



**SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

**SUBMISSION ON THE TRADITIONAL
COURTS BILL [B1-2017]**

**Submitted to the Portfolio Committee on
Justice and Correctional Services,**

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1. Introduction

The South African Human Rights Commission (SAHRC), welcomes the opportunity to make a submission to the Portfolio Committee on Justice and Correctional Services, on the draft Traditional Courts Bill [B1-2017]. The SAHRC has been closely monitoring the progress of the Bill and has previously engaged Parliament on both the 2008 and 2012 versions of the Bill. The SAHRC acknowledges the extensive re-drafting of the Bill to address the concerns raised by stakeholders during the 2012 deliberations and that the current, 2017 version intends to address the shortcomings of the prior draft Bills.

It is in accordance with the mandate of the SAHRC to make recommendations to organs of state for the adoption of progressive measures for the promotion of human rights, the SAHRC makes the submission on the Bill to the Portfolio Committee on Justice and Correctional Services (the Portfolio Committee).

2. Improvements and concerns on the Bill

At the outset, the SAHRC recognises that several matters in the prior versions of the Bill have been addressed in the new Bill. Such improvements include the draft Bill is no longer premised on apartheid-era tribal boundaries to define the jurisdiction of the traditional courts, and persons are permitted to opt-out of traditional courts and, alternatively, use other mechanisms / courts for dispute resolution. However, the SAHRC notes other concerns in the Bill, as set out below:

2.1 Guiding principles of the Bill

The SAHRC notes the guiding principles under clause 3 of the Bill lays the foundation for the implementation of the legislation and the re-affirms the constitutional values of the right to dignity, equality, non-racialism and non-sexism and the freedom of sexual orientation and identity. The SAHRC specifically notes the emphasis on restorative justice through mediation and that persons who subscribe to customary law practices, may voluntarily elect to have disputes resolved in traditional courts. This is a notable improvement on the 2012 version of the Bill. Historically, traditional communities have relied on the wisdom and insights of local leaders to resolve disputes and the Bill affirms the notion of communal values through the emphasis on restorative justice.

2.2 Institution of proceedings in traditional courts

Clause 4 of the Bill recognises that matters which are *sub judicæ* may not be instituted at a traditional court. In addition, that a traditional court may only hear a matter if the party against whom the proceedings are instituted, agrees to the resolution of the dispute before a traditional court. Whilst this indeed protects the prerogative of persons to voluntarily elect whether or not to abide to the traditional justice system, there are several anomalies which appear to thwart the 'opt-out' option. For example, clause 4(3)(a) requires that a person who has exercised their right to opt-out, must provide reasons for such decision to the clerk of the traditional court. Furthermore, that the clerk must ascertain whether the 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 or forum.¹ However, clause 3(d) still permits the traditional court to counsel, assist or guide the party who choose to be subject to the court. This is further entrenched in clause 4(3)(f) which permits the traditional court to offer, 'counselling, assisting or guiding a party to the dispute who has approached the court', on a matter which is not covered in Schedule 2 of the Act, with the proviso that it is done in a manner that does not have the potential of influencing the proceedings or outcome of the matter.² The SAHRC expresses concern that these provisions may not give effect to the *audi alterem partem* principle which requires all the sides of a dispute to be equally heard. However, in terms of the Bill parties make representations to the traditional courts in the absence of the other party. Despite clause 3(b), which stresses that a person may not be

¹ Clause 3(c) of the Bill

² Clause 4(3)(f)

intimidated, manipulated, threatened or denigrated for exercising his or her decision to opt-out, the SAHRC cautions that, allowing a party to make representations without the other party present, may result in an unequal, biased and prejudiced perspective. This is further exacerbated by the fact that traditional courts are open, public processes which could result in unintended consequence of ostracising or imposing 'social sanction' on the opted-out party, especially if the latter is from an already marginalised group.³ The SAHRC recognises the importance and flexibility of the traditional justice system and recommends that cumbersome procedural rules in the system should not serve as a barrier to access the courts by people who opt for its use. The SAHRC therefore recommends that any form of counselling, assistance or guidance to an aggrieved party, ought to be conducted in a private setting or alternate traditional sittings which safeguards the rights of all parties to the proceedings.

3.3 Composition of and participation of women in traditional courts

Clause 5 contains provisions to ensure equal access and participation by women, as both litigants and members of the traditional court. The SAHRC particularly welcomes the recognition of vulnerable persons under clause 5 (3)(a)(ii) of the Bill which states that, 'the Cabinet member responsible for the administration of justice... must 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.' Furthermore, that measures be put in place 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.⁴ Whilst recognising that the Bill legislates a role for the Commission for Gender Equality (CGE), the SAHRC expresses concern regarding the obligation on the CGE as the institution, '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.'⁵ While this is certainly notable, the SAHRC recommends that the CGE is adequately resourced in both human and financial resources to undertake an annual analysis and reporting on the gender equality in traditional courts. Additionally, that the Department of Justice and Correctional Services, ought to put additional measures in place to facilitate the gathering of such information by the CGE.

³ For example, LGBTI persons, older persons, women etc.

⁴ Clause 5(3)(a)(i)

⁵ Clause 5(3)(b)

3.4 Recital of a pledge

The SAHRC further welcomes the obligation placed on a presiding officer of a traditional court, that he / she must recite a pledge to promote and protect the values of the Constitution, prior to commencing a sitting of the court.⁶ However, read with clause 11(1)(c), no further information is provided for instances where the presiding officer fails to recite such oath, and whether this would have any impact on the proceedings before the court. Clarity is therefore sought in this regard. The Commission further recommends that in light of the low level of constitutional awareness, particularly in the rural areas, that a robust public education and awareness initiative on the Constitution (and the Bill), is undertaken so that parties fully understand the nature of the pledge.

3.5 The Bill should further safeguard the rights of the child

Clause 6 of the Bill affirms that traditional courts are courts of law under customary law, with the specific purpose of promoting the equitable and fair resolution of disputes, in a manner that is underpinned by the value system applicable in customary law, custom and that they function in terms of the Constitution.⁷ Furthermore, that the focus of the traditional courts are to prevent conflict, maintain harmony and resolve disputes in a manner that promotes restorative justice, social cohesion and reconciliation. Clause 7 further expands on the procedures in traditional courts and emphasises the safeguards in place to protect vulnerable groups. Clause 7(3)(a)(ii) compels the traditional court to ensure that the Bill of Rights are observed and respected and that children, in particular, are treated in a manner that takes into account their vulnerability. The SAHRC points out that section 28 of the Constitution, (which relates to children), specifically requires that the child's best interests are of paramount importance in every matter concerning the child. Further, that the child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result.⁸ The SAHRC notes that nature of proceedings before the traditional courts does not distinguish between civil and criminal matters, and that the Bill prohibits legal parties from being represented by a legal practitioner.⁹ In the alternate however, the Bill provides that parties may be assisted by any person, 'of his or her choice in whom he or she has confidence'.¹⁰ The SAHRC cautions that this may adversely affect the rights of the child as enshrined under section 28 and that not

⁶ Clause 5(5)

⁷ Clause 6(1)(a) and (b). However, they do not function as courts referred to in Chapter 8 of the Constitution.

⁸ Section 28(1)(j)

⁹ Clause 7(4)(b)

¹⁰ clause 7(4)(a)

permitting the child to have adequate legal representation, may hinder the best interest of the child principle. In addition, the SAHRC notes with concern that traditional courts must be conducted in the presence of both parties to the dispute; that it allows for the full participation of all interested parties; and that the courts, 'must be open to all members of the community'.¹¹ This is particularly concerning since Schedule 2 of the Bill permits the traditional court to provide advice on the customary practices which usually involved children such as, *ukuThwala*, initiation as well as the custody and guardianship of minor or dependent children. These may have the potential to encroach on the child's right to privacy, particularly if the matters are discussed in an open forum.

The SAHRC recommends that additional safeguards are factored into the Bill to fully protect the rights of the child and give effect to the primacy of the best interest principle. Furthermore, that the offences listed in Schedule 2 is considered in light of the minimum age of criminal responsibility and the prospect of diversion in the case of criminal offences.

3.6 Penalties and enforcement of orders

The SAHRC welcomes that orders a traditional court may make is more premised on restorative justice measures, unlike the prior versions of the Bill. In particular, that the Bill stipulates orders which are aimed at restoring relations between parties. During the 2012 deliberations on the Bill, the SAHRC cautioned against sanctions that may fall into the scope of forced labour. However, it would appear that similar provisions relating to the imposition of forced labour penalties, have been stipulated in the current Bill which provides, in clause 8(1)(c)(i) and (ii), that a party may be ordered to render without remuneration some form of service for the benefit of the community or for the benefit of any person or persons in the community. The SAHRC highlights that the International Labour Organisation (ILO), Convention on Forced Labour defines forced compulsory labour as "...all work or service which is exacted from any person under the menace of a penalty and for which the said person has not offered himself voluntarily."¹² The SAHRC therefore submits that an order to 'perform a form of service', as stipulated in the Bill, may be interpreted as, 'forced compulsory labour', which is contrary to section 13 of the Constitution.¹³

¹¹ Clause 7(6)

¹² Convention concerning Forced or Compulsory Labour, 1930, No. 29, article 2(1)

¹³ Section 13 states that, 'No one may be subjected to slavery, servitude or forced labour.'

3.7 Role of the justice of the peace

The SAHRC notes that clause 9 permits the traditional court to refer a matter to the justice of the peace, if a party fails to comply with an order of the court. The SAHRC however seeks clarity on how justice of the peace will be identified / assigned within the traditional communities, particularly in instances where there are multiple traditional courts operating in a particular jurisdiction. In addition, the SAHRC emphasises the need for proper training of the justice of the peace, particularly in light of the powers vested with the justice of the peace to, 'negotiate with the parties on how and when the order will be complied with and to make a determination therewith', as well as the power to summons a party to appear in the traditional court or have a matter transferred to the Magistrate's Court.

3.7 Review by High Court

The SAHRC notes in clause 11, the extensive grounds for which a judgement may be reviewed by the High Court. Furthermore, that the High Court may confirm, alter, set aside or correct the order made by the traditional court as well as its proceedings, and remit the case to the traditional court with instructions on how to deal with the matter. The SAHRC welcomes the recourse to such review mechanisms which provide for the effective enforcement of rights. However, the SAHRC recommends that the practical aspects of such review also be considered, particularly in light of the fact that accessing the High Courts may incur costs and delays. In addition, many persons who are subject to the traditional courts in the rural areas may not have the resources to access the High Courts and are unaware of its arduous legal procedures. Whilst a welcome addition to the Bill, it is therefore recommended that the practicalities of review be considered so as to not have the unintended consequence of impeding the right of access to justice.

4. Conclusion

The SAHRC welcomes the improvements in the Bill, particularly, the recognition that the traditional court must not be so formalised like western legal systems to intimidate potential litigants from access. Such informality allows individual representation and use of a litigant's preferred language. While there is a focus on restorative justice and reconciliation, a litigant's right of access to justice through punitive measures should not be eroded and an integrated system of arbitration, negotiation and mediation should be welcomed. It is important that the

values of formal justice systems such as procedural fairness, judicial accountability and impartiality of presiding officers as well as due process is followed.

While community participation is encouraged, the confidentiality and privacy of litigants including children must be safeguarded.

Recognising the diverse and cultural richness inherent to South Africa, the SAHRC maintains that customary law remains integral to many who live in the country and continue to practice and rely on its dispute resolution mechanisms. With this in mind and noting that the Bill falls within the concurrent provincial legislative competence (section 76 Bill), the SAHRC encourages Parliament to engage in a comprehensive public engagement process with affected communities. The SAHRC further avails itself for further engagement with the Committee in this regard.