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SUBMISSION IN RESPECT OF THE TRADITIONAL COURTS BILL

1. Introduction

1.1 My name is Thandabantu Nhlapo and I hereby make this submission in respect of the Traditional Courts Bill currently before Parliament.

1.2 I am a professor of law at the University of Cape Town and I have spent the greater part of my life working, researching and writing in the area of customary law. I also have extensive teaching experience in the subject.

1.3 Of particular relevance to this submission is the fact that I was intimately involved in the work of the South African Law Reform Commission at the time of the investigation which produced the first draft bill on traditional courts. I was the full-time member at the Law Commission at the time, and was Project Leader of Project 90, the Customary Law project. As such, I was the chairperson of the Project Committee during its deliberations on the original draft bill and also led the country-wide consultation process, both with the traditional leaders and with the womens' groups that were canvassed thereafter.

1.4 Since I am compelled by travel commitments to miss the hearing on Tuesday, 13 May 2008, I make this submission with the request that I be allowed to expand it in writing and afforded an opportunity to present it in its detail at a time and place to be mutually agreed.

2. Submission

2.1 The crux of my submission is twofold:

- The current Bill is radically different from the original draft bill on Traditional Courts that was attached to the Report of the Law Commission. That bill was the outcome of intense country-wide consultations with traditional leaders and a range of other stakeholders. The parliamentary process of public consultation is by its nature unable to compete with the Law Commission process for depth of debate or width of geographical coverage. To put this another way, the current bill might appear to be the outcome of the Law Commission process, but in reality it is not, because its provisions depart significantly from those that were negotiated, particularly with traditional leaders and women's groups, during that process.

- There are specific provisions in the Bill that cause concern, and which raise issues that remain unresolved. The two to which I wish to address myself are the issue of the constitution of customary courts, and the issue of appeals.

2.2 To expand on this last point:

- **Constitution of customary courts.** In the original draft bill, the Law Commission recognised the delicacy of this matter by proposing not one, but three alternative modes of constitution these courts (Section 4). The current Bill does not appear to be alive to these sensitivities.

- **Appeals.**. The Law Commission also took time to explore various models of appeal system, based on a desire to preserve the integrity of customary law and traditional modes of adjudication by allowing cases to travel upwards in a hierarchy insulated, at least in its early stages, from the influence of common law and western modes of

adjudication. The fact that the original draft bill provides three models (Section 27) attests to the thought that went into this concept. The concept is further buttressed by the creation of an administrative system that protects this customary law "universe" by developing the concept of a Registrar of Customary Courts (Section 24 and 25). Together these provisions serve to preserve the constitutional rights of a rural person to have his or her matter decided in a system that is familiar, non-alienating, inexpensive and accessible. For this to happen, the case needs to stay within the customary law system for a significant period before being transferred outside of that system. The immediate jump from the customary law world to the magistrate's court whenever a party is aggrieved by the decision of a customary court does not do justice to this right.

3. Conclusion

My submission is limited in scope to these two issues: the concern that the provisions in the current Bill are not the same as those which garnered a significant level of support in 1999; and the specific proposal that sections 4 and 27 (read with sections 24 and 25) of the original Law Commission bill be reconsidered for inclusion as they represent two areas which generated the strongest debates during the 1999 consultation process, with the emerging consensus being enshrined in the aforementioned provisions.

Professor RT Nhlapo

9 May 2008