

SUBMISSIONS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA)  
ON THE TRADITIONAL COURTS BILL (B1-2017)

The Law Society of South Africa (LSSA) represents more than 24 000 practising attorneys and almost 6 000 candidate attorneys countrywide. It is the umbrella body of the attorneys' profession in South Africa and its constituent members are the Black Lawyers Association (BLA), the National Association of Democratic Lawyers (NADEL) and the four statutory provincial law societies, namely the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KSNLS), the Law Society of the Northern Provinces (LSNP) and the Law Society of the Free State (LSFS).

The following comments flow from a review of the Traditional Courts Bill [B1-2017]. Although we are not making a detailed and exhaustive submission on the Bill, our comments will hopefully assist with your deliberations.

Inasmuch as we are pleased that this Bill is a much improved and amplified version of the previous bill, we believe that there are various aspects that need to be addressed, including the following:

Composition of courts

Clause 5(1)(b) provides that the traditional court must be convened by a traditional leader *or any person designated* by the traditional leader. We believe parameters should be placed on who would qualify to be so designated.

Training

Although Clause 7(3) enjoins the traditional courts to apply the principles of the Constitution, especially the Bill of Rights, it is important that the traditional leader *and* any person designated by him / her as contemplated in Clause 5(1)(b) must be sufficiently and competently trained to comply with the Constitution, so as to guard against the High Court being saddled with review proceedings in terms of Clause 11. If such persons are not properly trained, the potential will be there for

matters to be taken on review, due to a lack of understanding of the Constitution and the objectives that the Bill seeks to achieve.

Careful consideration should be given to the training model, as experience has shown that teaching by way of a manual, delivering a lecture and evaluation by way of question and answer is not always appropriate. Material should be created that, as far as possible, resembles real life situations.

#### Delegation and separation of powers

It should be clarified whether the powers of traditional leaders may be fully delegated or whether some would remain the preserve of the traditional leader.

We are concerned that there are no checks and balances on the powers granted to traditional leaders, nor any separation of powers. The Bill fosters power without accountability and directly defies the separation of powers explicit in the Constitution. Unilateral power is given to traditional leaders who, in the execution of their duties, will act as legislator, administrator and judicial officer of customary law.

#### Legal representation

Clause 7(4)(b) denies a party to the proceedings before a traditional court the right of legal representation. While we note that one of the objectives of the Bill is to ensure that resolution of disputes are based on restorative justice and reconciliation, it is the duty of a legal representative to ensure that his / her client is not prejudiced. Preventing a party the right to legal representation will deny many persons, particularly the uneducated, the marginalized and the indigent, the constitutional right to a fair trial.

Further, legal practitioners assisting parties may play a pivotal role in enhancing the jurisprudence of traditional / indigenous law in line with the Constitution.

The fact that participation in the traditional courts is voluntary and that there are alternative ways through which a case can be ventilated, should not be construed to imply that the general rights and duties relevant to normal civil and criminal courts should not apply in respect of traditional courts. This is relevant, given that there is recourse for review by the High Court in terms of Clause 11.

#### Jurisdiction of traditional courts

Although we note that there is no distinction between civil and criminal jurisdiction in customary law, we are concerned about the provisions of Clause 4(2)(b)(i), i.e. that criminal matters referred to in terms of Schedule 2, can be dealt with by the traditional courts, except those that are already being investigated by the South African Police Service. We believe that all matters of criminality should be reported to the SAPS and investigated, also so that they can form part of the statistics of the country. Reporting should not be curtailed based on the monetary amount.

Further, as far as paragraph (d) of Schedule 2 is concerned, housebreaking in itself has a psychological impact and monetary consequences. The problem is that complainants and the courts might only concentrate on the act of theft and value of stolen / damaged property and fail to consider the crime of housebreaking, the effect of which may go beyond the monetary jurisdiction of the traditional court. This may have unfair and unjust consequences for the aggrieved party and we believe that such matters should not be heard by traditional courts.

Clause 4(3)(f) provides that a traditional court may give counselling, guidance or assistance if approached by a party, even in matters not referred to in Schedule 2. We note that such counselling, guidance and advice should be done in a manner that does not have the potential of influencing the *proceedings* of another court or forum. Such advice might however not be in the interest of the parties, as it might have an impact on their decision as to whether or not to approach a court or forum which has jurisdiction to hear the matter.

In terms of Clause 8(3), traditional courts may make an order for compensation for personal injuries. We submit that personal injury matters should be excluded from the jurisdiction of

traditional courts. These matters are very complicated and require medico-legal reports from experts, determining the extent of the injury and future consequences of such injuries. The extent of an injury is often difficult to determine at first glance and it may take years for such injuries to settle.

#### Orders that can be made by traditional courts

Clause 8(1)(b) empowers traditional courts to order a party against whom proceedings were instituted and who is financially not in a position to comply with the order to render some specific benefit or service to the aggrieved party instead of compensation. Although we believe that this provision has been made with good intentions, it opens up the possibility for abuse by the aggrieved party, including subjecting people to servitude and forced labour. If not monitored properly, it may lead to undesirable consequences, which may be offending Section 13 of the Constitution.

#### Remedial steps in respect of members of traditional courts

Clause 16(6) gives the Member of the Executive Council responsible for traditional affairs in the province the power to impose remedial steps. We believe that this power should vest with the Judicial Service Commission or the Magistrates' Commission. We reiterate our view that the general principles relevant to civil and criminal courts should also apply in respect of traditional courts. It is inappropriate to have an executive authority exercising powers against a different arm of government, i.e. the judiciary.

#### Record of proceedings

The Bill makes provision for the record of the proceedings [Clause 13]. However, no provision is made for the keeping of mechanical record of the entire proceedings. This will make review and appeal proceedings difficult and we suggest that this issue be addressed.