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Chairperson and Honourable Members  
Portfolio Committee: Justice and Correctional Services  
Parliament of South Africa  
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### **Submission on Traditional Courts Bill, 2017**

#### **A. BACKGROUND**

The Land and Accountability Research Centre (LARC) – formerly the Rural Women’s Action Research Programme at the Centre for Law and Society (CLS)/Law, Race and Gender Research Unit (LRG) – is based in the University of Cape Town’s Faculty of Law. LARC is an interdisciplinary research unit supporting mobilisation, advocacy and strategic litigation on land rights, traditional governance, mining on communal land, and the nature of living customary law. LARC partners with the Alliance for Rural Democracy to provide strategic support to struggles for the recognition and protection of rights in the former homeland areas of South Africa. An explicit concern of LARC is power relations, and the impact of national laws and policy in framing the balance of power within which rural women and men struggle for change at the local level.

LARC participated in the public submissions process, as the Rural Women’s Action Research Programme, when the Traditional Courts Bill [B1-2012] was introduced in the National Council of Provinces.<sup>1</sup> LARC also played an active role in the Alliance for Rural Democracy’s campaigns on the Bill. Given this familiarity with the Bill’s history in Parliament, LARC would like to commend the Department of Justice and Correctional Services for the significant improvements that are presented in the 2017 version of the Bill. Nonetheless, some provisions of the Bill do present concerns and pose questions requiring clarification that will be highlighted in this submission. In this context, LARC also recommends amendments to the certain provisions of the Bill.

#### **B. POSITIVE ASPECTS OF THE BILL**

LARC would like to draw attention to the massive public outcry that accompanied the previous iterations of the Traditional Courts Bill as Bill 15 of 2008 and Bill 1 of 2012. Parliament received written and verbal submissions from all sectors of South African society on these two Bills,

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<sup>1</sup> Law, Race and Gender Research Unit *Submission on the Traditional Courts Bill (B1-2012)* (15 February 2012). Hereafter referred to as “LRG submission”.

including: rural-based activists, non-governmental organisations, community-based organisations, academics, Chapter 9 institutions, legal centres, traditional leaders, trade unions, and ordinary citizens.<sup>2</sup> Provincial legislatures similarly received written and verbal submissions on the 2012 Bill. Collectively, provincial legislatures conducted 30 hearings in various locations across the provinces.<sup>3</sup> Despite shortcomings in the public participation process, many ordinary citizens, including those from rural and traditional areas, were able to raise their concerns with the unconstitutionality of the 2012 Bill.<sup>4</sup> These submissions all form part of the public memory of the Traditional Courts Bill, and it is Parliament's duty to ensure that previous public input on the Bill is honoured throughout the coming parliamentary process. Parliament cannot take South Africa back to previous versions of the Bill.

The Department of Justice and Correctional Services has introduced many positive changes which illustrate an acknowledgement of the serious flaws that were identified in the 2008 and 2012 versions of the Bill. LARC highlight's the following changes:

### 1. Nature of customary law

The Bill explicitly emphasises the voluntary and consensual nature of customary law – that people can choose whether or not to belong to a group with shared rules and values or participate in customary practices.<sup>5</sup> Thus, the Bill acknowledges that people should have a choice about whether to participate in customary dispute resolution processes in traditional courts. The Bill also incorporates an understanding<sup>6</sup> of the “living” nature of customary law that has been upheld by the Constitutional Court in several judgments dealing with customary law.<sup>7</sup> The “living” nature of customary law has been explained as follows:

The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practised in the community. This law is sometimes referred to as living indigenous law. Statutes, textbooks and case law, as a result, may no longer reflect the living law. What is more, abuses of indigenous law are at times construed as a true reflection of indigenous law, and these abuses tend to distort the law and undermine its value.

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<sup>2</sup> Many of the submissions that were verbally presented at Parliament are available through the website of the Parliamentary Monitoring Group. See <https://pmg.org.za/bill/409/> for access to submissions on the Traditional Courts Bill [B 15–2008] and <https://pmg.org.za/bill/159/> for access to submissions on the Traditional Courts Bill [B 1–2012].

<sup>3</sup> Nolundi Luwaya ‘Report on the provincial Traditional Courts Bill hearings: Exploring rural people’s democratic participation and freedom of expression’ *Issues in Law and Society* 2 (Centre for Law and Society, November 2013) at 39 – 40. Hereafter referred to as “Luwaya”.

<sup>4</sup> Thuto Thipe, Monica de Souza and Nolundi Luwaya “‘The advert was put up yesterday’: Public participation in the Traditional Courts Bill legislative process” 60(2) *New York Law School Law Review* (2015/16) at 519 – 551.

<sup>5</sup> See for example the Preamble, Clauses 2(c), 3(2)(e), 4(2)(a)(iii) and 6(2).

<sup>6</sup> Clause 1(2).

<sup>7</sup> *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) (14 October 2003); *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) (15 October 2004) (“Bhe case”); *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9, 2008 (9) BCLR 914 (CC), 2009 (2) SA 66 (CC) (4 June 2008); *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14, 2013 (4) SA 415 (CC), 2013 (8) BCLR 918 (CC) (30 May 2013) (“Mayelane case”).

The difficulty is one of identifying the living indigenous law and separating it from its distorted version.<sup>8</sup>

These conceptualisations of customary law help to negate the notion that customary law stands in opposition to the rights contained in the Constitution.<sup>9</sup> Instead, customary law is equal to the common law and the Constitution entreats both sources of law to develop in line with constitutional values where there may be conflict.<sup>10</sup>

The previous versions of the Traditional Courts Bill were criticised for failing to accurately reflect the nature of customary law in practice, both historically and in present-day South Africa.<sup>11</sup> Instead, the previous Bills chose an interpretation that was rigid, autocratic and based on “official” colonial and apartheid distortions of customary law.<sup>12</sup> It is appropriate that such unconstitutional understandings of customary law have been removed from the 2017 Bill, and LARC submits that all legislation related to customary law should similarly incorporate explicit acknowledgements of the consensual and living nature of customary law.<sup>13</sup>

## **2. Mechanism for opting out of traditional courts**

The opting out mechanism included at Clause 4(3) is a response to major critiques against previous versions of the Bill.<sup>14</sup>

This mechanism aligns with the voluntary and consensual nature of customary law, and also with the rights to access justice and participate in a chosen cultural life.<sup>15</sup> By stating that a traditional court can only hear and decide a dispute if both parties agree freely and voluntarily, the Bill also supports an approach to justice that is restorative, rather than punitive. This restorative justice approach is furthermore endorsed by several provisions in the Bill.<sup>16</sup>

Although LARC will raise concerns regarding the wording and practical implementation of the opting out mechanism, the inclusion of a mechanism that enables people to opt out of traditional courts is imperative. Without it, the Bill would betray not only the inputs made by South Africans in the last two parliamentary processes, but also the nature of customary law and the rights enshrined in the Constitution. We point out that to be properly consistent with the consensual nature of customary law, the emphasis should perhaps be more on opting in mechanisms for all parties involved, rather than an opting out mechanism, since “opt out” means the person has initially been opted in by default.

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<sup>8</sup> Bhe case at para 154.

<sup>9</sup> Mayelane case at para 50.

<sup>10</sup> Section 39(2) of the Constitution of South Africa, 1996.

<sup>11</sup> Thuto Thipe ‘Voices in the legislative process: A report on the public submissions on the Traditional Courts Bill (2008 and 2012)’ *Issues in Law and Society* 1 (Centre for Law and Society, August 2013) at 29 – 36. Hereafter referred to as “Thipe”.

<sup>12</sup> Thipe at 29 – 36.

<sup>13</sup> For example, the Traditional and Khoi-San Leadership Bill 23 of 2015, currently before the Portfolio Committee on Cooperative Governance and Traditional Affairs, should incorporate similar provisions acknowledging the constitutional interpretation of the nature of customary law.

<sup>14</sup> See for example Luwaya at 23 – 25.

<sup>15</sup> Respectively, section 34 and sections 30 and 31 of the Constitution of South Africa, 1996.

<sup>16</sup> Clauses 1(1), 2(a), 3(1)(b) and (d), and 6(2).

### **3. Recognition of different levels of dispute resolution**

LARC welcomes the Bill's recognition that dispute resolution takes place in multiple and varying forums within customary law. The previous Bills centralised the powers to determine customary law, adjudicate disputes, and implement decisions within the hands of senior traditional leaders recognised under the Traditional Leadership and Governance Framework Act 41 of 2003.<sup>17</sup> Submissions pointed out that existing customary law processes of dispute resolution are complex, diverse and involve a multitude of role-players within and beyond traditional leadership.<sup>18</sup> Furthermore, that in terms of customary law traditional leaders' powers should derive from the support of people and lower level traditional leaders, rather than be imposed from above through state law.<sup>19</sup> The previous approach invited unaccountable conduct and abuses of power by leaders.<sup>20</sup>

By implicitly acknowledging the existence of other forums for dispute resolution, including the forums of traditional leaders who are not recognised as senior traditional leaders, the 2017 Bill takes a positive step towards making traditional leaders accountable to a larger system of dispute resolution. However, LARC has reservations about how this will be implemented in practice and these will be detailed in PART C of this submission. We believe that to be adequately robust this implicit recognition of other customary dispute resolution forums must be spelled out in terms.

It is problematic that while the Bill implicitly recognises the existence of these forums it does not regulate them. This is because the Bill provides that traditional courts can be convened only by recognised traditional leaders. This undermines the stated purpose of the Bill which is to regulate all existing customary dispute resolution forums.

### **4. Protections against discrimination**

The inclusion of protections against forms of discrimination in various provisions of the Bill is a significant improvement from the previous versions and indicates that the concerns raised previously were seriously considered in the drafting of this Bill.<sup>21</sup> For example, Clause 2 of the Bill states that the Bill aims to enable full participation of all members of a community in traditional courts in a way that promotes the rights in the Bill of Rights, such as gender equality.

However, while this development is most welcome and commendable the Bill is unclear on how these protections will be implemented practically. LARC's concerns in this respect will be detailed in Part C of this submission.<sup>22</sup> We note with concern that various categories of vulnerable groups are not included in those listed by the Bill.

### **5. Express prohibition of unlawful orders**

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<sup>17</sup> Clause 4(1) of Traditional Courts Bill 15 of 2008 and 1 of 2012.

<sup>18</sup> LRG submission at 6 – 8; Thiye at 37 – 40.

<sup>19</sup> Thiye at 40 – 47.

<sup>20</sup> Thiye at 40 – 47.

<sup>21</sup> See Clauses 2(f), 3(1)(a), 3(2)(b), 3(3), 5(2), 5(3), 7(3)(a), 7(6) and Schedule 1.

<sup>22</sup> See also the submission by Lawyers for Human Rights, and the joint submission by the Children's Institute and Centre for Child Law in this regard.

LARC notes that several orders and sanctions that were permitted under Clause 10 of the 2008 and 2012 Bills have been expressly limited in Clause 8 of the 2017 Bill. Submissions on the previous Bills pointed out that traditional courts would have the power to impose sanctions that were coercive and contrary to protections against cruel and degrading punishment, forced labour, and rights to human dignity, security of the person and land tenure security.<sup>23</sup> To permit similar orders in the 2017 Bill would undermine not only constitutionally-protected rights, but also the restorative justice approach of the Bill and the voluntary and consensual nature of customary law. It would furthermore open the door for abuses of power and oppressive conduct in traditional courts. It is therefore commendable that the 2017 Bill specifies that:

- Damages cannot be paid to an organisation that is connected to a member of a traditional court or traditional leader
- A person can only be ordered to perform a service, instead of compensation, for an aggrieved party if both parties consent
- A person cannot, instead of compensation, be ordered to perform a service for a traditional leader, his family, or another person acting in the traditional court
- An order of the court cannot include any form of detention
- An order of the court cannot include the deprivation of customary law benefits (such as access to land, although not expressly mentioned).

LARC submits that corporal punishment, banishment and cruel, inhuman and degrading punishment should additionally be explicitly excluded from the permissible orders listed in Clause 8 of the Bill. Furthermore, that the consent of both parties should be required before any order to perform services in lieu of compensation, in respect of both Clauses 8(1)(b) and (c).

## **C. CONCERNS AND QUESTIONS FOR CLARITY**

Notwithstanding the significant strides made by the Department of Justice and Correctional Services to incorporate inputs from previous public consultation on the 2008 and 2012 Traditional Courts Bills, important concerns and areas of uncertainty remain.

### **1. Uncertainty around status of traditional courts**

Clause 6 of the Bill indicates that traditional courts are “courts of law under customary law”, while the term “court” is defined in Clause 1 as any court established in terms of s 166 of the Constitution. This suggests that traditional courts will not form part of the judicial system that is established in s 166 of the Constitution. Indeed, the Bill’s Preamble states that traditional courts are “distinguishable from courts in the judicial system contemplated in Chapter 8 of the Constitution”.

Yet, according to the present wording of the Bill, the definition for “court” could also apply to traditional courts by virtue of the incorporation of the term “court” in their name and in their

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<sup>23</sup> LRG submission at 10 – 12.

definition description. It is confusing for traditional courts to be called “courts” but not have the status of “courts”, and at present the legal and constitutional implications of the unique status of traditional courts is entirely unclear in the Bill.

LARC submits that without clarifying the distinction between traditional forums for dispute resolution and the courts recognised in section 166 of the Constitution, the status of traditional courts and members of traditional courts will remain a site of contestation and elite capture. LARC therefore recommends that the distinction be made explicit – not only in the Preamble, but also through careful drafting of the definitions contained in Clauses 1 and 6 of the Bill.

There are furthermore questions around the status of dispute resolution forums for Khoi and San communities in the Bill. The Bill refers to “traditional courts” for Khoi-San communities as “tribunals”. What will be their status in relation to other traditional courts – will Khoi-San courts be differentiated in any way, and is there a customary law basis for this?

Khoi-San communities were not included in the 2008 and 2012 versions of the Bill. This seems to make explicit the links between the 2017 Traditional Courts Bill and the pending Traditional and Khoi-San Leadership Bill [B 23–2015] (“TKLB”), which is set to replace the Traditional Leadership and Governance Framework Act 41 of 2003 (“Framework Act”).<sup>24</sup> However, as will be explained in the next section the 2017 Traditional Courts Bill will only regulate courts run by traditional leaders recognised in terms of an Act of Parliament, namely the Framework Act. The Framework Act only recognises traditional leaders and communities – not Khoi-San leaders and communities as per the TKLB.<sup>25</sup>

Does this mean that traditional courts for Khoi and San communities will only be regulated after the TKLB comes into force? What will be the status of Khoi-San “tribunals” if this Bill comes into force before the TKLB? Public consultation on the TKLB is still ongoing and it is unclear when or if it will be passed into law in its current form.<sup>26</sup> If Khoi-San “tribunals” are forced to remain outside of the Bill’s regulation due to the emphasis on official statutory recognition of leaders, what will be the impact on the right to equality?

## **2. Linking traditional courts to colonial and apartheid spatial geography**

A major criticism of the 2008 and 2012 Traditional Courts Bills was that the geographic jurisdictions of traditional courts aligned with those established for “tribes”, “tribal authorities” and “chiefs” in terms of the Native Administration Act of 1927 and the Bantu Authorities Act of 1951.<sup>27</sup> This was because a traditional court was to be established for each “traditional community” headed by a “senior traditional leader” as recognised under the Traditional Leadership and Governance Framework Act 41 of 2003 (Framework Act).<sup>28</sup> When the

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<sup>24</sup> See also points raised in the following section on links between traditional courts and apartheid and colonial spatial geography.

<sup>25</sup> Clause 5(1)(b) of the Bill dealing with the composition of traditional courts similarly refers only to “traditional leaders” and not to “Khoi-San leaders” that could be recognised in terms of the Traditional and Khoi-San Leadership Bill of 2015.

<sup>26</sup> See, for example, LARC’s submission on the Traditional and Khoi-San Leadership Bill (2 February 2016), accessible at

[http://www.larc.uct.ac.za/sites/default/files/image\\_tool/images/347/Submissions/Submission%20on%20TKLB\\_LARC\\_20160202.pdf](http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/Submission%20on%20TKLB_LARC_20160202.pdf) .

<sup>27</sup> Thiye at 13 – 22.

<sup>28</sup> Clause 4(1) read with definitions at Clause 1 of Traditional Courts Bill 15 of 2008 and 1 of 2012.

Framework Act came into force in 2004, all of the “tribes” and “chiefs” recognised in terms of the Native Administration Act of 1927 were automatically converted into “traditional communities” and “senior traditional leaders”.<sup>29</sup> Similarly so for “tribal authorities”, which were converted into “traditional councils” with the old tribal authority areas of jurisdiction intact.<sup>30</sup> Some submissions noted that attempts to transform these institutions through the Framework Act’s own mechanisms had largely failed.<sup>31</sup> This meant that traditional courts would operate within the same tribal authority areas that collectively formed the Bantustans under apartheid, without any ability for people to opt out of the geographic jurisdictions.

Submissions pointed out that by linking to the structures recognised in the Framework Act, the 2008 and 2012 Traditional Courts Bills ignored the history of oppression and manipulation that accompanied the creation of the Bantustans.<sup>32</sup> Furthermore, that the Bills were creating a bifurcated and unequal legal system by forcing people living within the former Bantustan areas of South Africa to acquiesce to traditional courts, and then denying them constitutional rights through the Bills’ controversial provisions.<sup>33</sup>

The 2017 version of the Traditional Courts Bill attempts to address these concerns by omitting any references to the Framework Act and “traditional community” in its main content. Yet, the Bill still makes reference to each traditional court being convened by a “traditional leader”.<sup>34</sup> Any remaining dispute resolution forums in a particular customary justice system will not be regulated by the Bill as “traditional courts”. The definition of “traditional leader” in turn states as follows:

“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.<sup>35</sup>

The definition makes it clear that, in order to convene a traditional court, it is not sufficient for a traditional leader to be recognised according to the customary law of a particular group of people. The leader must also be recognised by statute. As previously stated, the relevant statute governing the official recognition of traditional leadership in South Africa at present is the Framework Act.<sup>36</sup> Since the Framework Act inherently couples the official recognition of traditional leaders with traditional communities,<sup>37</sup> traditional councils and their geographic jurisdictions, the 2017 Traditional Courts Bill inevitably links back to the colonial and apartheid underpinnings of the Framework Act. LARC submits therefore that it will be impossible to effectively implement the 2017 Traditional Courts Bill in a manner that honours its important shifts in approach until fundamental problems with the Framework Act’s implementation have been resolved legislatively

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<sup>29</sup> Sections 28(1) – (3) of the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>30</sup> Section 28(4) of the Traditional Leadership and Governance Framework Act 41 of 2003.

<sup>31</sup> Luwaya at 30 – 31. See also LARC submission on Traditional and Khoi-San Leadership Bill 23 of 2015 at 9 – 10. Indeed, Cabinet has recently approved the publication of a Draft Amendment to the Traditional Leadership and Governance Framework Act to address the failures of one of its transformative mechanisms – namely, the election of traditional council members (see the Cabinet statement at <http://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-1-march-2017>). The Traditional and Khoi-San Leadership Bill does little to undo these failures or improve the transformative mechanisms.

<sup>32</sup> Thihe at 13 – 22.

<sup>33</sup> Thihe at 22 – 29.

<sup>34</sup> Clause 5(1)(b).

<sup>35</sup> Clause 1(1).

<sup>36</sup> If the Framework Act is repealed by the Traditional and Khoi-San Leadership Bill of 2015, the latter law will become the relevant statute.

<sup>37</sup> Traditional leaders are also coupled with traditional communities in the definition of “traditional leader” at Clause 1 of the Traditional Courts Bill 1 of 2017.

and politically. For example, in an area where an officially-recognised traditional leader is contested by another claimant and there are ongoing disputes about support and legitimacy, who will be responsible for convening a traditional court? It is an immediate and pressing reality that officially-recognised traditional leaders regularly apply for, and obtain interdicts stopping groups who dispute their authority from meeting within their jurisdictional area. They do this on the basis of producing the Government Gazette notices issued in terms of the Bantu Authorities Act of 1951 and the Native Administration Act of 1927 in both Magistrates' and High Courts. We can provide numerous examples of such interdict orders in Limpopo and North West.

Unlike provisions in the previous Bill versions,<sup>38</sup> the definition does not stipulate at which "level" of traditional leadership traditional courts will be convened. In theory, this should address concerns that the previous Traditional Courts Bills did not acknowledge the existence of dispute resolution forums convened by traditional leaders who were not recognised as senior traditional leaders in the Framework Act's hierarchy.

Yet there are aspects about this important change that the Bill does not address. For example, will there automatically be a traditional court for each officially-recognised traditional leader? What process will be used to ascertain which forums constitute "traditional courts"? How many traditional courts will therefore be regulated by the Bill across the country? The number of traditional courts can greatly magnify the costs of implementing the Bill since, for example, each traditional court is to be assigned a clerk.<sup>39</sup> Government stated in 2012 that there are 11 officially-recognised kings, 829 senior traditional leaders and 7399 headmen in South Africa.<sup>40</sup> If each of these leaders was to convene a traditional court, 8239 clerks would have to be deployed to the public service.

Given these difficulties, LARC submits that it is unlikely that there will be sufficient state resources and capacity in order to regulate all dispute resolution forums convened by traditional leaders as "traditional courts". There is a danger that if the full nature and extent of the system being proposed by the Bill is not understood, a model that centralises convening power at the level of senior traditional leaders will be defaulted to in practice. This would take us back to the 2008 and 2012 versions of the Bill.

### **3. Practical implementation of the opting out mechanism**

As stated above, the opting out mechanism provided at Clause 4(3) is a positive improvement in the 2017 version of the Traditional Courts Bill. Nevertheless, LARC has concerns about how the mechanism will work in practice and has recommendations for improving the mechanism.

First, LARC notes with concern that the Bill does not impose a duty on the clerk of the traditional court to inform parties of their right to opt out and the relevant procedures therefor. Nor is there any remedy for a party whose right to opt out has been denied or impeded by misinformation or intimidation.

LARC submits therefore that the Bill must impose an explicit duty on the clerk to inform all parties who are summoned to the court, and also those who bring cases to the court, that it is their

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<sup>38</sup> See Clause 4(1) – (4) of Traditional Courts Bill 15 of 2008 and 1 of 2012.

<sup>39</sup> Clause 5(4).

<sup>40</sup> Written reply to an internal question to the Minister of Cooperative Governance and Traditional Affairs in the National Assembly (Question 63, Internal question paper number 1 of 9 February 2012).



choice whether to participate in proceedings. Parties should be informed fully of the processes and consequences involved in opting out – for example, the court’s continued advisory powers currently included in Clause 4(3)(d).

LARC submits further that grounds for review should be added in Clause 11 to address situations where:

- a person’s right to opt out in Clause 4(3)(a) has been impeded or denied,
- the clerk fails to inform any party of the right to opt out of traditional court proceedings, or
- a person has experienced intimidation, manipulation, threats or denigration as per Clause 4(3)(b).

Second, serious abuses could emanate from the “counselling, assisting or guiding” powers that the Bill grants to traditional courts even where a person has opted out of court proceedings.<sup>41</sup> Similar advisory powers are granted in respect of several contentious matters listed at item (g) of Schedule 2, which the court presumably cannot pronounce on, although this is unclear. Clause 4(3)(f) goes further to grant traditional courts the power to provide advice or guidance even if the court is not competent to hear the case because it is not listed in Schedule 2, although no “determination” or “order in terms of section 8” can be made.

LARC submits that in practice this provision could mean that the traditional court could still, in a public sitting, hear one party’s version of events and discuss the matter in order to give advice. The social consequences of the matter being discussed without the other party present to provide an explanation or alternative version could be devastating and result in ostracisation. LARC questions whether this advisory role should be played by a court, which is tasked with resolving disputes between parties. We submit that this advisory role is an intrinsic feature of customary law and is ordinarily provided outside of court sittings. By granting this power to traditional courts, the Bill also seems to contradict its own requirements that all traditional court “proceedings”, not only determinations or orders, take place in the presence of both relevant parties.<sup>42</sup>

LARC submits therefore that the powers to counsel, guide or assist be removed from Clauses 4(3)(d)(i) and (f)(i), and Schedule 2(g) of the Bill. The traditional court should only be granted the power to facilitate the referral of a matter elsewhere where it is not competent to hear the matter or a party has opted out of proceedings.

Finally, LARC is concerned that the Bill has not considered what the potential social consequences of opting out could be, or the subtle ways in which social relationships and power relations may undermine a party’s ability to freely opt out. These power relations could play a role not only in a party’s personal life, but also in interactions with the clerk. Note however that this does not negate the need for an opting out mechanism as the Bill is currently drafted. To be consistent with the consensual nature of customary law the Bill should be reconfigured to require that both parties expressly opt in. Failing that, the Bill should acknowledge the structural dangers of resorting to an opting out mechanism and make explicit provision for the mitigation of these dangers.

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<sup>41</sup> Clause 4(3)(d).

<sup>42</sup> Clause 7(7), read with Clause 11(1)(h).

LARC therefore submits that, in addition to grounds for review, a separate remedy should be made available to participants in traditional court proceedings who are being ostracised for opting out of proceedings or who feel pressured to participate despite wanting to opt out. This could take the form of an ombud position or complaints mechanism, separate from the clerk's role, and include protocols for referrals to relevant social services where relevant.

#### **4. Practical implementation of protections against discrimination**

As stated above, it is unclear how the Bill's provisions for preventing and protecting against discrimination in traditional courts will be implemented practically. For example, at present the only consequence for failing to comply with the prohibitions contained in Schedule 1 is that it establishes a ground for taking the dispute for review by a High Court. It is critical for remedies to be clarified and expanded in the Bill, especially since these protections are likely to be met with resistance as they seek to transform deeply patriarchal and finely segmented socio-cultural systems. As suggested above, an ombud position or complaints mechanism could be created to address instances of discrimination.

It is unclear how these much-needed protections are going to intersect with the deeply entrenched patriarchal socio-cultural rules and practices prevailing in many traditional communities. For example, how will ensuring women's participation in traditional courts as members intersect with the fact that in some socio-cultural contexts it is taboo to discuss initiation in the presence of women and uninitiated men, let alone allowing them participate in such a discussion? In some contexts, unmarried people are similarly not allowed to discuss marriage-related issues, like ukuThwala; while daughters-in-law cannot be involved in the discussions of matters concerning their marital home. How will the Bill be able to practically ensure participation in contexts where traditional courts are convened next to kraals – a space around which daughters-in-law may be expected to practice the rule of avoidance? In reality this will mean that daughters-in-law who become members of the community through marriage will be less likely to participate in traditional courts as members.

It is furthermore unclear from the Bill what well-considered and practical mechanisms will be put in place to ensure that the protections against discrimination are implemented effectively but without being interpreted as destroying or inventing new custom by participants in traditional courts? Where it is perceived that customary law is being distorted or imposed by the traditional courts that the Bill regulates, it may limit the extent to which participants make use of the courts. The composition and procedures of the courts need to be considered in relation to the current realities of customary law contexts. Without clear and practical implementation mechanisms these protections will be rendered null and void.

We note with concern that various categories of vulnerable groups are not included in those listed by the Bill, and recommend that these groups be included in the Bill.<sup>43</sup> This is particularly evident in Schedule 1 where gender discrimination and conduct harmful to children is omitted.

#### **5. Access to review proceedings**

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<sup>43</sup> For example, discrimination on the basis of nationality or ethnicity is not explicitly included in the Bill.

LARC notes that in terms of Clause 11 of the Bill traditional court matters can be reviewed on procedural grounds in a division of the High Court. However, LARC questions whether High Court proceedings are accessible to most ordinary South Africans given the resources required to litigate at High Court level.

LARC therefore recommends that the Bill should put in place an express provision that grants persons access to legal aid if they want to bring a review in terms of Clause 11.<sup>44</sup> This is particularly pertinent since persons would have been eligible for legal aid for many of the subject matters dealt with in traditional courts, had their cases been heard outside of a traditional court.

## **6. Accountability of members of traditional court and traditional leader**

LARC would like to highlight two provisions which relate to the accountability of members in traditional courts, including traditional leaders.

First, LARC notes Clause 15 of the 2017 Bill, which limits the liability of traditional court members for actions or omissions committed in good faith.

A recent application by the Congress of Traditional Leaders of South Africa (Contralesa) to the Western Cape High Court illustrates the background to this liability provision. Contralesa argued that traditional leaders should be deemed to have blanket immunity for all conduct related to their customary adjudication of disputes.<sup>45</sup> Thus, they argued that AbaThembu King Buyelekhaya Dalindyabo should not have been convicted of arson, kidnapping, assault and defeating the ends of justice<sup>46</sup> for his criminal conduct since he was responding to an ongoing dispute in his community as a judicial officer.<sup>47</sup>

LARC submits therefore that although the wording of Clause 15 requires good faith on the part of traditional court members, the provision should also explicitly prohibit abusive and harmful conduct by traditional court members. The broad wording of Clause 15 should not be allowed to legalise, condone or justify the kinds of abusive practices that resulted in the conviction of the AbaThembu King.

Second, LARC notes that in terms of Clause 16, a Code of Conduct is still to be drafted for persons with a role in traditional courts. LARC submits that Clause 16(1) should be amended to additionally require the Minister of Justice and Correctional Service to consult with ordinary people about the content of the Code of Conduct. As presently drafted, the Minister need only consult with the Minister responsible for Traditional Affairs and the National House of Traditional Leaders. LARC submits that, as the primary users of traditional courts, ordinary people are best placed to comment on the kinds of abuses that should be prevented in the Code of Conduct.

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<sup>44</sup> See, for example, the case of *Nkuzi Development Association v Government of South Africa and Another* (LCC10/01) [2001] ZALCC 31 (6 July 2001).

<sup>45</sup> *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly and Others* (2474/16) ZAWCHC. See Notice of Motion at paragraph 3.

<sup>46</sup> *Dalindyabo v S* (090/2015) [2015] ZASCA 144, [2015] 4 All SA 689 (SCA), 2016 (1) SACR 329 (SCA) (1 October 2015).

<sup>47</sup> *Congress of Traditional Leaders of South Africa v Speaker of the National Assembly and Others* (2474/16) ZAWCHC. See Notice of Motion at paragraphs 5 – 7.

## 7. Drafting anomalies

LARC has identified two apparent drafting anomalies in the Bill that should be addressed by the Committee:

- Clause 8(1)(a) to (c) specifies that orders in the form of monetary compensation or unremunerated services can only be granted in favour of the party who instituted proceedings in a traditional court (or against the party against whom proceedings were instituted). It is unclear why the Bill assumes that such orders will only be appropriate when the court decides in favour of the person who initiates a case before the court. Since the Bill takes a restorative justice approach, it cannot be assumed that the person who institutes a case will not also need to take action in order to resolve the dispute. LARC therefore recommends that this restriction be removed and that the orders listed in paragraphs (a) to (c) can be granted in favour of any party to the dispute, as with the other orders listed in Clause 8.
- Clause 9 seems to set out two contradictory procedures for when an order of a traditional court has not been complied with and it is deemed to be the fault of the relevant party. Clause 9(2) to (4) entreats the clerk to determine whether fault lies with the party or not, and if there is fault then enforcement is referred to a justice of the peace. Yet Clause 9(4)(b)(i) implies that the justice of the peace has the power to act as though no fault lies with the non-complying party – even though the clerk has already determined there to be fault. LARC recommends that this procedure be clarified in the drafting of the provision, and that the enforcement procedure set out in Clause 4(4) is preferable.

## D. SUMMARY OF SPECIFIC SUBMISSIONS AND RECOMMENDATIONS ON TRADITIONAL COURTS BILL 1 OF 2017

1. All legislation related to customary law should incorporate explicit acknowledgements of the consensual and living nature of customary law, as with this Bill.
2. Corporal punishment, banishment and cruel, inhuman and degrading punishment should be explicitly excluded from the permissible orders listed in Clause 8 of the Bill.
3. The consent of both parties should be required before any order to perform services in lieu of compensation can be granted. In other words, in respect of both Clauses 8(1)(b) and (c).
4. Without clarifying the distinction between traditional forums for dispute resolution and the courts recognised in section 166 of the Constitution, the status of traditional courts and members of traditional courts will remain a site of contestation and elite capture. The distinction should be made explicit – not only in the Preamble, but also through careful drafting of the definitions contained in Clauses 1 and 6 of the Bill.
5. It will be impossible to effectively implement the 2017 Traditional Courts Bill in a manner that honours its important shifts in approach until fundamental problems with the 2003 Traditional Leadership and Governance Framework Act's implementation have been resolved legislatively and politically.

6. It is unlikely that there will be sufficient state resources and capacity in order to regulate all dispute resolution forums convened by traditional leaders as “traditional courts”. Traditional courts are likely to default to forums convened by senior traditional leaders. This contradicts the purpose of the Bill to regulate all customary dispute resolution forums, and will in practice, inevitably elevate the courts of senior traditional leaders over the myriad of other lower level forums that dispense justice on a day to day basis.
7. The Bill must impose an explicit duty on the clerk of a traditional court to inform all parties who are summoned to the court, and also those who bring cases to the court, that it is their choice whether to participate in proceedings. Parties should be fully informed of the processes and consequences involved in opting out, including the Bill’s current problematic provision that empowers traditional courts to continue to provide advice even after a person has opted out.
8. Grounds for review should be added in Clause 11 to address situations where: a person’s right to opt out in Clause 4(3)(a) has been impeded or denied; the clerk fails to inform any party of the right to opt out of traditional court proceedings; or a person has experienced intimidation, manipulation, threats or denigration as per Clause 4(3)(b).
9. Serious abuses could emanate from the advisory or guiding powers that the Bill grants to traditional courts. Whether this advisory role is consistent with the Constitution is questionable. The powers to counsel, guide or assist should be removed from Clauses 4(3)(d)(i) and (f)(i), and Schedule 2(g) of the Bill. The traditional court should only be granted the power to facilitate the referral of a matter elsewhere where it is not competent to hear the matter or a party has opted out of proceedings.
10. To be consistent with the consensual nature of customary law the Bill should be reconfigured to require that both parties expressly opt in. Failing that, the Bill should acknowledge the structural dangers of resorting to an opting out mechanism and make explicit provision for the mitigation of these dangers.
11. In addition to grounds for review, a separate remedy should be made available to participants in traditional court proceedings who are being ostracised for opting out of proceedings or who feel pressured to participate despite wanting to opt out. This could take the form of an ombud position or complaints mechanism, separate from the clerk’s role, and include protocols for referrals to relevant social services where relevant.
12. Remedies should be clarified and expanded to ensure implementation of the provisions that aim to protect traditional court participants against discrimination, beyond High Court review. This also be achieved through an ombud or complaints mechanism. The composition and procedures of traditional courts need to be considered in relation to the current realities of customary law contexts. Without clear and practical implementation mechanisms these protections will be rendered null and void.
13. We note with concern that various categories of vulnerable groups are not included in those listed by the Bill, and recommend that these groups be included in the Bill.
14. The Bill should put in place an express provision that grants persons access to legal aid if they want to bring a review in terms of Clause 11.
15. Clause 15 should also explicitly prohibit abusive and harmful conduct by traditional court members.

16. Clause 16(1) should be amended to additionally require the Minister of Justice and Correctional Services to consult with ordinary people about the content of the Code of Conduct. As the primary users of traditional courts, ordinary people are best placed to comment on the kinds of abuses that should be prevented by the Code of Conduct.
17. Traditional courts should be able to grant the orders listed in paragraphs (a) to (c) of Clause 8(1) in favour of any party to the dispute, as with the other orders listed in Clause 8, not just in favour of the person who institutes proceedings.
18. The enforcement procedure in Clause 9(4) should be clarified, preferably to align with the similar procedure contained in Clause 4(4).

## **E. NOTE ABOUT COMMITTEE PROCESS**

LARC appeals to the Committee to permit additional time for the receipt of submissions on the 2017 Traditional Courts Bill. The Committee has expressed that the voices of ordinary South Africans, in particular those living in customary law and rural contexts, are crucial to understanding the impact of the Bill in people's lives. To this end, the Committee should ensure that a thorough consultation process is conducted on this Bill, with not only calls for written submissions, but also public hearings across the provinces with sufficient prior notice and information for people to attend. This will facilitate participation in the law-making process by the general public and also those who are likely to be most affected by the Bill.<sup>48</sup> Rushing the legislative process will only deprive the Committee's process of these valuable inputs.

## **F. CONCLUSION**

LARC thanks the Committee for the opportunity to present comments on this important Bill, and would welcome an invitation to explain our submissions to the Committee in a verbal presentation.

This submission is endorsed by Lawyers for Human Rights.

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<sup>48</sup> This is mandated by sections 59, 72 and 118 of the Constitution of South Africa, 1996, as has been upheld in several judgments of the Constitutional Court, inter alia: *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006); *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC) (13 June 2008); *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (CCT40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (28 July 2016).