9 November 2018

Chairperson and Honourable Members

Select Committee on Cooperative Governance and Traditional Affairs

National Council of Provinces

c/o Mr. Thembile Manele (Committee Secretary)

Per e-mail: tmmanele@parliament.gov.za

Dear Sirs and Madams

Response to comments by Department of Traditional Affairs on TKLB

The Land and Accountability Research Centre notes with concern recent comments and proposed changes to the Traditional and Khoi-San Leadership Bill ('the Bill' or 'TKLB') made in meetings of the Select Committee on Cooperative Governance and Traditional Affairs ('the Select Committee').

On 11 September 2018 the Department of Traditional Affairs ('the Department') presented and tabled its responses to the negotiating mandates previously submitted by provincial legislatures on the Bill. At the meeting held on 30 October 2018, the Department presented further responses to certain submissions received by the Select Committee following a call for written comments due by 19 September 2018.

In its presentation on 30 October, the Department indicated that LARC's concerns around the lack of community consent and consultation in relation to agreements and partnerships concluded by traditional and Khoi-San councils would be sufficiently addressed by the Department's proposed changes to clause 24 of the Bill. These changes were justified as a response to the Western Cape Provincial Legislature's negotiating mandate, which indicated that clause 24 of the Bill presented a potential conflict between the Bill and the Interim Protection of Informal Land Rights Act 31 of 1996 ('IPILRA').

The Department proposes that the wording underlined below be added to clause 24(3) of the Bill:

> *(3) Any partnership or agreement entered into by any of the councils contemplated in subsection (2) must be in writing and, notwithstanding the provisions of any other national or provincial law –*
>
> *(a)…*

> *(b)…*
>
> *(c) is subject to –*
>
> > *(i) a prior consultation with the relevant community represented by such council;*
> >
> > *(ii) a decision in support of the partnership or agreement taken by a majority of the relevant community members present at the consultation contemplated in subparagraph (i); and*
> >
> > *(iii) a prior decision of such council indicating in writing the support of the council for the particular partnership or agreement; …*

LARC disagrees that these amendments will address the concerns raised in our submission.

Far from solving the problem, this amendment may result in IPILRA being circumvented by using the word 'notwithstanding' as opposed to 'subject to' or 'in addition to' in clause 24(3).

The new reference to 'a majority of relevant community members' is ineffective as it operates within the framework of the TKLB, and does not start with rights holders as IPILRA does. It starts with councils and traditional leaders who represent the 'traditional communities' formerly named 'tribes'. Indeed, 'relevant community members' are only presented with the agreement or partnership after a 'prior decision' by the council has already approved it (per clause 24(3)(c)(iii)). The relevant community is that which is represented by the council, according to old Bantu Authorities Act delineations. This would trump IPILRA's focus on the people directly affected by mining who are never whole 'tribes' but always the sub-groups and families whose homes, fields and grazing land are targeted for mining activities.

Moreover, LARC would like to draw attention to the unanimous judgment delivered by the Constitutional Court on 25 October 2018 in the matter of *Maledu and Others v Itereleng Bakgatla Mineral Resources*, which reaffirms that the TKLB's approach would not withstand constitutional scrutiny. The *Maledu* judgment provides clear instructions in relation to mining on communal land, and affirms that the Mineral and Petroleum Resources Development Act 28 of 2002 ('MPRDA') must be read concurrently with IPILRA. IPILRA requires the consent of the holders of affected 'informal land rights' (including rights to use, access or occupy land under customary law) before decisions impacting on their land rights can be taken. If they do not consent, their rights must be formally expropriated. IPILRA foregrounds the rights of the people whose land rights are directly affected, by mining as opposed to super-imposed traditional communities (former 'tribes'), traditional leaders or neighbouring groups.

The judgment states at para 5 (footnote omitted):

> *Mining is one of the major contributors to the national economy. But there is a constitutional imperative that should not be lost from sight, which imposes an obligation on Parliament to ensure that persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices are entitled either to tenure which is legally secure or to comparable redress. Accordingly, this case implicates the right to engage in economic activity on the one hand and the right to security of tenure on the other.*

The judgment upheld an appeal by the Lesethleng community against an eviction order granted against them in favour of Itereleng Bakgatla Minerals Resources and Pilanesberg Platinum Mines in the Mahikeng High Court. Kgosi Nyalala Pilane is a director of the company that instigated the eviction. He relied on the fact that a *kgotha kgothe* of the overarching Bakgatla 'tribe' had decided to support the mining and terminate the rights of the Lesethleng villagers whose land was targeted for mining.

The judgment states at para 108 (footnote omitted):

> *But this resolution does no more than merely indicate that it was adopted and signed by Kgosi Pilane and a representative of Barrick. Thus, there is no shred of evidence to substantiate the respondents' assertions that the applicants were deprived of their informal land rights in conformity with the prescripts of section 2(4) of IPILRA.*

This judgment sets a powerful precedent that deals brokered between mining houses and traditional leaders, without the consent of those directly affected, infringe on the Constitutional rights of people whose tenure security is already vulnerable as a result of past discriminatory laws and practices. The judgment therefore holds up a red flag to the TKLB model of traditional councils and leaders having the unilateral power to sign deals with third parties in respect of mining at least.

The Department's proposed amendments to the TKLB appear to be a last-minute attempt to pre-empt the impact of the *Maledu* judgment. It justifies these amendments as a response to concerns that the TKLB is in conflict with IPILRA. Yet, instead of stating explicitly that the TKLB is subject to and must be read concurrently with IPILRA, which the Constitutional Court has now declared in respect of mining deals, the proposed amendment seeks to override or replace the requirements listed in IPILRA.

The only way for clause 24 of the TKLB to be consistent with the *Maledu* judgment is for it to state, in terms, that it is subject to the Constitutional rights that IPILRA was enacted to protect and secure.

LARC's submission also made reference to other flaws in clause 24 that are not being addressed by the Department's proposed changes. The TKLB thus continues to lack minimum standards for the consultation referred to in clause 24(3)(i), where people will be required to decide in favour of or against an agreement or partnership by the traditional council. There are no details about who should be present, what information or notice should be made available before the meeting, and where and how many consultation meetings should be held. There is nothing in the provision to suggest that procedures will be in place to ensure that people are adequately equipped to make informed and reasoned decisions about agreements or partnerships presented to them by a traditional council.

LARC also previously raised a concern about community consultation and consent once more being excluded from clause 63(22) of the B-version of the Bill, which requires a Premier to review partnerships or agreements that have been entered into by traditional councils in the past to assess whether they meet the requirements in clause 24. This issue has not been resolved in the Department's latest proposed amendments. Instead, the Department proposes that clause 63(22) be changed to exclude from this review process past partnerships or agreements concluded as a result of national or provincial legislation. The potential implication of this is that controversial deals concluded by traditional leaders and councils in pursuit of mining activities under the MPRDA will be excluded from the Premier's scrutiny, providing them with a veneer of legality whether or not they have complied with relevant consent and consultation requirements.

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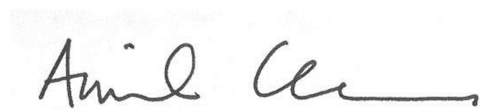
LARC furthermore disagrees with the Department's assertions on 30 October 2018 that LARC is incorrect to suggest that clause 25 of the TKLB may be an attempt to enable government to hand over some of its powers to traditional leaders and councils. There is nothing in the wording of clause 25 that makes it explicit that the roles enabled by clause 25 will only be of a facilitating, advisory and participatory nature as the Department suggests – only that it 'may not include any decision-making power'. Parliament should strive for clear language in order to prevent confusion or broad interpretations of legislation that result in unconstitutional or abusive practices.

We therefore bring to the attention of the Select Committee on Cooperative Governance and Traditional Affairs that the Department's proposed amendments fail to adequately address the myriad of concerns LARC raised about the Bill in its written submission.

Sincerely



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