

***Report of the Portfolio Committee on Cooperative Governance and Traditional Affairs dated 20 November 2019, as follows:***

***1. Terms of reference***

The Traditional Courts Bill (the Bill) was referred to the Portfolio Committee on Cooperative Governance and Traditional Affairs (herein after referred to as the Committee) by the Honorable Speaker.

The terms of reference of the Committee were to consider the Bill, to conduct public hearings on the Bill across the province and report to the House.

***2. Method of work***

The Chairperson attended a briefing on the Bill at the National Council of Provinces on the 9<sup>th</sup> of October 2019. The entire Committee was briefed on the content on the 31 October 2019 and it conducted public hearings to solicit the views of the people of the Eastern Cape Province.

Public hearings were conducted in various towns across all the Municipal Districts, and the Metropolitan Municipalities in the Provinces which are Alfred Nzo, Amathole, Chris Hani, Joe Gqabi and OR Tambo, Sarah Baartman, Nelson Mandela Metro and Buffalo City Metro. They were conducted from the 05 – 08 November 2019.

***3. Submissions on the Bill***

The following submissions were made;

***3.1 Ibhunga Hall, Sterkspruit***

The meeting was generally divided over the acceptance of the Bill. Below are the comments of the meeting's participants;

- (a) Clause 7 of the Bill prohibits legal representation which is against the Constitution which state that, every accused person has a right to a fair trial, which includes the right to be represented by, a legal practitioner.
- (b) The Bill state that a person should be represented by any person of his or her choice, which is viewed as a loophole for legal practitioners to represent people as their friends or family members in a traditional court.
- (c) Some traditional leaders are believed to be involved in criminal activities, collude in criminal acts, and abuse traditional courts to extort material resources from the community; all these abuses must be dealt with in the proposed legislation.

- (d) The Bill is viewed as an important document that will offload the courts roll and overloaded prisons but is not properly resourced.
- (e) A concern was raised on the lack of financial resources to ensure the functionality of the traditional courts.
- (f) The Bill was viewed as a step forward as it seeks to establish traditional courts that are recognized by the Constitution which is a supreme law of the land.
- (g) Most traditional leaders have no legal background. The training of traditional leaders must cater for the varying levels in literacy in the community.

### 3.2 Qamata Great Place, Cofimvaba

The meeting was overwhelmingly in favour of the Bill. Below are the comments of the meeting's participants;

#### ***Submissions made;***

- (a) There is a need for traditional courts to keep accurate record of all cases reported in a safe way with a functional recording system as it is the case with magistrate courts.
- (b) Public education must be conducted to educate members of the community to respect traditional courts as they tend to respect magistrate courts.
- (c) There should be traditional courts even at the level of subhead man or subhead woman since most cases starts at subhead man/women level.
- (d) Clause 4(a) empowers the Justice of the Peace to summon those who refuse to attend to the traditional courts, which is a limitation of powers traditional courts.
- (e) The traditional courts bill must outline ways in which the money collected from fines at traditional courts will be used.
- (f) The introduction of the traditional courts helps the poor by cutting legal fees as a condition for accessing justice and it will alleviate pressure on magistrate courts.
- (g) The Bill is not clear on how the decision of the traditional court will be defended when it is appealed against.

- (h) There is a need for the use of professional social workers in the traditional courts to conduct pre and post-trial assessment of minors since most offenses are conducted by minors.

### 3.3 Mngqesha Great Place, King Williams Town

The meeting was generally divided over the acceptance of the Bill. Below are the comments of the meeting's participants;

***Submissions made;***

- (a) The Bill brings more work to the secretaries of traditional councils as it expects them to do the duties of the clerks of the traditional court.
- (b) The senior traditional leaders, headman/ headwoman and sub headman are believed to come from the same clan, will probably show partiality, and could abuse traditional courts.
- (c) Some people cannot afford to go to magistrate's courts in towns and cities; and the traditional courts bill allows people access to justice in an affordable and understandable manner.
- (d) The traditional courts will be useful because they will deal with ordinary cases that would otherwise be dealt with at magistrate courts and this will help reduce the backlog on the justice system.
- (e) The introduction of traditional courts was seen as a backward move, which is set to erode the democratic gains and is thus undesirable.
- (f) The focus of the traditional courts is on preventing conflict, maintaining harmony and resolving disputes in a manner that promotes restorative justice, social cohesion and reconciliation.
- (g) Clause 13 of the Bill requires the traditional courts to keep records of proceedings; and subsequently submit reports to the Provincial Registrar. With no budget allocation from the Department of Justice

### 3.4 Chatty Community Hall, Port Elizabeth

The meeting was overwhelmingly in favour of the Bill.

- (a) The training of Traditional Leaders and Clerks of the Traditional Courts will reduce the reviews by high courts on grounds listed in clause 11 of the Bill.
- (b) The Bill is not clear on the prescribed manner on how to take the proceedings of the traditional court on review.

- (c) Clause 12 of the Bill is clear about the aggrieved party appealing the decision of the traditional courts, it is however not clear about referral of the appeal to the Small Claims Court which is far cheaper and less formal.
- (d) The Khoisan community is still not yet recognized in terms of Traditional Leadership and Governance Framework Act since the Traditional and Khoisan Bill has not been assented to.
- (e) The Bill is in line with Chapter 12 of the Constitution thus it is fully supported.
- (f) There is a need for a workshop by the Department of Justice on the roles of the traditional leaders in terms of the proposed legislation.

### 3.5 Libode Community Hall, Libode

- (a) Traditional leadership should be advised when the Bill comes into effect.
- (b) Clerks of current traditional councils should be paid a stipend.
- (c) Clause 3(2)(c) should be amended to add “in consultation with the National House of Traditional Leaders”.
- (d) In Clauses 16(1)(a), 16 (2) and 17 substitute the words “after consultation” with “in consultation”.
- (e) It is suggested that orders made at the courts of headman or headwoman must be made subject to ratification by the Senior Traditional Leader or King or Queen.

### 3.6 Butterworth Town Hall, Butterworth

- (a) Most traditional councils currently operate with no administrative support so this should be provided.
- (b) There should traditional courts even at the level of subhead man or subhead woman.
- (c) It is not clear who will assist the presiding officer with taking the pledge so this must be clarified.
- (d) The Bill provides no timeframes for lodging appeals from one traditional court to another.
- (e) The absence of legal representation at traditional courts appears to be in violation of the constitutional right to legal representation.

- (f) Traditional courts should operate under a system of geographical jurisdiction similar to Magistrates Courts instead of the current arrangement that a person may approach any traditional court.

### 3.7 Nqadu Great Place, Willowvale

- (a) The term of most traditional councils has expired and they therefore need to be reconstituted prior to the operation of the Bill.
- (b) The Bill should take into consideration differences in cultural practices so it is imperative that the traditional courts should have geographical jurisdiction.
- (c) It is suggested that legal representation should be provided to traditional leaders when a decision or order of a traditional court is subjected to an appeal to a Magistrate Court.
- (d) Traditional leaders should be provided with booklets on relevant pieces of legislation once the Bill has been passed into an Act of Parliament.
- (e) It was suggested that the amount set in Schedule 2 be increased from R15000 to R30 000 or the Bill must make provision for different amounts for the different levels of traditional courts.
- (f) The traditional leadership requests training on gender sensitivity and general issues around sexual orientation.
- (g) It appears that the Bill has omitted the level of a Principal Traditional Leader from traditional courts.
- (h) It was suggested that appeals from the King or Queen's courts should be directed to the High Court and not to a Magistrates Court
- (i) It was felt that the Bill is not clear enough and therefore it was suggested that some of the provisions of the Chiefs Courts Act, 1993 (Act No.6 of 1993) (Transkei) must be imported into the Traditional Courts Bill.
- (j) Traditional courts must be empowered to be able to direct that an offender be detained by the South African Police Services pending appearance by the offender before the traditional court.

### 3.8 Lusikisiki College of Education, Lusikisiki

Traditional Leaders and the community expressed appreciation of the Bill and also supported the Bill however they required time to go through the Bill with a view to share with other people who could not form part of the meeting. The stakeholders promised to submit contributions made through email or fax on the identified date.

The following concerns were raised by the attendees:

***Inputs***

- (a) The stakeholders advised the Department to appoint qualified and skilled people who will be relevant to traditional courts.
- (b) The stakeholders suggested that there must be clear timeframes for sheriff's summons.
- (c) The issue of a charge of R15 000.00 must be looked at it as it is a very small amount especially for the livestock offenders.
- (d) There must be stipend for the subhead man/woman as non-availability of stipend impacts negatively on the function of the Board.
- (e) The Palace must be provided with the building with court rooms, offices, personnel and tools of trade for traditional courts.
- (f) The areas of jurisdiction of traditional courts in the Bill must be equal to the model courts.

3.9 *Tsolo Town Hall, Tsolo*

The stakeholders in attendance supported and appreciate the Bill however they required time to go through the Bill also given time to share the Bill with other stakeholders who could not form part of the public hearings. The stakeholders promised to submit the inputs through email or fax on or before 06 November 2019.

***Inputs***

- (a) The Department must appoint qualified candidates who will be relevant to traditional courts, e.g. Clerk of the court, Sherriff officers, and the Registrar officers and also provide the traditional courts with tape recorders for recording cases and other resources.
- (b) The issue of deserving traditional leaders who do not benefit from gadgets like mobile phones and laptops which result to communication breakdown between the Department of COGTA and traditional leaders was raised as a serious concern.

- (c) The Department was requested by the stakeholders to fast track the Khoisan Bill.
- (d) A structure which is similar to the modern Magistrate's courts must be erected for the Traditional Courts.
- (e) The Department must ensure that the regalia of the Traditional Courts and the Modern Courts are the same so as to afford Traditional Leaders the honor they deserve.
- (f) Traditional courts must be properly equipped with both human and physical resources as the community is solely dependent on Magistrate Courts.

### 3.10 Mthatha Town Hall, Mthatha

The Bill overwhelmingly accepted by the Traditional Leaders and relevant stakeholders. However the following concerns were raised by the attendees respectively:

#### *Inputs*

- (a) The Traditional Courts should be used as the extension of the modern magistrate's court instead of referring the community matters to the magistrate's courts.
- (b) The issue of the fields which are not marked or demarcated must be looked at as this might result to expropriation.
- (c) Traditional Courts must be capacitated in all areas to fulfill its mandate.
- (d) There must be a clear administrative system for the administration of fines issued by Traditional Courts.
- (e) There must be funds set aside for the training of traditional court communities.
- (f) The appeal process needs to be carefully outlined, particularly with respect to how people will be represented.
- (g) The proposed legislation must recommend ways in which incidents which occur at traditional circumcision rites will be dealt with.
- (h) Traditional courts must not be undermined by the younger generation who generally prefer to go to Magistrates' Courts than traditional courts as they do not have the same dignity as Modern Magistrate Courts.

- (i) The Traditional Courts Bill must outline ways in which the money collected from fines at Traditional Courts will be used.
- (j) Some traditional leaders are believed to be involved in criminal activities, and abuse Traditional Courts to gain material resources from the community; all these abuses must be dealt with in the proposed legislation.
- (k) The Traditional Courts will be useful because they will deal with ordinary cases that would otherwise be dealt with by Magistrate Courts and this will help reduce the backlog on the justice system.

### 3.11 Matatiele Town Hall, Matatiele

#### Submissions/Comments

- (a) There seems to be a contradiction in terms of cases on appeal where the issue at hand is land; in communal land where the title holder is the traditional leader, you appeal to the same person who allegedly wronged you. The Magistrate must hear case after the appeal certificate has been issued.
- (b) The Traditional Court System will always remain inferior to the Roman Dutch Court System if we do not develop the system because in Traditional Court System there is no prosecution and there are lots of irrelevant questions which are being asked. There should be prosecution services to assist the Court.
- (c) The R15 000 limit with regards to fines and cases that can be dealt with seem to be very limiting to what the Court can hear and therefore this must be corrected.
- (d) Clause 7 – clarity must be made regarding legal representations whether paralegals means legal representation.
- (e) The Bill must take into consideration the issue of sub Headman as the Bill does not mention the Sub-Headman as they are also part of traditional courts system.
- (f) Workshops for women must be conducted with a view to educate women on progressive laws.
- (g) Monies for fines must be clearly indicated as to where they must be kept and how they are utilised.
- (h) There must be good relations between Traditional Leadership and SAPS as some of issues can be sorted without clogging up the judiciary system.



- (i) Corporal punishment as a sanction must be completely stopped by the Courts since this form of punishment is against the Constitution.
- (j) When the Chief or leader is involved in criminal activity, the responsibility to report the issue to upper authorities must be clearly defined.

### 3.11 Alfred Nzo District Municipality, Mt Ayliff

#### Submissions

Bill is supported subject to these issues being taken into consideration:-

- (a) That the Bill does not reduce the powers of traditional leaders.
- (b) The Bill must give an opportunity for the applicant to ask for a choice whether to go to traditional court or magistrate's court.
- (c) Sub-headmen seem to be the primary traditional court of rural people and therefore must be covered in the Bill.
- (d) The issue of other people bringing relatives who are lawyers to stand for them must be looked at seriously and the Bill must have a way of dealing with that issue.
- (e) If the Traditional Leader is not allowed to make determination on divorce proceedings only allowed to give advice on the matter, the advice must be followed even if it is not expressed on the Bill.

### 3.13 Mbizana Town Hall, Mbizana

#### Inputs

- (a) The uniform approach of putting justice should take into account the conditions of the area.
- (b) There must be a space where the Bill makes provision for appeal to the King's Court not only the Magistrate Court.
- (c) The issue of perpetrators committing different crimes to people which exceed the R15, 000 collectively but not individually must be clearly defined in the Bill.
- (d) The issue of banishment of person from a village needs scrutiny because the person who is being banished had to go and become a problem in the next village even the banishment of the perpetrator on the other hand is meant to help the perpetrator to leave without further community vigilantism.

- (e) The issue of lobola and customary law is being taken away from traditional courts due to the R15, 000 cap therefore this must be clearly defined as the issue of lobola is dealt with in traditional courts.
- (f) The issue of divorce cases which are referred by Magistrate Court to Traditional Courts to determine the issue of lobola must be clearly defined.
- (g) Traditional courts should be given powers to issue orders for imprisonment even it is for a month. The courts must also be given more powers to deal with domestic violence, issue maintenance money for children and for partners.
- (h) There must be separation of charges once the fines exceeds R15 000.

#### **4. Findings**

- (a) The majority of the submissions received support the Traditional Courts Bill.
- (b) The implementation of the Bill is going to be very difficult since there is no adequate funding for the functioning of traditional courts.
- (c) The Bill is not clear on the prescribed manner on how to take the proceeding of the traditional court on review and how to defend the decision of the traditional court.

#### **5. Recommendations**

- (a) The Committee recommends to the House that the Bill should be adopted.
- (b) The funding for the functioning of traditional courts must be made available in order to ensure that this is not an unfunded mandate for the traditional leaders.
- (c) The Department must ensure that there is a prescribed manner on how to take the proceedings of the traditional court on review and on how to defend the decision of the traditional court.



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**Hon. T. MATIWANE**  
**Chairperson: Portfolio Committee on Cooperative Governance and Traditional Affairs**