  | **Clause 8: Orders that may be made by traditional courts** | Sub-clause (1)*(a)*: the words “in favour of the party who instituted proceedings in terms of section 4(1)” should be deleted, as it would limit the court in the sense that the traditional court would not be empowered to make an order in favour of the other party (e.g. if the traditional court finds that he/she in actual fact owes the other party money). | Delete wording. |  |  |  |
|  |  |  | Sub-clause (1)*(a)*: the words “expressed in monetary terms or otherwise, including livestock” in the sandwich provision is superfluous and can be deleted. | Delete wording. |  |  |  |
|  |  |  | * Sub-clause (1)*(b)*: the words “against whom proceedings were instituted in terms of section 4(1)” should be deleted, as it would limit the court in the sense that the traditional court would not be empowered to make an order in favour of that other party.   It is unclear why the paragraph contains a limitation (“for damage or pecuniary loss”) – this has the effect that benefits and services rendered by the convicted party would not be available to the aggrieved party in cases such as assault where compensation for damage or pecuniary loss is not applicable. | Delete and amend wording. |  |  |  |
|  |  |  | * Sub-clause (1)*(c)*: the words “against whom proceedings were instituted in terms of section 4(1)” should be deleted, as it would limit the court in the sense that it would not be empowered to make an order in favour of that party. * Consider adding a body or organisation as contemplated in paragraph *(a)*(iv) here as well. * It is unclear why consent of both parties is not required in paragraph *(c)* (as is the case in paragraph *(b)*). * It is unclear why the wording in the sandwich provision in paragraph *(c)* (“traditional leader or his or her family or to a person acting in an official capacity in that traditional court”) is different from that used in paragraph *(a)* (“a member of the traditional court or a traditional leader”) – words must be used consistently throughout the Bill.   The wording in sub-clause (1)*(a)*(iv) and (1)*(c)* should be identical (“member of the traditional court or a traditional leader” and “any person acting in an official capacity in that traditional court”). | * Delete wording.   Ensure consistency throughout the Bill. |  |  |  |
|  |  |  | Sub-clause (1): it is unclear why only some of the orders require consent by both parties or a voluntary settlement. | Ensure consistency throughout the Bill. |  |  |  |
|  |  |  | Sub-clause (1)*(i)*: it is unclear why the word “condition” is used instead of “order” as in the rest of this clause. | Ensure consistency throughout the Bill. |  |  |  |
|  |  |  | Sub-clause (1)*(k)*: it is unclear what “in which event the decision of the [NPA] prevails” means – e.g. if the NPA decides not to institute proceedings, will that also bar the traditional court from making another order? | Clarify what will happen if the NPA decides not to institute proceedings. |  |  |  |
|  |  | **Clause 9: Enforcement of orders of traditional courts** | * Sub-clause (4)*(a)* is contradicted by sub-clause (4)*(b)*(i). Paragraph *(a)* states that a referral may only be made if the non-compliance is found to be *due to the fault* of the party, but paragraph *(b)*(i) sets out what may happen if it is *not* due to his/her fault (in terms of paragraph *(a)*, the matter would not be referred to the Justice of the Peace in such circumstances).   Justices of the Peace and Commissioners of Oaths Act must be defined. | * Reword so that the paragraphs can be read together.   Add definition of Act. |  |  |  |
|  |  |  | Sub-clause (4)*(b)*(ii) provides that the Justice of the Peace will issue a summons – should he/she not recommend that a summons be issued by the clerk? | Clarify who will issue the summons. |  |  |  |
|  |  | **Clause 10: Provincial Traditional Court Registrars** | Sub-clause (1): clarification is required regarding the number of registrars per province. | Amend to state one registrar for each province. |  |  |  |
|  |  | **Clause 11: Review by High Court** | It should be clearly stated whether a matter may only be taken on review after conclusion of the matter by the traditional court. | Clarify exactly when a matter may be taken on review. |  |  |  |
|  |  |  | It is unclear whether all the High Court’s rules will apply. | Clarify whether all the court rules will apply. |  |  |  |
|  |  |  | Sub-clause (1) should be in the alphabetical order of the cross-references (start with subpara *(l)*, then *(a)*, etc.). | Re-arrange sub-clause (1). |  |  |  |
|  |  |  | Sub-clause (1)*(a)*: incorrect cross-reference – there is no section 4(3)*(f).* | Correct the cross-reference |  |  |  |
|  |  |  | Sub-clause (1)*(d)*: it is not necessary to repeat the provisions of clause 7(3)*(a)* here. | Delete wording. |  |  |  |
|  |  |  | Sub-clause (2)*(b)*: it is unclear whether the High Court should only have regard to the Constitution and the customary law of the area concerned, or also other applicable legislation. | Clarify. |  |  |  |
|  |  |  | Sub-clause (2)*(b)*(i): it is unclear whether this means that the High Court will be limited to order as contemplated in this Bill (and therefore not be able to make any other order it would otherwise be able to make). | Clarify. |  |  |  |
|  |  |  | Sub-clause (2)*(b)*(ii): it is unclear how the High Court would be able to correct the proceedings. | Clarify. |  |  |  |
|  |  |  | Sub-clause (2)*(b)*(iv): change “think” to “deem”. | Change wording. |  |  |  |
|  |  |  | Sub-clause (3): consistent use of words: change “determined in the regulations” to “as prescribed”. | Change wording. |  |  |  |
|  |  |  | Sub-clause (5): for clarity, change “the matter” to “every matter”. | Change wording. |  |  |  |
|  |  | **Clause 12: Referral of matters from traditional courts to Magistrates’ Courts** | It is unclear whether the Magistrates’ Court should only take into account the Constitution and customary law, or also other legislation. | Clarify. |  |  |  |
|  |  |  | The Magistrates’ Court is therefore the appeal court for these matters, and it is questionable whether such courts are suited to deal with appeals. | Reconsider Magistrates’ Courts as appeal bodies. |  |  |  |
|  |  |  | It is unclear whether all the Magistrates’ Courts rules will apply. | Clarify whether all the court rules will apply. |  |  |  |
|  |  |  | Sub-clause (1): it is unclear why there is a distinction between a decision and an order. | Clarify. |  |  |  |
|  |  | **Clause 13: Record of proceedings** | It is unclear who exactly is responsible for record-keeping. Should the clerk of the traditional court not be responsible for record-keeping? | Clarify. |  |  |  |
|  |  |  | Sub-clause (1)*(f)*: the wording is unclear and should be reworded. | Reword paragraph. |  |  |  |
|  |  |  | Sub-clause (2): vague wording “convenient” – it is unclear to whom it must be convenient. | Reword. |  |  |  |
|  |  | **Clause 14: Transfer of disputes** | Consistent use of words: clause 12 refers to matters, and clause 14 to disputes. | Ensure consistent use of words throughout the Bill. |  |  |  |
|  |  |  | * Sub-clause (1)*(b)*: It is unclear whether all the Magistrates’ Courts rules will apply. * It is unclear whether the Magistrates’ Court should only take into account the Constitution and customary law, or also other legislation.   It is also unclear why there is no reference to the Small Claims Court here. | * Clarify whether all the court rules will apply. * Clarify whether other legislation should be considered.   Consider adding a reference to the Small Claims Court. |  |  |  |
|  |  |  | Sub-clause (2): it seems as though this means that in every instance where a prosecutor, magistrate or commissioner of a small claims court is of the opinion that a criminal dispute is a matter in respect of which a traditional court has jurisdiction, he or she may facilitate the transfer, as paragraph *(a)*(i) is not repeated in paragraph *(b).* | Reconsider wording. |  |  |  |
|  |  | **Clause 16: Code of conduct and enforcement thereof** | Sub-clause (1): the wording is different to that used in the rest of the Bill (person who facilitates sessions on behalf of a traditional leader instead of person designated by a traditional leader). | Ensure consistent use of words in the entire Bill. |  |  |  |
|  |  |  | Sub-clause (5): it is unclear who is responsible for reporting. | Redraft in the active voice. |  |  |  |
|  |  |  | It is suggested that a duty clause be included here in sub-clause (5)*(a)* stating that every person who has a role … must comply with the Code. | Consider adding a duty clause. |  |  |  |
|  |  |  | * Sub-clause (6): It is unclear whether a member of the traditional court includes a clerk and interpreter – consider defining member of the traditional court.   It is unclear what will happen if a specific province does not have a provincial house of traditional leaders. | * Consider defining “member of a traditional court”.   Clarify. |  |  |  |
|  |  |  | Sub-clause (6)*(d)*: the National House of Traditional Leaders must also be able to specify to whom compensation must be paid | Add details. |  |  |  |
|  |  |  | * Sub-clause (6)*(f)*: paragraph *(g)* refers to rehabilitation, so it must also be included in paragraph *(f)*.   It is unclear who will pay for the training. | * Amend paragraph *(f).*   Clarify. |  |  |  |
|  |  |  | Sub-clause (6)*(g)*: it is unclear what rehabilitation refers to here and who will pay for it. | Clarify. |  |  |  |
|  |  |  | Sub-clause (6)*(h)*: it is suggested that guidance be provided, e.g. factors to be taken into account. | Provide factors to be taken into account. |  |  |  |
|  |  | **Clause 17: Regulations** | Sub-clause (1)*(g)*: it is unclear why reference is made to both decisions and orders. | If there should be a distinction, then this should be made clear in the rest of the Bill, and the terms should be defined. |  |  |  |
|  |  |  | Sub-clause (1)*(l)*: it is unclear what the role of paralegals and interns will be as this is the first time they are referred to (as well as cost-implications). | Add details regarding paralegals and interns. |  |  |  |
|  |  |  | Sub-clause (1)*(m)*: this must be discretionary. | Amend wording. |  |  |  |
|  |  |  | Not all the necessary cross-references are included, e.g. to clauses 5(3), 13(2). | Add cross-references. |  |  |  |
|  |  |  | A paragraph relating to “any matter that may or must be prescribed” is missing. | Add paragraph. |  |  |  |
|  |  | **Clause 18: Transitional provisions and repeal of laws** | Sub-clause (2): It is unclear whether sub-clause (3) also applies to sub-clause (2) matters that are pending. | Clarify. |  |  |  |
|  |  | **Schedule 1** | Vague wording: “tends to” must be replaced. | Replace wording. |  |  |  |
|  |  |  | * Paragraph *(a)* is a closed list – there may be other gender identities as well.   The reference to dignity is limiting and should be deleted in line with paragraphs *(d)* to *(f).* | Amend wording. |  |  |  |
|  |  |  | Paragraph *(c)*: why is this limited to elderly persons? Mental health conditions are not limited to older persons. | Delete reference to elderly persons. |  |  |  |
|  |  |  | Paragraph *(d)*: the limitation “on the basis of existing perceptions or beliefs” should be deleted. | Delete wording. |  |  |  |
|  |  |  | Replace “and” with “or”. | Replace wording. |  |  |  |
|  |  |  | As stated earlier, there is a need for a clear prohibitions clause in the body of the Bill, with an offences and penalties clause. | Add new clause in Bill. |  |  |  |
|  |  | **Schedule 2** | It is suggested that statistics of criminal offences should be provided to SAPS for inclusion in the crime statistics. | Add a substantive provision in the Bill which provides that statistics be shared with SAPS. |  |  |  |
|  |  |  | It is unclear what the impact of Government’s focus on gender-based violence (GBV) will be on the jurisdiction of traditional courts. | Clarify whether the traditional courts will have jurisdiction over GBV matters. |  |  |  |
|  |  |  | Paragraph *(d)*: It is unclear how the traditional court will be able to ascertain what the amount involved would be – this is clearly only an *attempt* – theft did not take place yet, so how can one determine the value of the property that the perpetrator had the *intention* to steal? | Reword paragraph *(d).* |  |  |  |
|  |  |  | * Paragraph *(g)*: clause 4(2)*(a)* refers to hearing and determining a matter, but paragraph *(g)* refers to advice. It is unclear what the meaning and status of advice is. This must be spelled out clearly, as important legislation such as the Children’s Act, 2005 (Act 38 of 2005) deals with this in detail (sub-paragraph (iv)), and the interests of the child is of paramount importance in any matter relating to a child.   The term “custody” has been replaced with “care” in the Children’s Act. | * Clarify.   Amend wording. |  |  |  |
|  |  |  | Paragraph *(h)*: rather move “and different amounts may be determined in respect of different categories of disputes” to clause 17 together with an empowering provision. | Move wording and amend. |  |  |  |
|  |  |  | Paragraph *(i)*: the meaning of altercation is not clear. | Clarify. |  |  |  |
|  |  |  | It can be argued that at least some of the traditional leaders will not be able to identify the elements of the different crimes set out in this Schedule, e.g. assault GBH. | As stated above, traditional leaders require detailed training before this Bill, if enacted, commences. |  |  |  |
|  |  |  | Disputes relating to communal land and the allocation thereof should specifically be excluded, as allocation is most often done by the traditional leader and he/she will therefore not be able to be impartial. | Specifically exclude communal land disputes. |  |  |  |
|  |  | **General** | The regulations must be finalised before the Bill, if enacted, can commence, as its effective implementation is dependant thereon – e.g. clauses 5(5), 10(1)*(b).* | Ensure the regulations are finalised before the Bill, if enacted, commences. |  |  |  |
|  |  |  | It is unclear whether the power to transfer a matter to the Magistrates’ Court as set out in clauses 4(4)*(b)*(ii) and 9(4)*(b)*(ii) is an order. If so, it must be included in clause 8. | Clarify and amend wording. |  |  |  |
|  |  |  | It is unclear whether administrative and other assistance will be provided by DoJ&CD. | Clarify. |  |  |  |
|  |  |  | From the informal briefing by DoJ&CD to the Standing Committee on 30/10/2019, it was clear that CoGTA will play certain roles but these are not set out in the Bill. | Set out the responsibilities of CoGTA. |  |  |  |
| 26. | Association for Rural Avdancement |  | INTRODUCTION: About the Association for Rural Advancement (“AFRA”)  AFRA is a land rights non-profit organisation based in Pietermaritzburg, KwaZulu-Natal. Between 1948 and 1982, about 450 000 people in rural Natal were forcibly removed from their homes and their land in terms of apartheid legislation. AFRA was started in 1979 to assist rural communities in their struggle against this. Since the election of a new democratic government in 1994, our work has assisted rural communities to try regain the land which they lost, and ensure that their land and development rights are upheld during these processes.  In 1995 the government showed its intention to correct land injustices when it introduced the  Land Reform Programme with its three key foci of redistribution, restitution and tenure reform.  However, two decades later, this process has not delivered what was expected of it, to the growing frustration of landless people. In spite of an apparent land transformation in South Africa, there is an increasing number of indigent people working in sub-human conditions on farms, going to sleep without any food, having limited or no access to basic services such as water and electricity, and living with no proper shelter.  AFRA is working to support marginalised black rural people, with a focus on farm dwellers,  towards an inclusive, gender equitable society where rights are valued, realised and protected, essential services are delivered, and land tenure is secure. We work intensively with communities in and around the uMgungundlovu District Municipality in KwaZulu-Natal, South Africa, and extensively in offering support and advice.  Our Vision is an inclusive and gender equitable society where rights are valued, realised and protected. Our Objective is to identify, promote and support pathways to achieve security of tenure and access to services. Our Development Goal is that the living conditions of rural people have improved, as they have secure land tenure and they are able to access services to improve their livelihoods.  Rights to land and resources are at the centre of the most pressing development issues: human rights, food security, gender equality, poverty reduction, climate change, and resilience. Land in KwaZulu-Natal – and South Africa – is conflicted, and the land rights and human rights of the poor are regularly undermined.  Our mandate accordingly necessitates that we ensure that the voices of rural people are heard in legislative and policy making processes. For this reason the following submission has been prepared for your consideration.  B. BACKGROUND AND INTEREST IN THE BILL  AFRA believes that an effective and legitimate system of traditional courts, which complies with the Constitution, is a key component for ensuring adequate access to justice for all South Africans. Accordingly, we are in principle supportive of legislation regulating traditional courts and which ensures that their procedures and operation comply with the Constitution. However, there are many shortcomings and pitfalls in the current Bill that must first be addressed in order to achieve this.  AFRA respectfully requests to be afforded an opportunity to make oral submissions to the Council on this Bill when it is appropriate. Moreover, in light of the short deadline afforded for these submissions, we request permission to supplement our submissions at the time if needs be.  During 2013/4 AFRA participated in a consultative process with a number of communities who were subject to the jurisdiction of traditional leaders in order to gauge their attitude towards the 2008 TCB. This has informed our engagement and submissions on the Bill in our current and prior submissions.  There is a clear need for regulation in the form of framework legislation because otherwise the status quo will remain. This presently means that establishment and existence of traditional courts is based on ss12&20 of the Black Administration Act. In addition, many communities voice concern over the fact that a number of traditional courts operate in the absence of any form of regulation and hence often act in an arbitrary and unjust manner. Thus communities have stressed the importance of enacting legislation that will vastly improve the status quo.  It is submitted that this legislation will only achieve this desired result if it addresses the concerns that have been levelled at the 2008 Bill. To this end AFRA has participated in the current consultative process in good faith and on the understanding that the underlying  framework of the Bill will take the form of the development of traditional courts along the lines  of voluntary alternative dispute resolution forums dating back to the manner in which these courts used to function in the pre-colonial and pre-apartheid eras.  C. SUBMISSIONS  AFRA’s Position on Key Issues, as informed by consultations with our constituencies:  1. One of the major concerns raised was that the Bill would vastly increase the powers of Senior  Traditional Leaders since they would be vested with extensive judicial powers (in addition to political and administrative powers they enjoyed in terms of such legislation as the TLGF Act etc.) Many communities and individual members were concerned that this would entrench abuse of power that was currently a reality in many traditional areas.  2. On the other hand civil society (and many specific NGOs with which AFRA engaged over this  issue) voiced concern over the fact that the exercise of judicial powers by traditional leaders  violated the underlying doctrine of separation of powers and hence, if challenged, would be determined to be unconstitutional.  3. Another widespread criticism levelled at the TCB during this process was that the Bill consolidated all judicial powers in the Senior Traditional Leaders thereby marginalising other courts such as Headmen’s courts etc.  4. No opt-out clause: when the 2017 version of the Bill was first introduced, it contained an  “opt-out” clause at 4(3), along with protections for individuals who wish to exercise their right to elect not to proceed in the traditional court. This section has now been removed, and this presents serious problems. It undermines the voluntary nature of customary law and creates a mandatory second tier system of law for those residing in traditional territories.  This is the main cause of concern that emerged from our consultation process: that both communities and civil society alike were overwhelmingly of the opinion that the traditional courts system should operate on a voluntary basis thereby giving participants the option to opt out of any process should they wish. Ensuring that this process is entirely voluntary will address the criticism that the TCB sought to entrench boundaries of the apartheid era Bantustan system. This is because the system would be available to all individuals who voluntarily subscribe to traditional customary law and who consent to a particular dispute being settled in terms of this system.  D. RECOMMENDATIONS  The following are, at minimum, recommended changes to the Bill that must be applied to make the  Traditional Courts Act constitutionally compliant:  1. Traditional courts should be focused on mediation and conciliation, and their judicial powers should be clearly defined and circumscribed.  2. The “opt-out” clause that was present in the B1 2017 version of the Bill must be restored.  We once again thank the Council for the opportunity to make submissions and look forward to hearing from you about the future conduct of the hearings. |  |  |  |  |
| 27. | Legal Resource Centre |  | These submissions will proceed as follows:  Our position on the key issues in the Bill that must be addressed by the Council;  Our recommendations to address these key issues;  Additional clause-by-clause commentary on the Bill;  The statutory and factual context in which the Bill exists; and  A review of the criticisms levelled at the 2008 and 2012 Bills, and whether they have been adequately addressed.  **The LRC’s Position on Key Issues** The LRC’s primary concerns with the Bill can be summarized as follows:  Costs: the Bill will have an impact on government budgets because of the hiring of new clerks, the instituting of new procedures, and potentially increased need for legal aid. The LRC is concerned that the National government has not accurately costed the implementation of the bill.  No opt-out clause: when the 2017 version of the Bill was first introduced, it contained an “opt-out” clause at 4(3), along with protections for individuals who wish to exercise their right to elect not to proceed in the traditional court. This section has now been removed, and this presents serious problems. It undermines the voluntary nature of customary law and creates a mandatory second tier system of law for those residing in traditional territories.  The Traditional Court’s power to counsel: in clause 4(3)(a), the Bill states that a traditional court can advise, assist or guide a party to a dispute, even in the absence of another party. Given that these are powers currently unknown to courts in South Africa and not clearly delineated in the Bill, they potentially undermine both the procedural and substantive fairness of proceedings in traditional courts.  Separation of powers: The Bill lacks any consideration of the separation of powers, which is a pertinent principle enshrined in the Constitution. The distinct separation between the three arms of government being the executive, judiciary and legislature is important for upholding principles of accountability, openness and responsiveness. There are also no checks and balances on the powers granted to traditional leaders in terms of the Bill. These powers grant unilateral authority to act as legislators, administrators, and judges of customary law. This, at the very least, will not inspire confidence in parties appearing before the courts that they are impartial, with impartiality being another judicial principle enshrined in the Constitution. Traditional courts will also have the power to deal with cases of a civil and criminal nature.1 It is necessary for the legislature to consider the Bill in its entirety in line with the principle of separation of powers to ensure it is constitutionally viable.  We would like to acknowledge the Law Society of South Africa, who raised this issue in their submissions on the Traditional Courts Bill, B1-2012 and subsequently brought it to our attention. The issue is just as relevant today as it was then.  9.5. Denial of legal representation: Legal representatives are not allowed to participate in proceedings through the operation of section 7 (4)(b) of the Bill. The right to legal representation is provided for in the Constitution, and preventing this will deny many persons the right to a fair trial. | The following are, at minimum, recommended changes to the Bill that must be applied to make the Traditional Courts Act constitutionally compliant.  11. Any order of the traditional court in terms of the Act must be reviewable by the magistrates’ court even if all traditional court system procedures have not been exhausted. The court may then  11.1. Confirm such an order in whole or in part;  11.2. Set aside such order in whole or in part  11.3. Substitute such order in whole or in part; and  11.4. Remit the case to the traditional court with directions to deal with any matter in such a manner as the magistrates’ court may think fit, taking into account the tradition and customary law practiced in the area.  12. In each traditional court there must be assessors who are legally qualified, to ensure that the rights contained in the Bill of Rights are not transgressed in the course of traditional court proceedings.  13. Traditional courts should be focused on mediation and conciliation, and their judicial powers should be clearly defined and circumscribed.  14. The “opt-out” clause that was present in the B1 2017 version of the Bill must be restored.  15. The Traditional Court’s power to counsel and advise should be clearly defined in the Schedules.  16. Criminal matters should be removed from the jurisdiction of the traditional court in Schedule 2.  17. Section 7(4)(b) should be removed, and replaced with a provision that compels the traditional court to advise parties of their right to legal representation.  **Clause By Clause Commentary**  18. Besides the key issues highlighted above, we wish to make additional submissions on specific clauses that we find problematic.  19. Paragraph 3(2)(e): This paragraph states that “*a founding value on which customary law is premised, is that its application is accessible to those who voluntarily subject themselves to that set of laws and customs.*” [emphasis added]. As was mentioned above, the removal of the opt-out clause is incompatible with this principle. There is nothing voluntary about subjecting those living in traditional territories to imposed and inescapable jurisdiction of traditional courts.  20. Paragraph 4(3)(a) provides the procedure for summoning a person to appear before the traditional court. It is unclear how people will be summoned, whether written summons will be served, by whom, and how.  21. Paragraph 7(3)(b) states that “*the following rules of natural justice are adhered to: (i) That persons who may be affected by a decision must be given a fair hearing by the traditional court before the decision is made; and (ii) that any decision by the traditional court must be impartial.*” [emphasis added] For a hearing to be fair, this entails four principles. First, a party to an enquiry must be afforded an opportunity to state his or her case before a decision is reached, if such a decision is likely to affect his or her rights or legitimate expectations. Secondly, prejudicial facts must be communicated to the person who may be affected by the decision, in order to enable him or her to rebut such facts. Thirdly, the rule also stipulates that the tribunal (traditional court) which has taken the decision must give reasons for its decision. Fourthly, the rule entails that the traditional court exercising the discretion must be impartial. It is not clear in the Bill whether people will be given an opportunity to state their case, examine, lead evidence, cross-examine, and file closing arguments. Without these, the right to a fair hearing is severely compromised.  22. Paragraph 7(5)(a) states that “*Where two or more different systems of customary law may be applicable in a dispute before a traditional court, the traditional court must apply the system of customary law that the parties expressly agree should apply*.” In situations where there is no consensus, it is unclear which system of customary law should be applied.  23. Subclause 7(10) provides that: “*If any of the parties does not understand the language used in the traditional court, an interpreter must be provided.*” It is not clear who covers the costs of the interpreter.  24. Subclause 8(1)*:* This subclause lists the types of orders that may be made after deliberating on a dispute before it. The section refers to orders made in terms of monetary loss or otherwise, including loss of livestock. However, the phrase “proven financial loss” does not provide any guidance on how it may be proved. We would like clarity on what factors are to be taken into account, and whether experts will be allowed in the traditional courts.  24.1. The traditional courts can also make orders directing a party who cannot provide financial compensation to perform “without remuneration some form of service” to the offended party per paragraph 8(1)(c). This section  is highly problematic and an infringement of section 13 of the Constitution which prohibits servitude and forced labour.  24.2. Paragraph 8(1)(d) allows for “*an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of*.” This power is functionally equivalent to forcing “*specific performance without an alternative for payment of damages*” within the meaning of section 46(2)(c) of the Magistrates’ Courts Act 32 of 1944. This provision appears to grant traditional courts powers beyond that of the Magistrates’ Court.  24.3. Paragraph 8(1)(h) allows for “*an order that a party attends any form of training, orientation or rehabilitation that is consistent with the relevant customary law…the Constitution and this Act and does not include any form of detention or deprivation of any customary law benefits*.” It is unclear how the costs of training, orientation or rehabilitation will be covered. Is it provided by the offending party? The Traditional Court ?  24.4. Paragraph 8(1)(i) allows for “*an order requiring any party to the dispute to make regular progress reports to the traditional court regarding compliance with any condition imposed by the traditional court”.* This provision raises the question of whether traditional courts will be, or should be allowed to grant structural interdicts in the form of supervisory orders.  25. Clause 9 of the Bill gives the clerk of traditional courts wide powers including certain judicial powers. For example, subclause 9(2) states that: “*The clerk must inquire into or cause to be inquired into the reasons for non-compliance with the order and make a determination as to whether the non-compliance was due to fault on the part of the party against whom the order was made*.” [emphasis added] This power to make a determination is a judicial power that exceeds the other prescribed duties of a clerk of the traditional court.  26. Subclause 10(1) states that “*The role, functions and responsibilities of Provincial Court Registrars are as may be prescribed, in addition to the following… (b) referring and reporting on cases of public interest, in the prescribed circumstances*  *and prescribed manner, to the High Court having jurisdiction for review in order to contribute to jurisprudence or enhance the reform of customary law*” [emphasis added]. The procedure for referring or initiating cases to the High Court is either by way of application or by way of action. Following these procedures requires legal training and qualifications. It is not clear whether traditional court registrars will be legally trained and qualified, if they will be assisted by the court clerks, or otherwise.  27. Subclause 11(1) states that “*A party to any proceedings in a traditional court may, in the prescribed manner and period, take those proceedings on review to a division of the High Court having jurisdiction on any of the following grounds*.” Litigation in the High Court is expensive, complicated and adversarial. It requires people with legal training, and it is unclear whether legal aid will be provided to people taking matters on review to the High Court. We are also concerned with the limited grounds of review available in the High Court, as they are primarily procedural. Key grounds of review such as suspected bias are also absent from the enumerated list.  28. Paragraph 14(1)(a) states that “*If a traditional court is of the opinion that a dispute before it is not a matter which it is competent to deal with, as contemplated in section 4, or if the matter involves difficult or complex questions of law or fact that should be dealt with in a Magistrate’s Court or small claims court or if it is a matter as contemplated in section 4(4)(b)(ii) or section 9(4)(b)(ii), the traditional court may, in the prescribed manner, transfer such dispute to the Magistrate’s Court or small claims court having jurisdiction and notify the parties to the dispute of the transfer*.” [emphasis added]. As in subclause 10(1), above, this determination should be made by someone with legal training, and a traditional leader or member of the traditional council would not necessarily be qualified to do so. Once referred, it is also not clear whether normal Magistrate’s Courts procedures would then be followed. If so, who will represent the parties and who will pay for that representation?  29. Schedule 2 gives the traditional court powers to deal with criminal matters such as malicious damage to property, assault, *crimen injuria*, abduction etc. We strenuously object to providing traditional courts with jurisdiction over criminal matters.  **The Statutory and Factual Context**  30. This Bill will operate within the legal framework created by the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”) and the provincial pieces of legislation enacted within this framework. When the Deputy Minister of Justice and Constitutional Development introduced this Bill to the Portfolio Committee on Justice and Correctional Services in 2017, he insisted that the Bill should be evaluated on its own and that the criticism of the Framework Act is irrelevant to this process.  31. We respectfully and strenuously disagree. This Bill explicitly relies on the Framework Act in its definition of traditional leader. Tied to the definition of traditional leader in the Framework Act are the definition of the traditional community concerned, its boundaries, and the identity of the traditional council concerned.  32. If the Bill was intended not to be read in conjunction with the Framework Act, it would have said so explicitly. Instead, it is silent on jurisdictional boundaries, presumably importing it from other legislation. It is difficult to envision any court operating in the absence of jurisdictional boundaries. The Framework Act, and the boundaries it entrenches, are squarely at the center of the Bill currently before NCOP. In the circumstances, we must at least point to the significant problems these boundaries present.  33. The genesis of the problem lies in the Framework Act and the policy decision2 that despite the fact that the traditional boundaries inherited in 1994 were largely the result of colonial and apartheid architecture and covered all the former homeland areas, the regulation of traditional leadership under the Constitution will continue to  2 The draft White Paper on Traditional Leadership published in 2003 still indicated that the then Department of Land Affairs would determine (presumably new) boundaries of traditional community areas. The final White Paper omits this paragraph and is silent on how boundaries will be determined. However, when the Framework Act was debated in parliament, the understanding was that every community would freshly apply for recognition and the determination of its of its boundaries in terms of section 2 of the Act. However, the transitional provision, entrenching the boundaries drawn in terms of the Bantu Authorities Act of 1951 and contained in section 24 of the Act, was slipped in at the last moment with massive repercussions.  use those same boundaries.3 This problem is exacerbated by, in some cases, the imposition of illegitimate traditional leaders on the basis of their sympathy towards the apartheid government.  3 The Framework Act deems the boundaries established in terms of the Bantu Authorities Act of 1951 to be the default boundaries for Traditional Council jurisdictional areas, and converts existing tribal authorities into “new” traditional councils provided they include a minority of women and “elected” members.  34. This approach was particularly ironic given that the Department of Justice itself elaborated on this unfortunate history in its 1999 Executive Summary of the Status Quo Report on Traditional Leaders and Institutions. This report (at page 5) refers to the problems of grouping together “communities belonging to different tribes to form a tribal authority”, and the resultant widespread boundary disputes.  35. The Framework Act did attempt to create a mechanism whereby communities or individuals could lodge complaints about what they considered as illegitimate leaders or boundaries. This, in theory, would allow South African’s living on Traditional lands under an illegitimate or corrupt leader to seek redress under the Framework Act. This mechanism was called the Commission on Traditional Leadership Disputes and Claims and was initially a national commission. However, it soon became clear that the Commission, commonly referred to as the Nhlapo Commission, would never even scratch the surface of the vast number of disputes lodged. As a result, provincial committees were established to deal with disputes at a provincial level. These committees remain overwhelmed to this day, five to ten years into their mandates. In Limpopo alone, the provincial government announced that more than 500 boundary and leadership disputes were lodged. None of these have been settled. In other provinces where the committees have come to some decisions, the committees are commonly viewed as politically captured because of their deference to the status quo and the problematic research and reasoning on which they rely. As a result, grievances about imposed boundaries and leaders remain widespread. This state of affairs undermines the legitimacy of the current traditional leadership framework and thus the Traditional Courts themselves.  36. The ineffectiveness of the Nhlapo Commission points to a larger problem with the Framework Act and its subordinate provincial legislation: neither that Act nor any of the provincial pieces of legislation provide for a single mechanism for an ordinary community member to personally hold a leader to account if that leader acts in  contravention of customary law or of the provisions of any of the relevant pieces of legislation. Worse still, the mechanisms that exist under customary law are negated by these statutes and therefore can also not be relied upon. That places ordinary community members in a particularly vulnerable position.  37. In light of the lack of enforcement and accountability mechanisms, the Bill before this Council must be considered in context. The duty of the legislature is in particular to protect the rights and interests of those most vulnerable. While there is thus no doubt that countless traditional leaders are serving their communities with honour and that thousands of people feel themselves at home within their traditional boundaries, the Bill should specifically ensure the safety of the many people not in that position and be structured with them in mind.  38. In order to illustrate the point, we wish to describe an actual situation involving a vulnerable person who suffered abuse from a traditional leader he did not recognize. The LRC was involved. We will not use the real names of people and places in order to protect their identity (please read full submission attached).  39. The test for the Bill currently before the Council must be *whether it will protect Mr. Madunba and others in similar situations*. The LRC is of the view that the Bill before the Council is insufficient in providing the necessary protections for vulnerable people within traditional communities.  40. Lastly, we wish to draw attention to the recent signing of the Traditional Khoisan Leadership Bill. The TKLB was passed despite extensive protests from multiple sectors of civil society including high profile bodies such as the Nelson Mandela Foundation. The Bill robs millions of people living in rural areas of their fundamental rights and grants even more power to unelected traditional leaders. We fear that the TKLB, alongside this Bill, will act together to devastate the rights of those living on traditional lands.  **The 2008 and 2012 Traditional Courts Bill**  41. While the version of the Bill before this council differs greatly from the earlier versions, it is helpful to revisit the analyses of the earlier Bills in evaluating the Bill before us.  42. We remind this Council that the 2012 Bill never made it through Parliament. It was rejected repeatedly by community members, academics and lawyers at the hearings held, and yet the Portfolio Committee on Justice was never able to meaningfully engage with those submissions. Rather, the committee as it was allowed the Bill to lapse. It is critical that this Council learns from the failures of both the 2008 and 2012 processes and design a fresh process that is constitutionally compliant.  43. Below are comments on the adequacy of the Bill now before the Council in light of criticisms of the previous versions:  (a) The imposition of statutorily recognised structures in place of existing customary structures  44. We submitted in 2012 that the old version of the Bill failed because it superimposed statutorily recognised structures in place of the many institutions currently engaged in customary dispute resolution processes. In ignoring and overriding the courts that operate at village, council and family level, the Bill undermined the dynamics that mediate power and contribute to accountability in rural areas. In doing so, it also subsumed and undermined courts that are in some instances used and supported by people who dispute the legitimacy of the boundaries of their communities.  45. Fortunately, the new Bill recognises in the preamble the existence of other structures often at lower levels like the family, ward or village level.4 This is significant. However, important questions remain, such as:  45.1. The wording of the recognition of the other levels of dispute resolution suggests that those are not regarded as courts (see Preamble). That would imply that this Bill only applies to what the Bill defines as courts. None of the protection will thus extend to the lower levels of dispute resolution. Given that by far the most disputes are heard in those fora, this poses an obvious problem.  45.2. In fact, it appears that the Bill may just be paying lip-service to its recognition of the lower level for a, by creating a hierarchy in status between chief, headman, and queen/king ‘courts’ and lower level mechanisms not regarded as ‘courts’. The basis for this distinction appears to be arbitrary, unless it is based on the principle of empowering statutorily recognised traditional leaders5 which was a severe criticism of previous versions of the Bill.  45.3. The issue is further confused by Clause 6(3). In a previous version of the Bill, this clause provided that “the traditional court system is made up of such different levels as are recognised in terms of customary law and custom.” However, the language has now been changed to “The traditional court system is made up of the following levels of traditional leadership as contemplated in the [Framework Act] and recognised in terms of customary law: (a) a headman or headwoman’s court; (b) a senior traditional leader’s court; and (c) a king or queen’s court, where available.” While this clarifies that any other fora is definitively *not a court* in terms of the Bill, this creates a new problem in that the protections in the Bill only apply to this narrow subset of courts that have been recognized by statute.  (b) The protection of women  46. We were further concerned about discrimination against women in many customary and traditional courts. We were of the view that legislation concerning customary courts should take particular care to avoid entrenching patriarchal power relations and to provide practical mechanisms towards the realization of substantive equality for women in the context of traditional courts.  47. The 2017 Bill makes an effort at writing express protections for women into the provisions of the Bill. For example, it provides that:  47.1. Traditional Courts must promote and protect the representation and participation of women, as parties and members thereof (5(2));  The relevant Minister must put measures in place to ensure such promotion and protection happens, and must report to Parliament about the measures taken (5(3)(a));  47.2. The Gender Commission must report to Parliament on the participation of women in traditional courts (5(3)(b)).  48. There must remain a concern, however, as to the implementation of these measures. It is suggested that the protection of women can only be effective if, at a minimum, there is an “opt out” provision present in the Bill. Since this provision has been removed from the last version of the Bill, this substantially weakens the protections for women and other vulnerable groups present in the Bill.  (c) Entrenching and empowering apartheid boundaries  49. The LRC was deeply concerned about how the 2012 Bill entrenched the controversial tribal authority boundaries already discussed, and recognised only senior traditional leaders and those of royal blood as presiding officers.  50. These concerns are not at all addressed in the current Bill. We explained why above. The provision of an “opt out” clause would have provided some relief in this regard, as it would ameliorate the difficulties of people summoned to the court of a chief they don’t recognize. Consider the example of Mr. Madunba above. The Bill currently confirms the illegitimate boundaries that he was trying to resist, but at least an opt out clause would have allowed him to refuse the summonses to the traditional court.  51. The reinforcing of apartheid boundaries means that people like Mr. Madunba would be unable to voluntarily affiliate with the community, custom and leadership structure which he recognises. The default is still that he is captured within an illegitimate boundary and the onus remains on him to take steps to remove himself from the situation and the jurisdiction of the court. Clearly within the context of Mr. Madunba’s situation described above, it will not be a simple task and may well open him up to retaliation. The Bill is silent on how such retaliation may be addressed.  52. Thus, while the principle of “voluntary affiliation” is recognised as fundamental to customary law, it is not respected in the latest version of the Bill itself.  (d) State sanctioned coercive powers  53. The 2012 Bill provided formally appointed traditional leaders with state-sanctioned coercive powers to force people who live within a court’s jurisdictional boundary but who also reject its legitimacy to appear before it, and authorized the court to strip them of their customary entitlements to land, water or community membership and to perform forced labour. The strong objection that the LRC had to this approach was not merely based on constitutional principles, but on the actual experiences of clients who are continuing to endure this very treatment in provinces such as Limpopo and the North West where apartheid traditional courts legislation created these very powers.  54. The lack of an “opt-out” clause means that this concern which also existed in the 2012 Bill has not been addressed. The Bill itself is coercive because it forces those residing in traditional territories to resolve disputes through a separate legal system in a way that is undemocratic and unconstitutional.  (e) Customary law is contested  55. Critically, the LRC submitted that the 2008 and 2012 Bills failed to recognize that the content of customary law is contested in many areas, particularly between traditional leaders and ordinary people. By centralizing power in the hands of traditional leaders, the Bill enabled traditional leaders to enforce controversial versions of customary law that favour their interests and downplay the customary entitlements of subjects (e.g. land rights and rights to participate in decision-making processes). In this regard, there were indications that the Bill seeks to enforce customary law not by the innate legitimacy of traditional courts and the acceptance of customary law, but by the traditional leaders’ own interpretation and coercive measures.  56. The LRC reiterates the fact that customary law and its contents remain deeply contested. That has two major implications for the Bill:  56.1. It challenges this Council to ensure that it develops a nuanced understanding of these contestations and ensures that the Bill does not exacerbate contestations or, more serious still, curb the potential for customary law to develop to become and remain in line with the Constitution and the needs of the community concerned.  56.2. Secondly, it highlights the fact that the customary law that will be applied by the courts regulated by this Bill, will often itself be contested. At present, the Bill gives no guidance whatsoever as to how traditional courts must deal with this question. The Constitutional Court, in *Shilubana*, set out clear principles for establishing the contents of customary law. The Bill must require the application of these principles in establishing the customary law that will be applied (at least in cases where there is a dispute over the contents of the applicable customary law).  (f) Other Concerns  57. Other particular concerns raised by the LRC in 2012 included:  57.1. The drafters of the Bill had failed to take into account the reality of the way that traditional courts are currently exercising judicial powers and functions. In particular, the LRC argued that the drafters of the bill had taken a “top-down” approach to the institutional arrangements made in the Bill, rather than building on structures that already exist. The process in drafting the 2017 Bill has not changed significantly, and is this is still a problem.  57.2. The 2012 Bill seriously jeopardized the realization of the constitutional imperative, contained in section 39(2), of the development of customary law by courts of law. The development of customary law is relegated to a separate court system ruled by traditional leaders as the exclusive creators and adjudicators of customary law. Because the 2017 Bill maintains this separation, this problem has not been addressed. |  |  |  |
| 28. | Council of the Nguni People OFFICE OF PRINCIPAL TRADITIONAL LEADER: LUNGELO. NOKWAZA |  | The legislation is most welcomed. It is viewed as an important legislation aimed at repealing previous apartheid era legislation regulation functioning of Traditional Courts in South Africa. The legislation promotes restorative justice and reconciliation. Its aim is to ensure that disputes relating to traditional, customary and cultural issues are resolved in a manner that promotes social harmony and community cohesion.  On the basis that in the Western Cape the Nguni traditional leadership is not covered by legislation recognising traditional leadership in South Africa as well as no Provincial House of Traditional Leaders, it is propose that the legislation should vest authority to the Premier of the Western Cape to determine through consultation with traditional leaders of communities that practice aspects outlined in Schedule 2(g) of the Traditional Courts Bill how Traditional Courts will be constituted in these communities.  The authority to be vested on the Premier of the Western Cape should enable him / her to proclaim the process and criteria of establishing Traditional Courts in communities that practice their cultures and traditions as stipulated in Schedule 2. |  |  |  |  |
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