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## PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES AMENDMENTS TO THE TRADITIONAL COURTS BILL [B1B – 2017]

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## 1. INTRODUCTION<sup>1</sup>

The Traditional Courts Bill [B1B-2017] (“TCB”) emanated from the Justice Department’s 2008 ‘Policy Framework on the Traditional Justice System under the Constitution’<sup>2</sup> to regulate traditional courts, give effect to the policy initiatives enunciated in the policy framework; and give effect to the Traditional Leadership and Governance Framework Act 41 of 2003, which “enjoin[ed] the Department...to allocate roles and responsibilities to the institution of traditional leadership in the administration of justice”.<sup>3</sup>

The Constitution<sup>4</sup> lists customary law and practice under Part A of Schedule 4 as one of the concurrent national and provincial functional areas. Thus, national legislation concerning customary law and practice falls under section 76 of the Constitution, which must be dealt with in terms of the procedure for legislation affecting provinces. The Bill must also be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003.<sup>5</sup>

**Currently traditional courts are still governed by sections 11 and 20 of the Black Administration Act 38 of 1927.**<sup>6</sup> The 2017 TCB is the third attempt by the Department of Justice to pass legislation on traditional courts, after the previous bills introduced in 2008 and 2012, were not enacted by Parliament. The 2012 version of the Bill eventually lapsed in the NCOP, even though the relevant sections of the Black Administration Act were, at the time, kept alive by a “sunset clause” that expired on 30 December 2012. Because the TCB was not passed by the time of the deadline, Parliament passed the Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act, 2012 which came into effect on 28 December 2012, and which removed the requirement to pass legislation on traditional courts by a certain date. **That means the Black Administration Act is now being kept alive indefinitely until Parliament passes legislation on traditional courts.**

**The current version of the TCB that is before the Select Committee on Justice and Security for consideration was introduced in, and passed by, the National Assembly of the Fifth Parliament.** The Portfolio Committee on Justice and Correctional Services of the Fifth Parliament (“the PC”) adopted and reported the Bill with amendments.

The following section discusses the provisions of the Bill and the PC amendments.

## 2. CLAUSE BY CLAUSE PROVISIONS OF TRADITIONAL COURTS BILL [B1B – 2017]

The Memorandum on the Objects of the Bill simply states that the Bill aims to replace the current legislative framework in terms of which disputes are resolved in terms of customary law, in line with Constitutional imperatives and values.

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<sup>1</sup> Select Committee Members are also referred to the research paper, “Tracing the History of the Traditional Courts Bill”, by G Nesbitt, which sets out the development of TCB legislation from 1999, the 2008 policy framework, followed by the Parliamentary processing of the 2008 and 2012 versions of the TCB.

<sup>2</sup> Department of Justice and Constitutional Development (2008)

<sup>3</sup> At p40.

<sup>4</sup> Constitution of the Republic of South Africa, 1996

<sup>5</sup> Act 41 of 2003.

<sup>6</sup> Christa Rautenbach (2005)



## 2.1 LONG TITLE (PAGE 2)

The Long Title of the Bill states that the Bill aims to “provide a uniform legislative framework for the structure and functioning of traditional courts, in line with constitutional imperatives and values; and to provide for matters connected therewith.

## 2.2 PREAMBLE (PAGES 2 TO 3)

The Preamble *inter alia* sets out the:

- Need to replace the unconstitutional provisions of the Black Administration Act and former homeland legislation still governing the resolution of customary disputes, with a legislative framework in line with Constitutional imperatives and values;
- Need to have a single statute that applies throughout South Africa; and
- Recognition of customary law under the Constitution as a legal system that “lives side by side [with] the common law and legislation with different levels of dispute resolution”.

### Comments

- The **PC’s insertion of the reference to customary law living “side by side” with common law and legislation and its different levels of dispute resolution** are the first amendments the PC made to the Bill.
- The **PC also inserted a reference recognising the “flexibility of customary law** for consensus seeking and the prevention of and resolution of disputes and disagreements”.
- The **PC deleted the reference to “voluntary affiliation” in the Preamble and elsewhere in the Bill that provided for persons to “opt out”** should they not wish to have their matters dealt with by a customary court.
  - *The Bill now provides that a party aggrieved by a traditional court decision or order may, after exhausting all the traditional court system appeal procedures in the Bill, refer that decision or order to a magistrate’s court. **Clause 6(3) was inserted by the PC to set out the different levels of traditional leadership for customary law appeals, namely a (i) headman or headwoman’s court, (ii) senior traditional leader’s court and (iii) king or queen’s court, where available.***
  - *The replacement of the “opt out” provision by an appeals system to another court (only after exhausting all customary law appeals) has elicited wide-spread criticism. The absence of an opt-out clause was one of the main reasons why communities rejected the 2008 and 2012 versions of the Bill.*

## 2.3 CLAUSE 1: DEFINITIONS (PAGE 3)

The most important definitions in the Bill are that of “**traditional court**” (being the forum where customary disputes are heard), “**traditional leader**” (being the person who presides over a traditional court) and **customary law**.

### 2.3.1 A traditional court is defined as,

“a customary institution or structure, which is constituted and functions in terms of customary law and custom, for purposes of resolving disputes, in accordance with constitutional imperatives and this Act (my emphasis), and which is referred to in the different official languages as— (a) “*eBandla*” in isiNdebele; (b) “*Huvo*” in Xitsonga; (c) “*Inkundla*” in isiZulu; (d) “*iNkhundla*” in siSwati; (e) “*iNkundla*” in isiXhosa; (f) “*Kgoro*” in Sepedi; (g) “*Kgotla*” in Sesotho; (h) “*Khoro*” in Tshivenda; (i) “*Kgotla*” in Setswana; and (j) a tribunal for Khoi-San communities”.



### 2.3.2 A traditional leader is defined as,

“any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position and is recognised in terms of the Traditional Leadership and Governance Framework Act”.<sup>7</sup>

#### Comment

- o The PC amended this definition by inserting the reference to the **Traditional Leadership and Governance Framework Act** as the definition previously only referred to “an Act of Parliament”.

### 2.3.3 Customary law (for the purposes of the TCB) refers to the,

“accepted body of customs and practices of communities which evolve over time in accordance with prevailing circumstances, subject to the Constitution”.

## 2.4 CLAUSE 2: OBJECTS OF THE ACT (PAGE 4)

This clause sets out **what the Bill aims to achieve**, namely to:

- (a) Affirm the (i) values of customary law and customs in the resolution of disputes, based on restorative justice and reconciliation and to align them with the Constitution and (ii) role of traditional courts in terms of customary.
- (b) Promote and preserve those traditions, customs and cultural practices that are beneficial to communities, in accordance with constitutional values.
- (c) Create a uniform legislative framework regulating the structure and functioning of traditional courts in the resolution of disputes, in line with the Constitution.
- (d) Enhance the effectiveness, efficiency and integrity of traditional courts.
- (e) Facilitate communities’ full and meaningful participation (without discriminating) in a traditional court in line with the Constitution.

#### Comment

- o In Clause 2, the PC made **consequential amendments to delete references to opting out**, namely “consensual nature”, “voluntary affiliation” and “the right to freely and voluntarily elect to or elect not to abide by the various applicable practices and customs”.

## 2.5 CLAUSE 3: GUIDING PRINCIPLES (PAGES 4 TO 5)

**This clause guides how the Act must be applied in dispute resolution**, including:

- Applying Constitutional values of equality, human dignity, advancement of human rights and the promotion of non-racialism and non-sexism, freedom of sexual orientation and identity and religion; and the promotion of restorative justice measures through mediation and conciliation;

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<sup>7</sup> Act 41 of 2003



- Training (skilling) and capacitating members of traditional courts to ensure effective implementation;
- Reference to prohibited practices listed in Schedule 1 of the Bill which “is not conclusive and must be considered and revised on a continuous basis”.

#### Comment

- **The PC seemed to have overlooked the opt-out reference in Clause 3(2)(e) of the Guiding Principles** which states that “a founding value on which customary law is premised, is that its application is accessible to those who voluntarily subject themselves to that set of laws and customs”.

## **2.6 CLAUSE 4: INSTITUTION OF PROCEEDINGS IN TRADITIONAL COURTS (PAGE 5)**

The main provisions of Clause 4 provides that a traditional court:

- Can be held in a place other than where it is normally held; and the traditional leader can delegate a person(s) to preside over such a session and indicate who can participate therein.
- May not hear and determine disputes that (a) has been or is being dealt with by another person or structure recognised in customary law; (b) are being investigated by the South African Police Service, (c) are pending before any other court or traditional court; or (d) were already finalised by a court (a verdict was given in a criminal matter or final order made in a civil court).
- Can also provide counselling, assistance or guidance to a party to the dispute.
- Must make a determination whether or not to refer a summonsed person who failed to appear before the traditional court, to a Justice of the Peace who has the power to negotiate with a party to comply with the summons (if the party is not at fault) or to request the traditional court to have the matter transferred to the Magistrates Court.

#### Comment

- The PC made extensive amendments to Clause 4, mainly deleting references to opting out and referring of matters by the traditional court to another traditional court, mainstream court or forum.

## **2.7 CLAUSE 5: COMPOSITION OF AND PARTICIPATION IN TRADITIONAL COURTS (PAGE 6)**

- **The main amendments by the PC was to change the wording in the clause to provide that traditional leaders preside over a traditional court** (previously it stated that a traditional leader convenes a traditional court).
- The main provision in Clause 5 is (a) for traditional courts to comprise both men and women, (b) for the fair promotion and participation of women in traditional courts, in line with the Section 9 (Equality Clause) of the Constitution; (c) promotion and protection of vulnerable persons, especially the elderly, children, youth, the indigent and persons with disabilities and (d) the requirement that the Minister responsible for Justice must put measures in place and report to Parliament annually in this regard.



- The Commission for Gender Equality is also required to report to Parliament annually on the participation of women and the promotion of gender equality in traditional courts.
- Clause 5 also makes provision for the role and functions of the clerk of the traditional court.

#### Comment

- **Clause 5 attempts to address the concerns raised on the previous versions of the TCB Bills**, which failed to adequately provide for the equal and full participation of women and vulnerable groups in traditional courts.

### 2.8 CLAUSE 6: NATURE OF TRADITIONAL COURTS (PAGE 7)

- Clause 6 affirms the existence of traditional courts under customary law to fairly and equitably resolve disputes in a manner that (a) *inter alia* promotes restorative justice, Ubuntu and Constitutional values and imperatives and (b) promotes access to justice, (c) prevent conflict and (d) maintain harmony.
- **The PC inserted a new Clause 6(3) to set out the different levels of traditional leadership in the traditional court system** as contemplated in the Traditional Leadership and Governance Framework Act, 2003.
- The different **levels of traditional leadership for customary law appeals** are a (i) headman or headwoman's court, (ii) senior traditional leader's court and (iii) king or queen's court.

#### Comment

- The new Clause 6(3) provides certainty to parties to a customary court dispute regarding which levels of appeal they need to comply with before a decision of a traditional court can be referred to a Magistrates' Court.

### 2.9 CLAUSE 7: PROCEDURE IN TRADITIONAL COURTS (PAGES 7 TO 8)

- Clause 7 provides that traditional courts must:
  - Sit at times and at places that are accessible to the community and be open to all.
  - Ensure equal and full participation of women and vulnerable groups, especially the elderly, children, youth, the indigent and persons with disabilities in its proceedings.
  - Give fair hearings and make impartial decisions.
  - Apply the system of customary law agreed to by parties if more than one system may be applicable.
  - Apply customary law of procedure and evidence.
  - Conduct proceedings in a language most widely spoken in the area of the court and must provide interpretation to those parties that requires this.
- **Legal representation is not allowed in traditional courts.**
- **However, parties may be assisted by any other persons of their choice.**
- **The PC inserted a new Clause 7(11) to provide for the determination of fees payable to a traditional court** in terms of customary law.
- **It also inserted a new Clause 7(12) to require that members of a traditional court with a personal or family interest in a matter to be decided by the traditional court**



must declare such interest and withdraw from participating in the resolution of that matter.

## 2.10 CLAUSE 8: ORDERS THAT MAY BE MADE BY TRADITIONAL COURTS (PAGES 8 TO 9)

Clause 8 lists a number of orders that can be made by a traditional court, including:

- Payments (in money or livestock).
  - *Payment may not exceed the value of the damages caused or an amount which will be set by the Minister in the Gazette) for a settlement, damages or compensation. Payments can be made in installments or in full.*
- An order that a party (*who is financially not in a position to pay damages or compensation*) to render a specific benefit or service with the consent of both parties or to perform community service for the benefit of the aggrieved party or the community.
  - *Community service can never be for the benefit of a traditional leader or family of a traditional leader or any person acting in an official capacity in the traditional court.*
- An order to accept an unconditional apology as a voluntary settlement between parties.
- An order reprimanding a party or parties to the dispute.
- An order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of.
- An order requiring a party or parties to keep the peace.
- An order directing that the matter be submitted to the national prosecuting authority for possible institution of criminal proceedings.
- An order that a person who accepts payment for injury may not bring an action in any court to recover damages.

### Comments

- The Bill provides for compensation rather than the payment of fines.
- Acceptance of payment for injury sustained is regarded as final settlement for damages.
- Orders are restorative in nature.
- A traditional court can order community service for the benefit of the aggrieved party or the community (not for the benefit of a traditional leader or family of traditional leader).
- **The PC amended the wording of clause 8(1)(e)** to provide for an order to accept an unconditional apology as a voluntary settlement between parties.
- **The PC also amended the wording of Clause 8(1)(f)** to an order reprimanding a party or parties to the dispute.

## 2.11 CLAUSE 9: ENFORCEMENT OF ORDERS OF TRADITIONAL COURTS (PAGE 9)

- Clerks of the traditional court must investigate reasons for non-compliance with traditional court orders.
- If the party against whom the order was made was not at fault, then the Clerk must assist him or her to comply with the order.
- The Clerk can refer the matter to a justice of the peace if the fault lies with the party against whom the order was made, in which case the justice of the peace can summons him or her to re-appear in the traditional court for the matter to be transferred to a Magistrates Court.





- A justice of the peace can negotiate with a defaulting party to comply with a traditional court order where non-compliance was not his or her fault.

## 2.12 CLAUSE 10: PROVINCIAL TRADITIONAL COURT REGISTRARS (PAGE 10)

- The Justice Minister must, *after consultation with the Minister for Cooperative Government and Traditional Affairs*, and *subject to the laws governing the public service*, designate, second or appoint **Provincial Traditional Court Registrars for each province where there are traditional courts**.
- Provincial Traditional Court Registrars must:
  - Have suitable prescribed qualifications and experience.
  - Compile and maintain a prescribed Register of all traditional courts in the province
  - Refer and report on cases of public interest to the High Court with jurisdiction for review.
  - Assist parties to take a matter on review.
  - Guide and supervise the functioning of traditional courts.
  - Keep the MEC responsible for traditional affairs informed about the functioning of the traditional courts in that province.

### Comments

- The words “where there are traditional courts” show that is unlikely that all provinces will have traditional courts, and by extension Traditional Court Registrars.
- **The clause requires the Provincial Traditional Court Registrar to keep the MEC informed as opposed to “report to” the MEC.**
- The Department needs to clarify (a) in what manner and (b) how often the MEC must be informed of the functioning of courts in a province.
- **The PC inserted a new subsection 10(4) to clarify that “public interest” means an outcome, which affects any right of the public, public finances or the public good.**

## 2.13 CLAUSE 11: REVIEW BY HIGH COURT (PAGES 10 -11)

At the conclusion of each matter before a traditional court, it must advise parties of their right to take the matter on review to a High Court with jurisdiction. Grounds for review include if *inter alia*:

- The traditional court was not competent to deal with the matter as “contemplated in section 4(3)(f)”.
- The traditional court was not properly constituted in terms of section 5, *i.e.* it did not comprise both men and women in line with the Section 9 (Equality Clause) of the Constitution.
- The traditional court did not afford women (as parties to disputes or members of the court) full and equal participation in the proceedings; or take into consideration the particular vulnerability of vulnerable persons.
- One or both of the parties were not allowed to represent themselves or be represented by persons of their choice.
- Proceedings of the traditional court were not open to all members of the public.
- Proceedings proceeded in the absence of one or both parties.
- Proceedings were conducted in a language that was not understood by one or both parties and no interpretation was provided.
- A party to any proceedings in a traditional court may take matters related to procedural shortcomings on review to a division of the High Court. The High Court hearing the review may





amongst other actions, confirm, correct, alter or set aside the order made by the traditional court.

- The High Court may *inter alia* confirm, alter, set aside or correct the order made by the traditional court. It may also remit the case to the traditional court with instructions on how the traditional court must deal with the matter.

#### Comments

- o According to Clause 11(1)(a) a ground for review of a traditional court proceeding is if the traditional court was not competent to deal with the matter “as contemplated in section 4(3)(f)”. **The words “as contemplated in section 4(3)(f)” must be deleted or substituted as this sub-section was removed when the PC amended Clause 4.**
- o Whether or not a traditional court was competent to hear a matter would most likely depend on whether the value, payment of compensation or damages exceed R15 000 as set out in Schedule 2 of the Bill.
- o In criminal matters the value of theft, possession of stolen property or malicious damage to property must not exceed R15 000; and assault if no grievous bodily harm was inflicted.
- o Traditional courts are competent to deal with any matter arising out of customary law and custom where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette and different amounts may be determined in respect of different categories of disputes.
- o In terms of Schedule 2 the traditional court is also competent to provide advice relating to customary law practices in respect of—
  - (i) ukuThwala;
  - (ii) initiation;
  - (iii) customary law marriages;
  - (iv) custody and guardianship of minor or dependent children;
  - (v) succession and inheritance; and
  - (vi) customary law benefits.

#### **2.14 CLAUSE 12: REFERRAL OF MATTERS FROM TRADITIONAL COURTS TO MAGISTRATES’ COURTS (PAGE 11)**

- Clause 12 provides that a party aggrieved by a traditional court decision or order may, **after exhausting all the traditional court system appeal procedures** (set out in Clause 6(3)) **refer that decision or order to a magistrate’s court.**
- The Magistrate’s Court may (a) hear any evidence or summon any person to appear to give evidence or to produce any document or article; and (b) give any order or decision it deems competent to give in the matter.

#### Comments

- o The PC rejected Clause 12 in the original Bill, which merely stated that aggrieved parties could escalate a matter to a customary institution or structure in accordance with customary law and custom.
- o Appeals can be directed to the Magistrate’s Court **only after exhausting all levels of customary law appeals** in terms of Clause 6(3).
- o Review by a High Court of a traditional court proceedings can be made **at any time after the decision of the traditional court** on the grounds set out in Clause 11.



## 2.15 CLAUSE 13: RECORD OF PROCEEDINGS (PAGE 11)

- Records of traditional court must include the names of parties, date and nature of the dispute, a summary of facts of the dispute, list of exhibits and the decision and order of the traditional court.
- Records must be accessible to the public and must be in the language most widely spoken in the area of the traditional court.

### Comments

- The provision that records must be accessible is a new sub-clause the PC inserted.
- Other amendments were consequential to provide that traditional leaders preside over a traditional court, and not merely convene a traditional court.

## 2.16 CLAUSE 14: TRANSFER OF DISPUTES (PAGES 11 TO 12)

- **A traditional court can transfer** matters to a Magistrate's Court or a small claims court that it feels it is not competent to deal with.
- Proceedings on the matter will start afresh in the court to which the matter is referred.
- **A Prosecutor, a Magistrate of a Magistrate's Court or a Commissioner of the small claims court can transfer matters to a traditional court** that they feel would be more appropriate to deal with in a traditional court.

## 2.17 CLAUSE 15: LIMITATION OF LIABILITY OF MEMBERS OF TRADITIONAL COURT (PAGE 12)

- A member of a traditional court is not liable for anything done or omitted in good faith (a) in the performance of any function under this Act; or (b) in the exercise of any power under this Act.

### Comment

- Indemnity not only applies to the traditional leader who presides over the traditional court, but all other members who participate in the traditional court.

## 2.18 CLAUSE 16: CODE OF CONDUCT AND ENFORCEMENT THEREOF (PAGE 12)

- **The Minister of Justice in consultation with the Minister responsible for traditional affairs must:**
  - Compile and submit to Parliament for approval, a code of conduct for all members and officials of the traditional court** at least 60 days before publication in the Government Gazette. **If the code of conduct is not approved within 60 days, it shall be deemed to have been approved by Parliament.**
  - Review the code of conduct at least once in every three years.**
    - The outcome of the review and proposed amendments to the Code must be tabled in Parliament for approval.
    - Breaches of the Code of Conduct must be reported to the Provincial House of Traditional Leaders which may impose one or a combination remedial steps, including:



(a) an apology to the complainant, (b) a reprimand; (c) a written warning; (d) compensation; (e) counselling; (f) attendance of a specific training course; (g) being relieved of the role in the traditional court for the duration of his or her rehabilitation; or (h) any other appropriate corrective measure.

### Comments

- **The provision that the code of conduct “shall be deemed to have been approved by Parliament” negates the role of Parliament to approve the Code in the first place.**
- This can be remedied by either (a) requiring that the Code is only **tabled in Parliament** (for information only and not approval) or (b) **clarifying that the Code is only approved if Parliament approves it.**
- The PC substituted certain words in Clause 16(5). “Member of the Executive Council” replaced with “House of Traditional Leaders” and “Provincial House of Traditional Leaders”, respectively.
- The PC also inserted new wording for Clause 16(6)(g), viz. “being relieved of the role in the traditional court for the duration of his or her rehabilitation”. The previous wording of 16(6)(g) is now included under new 16(6)(h).

## **2.19 CLAUSE 17: REGULATIONS (PAGES 12 TO 13)**

- The Justice Minister must make regulations made after consultation with the Cabinet member responsible for traditional affairs, the Members of Executive Councils of provinces responsible for traditional affairs and the National House of Traditional Leaders.
- Regulations must be submitted to Parliament for approval.
- Regulations must be made in respect of the:
  - Role and responsibilities of clerks
  - Pledge and affirmation of traditional leaders or designated persons presiding over traditional courts
  - Qualifications and experience required of Provincial Registrars
  - Traditional Courts register
  - Manner and circumstances, and time period for referral of traditional court matters on review to the High Court
  - Time period and manner of orders or decisions of a traditional court that may be referred to a Magistrate’s Court;
  - Records of proceedings of traditional courts
  - Manner in which a matter may be transferred from a traditional court to a Magistrate’s Court or small claims court
  - Manner in which to report alleged breaches of the code of conduct,
  - Training of traditional leaders and persons designated by traditional leaders to preside over traditional courts;
  - Involvement and training of paralegals and interns in the functioning of traditional courts; and
  - Any other matter.



## 2.20 CLAUSE 18: TRANSITIONAL ARRANGEMENTS AND REPEAL OF LAWS (PAGE 13)

- Clause 18 repeals those Apartheid Acts that are still in operation in terms of which customary disputes were settled in the former Transkei, namely the Regional Authorities Courts Act 13 of 1982 (Transkei); and the Chiefs Courts Act 6 of 1983 (Transkei).
- It also repeals authorisations allowed under the Black Administration Act to (a) hear and determine certain civil claims and (b) try certain criminal offences.
- **Proceedings pending before a traditional court when the Traditional Court Act comes into operation must be continued and concluded as if the Act had not been passed.**

## 2.21 CLAUSE 19: SHORT TITLE AND COMMENCEMENT (PAGE 13)

- The PC amended this Clause to substitute the year 2017 (when the TCB was introduced) with 2019 when the Bill is most likely to be passed.
- The Traditional Courts Act, 2019 will become operational on a date fixed by the President by proclamation in the Gazette.

## 2.22 SCHEDULE 1: PROHIBITED CONDUCT WHICH INFRINGES ON THE DIGNITY, EQUALITY AND FREEDOM OF PERSONS (SECTION 3(3) (PAGE 14)

- Schedule 1 lists prohibited conduct referred to in Clause 3(3) of the Bill.
- These include conduct that:
  - Discriminates against the dignity of members of the Lesbian, Gay, Bisexual, Transgender and Intersexed community;
  - Promotes homophobia;
  - Denigrates, or discriminates against, elderly persons who suffer from mental health conditions such as memory loss, dementia and Alzheimer's disease; and
  - Discriminates against persons who (a) are mentally or physically infirm or disabled; (b) have albinism; and (c) are unmarried.

## 2.23 SCHEDULE 2 (SECTION 4(2)(a) (PAGE 15)

- Schedule 2 lists which matters a traditional court is competent to deal with as contemplated in Clause 4(2)(a).
- The value, payment of compensation or damages must not exceed R15 000.
- The traditional court is competent to deal with:
  - **Criminal matters if the value of theft, stolen property in possession or malicious damage to property does not exceed R15 000; and assault if no grievous bodily harm was inflicted.**
  - **Any matter arising out of customary law and custom where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette and different amounts may be determined in respect of different categories of disputes.**
- In terms of Schedule 2 the traditional court is also competent to provide advice relating to customary law practices in respect of—



- (i) ukuThwala;
- (ii) initiation;
- (iii) customary law marriages;
- (iv) custody and guardianship of minor or dependent children;
- (v) succession and inheritance; and
- (vi) customary law benefits.

**Comment**

- The PC amended Schedule 2 to **increase the monetary values to R15 000 (previously R5 000)**, wherever it appears in the schedule.

**3. TABLE OF PORTFOLIO COMMITTEE AMENDMENTS TO THE TCB**

AMENDED <sup>8</sup> CLAUSES	EXTENT OF AMENDMENT	PREVIOUS PROVISION (where relevant)
<b>Preamble</b>	<ul style="list-style-type: none"> <li>- Deleted the phrase “to address certain abuses prevailing in some traditional courts as they currently exist”.</li> <li>- Inserted reference to customary law living “side by side” with common law and legislation and its different levels of dispute resolution;</li> <li>- Inserted reference to recognise the “flexibility of customary law for consensus seeking and the prevention of and resolution of disputes and disagreements”.</li> <li>- The PC deleted reference to “voluntary affiliation” that provided for persons to “opt out” from traditional court.</li> </ul>	
<b>Arrangement of sections</b>	- Substituted words in the heading – “Escalation” of matters becomes “Referral” of matters	Escalation of matters from traditional courts
<b>Clause 1</b>	- Inserted Act name to clarify a traditional leader is recognised under <b>Traditional Leadership and Governance Framework Act 41 of 2003</b> .	A traditional leader is recognised under an “Act of Parliament”.
<b>Clause 2</b>	- Consequential amendments to delete references to <b>opting out</b> , namely “consensual nature”, “voluntary affiliation” and “the right to freely and voluntarily elect to or elect not to abide by the various applicable practices and customs”.	
<b>Clause 3</b>	- Consequential amendments to delete references to <b>opting out</b> by deleting “and voluntary” and deleted superfluous words.	
<b>Clause 4</b>	- Extensive amendments to mainly deleting references to <b>opting out and referring of matters</b> by the traditional court to another traditional court, mainstream court or forum.	
<b>Clause 5</b>	- Changed the wording to provide that traditional leaders <b>preside over</b> a traditional court.	Traditional leaders convene a traditional court.
<b>Clause 6</b>	- Inserted a new <b>Clause 6(3)</b> to clarify the different levels of traditional leadership in the traditional court system as contemplated in the	Traditional court system is made up of such different levels as

<sup>8</sup> Clauses 9, 15 and 18 and Schedule 1 were not amended.



	<p>Traditional Leadership and Governance Framework Act, 2003 (and thus different levels of appeal).</p> <p>- <b>The different levels of traditional leadership for customary law appeals</b> are a (i) headman or headwoman’s court, (ii) senior traditional leader’s court and (iii) king or queen’s court.</p>	are recognised in terms of customary law and custom.
<b>Clause 7</b>	<p>- <u>Inserted a new Clause 7(11) to provide for the determination of fees payable to a traditional court in terms of customary law.</u></p> <p>- <u>Inserted a new Clause 7(12) that requires members of a traditional court with a personal or family interest in a matter to be decided by the traditional court to declare such interest and withdraw from participating in the resolution of that matter.</u></p>	
<b>Clause 8</b>	<p><u>Amended wording of Clause 8(1)(e) to provide for an order to accept an unconditional apology as a voluntary settlement between parties.</u></p> <p><u>Amended wording of Clause 8(1)(f) to an order reprimanding a party or parties to the dispute</u></p>	order that an unconditional apology be made order directing that a party or parties to the dispute be reprimanded
<b>Clause 10</b>	<u>Inserted a new subsection 10(4) that “public interest” means an outcome which affects any right of the public, public finances or the public good.</u>	
<b>Clause 11</b>	<p><u>Substituted Clause 11(1)(f) to include situations where persons were not allowed to represent themselves or be represented by persons of their choice as grounds for a High Court to review a traditional court decision.</u></p> <p><u>Substituted Clauses 11(1)(j) and 11(1)(k)</u>  <i>(j) an order was made contrary to the provisions of section 8;</i>  <i>(k) a member of the traditional court participated in the proceedings of the court contrary to the provisions of section 7(12) (i.e. did not recuse him or herself from the session despite having a personal or family interest in the matter before the traditional court).</i></p> <p><u>Inserted a new Clauses 11(1)(l)</u>  <i>(l) the provisions of section 3(3) have not been complied with or have been contravened (i.e. the court used prohibited customs or practices that infringed on the dignity, equality and freedom of persons)</i></p> <p><u>Inserted a new Clauses 11(1)(m)</u>  <i>(m) any procedural shortcoming relating to the conduct of the traditional court in the resolution of the dispute..</i></p>	
<b>Clause 12</b>	<u>Amended Clause 12</u> provides that a party aggrieved by a traditional court decision or order may, after exhausting all the traditional court system appeal procedures (set out in Clause 6(3)) refer that decision or order to a magistrate’s court.	a matter can be escalated to a customary institution or structure
<b>Clause 13</b>	<p><u>Changed the wording</u> to provide that traditional leaders preside over a traditional court.</p> <p><u>Inserted a new sub-clause 13(j)</u> to provide that records of the traditional court must be accessible to the public.</p>	Traditional leaders convene a traditional court.
<b>Clause 14</b>	Minor changes to omit the words “and custom” and “should the parties agree”	
<b>Clause 16</b>	<p><u>Substituted words in Clause 16(5).</u> “Member of the Executive Council” replaced with “House of Traditional Leaders” and “Provincial House of Traditional Leaders”, respectively.</p> <p><u>Inserted a new wording for Clause 16(6)(g)</u> “being relieved of the role in the traditional court for the duration of his or her rehabilitation”. <i>Previous wording of 16(6)(g) now included under new 16(6)(h).</i></p>	
<b>Clause 17</b>	<u>Changed the wording</u> in 17(1)(b) and 17(1)(k) to show that a traditional leader presides over a traditional court.	“convening the traditional court” and “to convene”





<b>Clause 19</b>	<b>Substituted the year</b> 2017 with 2019.	
<b>Schedule 2</b>	<b>Monetary values increased to R15 000</b> wherever it appears in the schedule.	R 5 000

#### 4. CONCLUSION AND RECOMMENDATIONS

- In some respects the current 2017 TCB Bill is a marked improvement compared to the 2008 and 2012 Bills, insofar as the Bill aims to ensure full and equal participation of vulnerable groups, especially women, children, the elderly, indigent persons.
- The Bill also explicitly provides for the application of Constitutional values and imperatives in the resolution of disputes in traditional courts. It makes specific reference to Section 9 of the Constitution (Equality Clause), and further lists (in Schedule 1) a number of prohibited discriminatory practices. The list is not exhaustive and makes it possible for traditional courts to evaluate and make pronouncements on future conduct and practices that may at a later stage to be found to be discriminatory that are not included in the list. This is especially relevant due to the fast evolving nature of technology that, for example, has necessitated the creation of new types of crimes, like cyber bullying.
- **However, one of the main criticisms against the amendments made by the Portfolio Committee of the Fifth Parliament was the removal of the opt-out clause that was considered one of the biggest improvements in the 2017 Bill (compared to previous versions).**
- It will thus be up to provinces to decide whether they can live with the Bill in its current amended form, or whether they want the opt-out clause to be returned to the Bill.
- This is because the NCOP has more influence over section 76 bills that affect provinces directly, compared to ordinary section 75 bills that do not affect provinces.

##### 4.1 MANDATING PROCEDURES ON TCB AND PROVINCIAL PARTICIPATION IN NCOP

The mechanism through which provinces participate in the processing of section 76 bills and decisions is the mandating system which is governed by the Mandating Procedures of Provinces Act, 2008 (MPPA)<sup>9</sup>. The MPPA provides “a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf” as required by s 65(2) of the Constitution.

As the TCB is a section 76 Bill, provinces hold the power in terms of how they want the Bill amended. The TCB cannot be passed unless the majority of provinces agree to the Bill. It will thus be imperative for provinces to participate fully during the processing of the Bill, especially during the negotiating mandate phase when provinces propose amendments to the Bill. The requirement of provincial mandates to deliver and give effect to the decisions of provincial legislatures (on behalf of provinces) is intended to enhance democracy. Mandating procedures, if used optimally, can showcase provincial participation at its best.

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<sup>9</sup> Act 52 of 2008



## 4.2 RECOMMENDATIONS BASED ON OBSERVATIONS AND LESSONS LEARNT FROM THE PROCESSING OF THE 2012 TCB IN THE NCOP.<sup>10</sup>

### (i) Ensure adequate public participation in provinces

- The TCB 2012 was rejected by some provinces because consultation on the bill had been inadequate. It will thus be of utmost importance for provinces to publicise the bill in provinces and ensure as many of the communities affected by customary law and traditional courts are consulted to ensure adequate public consultation and input.
- Provinces must maximise their input on bills and should proactively arrange public consultations on bills about which they receive early notice.
- The NCOP Select Committee should request feedback from provinces regarding their public consultation processes followed and may decide to hold further public hearings if needed *before considering final mandates*.

### (ii) Ensure provinces send delegates to all Select Committee meetings on the Bill, especially the negotiation mandate meeting

- Provincial participation is at the heart of the mandating process and the negotiations phase is when provinces have the ideal opportunity to articulate their unique challenges and negotiate with one another on how the contents of bills should be amended to address their unique needs, or influence the outcome of a decision on other matters that affect them that require the approval of provinces in the NCOP plenary.
- Negotiations, if used optimally, can be a very powerful tool for provinces to sway opinions and decisions in their favour (in addition to voting in the NCOP plenary).
- Provinces directly affected by a bill must ensure that, in addition to a list of proposed amendments, their representatives are present at the negotiating mandate meeting.
- All provinces should attend and participate in negotiating and final mandate meetings and should lobby each other's support for the bill or proposed amendments to the bill.

### (iii) Schedule at least two negotiating meetings

- Having more than one negotiating meeting will allow provinces time to consider whether or not they accept amendments effected on the Bill (in light of the proposals) and provide an opportunity to propose further changes / amendments if required. This is important as the next stages (final mandate stage and voting mandate stage) only allows provinces to indicate whether or not they vote in favour of the Bill.

### (iv) Provinces should not abstain from voting on the TCB

- To avoid deadlocks during negotiations, it is imperative that no province abstains from voting on the Bill, as the MPPA is silent on how a committee should proceed when negotiations reach a stalemate and there is no decisive vote to either accept or reject a bill. *This was the challenge the Select Committee faced in 2014 when dealing with the 2012 TCB, as negotiating mandates indicated that four provinces rejected the bill, four were in favour of the bill with proposed amendments; and one (KZN) abstained. In terms of Section 65(1)(b) of the Constitution at least five provinces out of nine must vote in favour of a "Question" which includes section 76 Bills before the Council. The Select Committee at that time correctly interpreted the application of section 65 to mean that*

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<sup>10</sup> Whittle, P (2015). The Power to Negotiate: Examining Mandating Procedures in the National Council of Provinces and Their Impact on Legislation and Other Parliamentary Processes (LLM Thesis, UCT).



*the TCB needed the supporting vote of five provinces to be passed, but incorrectly expected five provinces to reject the bill in their mandates. **In reality, because only four provinces supported the Bill, the Bill did not meet the requirement to be passed.***

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## 5. SOURCES

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