**NATIONAL HOUSE OF TRADITIONAL & KHOI-SAN LEADERS (NHTKL)**

**Comments on the Cannabis for Private Purposes Bill [B 19 — 2020]**

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| **Comments** | **Responses** |
| **1. Tagging of Bill** |  |
| The Bill was introduced in the National Assembly as a proposed section 75 Bill. The NHTKL is of the view that the Bill contains provisions pertaining to customary law and customs of traditional communities, in that traditional communities use cannabis as medicine for certain diseases and perform certain rituals as the customs and tradition dictate, and that therefore the Bill should have been tagged as a section 76 Bill, and be formally referred to the National House by the Secretary to Parliament in terms of section 39 of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019) (the TKL Act). – (pages 1 and 2) | (a) The Bill as introduced in the National Assembly addresses the impermissible constitutional limitations of sections 4*(b)* and 5*(b)* of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992) on the right to privacy of an adult person to use and possess cannabis or cultivate cannabis plants in private for personal use in private as per the Constitutional Court judgment in ***Minister of Justice and Constitutional Development and Others v Prince***. It is submitted that the Bill, as introduced in Parliament, does not contain provisions -  (i) to which the procedure set out in section 76 of the Constitution applies (see ***Annexure A***); or  (ii) pertaining to customary law or customs of traditional communities as contemplated in section 18(1)*(a*) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) (TLGF Act)[[1]](#footnote-1).  (b) The proposed clause 1B (clause 11) aims to accommodate cannabis activities for cultural or religious purposes and falls within the ambit of section 39(1)*(a)* of the TKL Act. The Bill was therefore in accordance with section 39(1)*(a)* of the TKL Act referred to the National House for its comments. |
| **2. Long title** |  |
| The long title should be corrected to reflect the fact that the Bill also provides for the cultivation, possession and supply of cannabis plants by rural organisations for cultural purposes in adherence of the culture and customs of traditional communities. – (page 3) | The latest version of the Bill corrects the long title to address this aspect. |
| **3. Definition of "private place" (clauses 1, 2(1)*(b)* and 3(3))** |  |
| Persons in rural areas do not individually own land and cannabis will be grown communal land which may not be regarded as a private place as defined in clause 1. The growing of cannabis in a public space is an offence. "It is therefore recommended that the production of cannabis for personal use by people in rural areas be accommodated to assist the poorer to whom cannabis consumption is part of their lives." – (page 5) | (a) Clause 1 of the Bill defines -  \* "private place" as any place, including a building, house, room, shed, hut, tent, mobile home, caravan, boat or land or any portion thereof, to which the public does not have access as of right; and  \* "public place" as any place to which the public has access as of right.  (b) Clause 3(3) provides that an adult person who cultivates a cannabis plant in a public place, is guilty of an offence.  (c) In rural areas the distinction between a private and a public place becomes blurred. The definition of "private place" must be interpreted in the context of paragraph [108] of the Prince Judgment where the Court clarified this aspect as follows:  "**This judgment does not confine the permitted use or possession or cultivation of cannabis to a home or a private dwelling. This is because there are other places other than a person’s home or a private dwelling where the prohibition of the use or possession or cultivation of cannabis would be inconsistent with the right to privacy if the use or possession or cultivation of cannabis was by an adult in private for his or her personal consumption in private. Using the term 'in private' instead of 'at home' or 'in a private dwelling' is preferable.**".  (d) Communal land is specifically intended in clause 1B/clause 11. The clause, among others, provides that the Minister may, in terms of the permit specify conditions, restrictions, obligations or requirements which must comply with to restrict access to the land which is to be used for cultivation of cannabis (subclause (7)*(b)*(iv)*(aa)*).  (e) Clause 3(2) provides for regulations to be made to prescribe requirements or standards regarding the cultivation of cannabis plants in a private place for personal use. To address the concerns of the NHTKL clause 3(2) may be amended to the regulate cannabis cultivation on communal land. |
| **4. Prescribed quantities for personal use (clauses 2, 3 and 4 and Schedules 3 and 4)** |  |
| Clauses 2, 3 and 4, read with the Schedules to the Bill, unreasonably limit the quantity of cannabis that anyone may cultivate and possess in private. According to the NHTKL "there will be no harm prevented by criminalising someone to cultivate or possess more than the prescribed quantity". – (pages 3 to 4) | The limitations on the quantities of cannabis plants that may be cultivated are required to restrict cannabis to personal use. See:  \* Paragraphs [79] and [80] of the Prince Judgment, where the court refers to legislation of foreign jurisdiction where different amounts have been fixed as “small amounts” and remark that " like the Judge in the High Court, I would leave the determination of the amount to Parliament".  \* Paragraphs [110] and [111] of the Prince Judgment:  **"[110] In determining whether or not a person is in possession of cannabis for a purpose other than for personal consumption, an important factor to be taken into account will be the amount of cannabis found in his or her possession. The greater the amount of cannabis of which a person is in possession, the greater the possibility is that it is possessed for a purpose other than for personal consumption."**  If there is no limitation on the prescribed quantities for personal use, it may be used as a facade to facilitate the dealing in cannabis. The prescribed quantities in Schedule 3 of the Bill are liberal if compared with the limitations in foreign jurisdictions (see **Annexure B**: Personal possession limitations; home cultivation limitations; and interpersonal sharing limitations) and give effect to the Prince Judgment. |
| **5. Special measures to accommodate cultural or religious communities (clause 1B/clause 11 of the new proposal)** |  |
| The clause is supported as it will accommodate the traditional council and the traditional community of a particular community where the cannabis is cultivated. According to the NHTKL, traditional councils are the custodians of the culture and customs of traditional communities and can appoint a representative for that particular community to make an application for the permit on behalf of its members. – (page 4) | Noted. |
| **6. Cultivation offences (clause 3)** |  |
| Clause 3(1)*(b)*, read with Schedule 4 to the Bill, discriminates against large families or households and rural households which comprise of more than two adults. The Bill should allow all adults residing in the dwelling to cultivate cannabis. – (pages 4 to 5) | Clause 2(1)*(b*)(i), read with Schedule 3, of the Bill provides that an adult person may for personal use cultivate four flowering cannabis plants per adult or eight flowering cannabis plants per dwelling which is occupied by two or more adults. In terms of clause 3(1) an adult person who in a private place, cultivates a quantity of cannabis plants that -  (a) exceeds the prescribed quantity (more than four flowering cannabis plants per adult or eight flowering cannabis plants per dwelling which is occupied by two or more adults) (clause 3(1)*(a)*);  (b) are a trafficable quantity (more than six flowering cannabis plants per adult person or 12 flowering cannabis plants per dwelling which is occupied by two or more adults) (clause 3(1)(b) and item *(a)* of Schedule 4); or  (c) are a commercial quantity (more than nine/10 flowering cannabis plants per adult person or 18/20 flowering cannabis plants per dwelling which is occupied by two or more adults), (clause 3(1)*(c)* and item *(b)* of Schedule 4),  is guilty of an offence.  Most foreign jurisdictions provides for this household limitation (see ***Annexure B***). If this limitation is to be calculated on the basis of the prescribed quantity for all adults at a dwelling, it will adversely impact on enforcement measures to limit cannabis for personal use and may be used as a facade for dealing in cannabis. The aims are not only to limit the plants but also cannabis that is derived from such plants and which may be possessed by such adults per dwelling. |
| **7. Cannabis offences (clause 4) and smoking and consumption offences (clause 5)** |  |
| The Bill does not allow the use of cannabis for cultural and religious purposes in public spaces involving the gathering of more than two adults. This is discriminating against certain groups of people. The Bill needs to accommodate the possession and use of cannabis in larger quantities for cultural and religious events in public spaces. – (page 5) | See paragraph 5.5 of the Comments & Responses document. An amendment to clause 1B will be proposed to provide for a religious or cultural event at a place not specified in a permit in terms of clause 1B/clause11. |
| **8.** **Expungement of criminal records of persons convicted of possession or use of cannabis or dealing in cannabis on the basis of a presumption (clause 8)** |  |
| The expungement of criminal record in respect of possession or use of cannabis or dealing in cannabis is supported. "This will avoid the injustice of people continuing to be penalised for actions that would, with the passing of this Bill become legal." – (page 6) | Noted. |

1. Section 18(1)*(a)* of the TLGF Act provides that "Any parliamentary Bill pertaining to customary law or customs of traditional communities must, before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House of Traditional Leaders for its comments.". Section 65(1) of the TLK Act repeals the TLGF Act, whereas section 65(2) provides that anything done or deemed to have been done under any provision of a law repealed by subsection (1) and which may or must be done in terms of this Act, is regarded as having been done in terms of the corresponding provision of this Act. Section 39(1)*(a)* of the TKL Act deals with the referral of Bills to National House and provides as follows: Any Parliamentary Bill which directly affects traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities, must, before it is passed by the house of Parliament where it was introduced, be referred by the Secretary to Parliament to the National House for its comments. Section 65(1) of the TLK Act repeals the TLGF Act, whereas section 65(2) provides that anything done or deemed to have been done under any provision of a law repealed by subsection (1) and which may or must be done in terms of this Act, is regarded as having been done in terms of the corresponding provision of this Act. [↑](#footnote-ref-1)