

TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT & 2017 AMENDMENT BILL

December 2017

BACKGROUND

The Traditional Leadership and Governance Framework Act (the TLGFA/ the Act) came into effect in September 2004. The introductory chapter of the Act states that one of its purposes is to transform the institution of traditional leadership in South Africa so that it is in harmony with the Constitution and the Bill of Rights.

The Act provides for the recognition of:

- traditional communities;
- kingships or queenships, and those councils;
- traditional councils; and
- traditional leadership positions (such as principal and senior traditional leaders, and headmen and headwomen).

The Act also sets out what roles and functions traditional leaders or traditional councils can have that can be provided for by national or provincial government. This includes having possible roles in land administration; agriculture; the administration of justice; economic development; and the management of natural resources.¹

While the TLGFA is intended to transform traditional structures that existed before our constitutional democracy, it allows for structures set up during apartheid to remain active if certain conditions set out in the law are met. Tribal authorities that were established by the Black Authorities Act 68 of 1951 are allowed to continue as traditional councils in terms of the TLGFA.

Tribal authorities were administrative structures created by the apartheid government under the Bantu Authorities Act (later known as the Black Authorities Act) and were used to place people from different ethnic groups into overcrowded pieces of land, or tribal authority areas, which later became the homelands (Bantustans).

The Constitutional Court has noted that “The Black Authorities Act gave the State President the authority to establish ‘with due regard to native law and custom’ tribal authorities for African ‘tribes’ as the basic unit of administration in the areas to which the provisions of [the Communal Land Rights Act of 2004] apply. ... It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the Traditional Leadership and Governance Framework Act, 2003” - Tongoane and Others v Minister for Agriculture and Land Affairs and Others (2010).

¹ These are just some of the areas in which a role can be played by a traditional leader or traditional council as set out in Section 20 of the TLGFA. The list also includes arts and culture; health; welfare; safety and security; registration of births, deaths and customary marriages; environment; tourism; disaster management; dissemination of information relating to government policies and programmes; and education.

THE LAW AND TRADITIONAL COUNCILS

Section 28 of the Act provides transitional mechanisms for these structures that existed before the TLGFA came into operation to continue to function, with some changes required. Section 28(4) states that a tribal authority that was established before the Act would be recognised as a traditional council so long as it transformed according to the requirements in section 3(2) within a particular period of time. Section 3(2) requires that a tribal authority, in order to become a valid traditional council, must:

1. have 40% of its members democratically elected (the remaining 60% being traditional leaders and members of the traditional community who are chosen by a senior traditional leader or “chief”);
2. have a third of its members be women; and
3. have the total number of members calculated according to a particular formula.²

The Act originally gave tribal authorities one year to meet these requirements. This timeframe was not met. A 2009 Amendment Act extended the timeframe to seven years from when the TLGFA first became law. This lapsed in 2011. Even with these extensions, traditional structures have failed to transform.

Research has shown that even where traditional council elections did take place before 2011, they had serious weaknesses, with elections taking place below acceptable standards, as illustrated below:

Eastern Cape	During elections in 2010, many traditional leaders objected to having to include elected members. In King William’s Town, some villages rejected elections but were told, after meeting with the MEC, that the elections would still proceed even though the MEC admitted that the election process had not been properly conducted.
KwaZulu-Natal	Formal electoral ballot boxes were used despite there being insufficient funds to hire the IEC to monitor and support traditional council elections. This created the impression that elections were monitored and run by the IEC. It seems less than 2% of the voting age population in KwaZulu-Natal voted in the earlier traditional council elections.
North West	Elections were supervised by the Provincial House of Traditional Leaders, with many people unaware that elections had taken place in their areas. As of June 2011, only three of the fifty-six traditional communities had embarked on the election process, with only two of the three conducting elections. Election procedures were repeatedly postponed and Gazette notices attempting to recognise traditional councils were out of time.
Limpopo	No traditional council election has ever taken place.

These failures have led to questions about the validity and legal status of tribal authorities and councils that have not transformed.

² Formula determined and published by the Premier of a province in line with guidelines published by the Minister of Cooperative Governance and Traditional Affairs.

THE TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK AMENDMENT BILL

The Traditional Leadership and Governance Framework Amendment Bill [B8-2017] (the Amendment Bill) was introduced by the Department of Cooperative Governance and Traditional Affairs to the National Assembly on 28 March 2017.

According to the official memorandum, the Bill proposes to:

1. extend the timeframes for:
 - tribal authorities that completely failed to change to traditional councils, to do so within one year;
 - tribal authorities that tried to become traditional councils but not in full compliance with section 3(2), to comply properly within one year;
 - kingship and queenship councils to be established within two years;
2. give the Minister of Traditional Affairs the power to take necessary steps to ensure that tribal authorities and traditional councils are reconstituted if the proposed one year timeframe is not met;
3. align the terms of office of reconstituted tribal authorities or traditional councils, as well as align the terms of office of kingship and queenship councils, with the term of office of the National House of Traditional Leaders;
4. disestablish any community authority which still exists, by Notice in a Provincial Gazette and in terms of provincial legislation, within two years.

(NB: these new timeframes come into operation when the Bill commences as a law)

Community authorities were alternative administrative structures created for groups who challenged tribal boundaries, were of mixed ethnicities or resisted being included under the rule of traditional authorities during apartheid. These community authorities were led by elected Chairpersons and had a say in how they governed themselves.

The Memorandum attached to the Amendment Bill acknowledges the major failures in respect of provincial attempts to reconstitute tribal authorities within the required timeframes. The Memorandum states that there were many challenges identified in respect of reconstitution and that in some instances:

- (a) tribal authorities were not reconstituted at all;
- (b) the reconstitution took place after the expiry of the timeframe within which it had to be done;
- (c) no formula for total number of members was issued;
- (d) where a formula was issued, it was not aligned with the Minister's guidelines; and (e) certain requirements of the relevant provincial legislation were not met.

The Department of Traditional Affairs is aware of the delays and failures to implement transformation, which has resulted in legal uncertainty around tribal authorities that are still operating. The Memorandum explicitly states that “*there is legal uncertainty with regards to the status of those tribal authorities that were not reconstituted as well as those who were reconstituted but did not meet all the statutory requirements*”. Where the requirements for reconstitution in terms of Section 3(2) of the Act have not been met, tribal authorities are currently operating outside the law. This is because compliance with Section 3(2) was a condition for recognition, as the Memorandum also admits. These structures are not valid traditional councils in terms of the TLGFA and also cannot operate lawfully as tribal authorities since the Black Authorities Act has been repealed and no longer operates.

IMPLICATIONS OF THE BILL

The Bill is being framed as a “stopgap measure” to address the failure to meet the TLGFA’s timeframes for tribal authorities to transform. This is because the Traditional and Khoi-San Leadership Bill of 2015 (TKLB), which is intended to replace the TLGFA, is still going through the parliamentary processes. The Bill is also allegedly addressing the non-alignment of the terms of office of traditional councils with the National House of Traditional Leaders. The House’s term of office expires in August 2017. The TKLB puts into place another transition for tribal authorities, but the delays in finalising the TKLB apparently require the TLGFA to be amended before August.

The Amendment Bill does not set out:

- the legal consequences for failing to meet reconstitution requirements and the proposed timeframes. Will traditional councils be invalid?;
- what “necessary steps” the Minister can take to ensure reconstitution if the proposed timeframes are not met; or
- the consequences of decisions, contracts, or transactions that non-compliant tribal authorities and traditional councils have entered into and whether these have valid legal status.

While the government and Parliament says that the Amendment Bill relates only to “implementation challenges” that are technical and operational in nature, the Amendment Bill could have far-reaching consequences for people living within the boundaries of traditional councils in the future.

It has been thirteen years since the TLGFA came into effect without bringing about any effective changes or concrete solutions to enforce transformation. It is not clear from the Amendment Bill whether the proposed extension period of one year will be any different. The Amendment Bill does not suggest any new enforcement mechanisms, nor does it put forward any incentives to encourage transformation.

THE QUESTION OF LEGALITY

The Amendment Bill attempts to provide legal status to structures that have been operating outside the law. Untransformed traditional authorities that have been making decisions and entering into commercial transactions do not have valid legal authority to do so.

If traditional structures such as tribal authorities or improperly reconstituted traditional councils are invalid in law, any decisions made or transactions entered into at the time are also invalid in law after a court declaration.

Traditional structures have been failing to meet other accountability mechanisms provided for in the TLGFA. The Auditor-General has admitted that financial statements of traditional authorities in the North West have not been audited since 1994. In terms of Section 4(2)(b) of the TLGFA, a traditional council is required to have its financial statements audited.

The Amendment Bill and the current laws do not address how these decisions and transactions will be dealt with going forward. The Amendment Bill also does not say how future transactions of tribal authorities or traditional councils will be impacted if there is still no valid reconstitution within the proposed one year timeframe. No answers are provided to these practical and legal issues.

PARLIAMENTARY PROCESS FOR THE BILL

A “Section 76 Bill” is one that affects the provinces, and must be dealt with according to the procedure in Section 76 of the Constitution. It can be introduced in the National Assembly or the National Council of Provinces, but it must be considered fully in both Houses of Parliament.

“Once an ordinary Bill that affects the provinces has been passed by the National Assembly, it must be referred to the NCOP. The Council must pass the Bill, pass an amended Bill or reject the Bill. A section 76 Bill must, if it was passed by the Council without any amendment, be submitted to the President for assent. If the Council passes an amended Bill it goes back to the National Assembly and if the National Assembly passes the amended Bill, it must then be submitted to the President for assent. If the Council rejects a Bill or if the National Assembly refuses to pass the NCOP amended version of the Bill, the matter must be referred to the Mediation Committee. If the Committee is unable to secure an agreement on a section 76 Bill introduced in the National Assembly within 30 days, the Bill may be passed by the National Assembly with a two-thirds majority. If the Committee is unable to secure an agreement on a Bill that was introduced in the NCOP the Bill lapses.”³

³ <http://www.justice.gov.za/legislation/legprocess.htm>.



28 March 2017: Amendment Bill introduced to National Assembly

15 May 2017: The Secretary to Parliament, in accordance with section 18(1) of the TLGFA, referred the Bill to the National House of Traditional Leaders, which must, within 30 days from the date of the referral (12 June 2017), make any comments it wishes to make.

9 May 2017: Department of Traditional Affairs presented the Bill to members of the Portfolio Committee on Cooperative Governance and Traditional Affairs.

21 May 2017: The Portfolio Committee called for written submissions on the Bill from stakeholders and interested persons. The deadline for submissions was 4 June 2017.

13 June 2017: Briefing and presentation of submissions on the Bill by interested parties to the Portfolio Committee. The Land and Accountability Research Centre was the only party who made oral submissions.

14 June 2017: Discussion by the Portfolio Committee on new amendments to the Bill proposed by the National House of Traditional Leaders.

Section 3A of the Act was proposed to be changed concerning the composition of kingship and queenship councils. The proposal was that each traditional council, and not the traditional community, elects one member from that traditional council to serve as part of the 40% elected members of a kingship or queenship council. Another amendment put forth was to Section 3B of the TLGFA on the composition of principal traditional councils. The Amendment proposes similarly that the 40% elected component be elected within each traditional council, rather than by the broader traditional community. Effectively, the community's role in elections at the highest level of the traditional leadership hierarchy would be removed. Since this amendment was not initially set out in the Bill, a motion had to be tabled to the National Assembly in order for the Portfolio Committee to consider the new amendments in terms of the rule of Parliament.

21 June 2017: Discussion by Portfolio Committee on accepting the Bill with the amendments proposed by the National House of Traditional Leaders.

22 June 2017: Portfolio Committee accepts and adopts the final version of the Bill which now includes the amendments by the National House of Traditional Leaders. The Bill will now be referred to the National Council of Provinces. It is worrying that the Chairperson of the Portfolio Committee has suggested that the NCOP does not need to conduct further public participation. This is contrary to the Constitution's requirements.

22 August 2017: The Bill was debated in a National Assembly Plenary. The DA, EFF, UDM and COPE opposed the Bill. The IFP, NFP, AIC and ANC supported the Bill. The plenary voting results were:

- No: 6
- Yes: 203
- Abstain: 2

The Bill was passed by the National Assembly and referred to the NCOP.

REMEMBER: Section 72 of the Constitution places an obligation on the NCOP to facilitate public involvement in the legislative processes of the Council and its committees.

Public hearings should take place on the Bill during the NCOP process. Information about scheduled hearings are usually published in newspapers or on Parliamentary websites.

CALL FOR SUBMISSIONS ON THE BILL BY NCOP

On 15 October 2017, the Select Committee on Cooperative Governance and Traditional Affairs published a notice in the Sunday Times newspaper calling for written submissions on the Bill, but with the deadline expiring on 16 October 2017 (the next day).

The Committee extended the deadline to 3 November 2017, and then again to 10 November 2017.

Comments were to be emailed to tmmane@parliament.gov.za by no later than 10 November 2017.

For enquiries: tmmane@parliament.gov.za or 021 403 3823 or 083 709 8534.

The Committee has also referred the Bill to all the provincial legislatures which must have their own public participation process on the Bill.

NCOP PROCESS

After being passed by the National Assembly during August, the Bill was then referred to the NCOP for concurrence.

15 October 2017: NCOP initial call for submissions on the Bill advertised in Sunday Times.

16 October 2017: NCOP deadline for submissions.

17 October 2017: NCOP Select Committee on Cooperative Governance and Traditional Affairs briefed on the Bill by Department.

19 October 2017: NCOP official call for submissions on Bill opened.

24 October 2017: briefings on Bill to Western Cape, Mpumalanga and Northern Cape Provincial Legislatures.

25 October 2017: briefing on Bill to Gauteng Provincial Legislature.

26 October 2017: public hearing in Gauteng.

27 October 2017: three public hearings in Mpumalanga (Mzinti, Driefontein, Gamorwe). Briefing on Bill to KZN Provincial Legislature.

31 October 2017: public hearing in Free State (Qwaqwa).

2 November 2017: public hearing in Free State (Thaba Nchu).

3 November 2017: public hearing in Free State (Philipolis). Briefing on Bill to North West Provincial Legislature. More public hearings held in Mpumalanga (Nhlazatshe and Mapulaneng).

6 November 2017: deadline for written submissions on Bill to Free State Provincial Legislature.

7 November 2017: deadline for written submissions on Bill to Mpumalanga Provincial Legislature.

8 November 2017: four public hearings in North West (Khunwana, Taung, Madibeng, Vaal Reefs).

9 November 2017: Mpumalanga Portfolio Committee considered negotiating mandate.

10 November 2017: official deadline for submissions to NCOP.

11 November 2017: public hearing in Gauteng.

14 November 2017: at this stage in the process, only the Free State and Mpumalanga submitted negotiating mandates on the Bill to the NCOP. Deadline for written submissions on Bill to North West Provincial Legislature.

24 November 2017: briefing on Bill to Limpopo stakeholders (details still to be confirmed).