

BACKGROUND INFORMATION ON THE TRADITIONAL COURTS BILL

1. Following the lapsing of the Traditional Courts Bill, 2012 in the National Council of Provinces at the end of the fourth administration, and the concerns that were raised regarding this Bill, it is becoming increasingly urgent to promote legislation that will transform traditional courts, as they exist at present.
2. The need to promote the required legislation has been accepted by virtually all stakeholders in the discussions to date.
3. On 30 November and 3 December 2015, the Department held **consultative meetings** with representatives of the National House of Traditional Leaders and civil society, respectively. A National Dialogue, where all the stakeholders referred to above were present, was convened on 4 December 2015. The purpose of these meetings was to solicit views on the principles which have been identified for policy development and for the basis of draft legislation. The identified issues, in essence, are the concerns that were raised in respect of the Traditional Courts Bill as introduced in the National Assembly in 2008 and subsequently in the National Council of Provinces in 2012 (“the previous Bills”).
4. A Reference Group, established by the National Dialogue on the Bill in December 2015 and chaired by the Deputy Ministers of Justice and Constitutional Development and Traditional Affairs, met on numerous occasions during 2016. The Reference Group consisted of representatives of civil society, traditional leaders and Government. The mandate of this Reference Group was to discuss outstanding matters relating to the Bill, assist in the development of a Bill and to pave the way for the introduction of the Bill into Parliament.

Important aspects of the Bill include:

Participation by and representation of women and vulnerable groups

5. The previous Bills were criticised severely for not having meaningful provisions on the participation of women in traditional courts. It was pointed out that in some traditional communities and traditional courts, women are barred from participating in the proceedings of traditional courts, either as litigants or as members of the court.
6. Specific provisions are required in the proposed legislation in terms of which women are unequivocally free to participate as members of the court and also as litigants, with no limitations whatsoever. Many participants in the discussions argued strongly that women should be able to represent themselves as litigants in the court, and not be required to be represented by a male relative. It was also argued that traditional courts must be convened in places that do not restrict access by women.
7. The Bill, dealing with the constitution of traditional courts, provides that traditional courts must be constituted of women and men, pursuant to the goal of promoting the right of equality as contemplated in section 9 of the Constitution. It requires these courts, in their deliberations, to “promote and protect the representation and participation of women, as parties and members

thereof”.

8. It also requires the Justice Minister to put measures in place in order to promote and protect the representation and participation of women and to report thereon to Parliament every year.
9. The Commission for Gender Equality must, in its report to Parliament each year, report on measures it has taken or put in place in order to achieve the promotion and protection of women as parties and members in traditional courts, in addition to making recommendations on legislative and other measures in this regard.
10. Traditional courts must, during their proceedings, ensure that the rights in the Bill of Rights are observed and respected, with particular reference to women who are to be “afforded full and equal participation in the proceedings as men are.”
11. The thrust of all these provisions is therefore to encourage and promote full equality, requiring measures to be put in place to achieve the set goals in this regard. The Bill also sets out some examples of conduct which is specifically prohibited because it infringes on the dignity, equality and freedom of vulnerable persons.

The right to opt out the system of traditional justice:

12. The previous Bills did not allow parties to **opt out** of the traditional justice system. The current view is that, because the traditional justice system is, and always has been, voluntary in nature, parties should have the right to opt out of and into the system and to focus on the accepted view that the traditional justice system is there to be used by any person who subscribes to the system and who wishes to use it, rather than approaching the other courts, a constitutional right which cannot be taken away from any person.
13. The agreed position, however, seems to be that a party should only be able to “opt out” of the system before the commencement of any proceedings in a traditional court and not during the proceedings. The Bill therefore provides that a traditional court may only hear and determine a dispute “if the party against whom the proceedings are instituted agrees freely and voluntarily to the resolution of the dispute by the court in question”.
14. Failure to heed a summons of a traditional must also be dealt with. The Bill provides for the scenario where a party who, after being summoned to appear in a traditional court, willfully fails to so appear, in clear contempt of the court. The clerk of the court must make a determination to this effect and then refer the matter to a justice of the peace.

Sanctions and enforcement thereof:

15. The sanctions proposed in the previous Bills elicited severe criticism. The outcomes of stakeholder engagement seem to suggest that, because the traditional justice system is essentially about promoting restorative justice and social cohesion, traditional courts should not have the power to impose retributive sanctions.
16. Concerns were also raised that the sanctions proposed in the previous Bill could give rise to

abuse, for instance the deprivation of customary law benefits and having to do community service for the benefit of traditional leaders.

17. In terms of the Bill an order may be expressed in monetary terms or otherwise, including livestock, for the payment of damages suffered, on condition that the order for damages may not exceed the value of the damage in question or the capped amount determined by the Minister by notice in the *Gazette* from time to time, whichever is the lesser.
18. Other orders include an order prohibiting the conduct complained of, an order that an unconditional apology be made and an order requiring a party to keep the peace. All the orders suggested in the Bill are of a restorative justice nature. The Bill permits an order of community service, on condition that it is not for the benefit of a traditional leader.

Distinction between civil and criminal matters:

19. While the previous Bills conferred both criminal and civil jurisdiction on traditional courts, cogent arguments have been made to the effect that customary law does not make a distinction between criminal and civil matters, and that there are no offences that are customary law specific.
20. Furthermore, strong objections were raised regarding the power of traditional courts to adjudicate in criminal matters, which would be in conflict with the Constitution because the Constitution, in section 179, provides for a single prosecuting authority “which has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings”.
21. The emerging view would seem to be that traditional courts should deal with certain minor disputes/infractions, whether they are civil or criminal in nature, without categorising them as such. Traditional courts would go about their responsibilities in such a manner as to achieve conciliation between the parties and should have the power to grant compensatory type awards as discussed below. Criminal convictions are not envisaged at all.
22. The Bill therefore refers simply to “dispute”, which is defined in clause 1 to mean “a dispute between parties of any nature, including a dispute arising out of customary law, which a traditional court is competent to deal with in terms of this Act”.

Legal representation

23. The previous Bills prohibited legal representation in traditional courts. Strong objections were raised against this prohibition, especially since those Bills conferred the power on traditional courts to deal with criminal matters and also because they did not allow parties to opt out of the traditional justice system.
24. Reflecting on the outcomes of the stakeholder engagement, the general view would seem to be that, because the traditional justice system is essentially consensual and voluntary in nature, legal representation is undesirable. The traditional justice system is geared towards achieving conciliation between the parties in a non-adversarial manner, unlike other courts.

25. It was argued therefore that there is no need for legal representation in these courts and that a party in a traditional court should be able to be represented by any person of his or her choice, including a family member, whether male or female, a friend or a councillor. The discussions pointed sharply to the fact these courts operate in a manner which is entirely different to that applicable in other courts and that the introduction of legal practitioners will take away the benefits of a speedy, cheap and accessible system.
26. There is general agreement that legal representation is not suited for the traditional justice system. The Bill therefore provides that no party to any proceedings before a court “may be represented by a legal practitioner acting in that capacity”.

Boundaries/jurisdiction:

27. Concerns were raised that the previous Bills entrenched the former “Bantustan” boundaries. The emerging view appears to be that traditional courts should not be confined to any specific boundaries and that a person may approach any such court to resolve his or her dispute. While the previous Bills made provision for areas of jurisdiction of traditional courts, the view is held that the Bill should avoid making reference to the concept of “jurisdiction”, as it is known for purposes of courts as contemplated in Chapter 8 of the Constitution. The Bill therefore avoids references to “jurisdiction”. A person may “institute proceedings in respect of a dispute in any traditional court”.

Nature of traditional courts:

28. Participants in the consultation process were unanimous in their view that traditional courts are “courts of law under customary law’ (subject to the Constitution), which distinguishes them from the courts contemplated in Chapter 8 of the Constitution. This particular aspect still remains a point in respect of which there are and will remain, differing views but which can be taken further during the Parliamentary debates.
29. The previous Bills conferred on traditional leaders the power to preside over traditional courts. The discussions in the Reference Group made it clear that these courts practise what is referred to as “participatory justice”, which does not accord with the notion of a traditional leader being in sole control of the court.
30. The Bill therefore no longer deals with the concept of “presiding officers” but does recognise that they are and must continue to be, convened either by a traditional leader or by a person designated by him or her in accordance with customary law and custom.

Appeals:

31. The previous Bills made provision for appeals from traditional courts to magistrates’ courts. Concerns were raised that the conventional courts and the traditional justice system have different value systems and that the concept of appeal is a misnomer in the traditional justice environment.

32. According to commentators, if a person is aggrieved by a decision of a traditional justice structure, he or she escalates the matter to the next level in the traditional justice system. Therefore, the notion of “appeal” as it is known in our courts of law, is not known in customary law.
33. In the recent stakeholder engagements with the Department, commentators clearly favoured an approach where this escalation of matters remains contained in the traditional justice system, and that the terminology used in the proposed legislation possibly be adapted to make it clear that what is meant in this regard, namely an escalation of a matter from one level to another in the traditional justice system without referring specifically to “appeals”.
34. A proposal was made that a person who is aggrieved by a decision of a traditional court could escalate the matter to a structure within the customary law environment, possibly to a structure constituted by the National or Provincial Houses of Traditional Leaders.
35. The Bill provides that an aggrieved party may, on grounds other than the grounds for procedural review, escalate his or her matter to a customary law institution or structure in accordance with customary law and custom. Appeals may, however, not be lodged on the grounds of procedural deficiencies. Procedural short-comings may only be dealt with by way of review, as discussed below.

Administrative/logistical support for traditional courts:

36. In its report, the South African Law Reform Commission (SALRC) on “Traditional Courts and the Judicial Functions of Traditional Leaders” recommended the establishment of an Office of Registrar of Traditional Courts. This proposal, while it has financial implications, is still relevant and seems to be supported by most participants in the discussions referred to above.
37. In order to curb further financial implications for the State, the Bill does not provide for the establishment of such an Office but rather proposes that the Minister must, after consultation with the Cabinet member responsible for traditional affairs, subject to the laws governing the public service, designate or appoint persons as Provincial Traditional Court Registrar in respect of each province. While this is a departure from the recommendations of the SALRC, it will ensure that provinces use existing capacity and keep State expenses as low as possible.

Transfer of disputes:

38. The Bill provides for the transfer of disputes from traditional courts to the magistrate’s court having jurisdiction and *vice versa*.

Other features in the Bill:

39. The Minister must, in consultation with the Minister of Traditional Affairs, compile a **code of conduct** for members of the traditional court. The code of conduct will be the prevailing standard of conduct for members of a traditional court to which such members must adhere. The code will be applicable to all persons who have a role in terms of customary law for the effective functioning of traditional courts, including persons who facilitate sessions of court on behalf of

traditional leaders, clerks of traditional courts and interpreters.

40. The Minister is required to make **regulations** in respect of certain matters. Regulations must, among others, be made regarding the training of traditional leaders and persons designated by traditional leaders to convene traditional courts and the involvement and training of paralegals and interns in the functioning of traditional courts.
41. An important aspect of the Bill is that it repeals all existing former homeland legislation regulating traditional courts and provides for a single statutory framework in this regard.

ENDS

ANNEXURE A
REPUBLIC OF SOUTH AFRICA

TRADITIONAL COURTS BILL

(As introduced in the National Assembly (proposed section 76); explanatory summary of Bill published in Government Gazette No. of) (The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B — 2016]

BILL

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.

PREAMBLE

SINCE the remaining provisions of the Black Administration Act, 1927, and some provisions of former homeland legislation still regulate the resolution of disputes by the institution of traditional leadership, which are in stark conflict with constitutional values;

AND SINCE there is a need to provide a legislative framework to replace the current inadequate legislative framework in order to—

- address certain abuses prevailing in some traditional courts as they currently exist;
- protect the public interest; and
- enhance accountability in the resolution of disputes in accordance with evolving customs and practices in the new constitutional dispensation;

AND SINCE the Constitution recognises the institution, status and role of traditional leadership in dispute resolution, as well as the application of customs and practices in traditional courts, subject to the Constitution;

AND SINCE it is necessary 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, including the right to human dignity, the achievement of equality and the advancement of human rights and freedoms;

AND SINCE it is necessary to have a single statute applicable throughout the Republic, regulating the resolution of disputes in traditional courts in accordance with the Constitution;

AND RECOGNISING that the Constitution guarantees everyone the right of access to the courts of law as contemplated in Chapter 8 of the Constitution for purposes of resolving their disputes;

AND FURTHER RECOGNISING that customary law is premised on the principle and spirit of voluntary affiliation, and that its application is accessible to those who choose to live in accordance with the values of evolving customary law and abide by the practices and customs thereof ;

AND FURTHER RECOGNISING that many citizens who subscribe to customs and practices embedded in customary law may voluntarily elect to have their disputes resolved in terms of their customs and practices in traditional courts;

AND FURTHER RECOGNISING that customary law plays an integral role in the resolution of disputes in communities between members of those communities who

voluntarily subject themselves to and observe, the accepted practices and customs applicable in those communities;

AND FURTHER RECOGNISING that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court of law, or where appropriate, another independent and impartial tribunal or forum;

AND FURTHER RECOGNISING that there are different levels of dispute resolution in terms of customary law, in addition to the role played by traditional courts,

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA therefore enacts as follows:—

ARRANGEMENT OF SECTIONS

Sections

1. Definitions
2. Objects of Act
3. Guiding principles
4. Institution of proceedings in traditional courts
5. Composition of and participation in traditional courts
6. Nature of traditional courts
7. Procedure in traditional courts
8. Orders that may be made by traditional courts

9. Enforcement of orders of traditional courts
10. Provincial Traditional Court Registrars
11. Review by High Court
12. Escalation of matters from traditional courts
13. Record of proceedings
14. Transfer of disputes
15. Limitation of liability of members of traditional courts
16. Code of conduct for members of traditional courts
17. Regulations
18. Transitional provisions and repeal of laws
19. Short title and commencement

Schedule 1

Schedule 2

Definitions

1. (1) In this Act, unless the context indicates otherwise—
"**clerk**" means a clerk of a traditional court referred to in section 5(4);
"**Constitution**" means the Constitution of the Republic of South Africa, 1996;
"**court**" means any court established in terms of section 166 of the Constitution;
"**dispute**" means a dispute between parties of any nature, including a dispute arising out of customary law, which a traditional court is competent to deal with in terms of this Act;
"**Minister**" means the Cabinet member responsible for the administration of justice;
"**prescribed**" means prescribed by regulation in terms of section 17;

"Provincial Traditional Court Registrar" means a Provincial Traditional Court Registrar contemplated in section 10 and **"Provincial Registrar"** has a corresponding meaning;

"restorative justice"—

- (a) means an approach to the resolution of disputes that aims to involve all parties to a dispute, the families concerned and community members to collectively identify and address harms, needs and obligations by accepting responsibility, making restitution and taking measures to prevent a recurrence of the incident which gave rise to the dispute and promoting reconciliation;
- (b) does not extend to measures which, in good faith, purport to give effect to the objectives contemplated in paragraph (a) but which, in fact, do not meaningfully restore the dignity of, or redress any wrong-doing against any, person involved in the dispute; and
- (c) results in redressing the wrong-doing in question and ensuring the restitution of the dignity of the person in question in a just and fair manner;

"this Act" includes any regulation;

"traditional court" means 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, 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; and

"traditional leader" means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position in accordance with an Act of Parliament.

(2) For purposes of this Act the term "customary law" must be construed as the accepted body of customs and practices of communities which evolve over time in accordance with prevailing circumstances, subject to the Constitution.

Objects of Act

2. The objects of this Act are to—
- (a) affirm the values of customary law and customs in the resolution of disputes, based on restorative justice and reconciliation and to align them with the Constitution;
 - (b) affirm the role of traditional courts in terms of customary law by—
 - (i) promoting co-existence, peace and harmony in the community;
 - (ii) enhancing access to justice by providing a forum for dispute resolution in accordance with the principle of voluntary participation by all parties; and
 - (iii) promoting and preserving those traditions, customs and cultural

practices that are beneficial to communities and persons who elect to observe them, in accordance with constitutional values;

- (c) affirm—
 - (i) the consensual nature of customary law;
 - (ii) the principle and spirit of voluntary affiliation; and
 - (iii) the right to freely and voluntarily elect to or elect not to, abide by the various applicable practices and customs;
- (d) create a uniform legislative framework regulating the structure and functioning of traditional courts in the resolution of disputes, in accordance with constitutional imperatives and values;
- (e) enhance the effectiveness, efficiency and integrity of traditional courts in the resolution of disputes; and
- (f) facilitate the full, voluntary and meaningful participation of all members in a community in a traditional court in order to create an enabling environment which promotes the rights enshrined in Chapter 2 of the Constitution.

Guiding principles

3. (1) In the application of this Act, the following principles should apply:

- (a) The need to align traditional courts with the Constitution in so far as they relate to the resolution of disputes, so as to embrace the values enshrined in the Constitution, including—
 - (i) the right to human dignity;
 - (ii) the achievement of equality and the advancement of human rights and

- freedoms; and
- (iii) the promotion of non-racialism and non-sexism and the freedom of sexual orientation and identity and religion;
- (b) the promotion of restorative justice measures through mediation and conciliation;
 - (c) the development of skills and capacity of members of traditional courts in order to ensure the effective implementation thereof; and
 - (e) the need to promote and preserve values which are based on reconciliation and restorative justice.

(2) In the application of this Act, the following should be recognised and taken into account:

- (a) The constitutional imperative that traditional courts, tribunals or forums, when—
 - (i) interpreting the Bill of Rights, must promote the values that underlie an open and democratic society, based on human dignity, equality and freedom; and
 - (ii) interpreting any legislation, and when developing the common law or customary law, must promote the spirit, purport and objects of the Bill of Rights;
- (b) the existence of systemic unfair discrimination and inequalities or attitudes which are contrary to constitutional values or which have the propensity of precluding meaningful and voluntary participation in traditional court proceedings by any person or group of persons, particularly in respect of gender, sex, including intersex, gender identity, sexual orientation, age, disability, religion, language, marital status and race, as a result of unfair

discrimination, certain belief systems and harmful practices, brought about by colonialism, apartheid and patriarchy;

- (c) the provisions of subsection (3), setting out conduct which infringes on the dignity, equality and freedom of persons and which is prohibited;
- (d) the principles applied in the resolution of disputes in terms of customary law and customs in terms of this Act are not, in all respects, the same as those applied or understood in other courts in the judicial system; and
- (e) 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.

(3) (a) Without detracting from the generality of the provisions of this Act, the conduct set out in Schedule 2 to this Act, is intended to illustrate and emphasise some customs and practices which infringe on the dignity, equality and freedom of persons and which are prohibited.

(b) The State must, where appropriate, ensure that legislative and other measures are taken to address the practices referred to in paragraph (a).

(c) The Minister must, on an ongoing basis, assess the relevance of the practices listed in Schedule 2 for purposes of making recommendations for the amendment of the list of practices.

(d) The list of practices in Schedule 2 is not conclusive and must be considered and revised on a continuous basis.

Institution of proceedings in traditional courts

4. (1) (a) Any person may, subject to subsection (3), institute proceedings in respect of a dispute in any traditional court.

(b) A traditional court may hold a session thereof at a place other than where sessions of the traditional court in question ordinarily take place and, for that purpose, the traditional leader who ordinarily convenes the traditional court may, where necessary, in the presence of members of the community in the traditional court, delegate a person or persons to convene such a session and indicate who may participate therein.

(c) Disputes may only be dealt with in the place contemplated in paragraph (b) with the consent of the parties to the dispute.

(2) (a) A traditional court may, subject to subsection (3), only hear and determine a dispute contemplated in Schedule 1 —

- (i) that is not being dealt with by any other person or structure recognised in terms of customary law for purposes of the resolution of disputes; or
 - (ii) that has been dealt with by any person or structure in terms of subparagraph (i) but there has not been any resolution of that dispute;
- and
- (iii) if the party against whom the proceedings are instituted agrees freely and voluntarily to the resolution of the dispute by the traditional court in question.

(b) A traditional court may not hear and determine a dispute which —

- (i) is being investigated by the South African Police Service;
- (ii) is pending before any other traditional court or other court; or
- (iii) has already been finalised by a court, which means that a verdict has been given in a criminal matter or final order has been made by the court in a civil

matter.

(3) (a) Any person who has been summoned to appear before a traditional court who, for any reason, elects not to have his or her dispute heard and determined by that traditional court or to appear before that traditional court must, within 14 days or such longer period as may be necessary, duly assisted or accompanied by any person of his or her choice in whom he or she has confidence, should he or she so wish, inform the clerk of his or her decision accordingly.

(b) A person may not, in any manner whatsoever, intimidate, manipulate, threaten or denigrate a person who exercises his or her decision contemplated in paragraph (a).

(c) The clerk must ascertain from the person referred to in paragraph (a) whether that person is willing to have the dispute dealt with in any other traditional court, court or forum and, if so, request the traditional court to facilitate the transfer of the dispute to that other traditional court, court or forum.

(d) Despite the provisions of this subsection, nothing precludes a traditional court from -

- (i) counseling, assisting or guiding the party before the traditional court; or
- (ii) facilitating the referral of the dispute to an appropriate institution or organisation.

(e) Any party who consents to have a dispute resolved by a traditional court may, subject to section 14, not abandon or withdraw from the proceedings after such proceedings have commenced, unless he or she—

- (i) has compelling grounds to do so; and
- (ii) informs the traditional court accordingly.

(f) A traditional court may only determine or make an order

in terms of section 8 in respect of any matter referred to in Schedule 1 to this Act: Provided that if a person approaches the traditional court for any relief in respect of any matter not referred to in Schedule 1 and the matter is placed before the court, nothing precludes such a traditional court from—

- (i) counselling, assisting or guiding a party to the dispute who has approached it; or
 - (ii) facilitating the referral of the matter to another traditional court, court or an appropriate institution or organisation,
- and provided it is done in a manner that does not have the potential of influencing the proceedings or outcome of the matter in a court or forum which has jurisdiction to hear the matter.

(4) (a) The clerk of the traditional court must, if a party, after having been duly summoned to appear in and attend the proceedings of the traditional court, and without having exercised his or her rights under subsection (3)(a), fails to so appear and attend such proceedings, make a determination to that effect and must thereafter refer the matter to a justice of the peace appointed by the Minister in terms of section 2 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963), for purposes of this Act, who must deal with the matter in terms of the powers and duties as may be conferred or imposed on him or her under section 3 of the Justices of the Peace and Commissioners of Oaths Act, 1963.

(b) The role of the justice of the peace referred to in paragraph (a) is to facilitate compliance with the summons and for this purpose the justice of the peace has the following powers:

- (i) If non-compliance is not due to fault on the part of the party against whom the

summons was issued, the power to negotiate with the party to comply with the summons; and

- (ii) if non-compliance is due to fault on the part of the party against whom the summons was issued, the power to request the traditional court to have the matter transferred to the magistrate's court having jurisdiction, as contemplated in section 14(1)(a).

Composition of and participation in traditional courts

5. (1) Members of a traditional court must -

- (a) consist of women and men, pursuant to the goal of promoting the right to equality as contemplated in section 9 of the Constitution; and
- (b) be convened by a traditional leader or any person designated by the traditional leader.

(2) Traditional courts must promote and protect the representation and participation of women, as parties and members thereof.

(3) (a) The Cabinet member responsible for the administration of justice must—

- (i) put measures in place in order to promote and protect the fair representation and participation of women, as parties and members in traditional courts in order to create an environment that facilitates and promotes the meaningful and voluntary participation of women in accordance with the constitutional value of non-sexism;
- (ii) put measures in place in order to promote and protect vulnerable persons, with particular reference to the elderly, children and the youth, the indigent,

persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity; and

- (iii) by not later than 30 September of every year, submit a prescribed report to Parliament containing the information contemplated in subparagraphs (i) and (ii).

(b) The Commission for Gender Equality referred to in Chapter 9 of the Constitution must, in its report to Parliament each year, report on the participation of women and the promotion of gender equality in traditional courts and may, to this end, make recommendations on legislative and other measures.

(4) (a) For every traditional court there must be a clerk of a traditional court who is appointed, designated or seconded in accordance with the laws governing the public service and who has the powers, duties and functions as set out in this Act or as may be prescribed.

(b) The role, functions and responsibilities of the clerk of a traditional court include the following:

- (i) Issuing summonses;
- (ii) keeping an attendance register of sessions of traditional courts;
- (iii) keeping records of proceedings of traditional courts;
- (iv) keeping record of all cases reported to traditional courts;
- (v) filing decisions of traditional courts with the Provincial Registrar;
- (vi) advising traditional courts on cases that should be referred to any other customary institution or structure or court or forum;
- (vii) transferring disputes to any other traditional court, court or forum;
- (viii) dealing with, recording and filing the information received in the prescribed manner; and

(ix) submitting prescribed reports at the end of each quarter of a financial year to the Provincial Registrar to be dealt with in the prescribed manner.

(5) Before commencing any session of a court the traditional leader convening the court or the person designated by him or her must say the prescribed pledge that he or she will promote and protect the values enshrined in the Constitution and this Act.

Nature of traditional courts

6. (1) Traditional courts—

- (a) are courts of law under customary law which are intended to promote the equitable and fair resolution of certain disputes, in a manner that is underpinned by the value system applicable in customary law and custom; and
- (b) function in accordance with customary law, subject to the Constitution.

(2) Traditional courts, recognising the consensual nature of customary law, must be constituted and function under customary law and customs so as to—

- (a) promote access to justice;
- (b) prevent conflict;
- (c) maintain harmony; and
- (d) resolve disputes where they have occurred,

in a manner that promotes restorative justice, Ubuntu, peaceful co-existence and reconciliation, in accordance with constitutional imperatives and the provisions of this Act.

(3) The traditional court system is made up of such different levels as are recognised in terms of customary law and custom.

Procedure in traditional courts

7. (1) Sessions of a traditional court are held at the time and at a place which is accessible to members of the community in question.

(2) Subject to subsection (3), the procedure at any proceedings of a traditional court, including the notice to attend the proceedings of that court and the manner of preserving the dignity of the traditional court and the manner of execution of any order imposed by it, must be in accordance with customary law and custom.

(3) During its proceedings, a traditional court must ensure that—

(a) the rights contained in the Bill of Rights in Chapter 2 of the Constitution are observed and respected, with particular reference to the following:

(i) that women, as parties to any proceedings or members of the traditional court, are afforded full and equal participation in the proceedings, as men are; and

(ii) that vulnerable persons, with particular reference to children, the elderly, the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity, are treated in a manner that takes into account their vulnerability; and

(b) the following rules of natural justice are adhered to:

(i) that persons who may be affected by a decision must be given a fair hearing by the traditional court before the decision is made; and

(ii) that any decision by the traditional court must be impartial.

(4) (a) Subject to paragraph (b), a party to a dispute before a traditional court may be assisted by any person of his or her choice in whom he or she has confidence.

(b) No party to any proceedings before a traditional court may be represented by a legal practitioner acting in that capacity.

(5) (a) Where two or more different systems of customary law may be applicable in a dispute before a traditional court, the traditional court must apply the system of customary law that the parties expressly agree should apply.

(b) In the absence of any agreement contemplated in paragraph (a), the traditional court must decide the matter in accordance with the following guidelines:

(i) the system of customary law applicable in the area of the traditional court should take precedence over any other system of customary law; or

(ii) the traditional court may apply the system of customary law with which the parties or the issues in the dispute have their closest connection.

(6) Traditional courts must be open to all members of the community.

(7) Subject to the provisions of section 4(3)(d), proceedings of traditional courts must be conducted in the presence of both parties to the dispute and traditional courts must allow the full participation of all interested parties without discrimination on any of the prohibited grounds of unfair discrimination referred to in section 9(3) of the Constitution.

(8) The customary law of procedure and evidence applies in traditional courts.

(9) Subject to the provisions of subsection (10), the proceedings and records of traditional courts, as contemplated in section 13, must be in the language most widely spoken in the area of the traditional court in question.

(10) If any of the parties does not understand the language used in the traditional court, an interpreter must be provided.

Orders that may be made by traditional courts

8. (1) A traditional court may make any of the following orders after having deliberated on a dispute before it:

- (a) an order in favour of the party who instituted proceedings in terms of section 4(1), expressed in monetary terms or otherwise, including livestock—
- (i) accepting a settlement between the parties to the dispute;
 - (ii) for the payment of any damages in respect of any proven financial loss;
 - (iii) for the payment of compensation; or
 - (iv) for the payment of damages to an appropriate body or organisation which is not connected in any manner whatsoever to a member of the court or a traditional leader:

Provided that any such order expressed in monetary terms or otherwise including livestock, may not exceed the value of the damage giving rise to the dispute in question or the amount determined by the Minister from time to time by notice in the *Gazette*, for this purpose, whichever is the lesser;

- (b) an order directing a party against whom proceedings were instituted in terms of section 4(1) who is financially not in a position to comply with any order contemplated in paragraph (a), to render to the aggrieved party some specific

benefit or service instead of compensation for damage or pecuniary loss, with the consent of both the parties;

(c) an order directing a party against whom proceedings were instituted in terms of section 4(1) who is financially not in a position to comply with any order contemplated in paragraph (a), to render without remuneration some form of service—

(i) for the benefit of the community; or

(ii) for the benefit of any person or persons in the community in need who, in the opinion of the members of the traditional court, are deserving of that service,

under the supervision or control of a person or group of persons identified by the traditional court who, in the opinion of the traditional court, promote the interests of the community and who must upon the completion or otherwise of the service in question report to the court thereon: Provided that no service whatsoever may be rendered to a traditional leader or his or her family or to any person acting in an official capacity in that traditional court;

(d) an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of;

(e) an order that an unconditional apology be made;

(f) an order directing that a party or parties to the dispute be reprimanded for the conduct being complained of;

(g) an order requiring a party or parties to keep the peace;

(h) an order that a party attends any form of training, orientation or rehabilitation that is consistent with the relevant customary law and customary practices, the Constitution and this Act and does not include any form of detention or

- deprivation of any customary law benefits;
- (i) an order requiring any party to the dispute to make regular progress reports to the court regarding compliance with any condition imposed by the traditional court;
 - (j) an order directing that the matter be submitted to the national prosecuting authority for the possible institution of criminal proceedings in terms of the common law or relevant legislation; or
 - (k) an order, containing a combination of any of the orders contemplated in paragraphs (a) to (i), except where the matter is referred to the national prosecuting authority under paragraph (j), in which event the decision of the national prosecuting authority prevails.

(2) A traditional court may order that any payment contemplated in subsection (1) be paid in full or instalments and at a time or times it deems just.

(3) A traditional court may order that any payment contemplated in subsection (1) or part thereof be paid to a person injured by an act or omission for which the payment was imposed, on condition that such a person, if he or she accepts the payment, may not bring an action in any court in order to recover damages for the injury he or she sustained.

Enforcement of orders of traditional courts

9. (1) If an order made by a traditional court is not satisfied within the period determined by the traditional court, the party in whose favour the order was made, may bring the matter to the attention of the clerk.

(2) The clerk must inquire into or cause to be inquired into, the

reasons for non-compliance with the order and make a determination as to whether the non-compliance is due to fault on the part of the party against whom the order was made.

(3) If the clerk finds that the non-compliance is not due to fault on the part of the party against whom the order was made, he or she must assist the party to comply with the order on such conditions as may be agreed upon between the parties.

(4) (a) If the clerk finds that the non-compliance is due to fault on the part of the party against whom the order was made, he or she must make a determination to that effect and must thereafter refer the matter to a justice of the peace appointed by the Minister in terms of section 2 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963), for purposes of this Act, who must deal with the matter in terms of the powers and duties as may be conferred or imposed on him or her under section 3 of the Justices of the Peace and Commissioners of Oaths Act, 1963.

(b) The role of the justice of the peace referred to in paragraph (a) is to facilitate compliance with the order made by the traditional court and for this purpose the justice of the peace has the following powers:

- (i) If non-compliance is not due to fault on the part of the party against whom the order was made, the power to negotiate with the parties on how and when the order will be complied with and to make a determination in accordance therewith; and
- (ii) if non-compliance is due to fault on the part of the party against whom the order was made, the power to summons the party to appear in the traditional court again in order to have the matter transferred to the magistrate's court

having jurisdiction, as contemplated in section 14(1)(a) to be dealt with afresh.

Provincial Traditional Court Registrars

10. (1) (a) In provinces where there are traditional courts the Minister must, after consultation with the Cabinet Member responsible for traditional affairs, and subject to the laws governing the public service, designate, second or appoint persons as Provincial Traditional Court Registrars in respect of each province.

(b) A Provincial Traditional Court Registrar must have the qualifications and experience for that position, as prescribed.

(2) The role, functions and responsibilities of Provincial Registrars are as may be prescribed, in addition to the following:

- (a) Compiling and maintaining a prescribed register of all traditional courts in the province;
- (b) referring and reporting on cases of public interest, in the prescribed circumstances and prescribed manner, to the High Court having jurisdiction for review in order to contribute to jurisprudence or enhance the reform of customary law and the High Court, for this purpose, has the powers as set out in section 11(2);
- (c) assisting parties in taking a matter on review as contemplated in section 11;
- (d) guiding and supervising the functioning of traditional courts; and
- (e) keeping the Member of the Executive Council responsible for traditional affairs informed about the functioning of the traditional courts in the province in question.

(3) A Provincial Registrar shall, at all times, and for purposes of carrying out his or her role, functions, powers and responsibilities in terms of this section, have access to any traditional court within the province in question and to the records thereof.

Review by High Court

11. (1) A party to any proceedings in a traditional court may, in the prescribed manner and period, take those proceedings on review to a division of the High Court having jurisdiction on any of the following grounds:

- (a) The traditional court was not competent to deal with the matter as contemplated in section 4(3)(f);
- (b) the traditional court was not properly constituted as contemplated in section 5;
- (c) the requirements relating to the pledge or affirmation contemplated in section 5 were not complied with;
- (d) the provisions of section 7(3)(a), affording—
 - (i) women, as parties to any proceedings or members of the court, full and equal participation in the proceedings; or
 - (ii) vulnerable persons treatment that takes into account their particular vulnerability,were not complied with;
- (e) the provisions of section 7(3)(b), were not complied with;
- (f) one or both of the parties were not allowed to be represented by a person of their choice as contemplated in sections 4(3)(a) and 7(4);
- (g) the proceedings of the traditional court were not open to all members of the

public, contrary to the provisions of section 7(6);

- (h) the proceedings of the traditional court were not conducted in the presence of both parties, contrary to the provisions of section 7(7);
- (i) the proceedings of the traditional court were conducted in a language which one or both of the parties did not understand without the intervention of an interpreter, contrary to the provisions of section 7(9) or (10);
- (j) an order was made contrary to the provisions of section 8; or
- (k) where the provisions of section 3(3) have not been complied with or have been contravened.

(2) (a) The division of the High Court reviewing the proceedings of a traditional court as contemplated in subsection (1) may, at any sitting thereof, hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or article.

(b) The division of the High Court reviewing the proceedings of a traditional court, whether or not it has heard evidence, may—

- (i) confirm, alter, set aside or correct the order made by the traditional court in terms of section 8;
- (ii) set aside or correct the proceedings of the court;
- (iii) generally make such order as the court ought to have made on any matter which was before it; or
- (iv) remit the case to the traditional court with instructions to deal with any matter in such manner as the division of the High Court may think fit.

(3) Any request for review as contemplated in subsection (1) after the expiry of the period determined in the regulations may be condoned by the division of the High Court in question on good cause shown.

(4) An order of a traditional court in respect of which the matter is taken on review in terms of this section, is suspended until the review has been decided on.

(5) At the conclusion of the matter before the traditional court, the traditional court must advise the parties of their right to take the matter on review and of the grounds for such review as contemplated in this section.

Escalation of matters from traditional courts

12. A party who is aggrieved by a decision or order of a traditional court may, on grounds other than those referred to in section 11(1), escalate his or her matter to a customary institution or structure in accordance with customary law and custom.

Record of proceedings

13. A traditional court must, in the prescribed manner, record or cause to be recorded in the language contemplated in section 7(9)—

- (a) a file number of the dispute;
- (b) the date on which the dispute was dealt with;
- (c) the nature of the dispute;
- (d) a summary of the facts of the dispute;
- (e) the names and addresses of the parties and their witnesses;
- (f) the decision of the traditional court, including the decision or order of the traditional court;

- (g) a list of exhibits; and
- (h) an indication that the prescribed pledge or affirmation was taken by the traditional leader convening the session of the court or by a person designated by him or her in accordance with customary law and custom, as contemplated in section 5(5).

Transfer of disputes

14. (1) (a) If a traditional court is of the opinion that a dispute before it is not a matter which it is competent to deal with, as contemplated in section 4 or if the matter involves difficult or complex questions of law or fact that should be dealt with in a magistrate's court or a small claims court or if it is a matter as contemplated in section 4(4)(b)(ii) or section 9(4)(b)(ii), the traditional court may, in the prescribed manner, transfer such dispute to the magistrate's court or small claims court having jurisdiction and notify the parties to the dispute of the transfer.

(b) If proceedings are transferred from a traditional court to a magistrate's court in terms of this section, the magistrate's court must commence proceedings afresh.

(2) If a prosecutor, in the case of a criminal matter, before an accused person has pleaded to a charge as contemplated in section 6(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or a magistrate or a commissioner of a small claims court, in the case of a civil matter before him or her, is of the opinion that a dispute before him or her—

(a) in the case of a dispute of a civil nature—

(i) is a matter that can be dealt with more appropriately in terms of

customary law and custom in a traditional court; and

(ii) is a matter in respect of which a traditional court has jurisdiction, as contemplated in this Act; or

(b) in the case of a dispute of a criminal nature, is a matter in respect of which a traditional court has jurisdiction, as contemplated in this Act,

the prosecutor, magistrate or commissioner of a small claims court, as the case may be, may, should the parties agree, facilitate the transfer of the dispute to the traditional court and notify the parties to the dispute of the transfer.

Limitation of liability of members of traditional courts

15. 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.

Code of conduct and enforcement thereof

16. (1) (a) The Minister, in consultation with the Cabinet member responsible for traditional affairs and after consultation with the National House of Traditional Leaders, must compile a code of conduct for all persons who have a role in terms of customary law for the effective functioning of traditional courts, including persons who facilitate sessions of court on behalf of traditional leaders, clerks of traditional courts and interpreters, which must be submitted to Parliament for approval 60 days prior to publication thereof in the *Gazette*.

(b) If the code of conduct is not approved within the 60 day period referred to in paragraph (a), it shall be deemed to have been approved by Parliament.

(2) The code must be reviewed at least once in every three years by the Minister, acting in consultation with the Minister responsible for traditional affairs and after consultation with the National House of Traditional Leaders, and the result of such review, including any proposed amendment to the code must be tabled in Parliament for approval as contemplated in subsection (1).

(3) The code serves as the prevailing standard of conduct which must be adhered to by the persons contemplated in subsection (1).

(4) The code and every subsequent amendment must be published in the *Gazette*.

(5) (a) Any breach of a provision of the Code must be reported, in the prescribed manner, to the Member of the Executive Council responsible for traditional affairs in the province in question, who must cause the alleged breach to be investigated.

(b) Any investigation in terms of paragraph (a) must be in accordance with the rules of natural justice, after following due process.

(6) Any one or a combination of the following remedial steps may be imposed by the Member of the Executive Council in question in respect of a member of the traditional court who is found to have breached a provision of the Code:

- (a) apologising to the complainant, in a manner specified;
- (b) a reprimand;
- (c) a written warning;

- (d) any form of compensation;
- (e) appropriate counselling;
- (f) attendance of a specific training course; or
- (g) any other appropriate corrective measure.

Regulations

- 17. (1)** The Minister must make regulations regarding the following:
- (a) the role and responsibilities of clerks as contemplated in section 5(4);
 - (b) the pledge to be said or affirmation to be made by the traditional leader convening the court or the person designated by him or her in accordance with customary law and custom as contemplated in section 5(5);
 - (c) the qualifications and experience required to be appointed or designated as a Provincial Registrar as contemplated in section 10(1)(b);
 - (d) the register to be kept by Provincial Registrars of Traditional Courts of all traditional courts as contemplated in section 10(2)(a);
 - (e) the manner and circumstances in which Provincial Registrars of Traditional Courts may refer matters on review, as contemplated in section 10(2)(b);
 - (f) the time period and manner for taking proceedings of a traditional court on review to the High Court, as contemplated in section 11(1);
 - (g) the manner in which the records of proceedings of traditional courts must be dealt with, as contemplated in section 13;
 - (h) the manner in which a matter may be transferred from a traditional court to a magistrate's court or small claims court, as contemplated in section 14(1);
 - (i) the manner in which to report alleged breaches of the code of conduct, as

contemplated in section 16(5)(a);

- (j) the training of traditional leaders and persons designated by traditional leaders to convene traditional courts;
- (k) the involvement and training of paralegals and interns in the functioning of traditional courts; and
- (l) any other matter which is necessary or expedient to prescribe in order to give effect to this Act.

(2) Any regulation envisaged under this section must be -

- (a) 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; and
- (b) submitted to Parliament for approval.

Transitional provisions and repeal of laws

18. (1) The following Acts, if they have not been repealed before the commencement of this Act, are hereby repealed:

- (a) the Regional Authorities Courts Act, 1982 (Transkei); and
- (b) the Chiefs Courts Act, 1983 (Act No. 6 of 1983) (Transkei).

(2) Any authorisation by the Minister under section 12 of the Black Administration Act, 1927 (Act No. 38 of 1927), to hear and determine certain civil claims, any conferment of power by the Minister under section 20 of the Black Administration Act, 1927, to try certain criminal offences, and any other similar authorisation or conferment of power under any other law is of no force and lapses upon the commencement of this Act and the provisions of this Act apply.

(3) Any proceedings pending before a traditional court at the commencement of this Act must be continued and concluded as if this Act had not been passed.

Short title and commencement

19. This Act is called the Traditional Courts Act, 2016, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

Schedule 1

(Section 4(2)(a))

Matters which traditional courts are competent to deal with in terms of this Act:

- (a) Theft where the amount involved does not exceed R5 000-00.
- (b) Malicious damage to property where the amount involved does not exceed R5 000-00.
- (c) Assault where grievous bodily harm is not inflicted.
- (d) Breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute where the amount involved does not exceed R5 000-00.
- (e) Receiving any stolen property knowing it to be stolen where the amount involved does not exceed R5 000-00.
- (f) Crimen injuria.
- (g) 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.
- (h) 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.

- (i) Altercations between members of the community.

Schedule 2

**PROHIBITED CONDUCT WHICH INFRINGES ON THE DIGNITY, EQUALITY AND
FREEDOM OF PERSONS**

(Section 3(3))

Conduct of any nature which tends to—

- (a) discriminate against the dignity of members of the Lesbian, Gay, Bisexual, Transgender and Intersexed community;
- (b) promote homophobia;
- (c) denigrate, or discriminate against, elderly persons who suffer from mental health conditions such as memory loss, dementia and Alzheimer's disease;
- (d) discriminate against persons who are mentally or physically infirm or disabled on the basis of existing perceptions or beliefs;
- (e) discriminate against persons with albinism; and
- (f) discriminate against unmarried persons.