

**CONSOLIDATED NEGOTIATING MANDATES OF THE TRADITIONAL COURTS BILL
(INCORPORATING PROPOSALS FROM THE PUBLIC HEARINGS HELD IN PARLIAMENT)**

1. Processing the Bill

1.1 The negotiating mandates have been tabled with the Committee and this entitles it to discuss the mandates and negotiate with regard to amending the Bill, approving the Bill or rejecting the Bill.

1.2 The Committee held further public hearings in Parliament during 18-21 September 2012. The Committee incorporated the information raised during the public hearings and the negotiating mandates into the document below to assist the Committee's discussion of the mandates.

1.3 The clauses from Provinces include issues bordering constitutionality of some of the clauses in the Bill.

Clause No.	Comments from Provinces	Province
Purpose	Line 3 : [enhance] customary law	LIMPOPO
1. Definitions	(iii) definition of a traditional court- ["inKantolo ye Ndabuko"] "inkundla yoMdabu" in isiZulu	KZN
	No definition for family courts	LIMPOPO
	Replace "Traditional Leader" with "Kgoshi" and "senior traditional leader" with "kgoshikgolo"	LIMPOPO
	Definition of Traditional Leadership and Governance Act: add the word "as amended"	LIMPOPO
	The Bill makes no mention of a Chief's Council	NC
	The Bill needed amendments to change references in the Bill to traditional courts to that of alternative dispute mechanisms; and proposed that the title of the Bill be amended to: "Resolution of Certain Disputes by Traditional Councils Bill, 2012"	DOJ
	The provisions in the Bill dealing with the designation of traditional leaders as presiding officers be deleted in their entirety	DOJ
	A revised Bill should avoid the concept of "jurisdiction" as defined by boundaries as much as possible	DOJ
	An analysis be conducted to establish whether the Bill complies with international	SAHRC

	conventions and laws that placed obligations on South Africa to reform customary practices and establish judicial equality with regard to women	
2. Objects	The Bill does not create uniformity and leave the process at the discretion of each traditional court to determine content of the law	EC
	Procedures for traditional courts must be strictly regulated, certain rights must be guaranteed	EC
3. Guiding Principles		
4. Designation and training	<ul style="list-style-type: none"> • There should be a competency assessment for traditional leaders as presiding officers. Designation should be revoked if failure to acquire competency levels • The Bill must speak to when a presiding officer can be designated, should not be left to regulations • The Bill is silent on Council of Elders who should preside over traditional courts • The gender representation of presiding officers ought to be changed to give women greater representation 	EC
	Birthright of presiding officers are/can be excluded in current	GA
	There is no provision when presiding officers have a conflict of interest. Presiding officers must recuse themselves from dealing with such matters	GA
	A Code of Conduct should be developed for traditional courts and presiding officers similar to the code that guides the conduct of judges	DWCPD
5. Settlement of Civil Disputes	That under clause 5(1)(2)(b) it is incorrect to reiterate that the traditional court cannot get involved in matters of divorce or separation – the opinion is that the families should get involved when challenges arise in the marriage as per tradition. That the bill was not explicit on the participation of women. That it was also not clear on where the “seat of the traditional council” will be.	FS
	Legal representation should be available to people who appear before a traditional court on a civil matter	GAWC/

6. Settlement of Criminal Disputes	The Bill must make it an offence for traditional courts to hear matters outside those mentioned in the schedule	EC
	The Traditional Courts operate outside the provisions of the Criminal Procedure Act and section 35 (3) of the constitution and section 35(3) (c) which confers to every citizen the right to a public trial	GA
	The Bill must clearly specify different types of assaults and offences such as witchcraft as contemplated in the Schedule to the Bill	LIMPOPO
	That the challenge was that traditional courts are not assisted by the magistrate's courts for example when an offender refuses to appear before a traditional court after being subpoenaed	FS
7. Nature of Traditional Courts	The Traditional Court operates in the justice sphere of government and is distinct from section 166 of the Constitution. The Bill is unprincipled because it operates contrary to the principle of separation of powers	GA
	The combination of both executive and judicial functions on the part of Traditional leaders is contrary to the spirit of separation of powers. Traditional leaders are expected to uphold customary practices , represent communities and act as impartial presiding officers . This may give rise to a conflict of interest as the independence of the Traditional leader may be compromised.	NC
	Power is centralised in the senior traditional leader and goes against the grain of separation of powers	WC
	<p>Jurisdiction of courts is a vague concept. When disputes centre on land ownership, land use and occupation, it may necessitate involvement of municipalities. Will the Traditional courts have jurisdiction to add municipalities to such cases. This must be clarified from the outset. Furthermore, the jurisdiction areas of the courts follow the jurisdictional areas of the traditional authorities. Firstly, it is not clear in a number of instances exactly where such boundaries lie and this may give rise to jurisdictional disputes.</p> <p>Secondly, the jurisdictional areas in all instances do not correspond with the areas of jurisdiction of municipalities. This will have the effect that in one municipality there will be at least two courts having jurisdiction. This may lead to conflicting interpretation on issues related to land use, occupation and ownership having a potentially detrimental effect on the application of land use policy within the municipality.</p> <p>It is not clear whether the Department of Justice has capacity to implement the Act to train the presiding officers to enforce jurisdictional issues, etc where ordinary magistrates courts</p>	FS

	are called upon to adjudicate appeals, it is not clear from the Bill whether such appeal courts must have the required expertise to deal with traditional law.	
	Clause 4 - Role clarification between chief (kgosi) and the Headman (kgosana) All traditional leaders should be properly briefed on Section 10 of the Bill and they should also be provided with the Constitution and be properly workshopped.	NW
8. Sessions of the Traditional Court	The Bill states that the court will sit at a place to be determined by the presiding officer. The Bill must expressly state that the Traditional Court cannot sit in places where women are not allowed to enter.	EC
	Women in mourning clothes will not be allowed to enter the traditional courts and will not be allowed to speak and must speak through a male person. These are discriminatory practices	NC
	Clause 8 – that the word 'presiding officer' be substituted with the word 'traditional council'	FS
9. Procedure of the Traditional Court	<ul style="list-style-type: none"> • There are issues relating to procedure that is not regulated in the Bill. • Legal representation to be allowed in traditional court as per section 35(3) of the constitution • Clause 9(3)(b) Women who are minors will be represented by their male counterparts is discriminatory towards women • Clause 9(4) is unclear in how the court will apply traditional and customary law to litigants from different areas with different customs and how the court will decide this • Clause 5(a)(ii) collection of revenue to be utilised by the traditional community concerned 	EC
	<ul style="list-style-type: none"> • Clause 9(3)(a)-that 'legal representative' be defined for the purposes of this Bill. • Clause 9(3)(4)(b)(ii) – that this clause be totally removed from the Bill. <p>Another concern is that women might be prejudiced in certain circumstances. Although the traditional courts aim to have the Constitution and Bill of Rights as part of their Guiding Principles, in reality women remain more marginalised in certain areas, and this might be prejudicial to the way the traditional courts operate. For instance, matters of domestic violence (which do not fall under assault with the intent to do grievous bodily harm) or the targeting of elderly women for 'witchcraft' might not be handled in ways that promote non-sexism, and might actually result in the further disempowerment and marginalisation of women.</p>	FS
	Clause (9)(3)(a) is unconstitutional in terms of section 35(3) and section 166 of the constitution	GA/ KZN/WC

	<ul style="list-style-type: none"> • Clause 5(a)(ii) collection of revenue to be utilised by the traditional community concerned • Compliance with the PFMA must take effect • There should be more powers allocated to the traditional court as all offences start at the traditional court 	LIMPOPO/ KZN
	Clause 7 Equitable representation of women in these courts should be progressively realised	NW
	Clause 10(1)(a) the reference to forced labour in this clause be removed as a possible sanction	DWCPD
10. Sanctions by the Traditional Court	<p>Clause 10(2)(f): It is unclear how the court will hear criminal matters that will fall under the auspices of the National Prosecution Authority.</p> <p>Clause 10(2)(g),(h),(i) violates the dignity of a person and it may be cruel, inhumane and degrading. It should be removed</p>	EC
	<p>Clause 10(2)(e) – provide for the training of person(s) that will;</p> <p>10(2)(g) – be monitoring the process after an order is made.</p> <p>(The purpose is to avoid further abuse of such sections wherein untrained people will abuse this power if left this vague).</p> <p>The Bill must provide for how such persons will be trained.</p>	FS
	Evictions would contravene sections 25 and 26 of the Constitution	SAHRC
	Clause 10(2)(g) may well be in conflict with section 13 of the constitution	GA
	Courts will not be able to enforce their decisions because they do not have resources. This will lead to a duplication of magistrates courts	LIMPOPO
	The Bill does not explain how the decisions of the court will be enforced	NC
	The various sanctions options available to the presiding officer should be reviewed to ensure that traditional communities are protected from abuse	WC
	Fines or taxes paid by rural communities to Chiefs should be regulated, audited and should be used for rural development and scholarships for rural children	DWCPD
11. Enforcement of sanctions	The Traditional Court must conduct an inquiry into a person's ability to comply with an order prior to an order is made	EC
	The clause complies with the constitution and other applicable laws	GA
	<ul style="list-style-type: none"> • People will have to travel far to the office of the Sheriff to have orders of the court 	LIMPOPO

	<p>executed.</p> <ul style="list-style-type: none"> • The Bill must provide for the traditional court leaders the means to force the offenders to pay their fines and to remove the offender from the community if they see fit • The Bill must also provide for protection of the traditional leader • The Bill must take the principle of proportionality into account when issuing fines 	
	Misconduct processes against a presiding officer in a Traditional Court is not clearly detailed	NC
	Failure to comply with an award or directive of the Traditional Court should result in criminal prosecution	DOJ
12. Finality of Court order	This clause limits the right of appeal with respect to the right to administrative justice as contemplated in section 33 of the constitution	GA
	This clause does not achieve its intended purpose because it does not lead to speedier, less formal and less expensive access to justice	LIMPOPO
13. Appeals to Magistrates Courts	Appeals should be allowed irrespective of the order or the sanction. The appeal structure should recognise the hierarchy in traditional authorities. Appeals should be chaired by a headman and must go to the chief and thereafter to the King	EC
	The limits on the right of appeal to one in respect of certain of the sanctions impacts on the right of access to court enshrined in section 34 of the constitution	GA
	<ul style="list-style-type: none"> • Magistrates courts are already overburdened and they would require magistrates who will specialise in African Customary law • The Bill must allow for a Traditional Courts of Appeal to allow for appeals to be dealt with in the customary tradition • There must be automatic review of cases when dealing with vulnerable groups • If appeals are handled by magistrates, offenders will undermine the authority of the traditional leaders 	LIMPOPO
	The appeals processes should be strengthened to ensure that traditional communities have legitimate processes through which to appeal against the decision of the traditional court	WC
14. Procedural review by magistrates	Clause (14)(1)(c) provides for gross irregularity as one of the grounds for review.	EC

courts		
	The fullest powers of review should be granted given the birthright and powers of a royal family as against the poor and vulnerable in rural areas	GA
	Persons should have the option of 'opting out' of the jurisdiction of a traditional court system	WC
15. Oath	Silent	
	Oaths of office should be taken before a Judge President	NHTL and DOJ
	What happens if a traditional leader's appointment is revoked due to gross misconduct? Provision should be made for the Minister to revoke a traditional leader's appointment and removal if he brings the institution of the traditional court into disrepute	GA
17. Assignment of officers	Insert: (a) <u>The Minister must recognize the exiting traditional court constables as officers of the court</u> (b) <u>The traditional court constables shall serve summonses in writing or orally</u>	KZN
	Traditional courts should assign officers of the traditional courts and not the Minister	LIMPOPO
	Clause 17 – that when officers are assigned, the Minister looks into gender representation That this Bill should be simplified in terms of making it easier for appeal purposes and also the financial implications for people who cannot afford the legal fees for making an appeal. That provision be made for two (2) assessors in principle, to comply with gender representation otherwise it might lead to the abuse of power.	FS
18. Record of proceedings	<ul style="list-style-type: none"> The Bill is not clear on how proper record keeping and administration will be maintained and conducted. This has the potential of impacting on interested parties' right to access. There is no system of documenting customary law, a Bill of this nature should make provision for documentation of customary law of the various traditional cultures and traditions 	WC
	The Bill excuses the Traditional Court from any obligation to keep a record of its proceedings. This is inappropriate and unfairly truncates the right of review or appeal of the court concerned and offends against the notion of a court which is an institution whose proceedings are proceedings of record	GA
19. Transfer of		

cases		
	Parties should be informed in advance of such decision of transfer of their cases by court	GA
	Some cases in magistrate's courts take a long time before they are referred to traditional courts without valid reasons. Magistrates who fail or delay to refer cases that must be dealt with in traditional courts must receive penalties	LIMPOPO
20. Offences and penalties		
	Clause complies with the Constitution	GA
	There must be a provision for a police officer to be present during traditional court proceedings to guard against any misconduct including disruption of the court proceedings Police officers must visit crime scenes, deal with offenders and help traditional leaders with law enforcement on cases decided in traditional courts	LIMPOPO
21. Regulations	The Clause must be amended as follows: <u>21(1)The Minister must make regulations after consultation with the National House of Traditional leaders regarding the following:</u> 21(1)(h) the manner in which a traditional court must cause persons, who have not complied with any – (i) Sanctions imposed by it; <u>or</u> (ii) <u>Summons or subpoenas issued by it,</u> To appear before it, as contemplated in section 11(1).	KZN
Consultation	<ul style="list-style-type: none"> The consultation process was not balanced because only traditional leadership has been consulted. The lack of consultation has been raised at most of the public hearings conducted by the Eastern Cape Legislature The Bill is not translated in official languages accessible to traditional communities 	EC
	<ul style="list-style-type: none"> The process of consultation during the drafting of the Bill was inadequate in that consultation was limited to traditional leaders. A wide range of rural communities that would be affected by the Bill. The process of consultation was also impeded by the fact that the Bill was only available in English, a language that is not understood by the majority of people affected by the Bill 	WC