

**MEMORANDUM ON THE OBJECTS OF THE TRADITIONAL COURTS
BILL, 2008**

1. PURPOSE OF BILL AND BACKGROUND

The Bill emanates from the Policy Framework on the Traditional Justice System under the Constitution. The aim of the Bill is to provide for the structure and functioning of traditional courts, in line with constitutional imperatives and values.

2. OBJECTS OF BILL

2.1 The objects of the Bill, as set out in **clause 2** of the Bill, are, among others, to-

- (i) affirm the values of the traditional justice system, based on restorative justice and reconciliation and to align them with the Constitution;
- (ii) affirm the role of the institution of traditional leadership in enhancing access to justice;
- (iii) create a uniform legislative framework, regulating the role and functions of the institution of traditional leadership in the administration of justice, in accordance with constitutional imperatives and values;
and
- (iv) to provide a framework to enhance the effectiveness, efficiency and integrity of the traditional justice system.

2.2 **Clause 3** sets out the principles that should guide the application of the Bill, among others, the following:

- (a) The need to align the traditional justice system with the Constitution in order for the traditional system to embrace the values enshrined in the Constitution;
- (b) the need to promote access to justice to all persons;
- (c) the promotion of restorative justice;
- (d) the enhancement of the quality of life of traditional communities through mediation;
- (e) the development of skills and capacity of persons applying the legislation in order to ensure the effective implementation thereof; and
- (f) the need to promote and preserve African values which are based on reconciliation and restorative justice.

2.3 **Clause 4** provides for the designation of senior traditional leaders, kings and queens as presiding officers of traditional courts, the revocation or suspension of their designation and the attendance of a training programme within the timeframe set. It also requires the Director-General of Justice and Constitutional Development to keep a register of traditional leaders who have been designated and whose designation has been suspended or withdrawn.

2.4 **Clause 5** deals with the civil jurisdiction of traditional courts and sets out the matters in respect of which traditional courts do not have civil jurisdiction.

2.5 **Clause 6** deals with criminal jurisdiction of traditional courts and refers to a Schedule containing offences in respect of which traditional courts have jurisdiction.

2.6 **Clause 7** deals with the nature of traditional courts and makes it clear that they are distinct from courts, referred to in section 166 of the Constitution.

2.7 **Clause 8** provides for the sessions of the traditional courts.

2.8 **Clause 9** provides for the procedure at the proceedings of a traditional court, which must be in accordance with customary law and custom, except if the Minister prescribes otherwise in regulations. It also requires presiding officers to observe the Bill of Rights and rules of natural justice during the proceedings of the traditional court. Legal representation in traditional courts is prohibited, but parties can be represented by any person of their choice in terms of customary law and custom. This clause also makes provision for the situation where two or more different systems of customary law may be applicable in a dispute before a traditional court. Lastly, it regulates how the payment of any fines imposed by a traditional court must be dealt with.

2.9 **Clause 10** sets out –

- (a) specific sanctions that cannot be imposed by a traditional court; and
- (b) a whole range of orders that a traditional court can make, many of which are of a restorative justice nature.

2.10 **Clause 11** deals with the enforcement of the sanctions/orders made by traditional courts.

2.11 **Clause 12** provides that orders of traditional courts are final, except where an appeal is lodged in terms of clause 13, or where a matter is taken on review in terms of clause 14. **Clause 13** sets out the powers of a magistrate's court when it deals with an appeal from a traditional court in respect of certain orders made by a traditional court. The grounds for review are contained in **clause 14**.

2.12 **Clause 15** obliges senior traditional leaders and kings and queens who have been designated as presiding officers to take a prescribed oath of office or make a prescribed affirmation before a magistrate before they may preside in a traditional court. It also requires the Director-General: Justice and Constitutional Development to keep a register of every traditional leader who has taken the oath of office or made an affirmation.

2.13 **Clauses 16** establishes a mechanism to lodge, receive and deal with complaints against presiding officers. The grounds for lodging a complaint are the following:

- (a) Incapacity, giving rise to a presiding officer's inability to perform his or her functions as a presiding officer, gross incompetence or misconduct which has a bearing on the administration of justice;
- (b) any wilful or grossly negligent breach of the code of conduct contemplated in the Traditional Leadership and Governance

Framework Act, 2003, or any code of conduct under any provincial legislation required by the Traditional Leadership and Governance Framework Act, 2003, which has a bearing on the administration of justice;

- (c) any other wilful or grossly negligent conduct which is incompatible with or unbecoming of, the office of presiding officer; or
- (d) any contravention of a provision of this Bill.

2.14 **Clause 17** empowers the Minister for Justice and Constitutional Development to assign officers who will assist traditional courts in performing its functions under the Bill.

2.15 **Clause 18** sets out what records are to be kept by traditional courts.

2.16 **Clause 19** creates a mechanism which regulates the transfer of cases in certain circumstances from a traditional court to a magistrate's court or small claims court and from a magistrate's court or small claims court to a traditional court.

2.17 **Clause 20** creates offences and penalties.

2.18 **Clause 21** empowers the Minister to make regulations in respect of a number of matters, among others, the training programmes which traditional leaders must attend, the designation of traditional leaders as presiding officers, registers to be kept by the Director-General, the lodging of appeals

and procedural reviews, powers of magistrates in respect of procedural reviews, the oath or affirmation of office to be taken or made by presiding officers of traditional courts, the manner of dealing with fines, the keeping of records, the referral of matters from a magistrate's court to a traditional court and vice versa, the lodging of complaints against a presiding officer and the manner of execution of judgements of a traditional court in a magistrate's court.

2.19 **Clause 22** provides for the delegation of the powers of the Minister under the Bill to senior officials in the Department of Justice and Constitutional Development.

2.20 **Clause 23** contains a range of different transitional arrangements in order to ensure a smooth implementation of the proposed legislation.

2.21 **Clause 24** contains the short title and commencement of the Bill.

3. DEPARTMENTS/BODIES /PERSONS CONSULTED

3.1 As required by the Traditional Leadership and Governance Framework Act, 2003, the Department consulted with the structures of traditional leaders and the South African Local Government Association. Consultation with the structures of traditional leadership took place at national and provincial level. At national level a Conference of Magistrates to which the National House of Traditional Leaders was invited, took place during September 2007. The

Conference discussed the policy initiatives that should be considered in drafting the Traditional Courts Bill. Flowing from the Conference, the Policy Framework and the Bill supporting the policy were drafted in consultation with the Constitutional Affairs Committee of the National House of Traditional Leaders.

3.2 Further provincial consultative workshops were held with provincial Houses of Traditional Leaders and SALGA, at which the South African Human Rights Commission, the Commission on Gender Equality, magistrates and prosecutors participated.

3.3 During the consultation process the policy thrust enunciated in the Policy Framework and Traditional Courts Bill was largely supported by the structures within the institution of traditional leadership, SALGA and members of the lower court judiciary.

4. IMPLICATIONS FOR PROVINCES

The envisaged legislation will be applicable in all the provinces where traditional courts exist.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

Clerks attached to magistrate's offices will be assigned to provide administrative support to the traditional courts.

6. FINANCIAL IMPLICATIONS FOR THE STATE

Financial implications will result from the implementation of training programmes for presiding officers of traditional courts. The funds for this purpose will be accommodated within the Department's allocated budget.

7. COMMUNICATION IMPLICATIONS

None.

8. PARLIAMENTARY PROCEDURE

8.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by subsection (1) or (2) of section 76 of the Constitution since it falls within a functional area listed in Schedule 4 to the Constitution (indigenous law and customary law).

8.2 The State Law Advisers are of the opinion that the Bill must be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003), since it contains provisions relating to customary law or customs of traditional communities.