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15 February 2012

TO : Mr. Tjheta Makwa Harry Mofokeng, MP  
The Chairperson: Select Committee on Security and  
Constitutional Development  
National Council of Provinces

Att: The Secretary  
Mr. Gurshwyn Dixon  
Fax: 086 658 9371 / 021 403 3942  
Email: gdixon@parliament.gov.za

Dear Sir

SUBMISSION BY THE LESBIAN AND GAY EQUALITY PROJECT ON THE  
TRADITIONAL COURTS BILL THAT HAS MADE MANY RURAL LESBIANS  
EXTREMELY WORRIED

The Lesbian and Gay Equality Project (LGEP), formerly the National Coalition for Gay and Lesbian Equality (NCGLE) established in 1994, is a non-profit, non-governmental organization that works towards achieving full legal and social equality for lesbian, transgender, gay, bisexual and intersex (LGBTI) people in South Africa. This is a preliminary submission to your committee on the Traditional Courts Bill. We ask you to provide space for our organization and other LGBTI organizations to make a further detailed submission and space for an oral presentation at provincial and national hearings on the Bill.

Through this submission, the LGEP registers its extreme unhappiness with the fact that the call for submissions on the Traditional Courts Bill (TCB) was published on 13 December 2011 with a 2-month deadline for submissions. As government and parliament should know, at that time of the year when the entire country shuts down for the summer holiday very few people would have seen the call for submissions. We also wish to register our unhappiness that the call for submissions was only advertised in newspapers given that government and parliament know that very few rural people read newspapers. Yet, the voices of rural people must be given an opportunity in the process to finalize the Bill. Even worse is the fact that when the New Year started government and parliament did not then undertake additional mobilization to ensure that rural people are aware of the 15 February 2012 deadline for submissions.

The government seems not to see the importance consulting the public that will be the most affected by this piece of legislation. In this regard, the LGEP calls on the NCOP and the National Assembly to ensure that the next phases of the

TCB legislative process will be based on proper and adequate consultation of rural people, in particular rural women. For this consultation to be proper it must be carried out to ensure that all voices are heard and an opportunity to influence the content of the Bill is broadened and relevant changes are effected for the benefit of those who will be affected by it in line with the provisions of the country's Constitution. Specifically, we call for provincial hearings and a deeper process of consultation that must create safe spaces for lesbians and other vulnerable members of rural communities to speak about their concerns and proposals on the Bill. The consultation process must be sensitive to this. Therefore, the homesteads of chiefs or offices of tribal authorities are simply not the neutral or suitable safe spaces for allowing all voices to be heard. In our work, we have come across cases where rural lesbians have been punished unfairly at such homesteads or tribal offices which are normally the seats of customary courts. Our information shows that it is not just lesbians only who have suffered injustice when their cases are heard in current customary courts run from the homesteads of chiefs or tribal offices. These realities therefore disqualify these spaces as neutral, sensitive and safe enough. Also important in the consultation process is not just the form, but also the content of what the final Bill will provide for. In this regard, we call on the NCOP and the National Assembly to go back to the Report and Draft Bill on Customary Courts that was developed by the South African Law Reform Commission. This report and Draft Bill were based on a proper 5-year consultative process that took substantive voices from rural women on board and also put forward a Bill that was consistent with the Constitution. The voices of those rural women who were consulted by the Law Commission must not now be drowned out simply because government has consulted only traditional leaders in drafting the current version of the TCB. We therefore specifically request the NCOP to revise the TCB substantially to be in line with the Law Commission's Draft Bill. Even this revision must allow for proper and adequate consultation.

Secondly, this Bill is highly anti-democratic, unconstitutional and discriminatory in its content as well. The process and its content undermine the South African Constitutional frameworks that commits to human rights, non-discrimination, equality and consultation. The LGEP is extremely concerned about the fact that this Bill is actually putting women in rural areas at the worst position of being discriminated and treated as second class citizens. The Bill basically opens the door for women not to approach the customary court but be represented by a man. Women's rights to equality before the law is compromised in this situation which make it worse for lesbian women since it is the general

knowledge that customary law is not favorable to people who have intimate relations with people of the same sex. The Bill is silent on how the envisaged traditional courts will be structured so as to remove this unfair discrimination against lesbians that is entrenched in dominant practices and understandings of customary law. The Bill must state how this will happen. If the Bill does not include such a change then clearly the Bill is a mission to do away with the freedoms guaranteed by our constitution to people regardless of their sexual orientation. The situation of women and lesbians living in rural areas is clearly going to be worsened by this Bill as it will create a separate legal regime operated by unaccountable traditional leaders who have the sole power to determine the content of customary law. The Bill locates all the judicial and administrative power to one person who will either be the chief or someone nominated by the chief and does not give an option to people who would rather use the Magistrate's Court or other forums. This must be changed in the Bill so as to allow those who chose so to opt out. By doing all these things, the Bill freezes the development of customary law in ways that maintain perpetual discrimination against lesbians. Yet, there is a need for a dialogue between the country's Constitution and customary law in ways that evolve and develop customary law to be consistent with the Constitution.

The LGEP fully supports the concept of promoting access to justice through democratic customary and other community-based systems driven from below. However, these must be structured in ways that are democratic, accountable, gender-inclusive and actively promoting women's participation and gender equality, inclusive of all vulnerable groups, and based on the constitutional values of social justice, reconciliation, equality, democracy, non-sexism, and the removal of unfair discrimination on various grounds including on the basis of sexual orientation. Therefore, the TCB cannot and must not identify only traditional leader based traditional courts. We call on the NCOP to integrate these principles in the final version of the TCB.

