



LEGAL RESOURCES CENTRE

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DEPARTMENT OF TRADITIONAL AND LOCAL GOVERNMENT:

**TRADITIONAL LEADERSHIP AND GOVERNANCE  
FRAMEWORK DRAFT BILL, 2003  
(GG25155, GN1850 : 27 June 2003)**

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SUBMISSION TO THE PROVINCIAL AND LOCAL  
GOVERNMENT PORTFOLIO COMMITTEE

17 SEPTEMBER 2003

PARLIAMENT, CAPE TOWN

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LEGAL RESOURCES CENTRE

1. The Legal Resources Centre

The Legal Resources Centre (LRC) is an independent, client based, non-profit public interest law centre which uses law as an instrument of justice. It works for the development of a fully democratic society based on the principle of substantive equality, by providing legal services for the vulnerable and marginalized, including the poor, homeless and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic and historical circumstances.

2. The overall objectives and vision of the Draft Bill.

The LRC is acutely aware that in many respects, the colonial conquest and dispossession of the indigenous peoples of South Africa, went hand in hand with a carefully planned assault on the traditional structures and institutions of indigenous cultures. The end result of the imposition of colonial rule, the introduction of a monetary economy and the plethora of statutes introduced by colonial and apartheid administrators, was the manipulation and endemic corruption of a system of traditional leadership which had pre-dated the advent of colonialism by hundreds of years.

What followed was alienation of the people from the structures of traditional leadership, harassment and intimidation of traditional leaders who resisted co-option in the colonial and apartheid policies, and a deepening conflict between those who supported the system of traditional leadership, and those who viewed it with suspicion and increased hostility.

The Bill sets out a far-ranging vision of government to transform the institution of traditional leadership so that it serves the interests of the people of South Africa as a whole, conforms with constitutional principles of accountability, democracy and equality, and contributes to socio-economic development of the nation. This overall vision, and the general objectives and purpose of the Bill are welcomed.

Due to time constraints, it has not been possible for us to draft detailed submissions on each area covered by the Bill. We have chosen to limit our submissions to the following key areas:

- a) Recognition of traditional communities
- b) Establishment of traditional councils
- c) Functions of traditional councils
- d) Accountability and regulation of traditional councils
- e) The role of traditional councils and traditional leaders in land administration and agriculture.

### **Section 2 : Recognition of traditional communities**

S 3 provides for the Premier to recognize a traditional community if it is “ *subjected to a system of traditional leadership in terms of that community’s own customary rules and observes a system of customary law*”. In terms of s 2(2), the Premier must consult the provincial house of traditional leaders and the community concerned before recognizing a community as a traditional community.

The Draft Bill does not define the nature or the extent of the Premier’s consultation with the community concerned, nor does it contain any objective guidelines or standards for assessing public participation in that consultation process. It’s failure to do so detracts from the Bill’s stated objective of promoting democratic governance, and the values of an open and democratic society in the institutions of traditional leadership.

It is likely that in most instances, the provincial legislation will not contain much detail or guidelines on the extent of community consultation either. In KwaZulu-Natal for instance, the Premier would be obliged to act in accordance with s 2(1) of the KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990, when seeking to recognize a traditional community. That section provides as follows:

S2(1) : *The minister may, after consultation with the cabinet, by notice in the official gazette-*

- (a) define or redefine the boundaries of the area of any tribe or community;*
- (b) constitute a new tribe or community*
- (d) recognize the existence of any tribe or community*

*Provided that the provisions of paragraphs (a),(b),(c), (d) and (e) shall not apply unless the Chief Minister or his delegate has consulted the people of the area to be affected by such definition, redefinition, constitution, division, amalgamation, recognition or less formal township.*

It is apparent that apart from the general duty to ' *consult the people of the area to be affected*', no guideline or standard as to the extent of consultation required is set out in order to give effect to the duty of consultation.

Traditional leadership has historically exercised considerable powers over its subjects, notably in the areas of allocation of land and regulation of agricultural, pastoral, hunting, trading and other economic activities. Legislation such as the Black Administration Act 38 of 1927 conferred further powers in the areas of land allocation, state pensions and the administration of justice in the tribal authority courts. While legislative reform has considerably reduced many of the formal powers exercised by traditional leaders, to this day they remain an important and unavoidable conduit to land allocation in the rural areas.

The Premier's decision to recognize a traditional community as provided in s 2(2) therefore has far reaching consequences not only for the personal rights of individuals comprising such a community but also for their rights insofar as occupation and use of land is concerned.

Research on the contemporary nature of rural society (Ntsebeza, 1999) has shown that in many cases, retrenched migrant workers, the youth and students living in the rural areas often do not see themselves as permanent residents and consequently do not participate in

rural activities and meetings. It may be the case that some of these individuals may wish to exercise a personal preference not to be bound by the structures and dictates of traditional leadership and customary law

Meaningful community participation in decisions pertaining to the establishment of traditional communities with defined areas of jurisdiction is important for two other reasons.

In the first place, the arbitrary determination of tribal and ward boundaries has created overlapping land tenure rights and conflict in many rural areas. The effects of the apartheid betterment scheme policies, “black spot” forced removals and evictions have resulted in many communities being removed from their original areas and placed on land which falls under the jurisdiction of different traditional authorities. Despite having lived on such land for generations, their security of tenure on such land is constantly threatened by tribal authorities who allocate land to people from outside the area. This problem is exacerbated by the almost complete collapse of land administration systems in communal land areas such as the former TVBC states.

Secondly, the process of demarcating and resolving administrative and jurisdictional boundary disputes is highly complex and resource intensive. Unless sufficient provision is made for individuals and communities to be fully consulted before such boundaries are demarcated, conflict over boundaries and insecurity of tenure will be a continuing characteristic of land disputes in rural areas.

We therefore suggest that the words “*full and proper*” should be inserted before the word consultation in s 2(2) of the Bill. A less stringent alternative might be the words “*reasonably adequate consultation*” as provided in the consultation process for land tenure rights in s 7(3)(b) of the Communal Land Rights Bill currently before Parliament. What would amount to ‘*full and proper*’ or ‘*reasonably adequate*’ consultation would depend on the circumstances each individual community, however such an amendment would provide a clear normative standard for assessing the adequacy or lack thereof of community consultation before a decision in terms of s 2(2) is taken.

**Section 4 : Establishment and recognition of traditional councils**

The traditional councils established in terms of s 4(1) are an important mechanism for achieving wider community involvement in the institutions and structures of traditional leadership and governance. By providing for democratic representation of elected community members as well as a compulsory quota of women, the Bill makes a firm commitment to moving away from the patriarchal unaccountable and undemocratic nature of the old tribal authority institutions.

We have two major concerns. The first lies in the clear shortcomings of present provincial legislation dealing with establishment of traditional leadership structures and the silence of the Bill on guidelines and uniform norms for the content of future provincial legislation on this issue.

The second is that the Bill's commitment to chart a new direction towards democratic traditional leadership governance structures is effectively negated by the transitional arrangements provided for in s 25(3) of the Bill.

**Provincial legislation**

We accept at the outset that the vast majority of provincial legislation dealing with the establishment of tribal, community and regional authorities was promulgated prior to the new constitutional order of democracy and equality. It would follow that traditional communities would be hard pressed to rely on the principles of provincial legislation, at least in their present form, to produce the democratic and non-sexist traditional councils envisaged by s 4(2) of the Bill.

This much is abundantly clear from an analysis of the relevant provisions of provincial legislation in KwaZulu-Natal, which place the entire process under political as opposed to community control.

S 5 of the KwaZulu Amakhosi and Iziphakanyiswa Act places the power to appoint tribal, community and regional authorities solely in the hands of the Minister, who may appoint such authorities only “with due regard to Zulu Law and custom”. In terms of section 6, the chairman and executive council of a regional authority may only be elected from the ranks of the amakhosi, iziphakanyiswa and councilors of the tribal or community areas.

It is unclear why the drafters of the Bill have not included any norms or standards relating to the establishment of traditional councils in the national framework legislation.

It is beyond the scope of these submissions to suggest detailed and specific guidelines for future provincial legislation. We nevertheless point out that the failure of the Bill to delineate clear norms, standards and policies for traditional councils raises serious questions as to whether it will be able to successfully rely on the provisions of s 146(1)(b) of the Constitution to ward off legal challenge.

In our view, the need to establish national uniformity on the election of members of the councils, fair participation in decision-making, legislative entrenchment of gender equity and democratic process, are vital requirements of any framework legislation purporting to deal with governance of traditional leadership.

The Bill seems to leave these issues solely in the hands of future provincial legislation. This situation gives scant relief to those hoping for a firm commitment from government to effectively address the discriminatory and undemocratic nature of traditional authorities as constituted in their present form.

The effect of the transitional provisions on democratic governance, the role of women in traditional councils and South Africa's obligations under international law

We welcome the Bill's commitment to gender equity in traditional leadership governance structures, which it seeks to do by allocating women a compulsory one third quota in membership of the traditional councils envisaged in s 3(2).

It is most unfortunate that this commitment is considerably diluted by the provisions of s 25(3) of the Bill. Section 25(3) provides that *"any tribal authority that, immediately before the commencement of this Act, had been established and was still recognized as such, is deemed to be a traditional council as provided for in section 4 and shall carry out the functions provided for in section 3 : provided that such tribal authority must comply with section 3(2) within four years of the commencement of this Act"*.

This provision will effectively deem tribal authorities established in terms of the Black Administration Act 38 of 1927, the Black Authorities Act 68 of 1951, and legislation of the old TVBC states, to be legitimate traditional councils in terms of section 4 of the Bill. Not only will un-elected tribal authorities be deemed to be "traditional councils", but they will be entrusted with the wide array of functions provided for in s 5, including inter-alia, *"participating in the development of policy and legislation at local level"* as well as *"participating in development programmes of municipalities and of the provincial and local spheres of government"*.

The Bill goes further by essentially exempting existing tribal authorities from the requirements of democratic elections and compulsory representation of women, for a period of four years from the commencement of the Act.

We find it difficult to understand why it is necessary for the Bill to beat such a hasty retreat from the avowed commitment to non-sexism and democratic governance set out in it's preamble.

The only explanation which springs readily to mind is that it was felt necessary to avoid conflict with conservative traditional authorities by delaying compliance with the requirements of democratic governance and gender equity for a certain specified period. This would allow existing tribal authorities a period of time to adjust their practices and bring them in line with the new and transformed institutional structures contemplated by the Bill.

S3(2) purports to establish uniform norms and standards for democratic governance and non-sexism in traditional councils. The effect of the proviso in s 25(3) is to considerably undermine the application of these norms and standards. It may be arguable that this proviso is a contravention of South Africa's obligations in terms of Article 2(g) of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This convention was ratified by South Africa in 1995 and article 2(g) thereof provides for a state party to take "*all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.*" In order to prevail over the plethora of provincial legislation which protects discriminatory practices by existing tribal authorities, the Bill must be capable of effective implementation of national frameworks, norms and standards for democratic governance and non-sexism. It is unlikely to do so if it accords implied legislative approval to the continued perpetration of discriminatory and undemocratic practices by existing tribal authorities.

In our view, there is no legitimate governmental purpose being served by s 25(3) of the Bill. What the section effectively does is to entrench undemocratic and gender discriminatory practices by existing tribal authorities. Although a period of four years is provided for compliance with s 3(2), there is nothing in the Bill to indicate the consequences of non-compliance upon expiry of that time period. Although research by Department of Land Affairs and the Gender Research project in the Braaglagte and Taung areas has shown increasing community acceptance of women playing a role in traditional councils and structures, the available evidence indicates that these cases are in a minority.

The issue which arises is whether, in our current constitutional state, it is reasonable and justifiable, albeit only for a period of four years, to accord legal recognition to traditional authority structures which deny women opportunities to effectively participate in key decision making structures in their communities. We recognize of course, that the lack of democratic governance and gender discrimination inherent in many tribal authorities would be difficult to address in one fell legislative swoop.

The obligations imposed by the Constitution and international law to advance, protect and promote fundamental human rights and non-sexism must however be dealt with diligently and without undue delay.

We are of the view that the proviso contained in s 25(3) is unjustifiable in its present form and fails to comply with the constitutional obligation of protecting and advancing women, who have historically been the principal victims of discrimination sanctioned by unfair customary law practices.

Insofar as Parliament may not see fit to amend s 25(3), we suggest that national and provincial government should consider the failure of a traditional council to comply with the provisions of s 4(2), when allocating a role for traditional councils in terms of s 18(1).

#### **Sections 4 and 5 : Functions of traditional councils**

Although we support the involvement of traditional councils in many of the areas set out in s 5, we have serious reservations over the appropriateness of allocating traditional councils a specific function of “ *entering into service delivery agreements with municipalities regarding the provision of services to rural communities*” as envisaged in s 5(3).

As pointed out in our comments above, the effect of the deeming provision in s 25(3) is that a substantial number of traditional councils will be the same un-elected and undemocratic entities which existed prior to the commencement of the Act.

It is also necessary to draw a clear distinction between the role and functions of local government as against tribal authorities and traditional councils. Local Government is an elected government body, which is obliged to take ultimate responsibility for service delivery.

The electorate is able to hold local government accountable over poor service delivery at the elections. The ability of impoverished rural communities to hold traditional leaders and un-elected traditional councils accountable for service delivery would be an altogether more complex undertaking.

Tribal authorities and the proposed traditional councils can no doubt play a complementary but different role in the provision of essential services in rural areas. The blurring of the distinction between the roles and responsibilities of the two will be the likely result of giving traditional councils the function of entering into service delivery agreements with local government.

Moreover, the Bill contains little clarity on the manner in which such service delivery agreements will be concluded, the payment of revenues or fees to traditional councils, or the use to which such fees or revenues will be put.

Many existing tribal authorities also operate under severe financial disabilities and a complete lack of administrative support and capacity. Although the Bill does provide for support to be given to traditional authorities, it is highly unlikely that the present situation will be remedied without sustained material and financial support to tribal authorities.

We would therefore recommend that Parliament removes the function allocated to traditional leaders in terms of s 5(i), at least until such time as traditional councils have the necessary capacity and comply with the requirements set out in s 3(2) of the Bill.

**Section 4(2) : Accountability and regulation of traditional councils.**

We support the inclusion in the Bill of the requirements set out in s 4(2)(a) to (d) as a means of regulating and supervising the functions of traditional councils. The use of the word “ *may*” in s 4(2) of the Bill does however suggest that provincial legislation would have a discretion to regulate the exercise of functions of traditional councils by imposing certain requirements.

In the interests of ensuring transparency and accountability of traditional councils, we suggest that the Bill places a mandatory duty on provincial legislation to regulate the exercise of traditional council functions. This can be done by the inclusion of the word “*must*” instead of “*may*” in s 4(2).

**Section 18 : Guiding principles for allocating roles and functions**

Our submissions on this section of the Bill re-iterate our expressed concerns over the unequal and discriminatory treatment of women in traditional governance structures. In virtually all respects, women’s rights of access to land in communal areas are severely constrained by land administration systems dominated by patriarchal tribal authorities.

The legacy of apartheid, gender discrimination sanctioned by customary practices and the chaotic state of land administration in communal areas has resulted in rural women facing the continuing indignities of unequal and subservient property and land rights. By giving legislative recognition to a role for traditional councils in land administration, the Bill runs the danger of re-enforcing the continued disempowerment of rural women in their struggle for equitable land rights. This is particularly so when consideration is given to the historical suppression of women’s participation in traditional governance structures in rural areas.

The guiding principles for allocating roles and functions to traditional councils should be drafted in such a manner so that recognition is given to the history and current context of rural women's land struggles.

For example, s 2(c) could be re-drafted to read “ *ensure that the allocation and implementation of a role or function is done in a manner consistent with the Constitution and applicable legislation*”.

We further recommend that Parliament gives consideration to the inclusion of an additional clause in s 18(2), stating that an organ of state in the national and provincial government *must give consideration to the extent of a traditional council's compliance with the criteria in s 4(2) before allocating a role or function for traditional councils or traditional leaders in terms of s 18(1)*.

### **Conclusion**

This Draft Bill presents Parliament with a unique opportunity to significantly address not only governance of traditional leadership, but also the opportunity to establish clear and uniform standards for eliminating unfair gender discrimination in land administration at a national level. It is an opportunity that should not be missed.