**SUMMARY OF COMMENTS: NEGOTIATING MANDATES**

**TRADITIONAL COURTS BILL**

**[B 1B-2017]**

The table below contains a summary of submissions received from the Legislatures of all nine provinces.

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| **CLAUSE/THEME** | **COMMENTATOR** | **SUBMISSION/RECOMMENDATION** | **RESPONSES BY THE DEPARTMENT** |
| **Preamble** | Northern Cape Provincial Legislature | Amend Preamble by inserting underlined words as follows: And further recognising that customary law plays an integral role in the resolution of disputes in communities between members of those communities and to apply the accepted practices and customs applicable in those communities. | (a) This proposal is not supported. There is no doubt that traditional courts apply customs applicable, but empirical research has not been done to determine the level of acceptance of those practices and customs. It has been argued that customs are only acceptable to certain members of the community who subscribe to customary law. A preamble explains the underlying philosophy for the legislation, the words proposed will not add anything new to the Preamble. |
| **Clause 1:****Definitions** | Northern Cape Provincial Legislature | Define traditional leader as follows: "traditional leader" to mean a person who has been recognised as a king or queen, principal traditional leader, senior traditional leader or headman or headwoman and includes regents, acting traditional leaders and deputy traditional leaders” | (a) The definition of a “traditional leader” as contained in the Bill is aligned to the definition as it was contained in the Traditional Leadership and Governance Framework Act, 2003, then. TheTraditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019) amended this definition as the proposal suggests. The Department has no objection to revising the definition as suggested. |
| Limpopo Legislature | (a) Traditional court is a competent court and should be accorded its status as intended. Therefore it is proposed that it be defined as follows: **“traditional court”** means every court including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the applicable legislation”.(b) The Bill should define “customary law”.(c) The definition of restorative justice is too long. Delete sub-paragraph (b) from the definition of "restorative justice" | (a) The proposed definition is not supported. The proposed definition is a transitional definition that was used to define courts in the Constitution. While the definition is a general one it is necessary to define every court by the role it performs. (b) The Department does not support the proposal that the words customary law be defined. It is deemed prudent that the word be given its ordinary meaning in order to avoid disagreements among stakeholders as to the correct meaning of customary law. There is no disagreement regarding the meaning of customary law. Since customary law is largely unwritten, defining the words will only lead to disagreements. (c) The wording is necessary in order to define the parameters of restorative justice. It is not justifiable to delete the wording merely because the definition is too long. The wording is necessary for completeness. |
| **Clause 2:****Objects of Act** | Northern Cape Provincial Legislature | (a) Customary courts are accessible to all people, it should not be a choice as these people are already observing and practising customary law, tradition and respect their customs and practices.(b) Traditional court and/or institution of traditional leadership is not a voluntary association and should be accorded with respect it deserves by government and its institutions. Traditional court should thus be accorded the status and respect of a competent court. | (a) It is accepted that traditional courts are accessible to anyone who wants to use them. However, this should be understood in the context of sections 30 and 31 of the Constitution. Section 30 provides that everyone has the right to use the language and participate in the cultural life of their choice. Section 31 affords persons the right to belong to a cultural, religious or linguistic community to enjoy their culture, practice religion and the use of their language and to form, join and maintain cultural, religious or linguistic associations and other organs of civil society. These rights must be exercised in a manner that is not inconsistent with the Bill of Rights. These sections already give persons a choice in practicing their culture, and do not impose a duty on them.(b) Noted. See (a) above. Furthermore, Item 16 of Schedule 6 of the Constitution already recognizes traditional courts and that these courts continue to function and exercise jurisdiction in terms of the legislation applicable to it.  |
| Gauteng Legislature | Monitoring mechanisms must be put in the Bill to ensure constitutional compliance/consistency with constitutional principles. | There are a number of provisions in the Bill that ensures that traditional courts are monitored. These are: Clause 16 of the Bill deals with the Code of Conduct which will be used to deal with the accountability of members of the traditional court. The Bill also provides for the role of a Provincial Registrar who will be responsible, among others, for monitoring of traditional courts. |
| **Clause 3:****Guiding principles** | Gauteng Legislature | (a) Training and development of skills and capacity of members of traditional courts should also be extended to include members of traditional courts in and outside traditional community areas.(b) Clause 3(2)(c) should be amended to add "in consultation with the National House of Traditional Leaders".(c) Clause 3(2)(e) must be rejected because it allows voluntarism to approach magistrate court. It is equal to opting-out through back door. If the aggrieved party approaches a traditional court, the offender should not have an option whether to attend the traditional court or not as this will render traditional courts powerless. | (a) All members of the traditional court will need to be trained on the application of the Bill. The Bill does not limit the training to only members in the traditional community. However, the training must be focused on persons who need the training in order to deal with the disputes, and to those who have to develop customary law. It will not serve any purpose to train persons who will not use the skill acquired to implement the Bill. Any attempt to train everyone will result in wasted expenditure. The training should target persons who need it and who will utilise it so that value for money is realized, but it also necessary to cover everyone who will be instrumental is applying the Bill, and not only traditional leaders . The regulations will provide more detail on the content of the necessary training.(b) The proposal seem to be relevant to the contents of clause 3(3)(c).Existing legislation already caters for this suggestion. Section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), already requires that the National House of Traditional Leaders should be consulted on any legislation pertaining to customary law or customs of traditional communities. Even in the development stage of legislation, the Department consults the National House of Traditional Leaders as a matter of course. (c) The other view is that because the traditional justice system is, and always has been, voluntary in nature, parties should have the right to opt out of and into the system. |
| Eastern Cape Provincial Legislature | Clause 3(2)(e) is equivalent to “opting-out" which has been removed from the current version of the Bill. | Sections 30 and 31 of the Constitution already grant persons this choice. Section 30 provides that everyone has the right to use the language and participate in the cultural life of their choice. Section 31 affords persons the right to belong to a cultural, religious or linguistic community to enjoy their culture, practice religion and the use of their language and to form, join and maintain cultural, religious or linguistic associations and other organs of civil society. These rights must be exercised in a manner that is not inconsistent with the Bill of Rights. These sections already give persons a choice in practicing their culture, and do not impose a duty on them. Clause 3(2)(e) only reinforces what is already provided for in the supreme law of the country. |
| Limpopo Legislature | The Bill does not provide legal protection for any person against being discriminated against in various forms. | The Bill sets out some examples of conduct which is specifically prohibited because it infringes on the dignity, equality and freedom of vulnerable persons. The Bill does provide for the right for a party aggrieved by a decision or order of the traditional court to appeal to the Magistrates’ court. |
| **Clause 4:****Institution of proceedings in traditional courts** | Northern Cape Provincial Legislature | (a) The Bill is silent about who investigates the allegations brought before it.(b) Traditional leaders and the clerks should be empowered to handle and manage lawlessness especially drug related cases and corrupt foreign nationals who sell drugs. | (a) The Bill does not aim for the traditional courts to change the way they have been practicing the custom except to the extent that it is against the spirit of the Constitution. Police do not have any role to play in traditional courts, unless a matter is referred to them because the traditional court does not have the powers or jurisdiction to deal with the dispute. The Bill does not aim to change customary law.(b) Matters relating to drugs and drug trafficking are dealt with in dedicated Statutes and are complicated matters that need targeted investigation by the South African Police Service. The traditional court will not be able to impose sentences, including that of imprisonment, applicable for offences relating to drug trafficking. If the members of the community become aware of the unlawfulness relating to these matters they can take part in dealing with crime by reporting them to the police so that they can be thoroughly investigated and perpetrators punished accordingly. |
| Limpopo Legislature | (a) All cases must be heard and dealt with within the traditional area where the offences were committed;(b) A traditional court should only hold its sessions where its sessions ordinarily take place as this might be an inconvenience to some community members. Traditional courts should take place only at *Moshates* and nowhere else. | (a) It has been argued that the Bill should avoid the concept of “jurisdiction” as far as possible. The consultation process during the development of the Bill indicated that stakeholders were opposed to the entrenchment of apartheid boundaries and that the Bill should allow persons to institute their claim anywhere they wish. This is so because a party will have some connection with the court at which he or she registered their claim. This will allow persons living in close proximity to a traditional community to use these courts should they wish.(b) The Bill specifically provides in clause 4(1)(b) that the while the court has a place where it ordinarily holds its sessions, it extends this by allowing a court to be held at another place to assist those members of the traditional community who may be far away from his or her area of residence, and in the urban area, to hold the sessions of the court under the guidance of a person delegated by the traditional leader to preside over such a matter. |
| Mpumalanga Provincial Legislature | (a) Add the following in clause 4(2)(a)(iii) as follows:“anyone who resides within the area of jurisdiction of that traditional council is bound by the laws of that area. The case cannot be heard to another area of jurisdiction.(b) Clause 4(3)(a), provides that a traditional court can advise, assist or guide a party to a dispute, even in the absence of another party. These powers potentially undermine both the procedural and substantive fairness of proceedings in traditional courts, considering that they are currently unknown to courts in South Africa and not clearly delineated in the Bill,(c) Clause 4(4)(a) of the Bill undermines powers of the traditional leaders by allowing justice of the peace to deal with parties that fail to appear before the court. (d) The Bill must provide for imposition of fines where a person ignores the summons by offending parties. | (a) Such a provision will be problematic. It has been emphasized that people opt into and out of a system. It also needs to be understood that even if people maybe residing in a traditional community not all of them subscribe to customary law and particularly the traditional justice system, and that those who do not subscribe to customary law will prefer to use the conventional courts. Another concern has been raised with the latter part of the recommendation is that confining people to certain areas entrench the Bantustan boundaries.(b) This provision is aimed at assisting a party where the court is not going to deal with a dispute but rather to give the party that approaches it some support. The procedure will not be undermined as the court will not be dealing with the matter. It can be as simple as advising the complainant of which forum to take the dispute. It is deemed necessary in order not to turn people away without any assistance.(c) Noted. The role of Justices of the Peace is to enforce orders of traditional courts. They will only get involved when there is non-compliance with court orders. Because the traditional justice system is essentially about promoting restorative justice and social cohesion, the role of the justice of the peace will be useful in brokering the cooperation of the person involved in complying with the order. (d) Because the traditional justice system is essentially about promoting restorative justice and social cohesion, it has been argued that traditional courts should not have the power to impose retributive sanctions. The imposition of fines does not resonate with the notion of restorative justice which is the premise of the Bill. Furthermore it has been argued that fines will need to be dealt with in terms of the Public Finance Management Act, 1999, and that this will create an enormous administrative burden. Engagements on the Bill have supported the view that these courts should only be able to make awards that are aimed at restoring and healing the relations between the parties, thereby promoting social cohesion. |
| Western Cape Provincial Parliament | (a) The Bill has a potential to unconstitutionally vesting the legislative, executive and judicial powers in traditional leaders.(b) The Bill places traditional leaders in an autocratic position and such power could be abused which is contrary to restorative justice.(c) The Bill does not stipulate how conflict of interest is to be managed and monitored by external parties. | (a) The Bill does not seek to concentrate the power to resolve disputes on the traditional leader as a judicial officer. A traditional leader is not a judicial officer and the Bill does not aim to bestow them this role. Their role as traditional leaders is discharged in line with “participatory justice” where any member of the community can take part in the proceedings of the court in terms of customary law. Therefore, it is the traditional leader together with the community who sit to deal with disputes. The administration of justice in traditional courts is also not a judicial function, and traditional leaders are not judicial officers.The traditional leader can also delegate powers to convene a court to another person or group of people.(b) The Bill does not seek to concentrate the power to resolve disputes on the traditional leader as a judicial officer. Resolution of disputes is achieved through “participatory justice” where any member of the community is free to take part. (c) Clause 7(12) deals with conflict of interest, and a member of the court must declare their interest in the matter before court and where appropriate must withdraw from participating in a matter. |
| **Clause 5:****Composition and participation** | Gauteng Legislature | There should be gender parity of 50/50 representation in traditional courts. | It has been argued thatbecause of the socialisation of women regarding their role in traditional courts the imposition of quotas for the representation of women in the traditional court will be an impediment in their participation in these courts and therefore not t practicable. The thrust of the provisions on representivity is to encourage and promote equality, including requiring measures to be put in place to achieve the set goals in this regard as contemplated in clause 5(3)(b). This will ensure that there is progressive realisation of the participation of women in these courts. Concerns have been raised that imposing quotas at this stage will hamstring the functioning of the traditional courts. |
| Northern Cape Provincial Legislature | The Bill is silent on security of presiding officials during court proceedings. | The security of members of the court should not be a concern because the Bill is premised on restorative justice, and the cooperation of parties is of importance as they choose to use the system. |
| Limpopo Legislature | The Bill should provide for a messenger who will be responsible for serving summons issued by the traditional court. | The Bill does not aim to establish courts, but rather to regulate the functioning of traditional courts by aligning their functioning with the principles of the Constitution. Because of the lack of funds and the fact that available resources should be used to run the traditional court, every effort has been made to ensure that processes continue to run as they have been and that there is a sharing of resources, for example court should continue to serve processes the way they have been. |
| Free State Legislature | (a) Traditional leaders should not be subjected to saying a pledge.(b) The Bill provides no specific legal protection for any person against being discriminated against on the grounds of race, gender, sexual orientation or religion, neither in the composition of the court, nor in the rulings of the court.The Bill is supported subject to the deletion of the word “women” in clause 5 and replacing it with the words “any person” and the word “non-sexism” in clause 3with “non-discrimination based on the grounds of race gender sexual orientation or religion” | (a) The saying of the pledge is necessary as it has the effect of taking oath of office. Other options such as taking the oath were considered but found to be impracticable as an oath has to be taken before a commissioner of Oaths and this seemed impracticable as members of the court change frequently. The saying of the pledge is necessary for whoever applies the provisions of the Bill to be reminded that they need to comply with its provisions. (b) The guiding principles in clause 3 andprotection to persons with vulnerabilities in clause 5 provide much needed protection to parties in the traditional court as members of the court or as parties. It is necessary to specify the rights of women so that the protection of women stands out in the Bill. Calls have been made for the Bill to protect the rights of women in these courts. The latter part of the recommendation is also not supported as all the principles covered in the clause relate to non-discrimination. |
| Eastern Cape Provincial Legislature | (a) There is no legal protection in the Bill for a person who suffers discrimination in the traditional court.(b) Traditional courts should be adequately funded in order for them to be integrated into the court system.(c) Clause 5(5) of the Bill is not clear in terms of who will be responsible to administering the pledge. | (a) Clauses 3, 5, 6 and Schedule 1 provide much needed protection to any person appearing before or using the services rendered by traditional courts. The Bill also envisages a role for paralegals and interns in the traditional courts. These functionaries, together with the envisaged training of those involved in traditional courts will be instrumental in ensuring that the rights of participants are upheld.(b) Noted. The Bill has been costed. It is not possible at this stage to integrate the traditional justice system into the conventional courts system because the two systems function differently.(c) It has been argued that the membership of the court changes from time to time, and for this reason it is advisable that members make a pledge every time the court is convened to ensure that all members have made the pledge at all times hence clause 5(5). The regulations will provide more detail in this regard. |
| Northern Cape (Hanesab leader) | (a) Using Botswana as a benchmark, the Bill should make provision for a traditional court to have a secretary to assist the clerk of the traditional court as in our opinion the work is too much for the clerk of the traditional court to manage on their own. Also, an interpreter must be appointed on a permanent basis at each traditional court. The compensation for presiding officers and staff of the court must be budgeted for.(b)Amend clause 5(*a*) as follows: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 of the presiding officer who will be the traditional leader. | (a) It is important to note that the Bill is not mirrored on the Botswana traditional court system. The traditional justice system uses a different value system to the conventional system. The Bill is not intended to change the way traditional courts function but to align their functioning with the Constitution. (b) This proposal is not supported as it will be imposing system that is foreign to the parties thereby severely violating the rights of parties.  |
| Mpumalanga Provincial Legislature | (a) Clause 5(3)(*b*) should be amended to require the National House of Traditional Leaders to also report to Parliament each year, report on the participation of women and the promotion of gender equality in traditional courts and may, to this end, make recommendations on legislative and other measures.(b) Clause 5(4) should be amended to provide for the clerk of a traditional court to be appointed after consultation with the Provincial House of Traditional Leaders appointed, designated from Traditional Council concern and for the clerk of the court to be capacitated after the Act has been enacted for them to perform their duties efficiently. The current staff of traditional institutions should be given preference during the appointment process. | (a) The Commission for Gender Equality is better placed report to Parliament as it has the mandate to promote gender equality. In working the report the CGE will by all means need the input of the National House of Traditional Leaders. When legislation is prepared the National House will be consulted as a matter of course and also as required by the Rules of Parliament.(b) The clerk of a traditional court will be appointed, designated or seconded in accordance with the laws governing the public service, as such it will not be possible that they are appointed after consultation with the Provincial House of Traditional Leaders, as the clerks of court will be public service officials, and appointed in terms of the regulations governing appointments in the Public Service. |
| **Clause 6:****Nature of traditional courts** | Gauteng Legislature | The status of traditional courts should be the same as that of the judicial courts where same powers are exercised. | Clause 6 of the Bill outlines the nature of the traditional courts. These courts are courts of law the purpose of which is to promote the equitable and fair resolution of certain disputes, in a manner that is underpinned by the value system applicable in customary law and custom subject to the Constitution. Section 34 of the Constitution recognises that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. traditional courts qualify for classification under this section, so they are recognized in the Constitution. These courts are also recognized under Item 16 of schedule 6 of the Constitution. What is of importance is the nature of these courts. |
| Limpopo Legislature | Amend this clause by adding the following words:“Traditional courts should create enabling environment to community members for successful resolution of conflicts.” | The Bill already does this in clause 3 containing the guiding principles and in clause 7 dealing with the procedure in the court. |
| KwaZulu-Natal Provincial Parliament | (a) Safety at traditional courts is a huge concern.(b) The addition below is proposed: **Appeals from the decision of the traditional courts with leave of the traditional court****6A** Powers of the king or queen’scourt on hearing appeals:6A(1) the king or queen’s court exercising appeal jurisdiction may-1. Hear and determine the appeals

from the traditional courts;(b) Receive further evidence;(c) Remit the matter or the case to the traditional court whose decision is subject of the appeal for further hearing with such instruction as regards the taking of further evidence otherwise as the king or queen’s court deems necessary; and(d) Confirm, amend or set aside the decision which is the subject of the appeal and make any decision which the circumstances may require.6A(2) Other disputes the king or queen’s court may have jurisdiction on:The king or queen’s court exercising jurisdiction may, in addition to any power as may specifically be provided for in this Act or in any other law-1. hear and determine

disputes arising from traditional law and custom referred to it by an individual, the Premier or the MEC responsible for the traditional affairs, for consideration over:1. traditional leadership;
2. boundaries between traditional

communities within a particular kingship or queenship concerned;(iii) succession or inheritance;(iv) payment or return of *lobolo*;(v) or related to:(aa) altercation between the members of traditional leadership;(bb) damages for seduction;(cc) witchcraft; and (dd) defamation of character. | (a) The security of members of the court should not be a concern because the Bill is premised on restorative justice, and the cooperation of parties is of importance as they choose to use the system to resolve their disputes. Because the traditional court mediates between the parties, this by its nature makes the appearance at the court voluntary. This is due to the fact that the court apply restorative justice methods aimed at restoring the relations between the parties, maintenance of peace and social cohesion.(b) The Bill is pitched at the level of the court of the traditional leader. As the Bill does not aim to change customary law, the king’s or queen’s court should be able to deal with appeals the way they have been. It is not known whether the proposal covers the handling of appeals by kings and queens in all communities where they exist, or whether there are any disparities, in which case there must be comprehensive consultation. As for other disputes that king or queen’s court may have jurisdiction on, it is not clear whether such a court will be a court of first instance in respect of thesematters. The Department is of the view that if the king or queen’s court will be the court of first instance then the provision will be misplaced in the Bill and that they could be best dealt with in its own piece of legislation, because the Bill does not cover the proposed scope. |
| MpumalangaProvincial Legislature | (a) The Bill must accommodate the hierarchy of traditional institutions for dealing with cases and appeals.(b) The Court of a Principal Traditional Leader must be provided for in clause 6(3) by insertion of the levels Court of a Principal Traditional Leader. | (a) As the Bill does not aim to change customary law and also recognizes the levels of traditional leadership, the Bill does not preclude the courts from operating the way they have been other than to align their functioning with the values of the Constitution.(b) The levels of the traditional leadership as stated in the Bill are the levels as they existed in the Traditional Leadership and Governance Framework Act, 2004 at the time of drafting of the Bill. The Traditional and Khoi-San Leadership Act now provides for this level. Therefore,the Department has no objection to revising Clause 6 in order to recognise the level of principal traditional leader.  |
| **Clause 7:****Procedure in traditional courts** | Eastern Cape Provincial Legislature | Legal representation in the traditional court is required. | The retention of the purist character of the traditional justice system obviates the need for legal representation which is unsuited for dispute resolution in the traditional justice system. A person in the traditional court may be represented by any person of his or her choice as provided in clause 7(4)(a). Traditional courts providefor easy access to justice because of their proximity to communities and are cost effective, cheaper and offer speedy resolution of disputes. The expeditious nature of these courts can be frustrated by protracted legal arguments which will also diminish the simplicity and flexibility of this system. Affordability and the need for interpretation services can also complicate the functioning of these courts if legal representation is allowed. A view is held that legal representation is unsuited to this system. It has been argued that the disputes that are brought to these courts are simple and do not need the complicated legal arguments This is not unique to this system as legal representation is also not permitted in small claims court. It is critical that the dynamism of the system is maintained for the benefit of those who use it.  |
| Limpopo Legislature | There is a need for legal representation in the courts for fair decision of cases so that the court’s rulings can be appealed. | See above. A person can still escalate their matter to the magistrate’s court in terms of clause 12 after exhausting all traditional court system appeal procedures available in terms of customary law as contemplated in clause 6(3). The added benefit is that magistrate will hear a matter afresh. |
| Free State Legislature | Prohibition of legal representation is in conflict with the right to a fair trial and administration of justice. | There will be no trial in the traditional court as the traditional justice system is restorative in nature. The operation of traditional courts need to be differentiated from that of conventional courts as even a person against whom a complaint is made is assisted by the court. |
| KwaZulu-Natal Provincial Parliament | Legal representation in the traditional court should be allowed so that parties can have a fair hearing | See above. In addition allowing for legal representation in the traditional courts will be costly, will burden the courts with unusual legal technicalities which will prolong the proceedings, and impede access to justice. |
| North West Provincial Legislature | (a) Prohibition of legal representation is not supported.(b) Women and children must be empowered and afforded opportunities in the proceedings of the traditional courts. | (a) See above. Further, a party can be represented by any person of his or her choice as highlighted in section 7(4)(a). The use of legal practitioners will take away the benefits of a speedy, cheap and accessible system.(b) The Bill in section 5(3)(a)(ii) provides for measures to be put in place in order to promote and protect vulnerable persons, the representation and participation of women.The Bill requires the Commission for Gender Equality toreport to Parliament on the participation of women and the promotion of gender equality in traditional courts. The Bill also envisages a role for paralegals and interns in the traditional courts. These officials will be instrumental in ensuring that the traditional courts are made aware of the rights of persons with vulnerabilities and how the court should deal with such persons.  |
| Western Cape Provincial Parliament | Clause 7(6) and (8) are inconsistent with legislation that protects the rights of children to testify in camera. | (a) Clause 7 requires the court to take the vulnerabilities of persons including children into consideration when applying the Bill. The Bill also envisages a role for paralegals and interns in the traditional courts who will be able to assist and guide the court when it deals with children. The persons who implement the Bill will also be trained on the rights of persons with vulnerabilities, including children. A view is held that the children will be better off when their problematic conduct is dealt with in the traditional court so that they do not acquire criminal records early in their youth and their conduct can be better corrected in the traditional court. |
| **Clause 8:** **Orders that may be made** | Gauteng Legislature | The consent of both parties should be obtained before an order to perform services in lieu of compensation is ordered. | Noted. This is what the Bill aims to achieve through social cohesion, applying restorative justice. |
| KwaZulu-Natal Provincial Parliament | The Bill should allow the imposition of fines as it may serve as a deterrent. In order to avoid abuse, the amounts that can be imposed as fines should be regulated. | Because the traditional justice system is essentially about promoting restorative justice and social cohesion, and imposition of punitive sanctions such as fines vitiates the nature of traditional courts. |
| Western Cape Provincial Legislature | Fees payable to a traditional court will create an opportunity for corruption and might limit access to justice for those unable to pay. | It has been argued that the fees of the traditional court will be very minimal. The regulations will provide more detail on how the fees must be dealt with. |
|  | Mpumalanga Provincial Legislature | (a) Corporal punishment, banishment and cruel, inhuman and degrading punishment should be explicitly excluded from the permissible orders listed in clause 8 of the Bill.(b) 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).(c) 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.(d) Clause 8(1)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.(e) 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.(f) 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.(g) 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?(h) 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 | (a) These are not provided for as orders that the court may make under the Bill.(b) The Bill is premised on restorative justice and maintenance of harmony in communities. Consent of the parties is a basic tenet of restorative justice. (c) The aim of these orders is to restore the person who suffered the loss to the position they were in before the loss, it is specifically for the damage suffered. This is in order to mitigate the complainant’s loss.(d) The disputes which the traditional courts may deal with are not the type that will require experts to prove. The loss can be proven in anyway of presenting evidence, such as receipts, witnesses, etc(e) This will be based on consent, in order to achieve restorative justice. This is a known order at customary law, above all the parties consent to the order.(f) These are customary law orders which are considered to foster peace making between the parties. This will be based on consent, in order to achieve restorative justice. This is equivalent to a reprimand.(g) This will be covered by the party against whom a complaint is made. The rehabilitation will also be beneficial to the offending party. It cannot be expected that the traditional court will have funds to cover such an expense, if any. This may even not involve any expenses as it may be in the form of the peers of the offending party giving him or her lessons. (h) It is important to note that customary law does not have the strict formalities, all the parties will be interested in the resolution of the dispute, and the realisation of peace and harmony. This has been done in the court and can take the form of an oral report |
| Northern Cape Haneseb | (a) Clause 8(1)(a)(iv) the clause is not acceptable because all bodies or organisations will be connected to a member of the Traditional Court or the Traditional leader as the community members appearing in the court will be either direct or extended family members.(b) Clause 8(1)(c)(ii) ‘provided that no service whatsoever…’ This clause is unacceptable because the traditional leader or his or her family or to any person acting in an official capacity in that traditional court, will be family as well as the community will be members of the extended Kruiper community.(c) Clause 8(3) to be amended as follows:A traditional court may order that any payment contemplated in subsection (1) or part thereof be paid to a person injured by an act or omission for which the payment was imposed, unconditionally and may bring an action in any court in order to recover damages for the injury he or she sustained. | (a) Clause 7(12) deals with conflict of interest, and a member of the court must declare their interest in the matter before court and where appropriate must withdraw from participating in a matter.(b) See above.(c) This will be unfair as it will be amounting to punishing a party twice for the same act or omission. This is not permitted by rules of natural justice. If the traditional court resolves a matter a party cannot take the same resolved matter to other courts to be processed again.  |
| **Clause 9:****Enforcement of orders** | Gauteng Legislature | The enforcement procedure in clause 9(4) of the Bill should be clarified, preferably to align it with a procedure contained in clause 4(4).  | Noted. Clauses 4(4) and 9(4) give guidance on the enforcement procedure to be followed. The clerk of the court will refer the issue of non-compliance to the peace officer who will then deal with the matter in terms of the processes available under the Justice of the Peace and Commissioners of Oath Act, 1963. |
| Limpopo Legislature | Permitting appeals to the magistrates’ courts will result in traditional courts being undermined. | (a) The referral of the matter to the magistrate’s court under clause 12 is necessary as a built-in safeguard in respect of the protection of rights of an individual. This provision is necessary especially where a party who did not want to appear in a traditional court was not given an option not to and they feel that their matter was not dealt with fairly and to their satisfaction. |
| KwaZulu-Natal Provincial Parliament | It is not clear how enforcement of orders will be dealt with especially where there is non-compliance due to the court being undermined. | The Bill provides for the scenario where a party who, after being summoned to appear in a traditional court, willfully fails to so appear, in clear contempt of the court. The clerk of the court must make a determination to this effect and then refer the matter to a justice of the peace. Clauses 4(4) and 9(4) outline the procedure to be followed in enforcing compliance with the orders of the traditional court. |
| **Clause 10:Provincial Traditional Court Registrars** | Mpumalanga Provincial Legislature | (a) In order to ensure that matters before the traditional court are treated with the necessary urgency and professionalism that it requires, the following insertion is proposed:The new position will ensure that all districts have a regional registrar who will report to the Provincial Registrar. The duties of the regional registrar should amongst others review with recommendations all matters that must be reviewed by the High Court. The regional registrar should study all matters that were decided by the traditional court and advise the provincial registrar accordingly on those issues to be referred to the High Court. The regional registrar would be appointed in the same manner as the provincial registrar.(b) Traditional court registrars will be legally trained and qualified, if they will be assisted by the court clerks, or otherwise. 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 not clear whether normal Magistrate’s Courts procedures would be followed. If so, who will represent the parties and who will pay for that representation? | (a) The issue of personnel in the office of the Provincial Registrar could be looked into once an evaluation of the work is done. The Registrar will have personnel assisting him but a determination of that could be done at a later stage by the Provincial Registrar himself or herself.(b) One of the functions of the Registrar will be to guide and supervise the courts. Clause 14(1)(*b*) provides that if the matter is transferred to the Magistrate's Court, the Magistrate's Court must commence the proceedings afresh, thus applying the rules of procedure as applicable in that court. If a party needs legal representation, such a party will apply for legal aid as a matter of course in proceedings in the Magistrate's Court. |
| **Clause 11:****Review by High Court** | Gauteng Legislature | The Bill should provide for legal aid where persons want to file for a review. | It is submitted that nothing precludes a person who wants to have a matter reviewed to apply for legal aid. |
| Limpopo Legislature | There is no need for the Bill to provide for review process because there will be no cost implications in the adjudication of cases in traditional courts, and traditional leaders would have been provided with training. The involvement of the high court is not necessary. | The provision offers a remedy in instances where a party to any proceedings in a traditional court is aggrieved by the manner in which proceedings were carried out. It will assist in developing jurisprudence relating to customary law. The right to have a decision reviewed is a constitutional right and cannot be excluded. |
| Western Cape Provincial Parliament | It is proposed that grounds for review be expanded to include all matters pertaining to the application of formal and procedural law during proceedings. | Review has a very specific purpose in law, which is for another court to consider whether there were procedural shortcomings in dealing with the matter. |
| Northern Cape Haneseb | Amend clause 7(6) as follows: The proceedings of the traditional court were not open to all members of the extended Kruiper community. | It is difficult for the Department to make an informed decision without the information of why the court should not be open to all members of the community, and which members of the community will not be allowed in the court and under what circumstances. The Bill will be a law of general application and it cannot have a provision preventing other people not to aces the court. Concerns have been raised in the past of women being prevented from accessing the court in certain communities, which cannot be permitted |
| Mpumalanga Provincial Legislature | (a) 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.(b) The grounds of review are limited and are as they are primarily procedural. Key grounds of review such as suspected bias are absent from the enumerated list.(c) 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.(d) 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.(e) 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. | (a) Nothing precludes a person who wants to have a matter reviewed to apply for legal aid.(b) Legally matters are taken on review only on grounds of procedural deficiencies. The last ground on the Bill, on which matters may be taken on review is a catch- all phrase which will cover any procedural shortcoming even those listed in the Bill.(c) The right to opt out of the traditional justice system was removed from the Bill in the Portfolio Committee. In order to give parties some protection clause 12 was then inserted in the Bill. This clause provides for a right for a party aggrieved by a decision or order of the traditional court to refer a matter to the Magistrates’ Court after exhausting all traditional justice system appeal procedures. The Magistrates’ Court may then give any order or decision it deems competent to give.(d) The duties of the clerk of a traditional court, as highlighted in clause 5(4)(b) of the Bill, are mainly administrative in nature. The clerk of the court will be acting outside the confines of the Bill as the Bill does not provide for parties to elect whether to attend court or not. A safeguard mechanism is contained in clauses 11 and 12 of the Bill that will ensure added protection to the rights of participants in the Traditional court.(e) The Bill does not provide for the right to opt out of the system, so this cannot be a ground for review. The ground relating to the conduct of the court where a person has been intimidated is covered in paragraph clause 11(1)(m). |
| **Clause 12:****Referral of matters** | Eastern Cape Provincial Legislature | The Bill should provide for an appeal structure within the traditional justice system so that referral of cases to the magistrates ’court is avoided. | The Bill, in clause 12(1), does not prohibit parties from escalating the matters to different levels of the traditional court system as they exist at customary law before approaching the magistrates’ courts. This is a constitutional right which cannot be denied to a party that feels their rights are infringed. |
| Western Cape Provincial Legislature | (a) Requirement that a compelling reason must exist before a matter will be allowed to be withdrawn or abandoned is unconstitutional.(b) The Bill should provide for an appeal process. | (a) The Bill does not contain such a provision. The Bill contains Schedules 1 and 2 which help in determining matters that can be heard or not in the traditional courts.(b) Clause 12(1) provides for referral of matters from the traditional courts to Magistrates’ Courts effectively which is an appeal process. An aggrieved party can refer the matter to the magistrate’s court under thisclause of the Bill. |
| KwaZulu-Natal Provincial Parliament | Amend clause as follows:**“12.** A party aggrieved by a decision or order of a traditional court on grounds other than those referred to in section 11(1) may, after exhausting all traditional court system appeal procedures available in terms of customary law in section 6(3) where the envisaged traditional appeal institution exist, refer that decision or order to the Magistrate’s Court having jurisdiction, in the prescribed manner and period.”. | Clause 6 already recognises the levels of traditional justice system as they may be available in certain communities. As the Bill does not aim to change customary law, the communities where kings and queens exist will continue to use the levels as they know them to exist in their areas. The fact that the clause references clause 6(3) suffices, including that the clause mentions kings and queens where they are available. |
| Limpopo Legislature | The Bill must provide for the establishment of appeal structure in senior traditional leader’s jurisdictions. There must be a structure that looks into appeals so that by all means magistrate courts are avoided. | As the Bill does not aim to change customary law, the courts should be able to deal with appeals the way they have been. The referral to magistrate’s courts cannot be avoided as parties have the right to have their disputes adjudicated by any court |
| Free State | Clause 12 of the Bill allows for the referral of matters from the traditional court to the magistrate's court by an aggrieved party, but only after the party in question has exhausted all traditional court appeal procedures available in terms of customary law.The Magistrates’ Court alternative is costly and could further frustrate the aggrieved party who never wanted to be part of this system in the first place. This is in contravention of Clause 3 which states: A founding value of customary law is that its application is accessible to those persons who voluntarily subject themselves to that set of laws and customs.Persons should not be permitted to opt out of the traditional court system. | This provision will be beneficial to a party who never wanted their matter dealt with in the traditional court but could not make that choice. Such a person will be able to have another forum adjudicate the matter if they are aggrieved by the decision or order of the traditional court |
| Mpumalanga Provincial Legislature | (a) 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; Confirm such an order in whole or in part; Set aside such order in whole or in part; Substitute such order in whole or in part; and 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.(b) 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.(c) The Bill as introduced into Parliament provided for the right of persons to be able to opt out of the traditional justice system. This provision has now been deleted from the Bill, and this presents serious problems. The deletion of this provision undermines the voluntary nature of customary law and creates a mandatory second tier system of law for those residing in traditional communities | (a) Noted. However,a review must be carried out after the conclusion of a matter. This Bill is pitched at the level of a court of a traditional leader. So dispute resolution at other levels such as headman/woman level will not result in review, but only if an order is made at the level of the traditional court level. Dispute resolution at other levels is not regulated in terms of this Bill and thus parties are not precluded from taking their disputes to those levels. It is also possible for a party to take their matter directly to the traditional court, without having started at other levels. It is important to note that resolution of disputes in terms of customary law is to prevent conflict and maintain harmony, using restorative justice. The parties need to be sensitised about this when bringing matters to the traditional court. (b) It has been emphasised that in a traditional court the traditional leader does not operate like a judicial officer in a conventional court deciding cases, and that he or she acts in concert with other people.It has been pointed out that even other people in the court make a contribution to the proceedings. Based on this, a traditional court system does not lend itself to the use of assessors. The members of the court will be trained on the application of the Bill. The Bill of Rights is one important area where they will need to be trained. The regulations will provide more detail on the content of training.(c) The right to opt out of the traditional justice system was removed from the Bill in the Portfolio Committee. In order to give parties some protection clause 12 was then inserted in the Bill. This clause provides for a right for a party aggrieved by a decision or order of the traditional court to refer a matter to the Magistrates’ Court after exhausting all traditional justice system appeal procedures. The Magistrates’ Court may then give any order or decision it deems competent to give. |
| **Clause 13:****Record proceedings** | Limpopo Legislature | Clause 13(1)(h), related to taking of a pledge, must be deleted from the Bill. | The saying of the pledge is necessary in order as it has the effect of taking oath of office. Other options such as taking the oath were considered but found to be impracticable as an oath has to be taken before a commissioner of Oaths and this seemed impracticable as members of the court change frequently. The saying of the pledge is necessary for whoever applies the provisions of the Bill to be reminded that they need to comply with the provisions. |
| **Clause 14:****Transfer of disputes** | Western Cape Provincial Legislature | There are no mechanisms in the Bill to guide and monitor a relationship between the traditional courts and SAPS. | There should be no involvement of the police in traditional courts as these courts are premised on restorative justice. Nothing precludes the court from summoning the police if a crime is committed and the court does not have jurisdiction. |
| Mpumalanga Provincial Legislature | (a) Clause 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." 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. (b) It is also not clear whether once referred, normal Magistrate's Courts procedures would then be followed. If so, who will represent the parties and who will pay for that representation? | (a) The court has a Schedule which contains a list of disputes that a traditional court may deal with, this should guide the court in determining the matters they may need to refer. Also, one of the functions of the Traditional Court Registrar is to guide and supervise the courts. Therefore where the court is in doubt, the Registrar will be of assistance. (b) Clause 14(1)(*b*) provides that if the matter is transferred to the Magistrate's Court, the Magistrate's Court must commence the proceedings afresh, thus applying the rules of procedure as applicable in that court. If a party needs legal representation, such a party will apply for legal aid as a matter of course in proceedings in the Magistrate's Court. |
| **Clause 15:****Limitation of liability** | Limpopo Legislature | ”Limitation of Liability” should be substituted with “indemnity” | The Bill absolves members of the traditional court from liability in the case of anything done in good faith. This excludes anything done in bad faith. The Bill provides a form of limitation of liability and not indemnity as an accountability measure. |
| **Clause 16:****Code of conduct** | Gauteng Legislature | Clause 16(1) must be amended to require the **Minister to consult with ordinary people** about the content of the Code of Conduct. | Noted. Ordinarily, regulations as subordinate legislation, and the content thereof are consulted on with interested parties, who include members of the public. |
| North West provincial Legislature | The Bill should provide for the **screening/vetting** of those who are going to preside over traditional court proceedings so that persons who have criminal records can be excluded from presiding in traditional courts. | Noted. Traditional leaders preside in the traditional court because of their recognition, as such, by the under the Traditional Leadership and Governance Framework Act. Furthermore, there are processes under this Act to deal with a traditional leader who has made himself or herself guilty of misconduct.The Code of Conduct will not only apply to traditional leaders but also to persons who have a role to play in the traditional court, so the provision is even broader than as proposed.  |
| Eastern CapeProvincial Legislature | In Clauses 16(1)(*a*), 16 (2) and 17 substitute the words "after consultation"' with "in consultation". | Clause 16(1)(a) and (2) state that the compilation of the Code and the periodic review thereof must take place in consultation with the functionaries responsible. The input of the relevant functionaries on the content of the Code of Conducthence it will be critical that the provision is worded in this manner.However, with regard to clause 17(2), the making of regulations is the function of the Minister which he or she is obliged to carry out. Requiring the Minister to only make regulations **“after consultation”** will likely hamstring and delay the process, especially if, the co-operation from the other functionaries is not adequate. The regulations are necessary to put the Bill into operation hence it sufficesto require that the Ministeris consulted on the regulations.  |
| Mpumalanga Provincial Legislature | (a) Ordinary people are best placed to comment on the kinds of abuses that are sought to be prevented by the Code of Conduct, therefore, clause 16(1) should be amended to require the Minister to also consult with ordinary people about the content of the Code of Conduct.(b) The responsibility for enforcement of the Code of Conduct in terms of clause 16(5) and (6) should remain with provincial MECs as originally provided for in the Bill as introduced. | (a) The Code of Conduct is aimed at regulating and guiding the conduct of persons who will be implementing the Bill. The consultation is normally is carried out with the role-players who will be directly affected by the instrument consulted on, ie Code. Whether the public is consulted on the Code or not it should be accessible to whoever wants to know its contents and see whether the conduct of a person is in line with the Code.Code, normally, reside with the institution whom it is intended to govern. Even with primary legislation there is not a provision in specific Acts that the general public must be consulted, the consultation happens as a matter of course. Based on this, the proposal is not supported.(b) The proposal is noted. The requirement that the breach of the Code be reported to MEC responsible for traditional affairs in the specific province was substituted for the institution of traditional leadership by the Portfolio Committee. |
| Northern Cape Provincial Legislature | (a) The amount of **compensation** in clause 16 must be clearly specified.(b) The Bill does not indicate if *Dikgosi* and *Dikgosana* will also be subjected to proposed disciplinary actions. | (a) Specifying the amount of compensation in primary legislation or at all will be problematic since the legislation will require to be changed every time the amount may change. The other reason which is the main one is that the compensation is linked to the damage suffered, so there is no need to specify the amount of compensation payable since it determines itself, although the court can adjust it to what is fair and equitable depending of the facts of the dispute.(b) The Bill provides for the Code of Conduct to apply to every member of the traditional court. |
| **Clause 17:****Regulations** | Limpopo Legislature  | The Bill must provide for a minimum of five persons per traditional council to be identified for training. | The Bill does not envisage a traditional council being a traditional court. This is largely because the composition requirements differ as well as the function of the two institutions However, every person who applies the provisions of the Bill is required to be trained, as provided in the Bill. |
| **Clause 18:****Transitional provisions** | KwaZulu-Natal Provincial Parliament | The following should be inserted in this clause:“18 (2A) All matters or cases that were dealt with under section 12 and 20 of the Black Administration Act (Act No. 38 of 1927) by traditional leaders before the commencement of this Act, shall be regarded as valid”. | There is no need to include such a provision in the Bill since finalised cases are not covered in the Bill. They are final and can only be dealt with in terms of the law that was applicable to them by the time they were finalised. They are finalisedmatters and can only be reviewed in terms of the law under which they were finalised. |
| **Schedule to the Bill** | Northern Cape Provincial Legislature | Monetary jurisdiction of R15 000 should be increased so as to enable the courts to deal with stock theft. | The Bill aims to empower traditional courts to only deal with minor disputes which may not warrant a person acquiring a criminal record. There are specific penalties for stock theft which a traditional court may not impose. Offences such as stock theft are complex and a full investigation by the police may be required, and offenders if convicted are to be harshly dealt with. This may not be possible in the traditional court. |
| Gauteng Legislature | Monetary jurisdiction of R15 000 should be increased in order to enable the courts to deal with more serious offences. | The Bill aims to only deal with minor disputes which may not warrant a person acquiring a criminal record. Capacity constraint may not enable the traditional court to deal with serious cases as such cases may require investigation by the police and for persons if found guilty of the offence to have a record of that offence registered against their name, which may not be possible in the traditional court. The threshold was initially set at R5000 following consultations on the Bill, and it has since been increased to R15 000. |
| Western Cape Provincial Legislature | Court has jurisdiction to hear matters pertaining to *ukuthwala*, initiation and custody and guardianship, which is inconsistent with the Constitution. | The Bill does not allowthe court to deal with *ukuthwala*, but the court can give advice and opinion to courts when they are adjudicating cases involving *ukuthwala*, initiation, custody or guardianship, maintenance andand other customary law practices.This would be similar to expert evidence. There is already a precedent on such a matter in **Jezile vs The State[2015] 3 All SA 201 (WCC) (23 March 2015)**which related to ukuthwala, the court requested an opinion on the correct practice of this cultural. This shows that it is legally permissible. |
| **General comments** | Gauteng Legislature | (a) The Bill should provide for the seat of the traditional court and the logistics around the functioning of the courts.(b) There is a need to protect the communities from the kangaroo courts system where communities are made to pay subscription fees.(c) Women issues cannot be solved by men, and therefore there is proposal for two courts of men only and women respectively.(d) Public hearings should be held on weekends when all the traditional leaders are available.(e) CPF Patrollers should work with traditional courts as they are in the community. | (a) The Bill does not aim to establish traditional courts, it aims to regulate its functioning.(b) Noted.(c) The proposal is not supported as it will be unconstitutional. (d) Noted. The issue raised falls outside the mandate of the Department.(e) Noted. There should be collaboration between agencies for safe communities. However, this cannot be provided for in the Bill because this Bill provides for the functioning of the court as this may be achieved administratively by way of memoranda of understanding. |
| North West Provincial Legislature | (a) Some traditional leaders have criminal records and it is unlikely that such persons can deal with matters in the traditional courts in a fair and just manner.(b) In order to prevent the relegation of traditional courts as inferior courts, the judges, magistrates and judicial officers of customary courts must all be trained to understand the status of customary law under the Constitution, the rules of evidence relating to it and how it is to be applied in the face of statutory law that regulates it. (c) Adequate time need to be provided to stakeholders for making comments and inputs to Bills. | (a) Noted. Traditional leaders preside in the traditional court because of their recognition as such under the Traditional Leadership and Governance Framework Act. (b) Training of judicial officers is already taking place under the auspices of the South African Judicial Education The object of this institution is to ensure the effectiveness of the courts through continuing judicial education. Furthermore, all members of the traditional court, who require training, will be trained on the implementation of the Bill. The Bill does not limit the training to traditional leaders only, and also caters to persons who have a role to play in the court. However, the training must be focused on persons who need the training because they deal with the disputes, and to those who have to develop customary law. It will not serve any purpose to train persons who will not use the skill acquired to implement the Bill. Any attempt to train everyone will result in wasted expenditure.(c) Noted. The public hearing are planned and coordinated from the Legislatures, and not the Department |
| Eastern Cape Provincial Legislature | (a) Some traditional leaders are believed to be involved in criminal activities, collude in criminal acts, and abuse traditional courts to extort material resources from the community; all these abuses must be dealt with in the proposed legislation. (b) There is a need for the use of professional social workers in the traditional courts to conduct pre- and post-trial assessment of minors since most offenses are conducted by minors. (c) The Bill does not provide for timeframes for lodging appeals from one traditional court to another.(d) Traditional courts should operate under a system of geographical jurisdiction similar to Magistrates Courts instead of the current arrangement that a person may approach any traditional court.(e) Traditional leaders should be trained on gender sensitivity and general issues around sexual orientation.(f) The Bill should give traditional leaders powers to impose imprisonment as a penalty. The courts should also be given powers to deal with domestic violence, and issue maintenance orders. | (a) This proposal is not supported. If traditional leaders are involved in crime they should be subjected to the law like any other person. They are not above the law. If a person has reason to believe that a traditional leader is involved in crime, they should report that to the SAPS for investigation and possible institution of criminal proceedings.(b) There is no need for social workers reports in the traditional courts as these courts will only deal with cases from a restorative justice perspective, where no punitive sanction can be made. The courts will not conduct trials, but will engage in dispute resolution. If a court cannot resolve a matter because it is too complex, it can transfer the matter to another competent court. (c) The timeframes can be provided for in the regulations or rules. The primary legislation provides a framework, and then the regulation will provide the detail.(d) Bill avoids making reference to the concept of “jurisdiction”. Therefore, a person may institute proceedings in respect of a dispute in any traditional court. Limiting persons to their geographical areas has been criticized as entrenching the apartheid/homeland boundaries(e) Noted. The Bill provides for regulations to be made, and these regulations will cover the detail of what courses will be relevant for those who will apply the legislation, such courses can include social context training which covers areas of gender sensitivity.(f) Unlike the conventional courts, traditional courts do not have criminal jurisdiction. There are no criminal law specific offences at customary law to justify allowing these courts criminal jurisdiction. As for domestic violence and issuing of maintenance orders, this is not possible since the legislation on these matters specify the courts that have jurisdiction on these matters. |
| Northern Cape Provincial Legislature | (a) Various categories of vulnerable groups are not included in those listed by the Bill, and recommend that these groups be included in the Bill.(b) Traditional courts system must be transparent and not allow any misrepresentation.(c) The composition of and participation in traditional courts should reflect the diversity of traditional communities and their respective practices. | (a) Noted. The list is not exhaustive. More of such groups can be added as and when amendments are effected to the Bill.(b) Procedure in the traditional court system is guided by clause 7 of the Bill. Deviation from the provisions of the clause invite for the invocation of the review and or the appeal processes as contained in clauses 10 and 11 of the Bill.(c) The Bill requires that traditional courts must consist of men and women of that community pursuant to the goal of promoting the right to equality, the right to human dignity, advancement of human rights and freedoms, and the promotion of non-sexism, freedom of sexual orientation and identity and religion.It is common cause that the membership of the court will be comprised of members from a particular community, which should acknowledge the diversity of the particular community. The fact that a court was not properly constituted will be a ground for review.  |
| KwaZulu-Natal Provincial Parliament | Safety at the Traditional Courts is a huge concern where people that are summoned come armed. | The security of members of the court should not be a concern because the Bill is premised on restorative justice, and the cooperation of parties is of importance as they choose to use the system. |
| Mpumalanga Provincial Legislature | (a) Government should assist in building a strong relationship between communities and Traditional Leaders within the Province.(b) The Bill should 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.(c) The exercise of judicial powers by traditional leaders violates the doctrine of separation of powers. | (a) Noted. This matter falls within the mandate of the Department of Traditional Affairs.(b) The Bill does not seek to concentrate the power to resolve disputes on the traditional leader as a judicial officer. The role is allocated in line with “participatory justice” where members of the community take part.(c) Traditional leaders do not have judicial powers in the strict sense because traditional courts apply restorative justice system and not the process of the retributive system of conventional courts. It is highly problematic to remove the traditional leader from the functioning of the court. |
| Western Cape Provincial Parliament | (a) There is limited understanding of customary law to see how it can realistically co-exist within the constitutional framework.(b) This Bill should not be signed into law before the recognition of traditional leaders in the Khoi-San community has been concluded. | (a) Noted. Every principle of customary law must be considered against the Constitution to ensure that it passes constitutional muster.(b) Although the implementation of this Bill is not dependent on the Traditional and Khoi-San Leadership Act, the submission is noted.This Bill has since been enacted. |