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The Minister of Cooperative Governance and Traditional Affairs
Honourable VF Hlabisa
Department of Traditional Affairs
c/o Ms R S Mogaladi
Per E-mail: legislation@cogta.gov.za

Submission on the Draft Traditional and Khoi-San Leadership Bill, 2024

Introduction

The Land and Accountability Research Centre (LARC) is based in the University of Cape Town's Faculty of Law. LARC works within a collaborative network alongside a range of partners, including the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights in the former homeland areas of South Africa. LARC integrates the use of action-research methodologies with support for mobilisation and litigation activities by our partners. An explicit concern of LARC is power relations, and the impact of national laws and policy in framing the balance of patriarchal and autocratic power within which rural women and men struggle for change at the local level.

In this context, LARC is concerned that the Draft Traditional and Khoi-San Leadership Bill, 2024 (hereafter "the Draft Bill" or "TKLB") as originally published under Notice No. 2859 of 2024 in Government Gazette No. 51657, will be detrimental to the democratic rights of citizens in the former homeland areas of South Africa, and to the full recognition of a "living" customary law, as mandated by the Constitution. We are disappointed to note that this Draft Bill is not significantly different to that which was passed as the Traditional and Khoi-San Leadership Act 3 of 2019 (hereafter "the TKLA" or "the Act"). This despite the Department of Traditional Affairs (hereafter "the Department") having had the opportunity to monitor and learn from several years of the Act's implementation, as well as judicial and political developments that have taken place since 2019. Moreover, since the TKLA was struck down by the Constitutional Court for having insufficiently included public participation during its processing, most of the public comments made about the TKLA when it was previously in Parliament as the Traditional and Khoi-San Leadership Bill 23 of 2015 (hereafter "the 2015 Bill") remain relevant.

We also reject the Department's requirements that public submissions be confined to a rigid tabulation of offending clauses, proposed amendments, and detailed motivation for proposed amendments. This demonstrates a misunderstanding on the part of the Department of the ways in

which the everyday experiences and histories of people living within traditional communities should shape this legislation. The Department should open itself up to narratives challenging the fundamental approach and building blocks of the TKLB, rather than anticipating only minor tinkering with the text after the fact. This is true also of LARC's submission, which will highlight specific clauses as relevant. It is the role of the Department (and later the legislatures) to translate contributions received from the public into legislative amendments. Members of the public should not be prevented from making contributions on the basis of not being able to engage with technical clause amendments and legal drafting.

The points that LARC would like to raise, elaborated in further detail below, can be summarised as follows:

1. The Draft Bill entrenches geographic boundaries derived from colonial and apartheid racist notions and distortions of customary governance systems.
2. These boundaries lock people into territorial jurisdictions that are used to justify forms of authority exercised by traditional leaders that are unaccountable and not consultative.
3. The result is the imposition of "tribal" identities and the suppression of countervailing forms of representation that runs contrary to the historical narratives articulated by people living in the former homelands.
4. These deep-seated flaws in the Draft Bill's architecture are not sufficiently mitigated by the weak transformative mechanisms provided – particularly in light of the recorded failures of these mechanisms over the past decades.

Technical amendments to the TKLA as proposed in the Draft Bill fail to address these substantive shortcomings. It is therefore **LARC's submission that the Draft Bill is fundamentally inconsistent with the promises made to citizens during the transition to democracy and the rights and values enshrined in the Constitution of South Africa.** Indeed, there is a glaring absence of references to democratic governance in the Draft Bill. For these reasons we call for the Draft Bill to be rejected and propose that government uses living customary law, shared identity and consensual legitimacy as the basis for recognising traditional groupings and authorities, rather than the distorted legacy of "tribal" boundaries left behind by the colonial and apartheid governments.

This requires that government not only rethink many of the administrative procedures incorporated into the Draft Bill, but also undertake a process of consultation with traditional groupings and rural constituencies to understand their lived customary law identities. This consultation process should be held directly with individual members of traditional and rural communities, not individuals that purport to speak on their behalf, such as traditional authorities. This should inform a new vision for the regulation of traditional governance, based primarily on the interests and lived traditions of customary groupings, rather than sustaining a tainted system to the benefit of a small elite. The Department, Parliament, and Provincial Legislatures must respectfully abide by the Constitutional Court's ruling in *Mogale and Others v Speaker of the National Assembly and Others* [2023]¹ and take seriously their obligations to meaningfully engage with the public and facilitate public

¹ (CCT 73/22) [2023] ZACC 14 (30 May 2023).

participation given the impact of this proposed statute on both traditional and Khoi and San communities.

Also of significant importance are the recommendations in the report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, which was chaired by former President Kgalema Motlanthe and released in November 2017. At the time, the report recommended that the 2015 Bill be withdrawn and reviewed, and that it be replaced with separate legislation for the “inclusive” recognition of Khoi and San groups. Additionally, the report of the Presidential Advisory Panel on Land Reform and Agriculture, released in May 2019, stated that certain laws affecting communal land tenure and governance, including the 2015 Bill that was enacted as the TKLA, are viewed to:

“...individually and collectively entrench the Bantustans by removing the right to equal citizenship in a unitary state, violating the principle of free, prior and informed consent, and reinforcing the powers of traditional authorities over customary and family land and resource rights. It is therefore crucial that government consults and engages directly, widely, meaningfully and adequately with rural communities and inhabitants of the former ‘Bantustans’ whose lived experiences and relationship and interaction between land, culture and heritage must inform government policy”.²

It appears that neither the Department nor Parliament has yet meaningfully engaged with these reports – this is evident from the ongoing processing and content of the Draft Bill. **LARC submits that the recommendations of both reports be urgently assessed and applied.** The High Level Panel report details the kinds of changes that should be made to legislation about traditional governance based on the implementation of such legislation thus far.

1. Draft Bill entrenches colonial and apartheid distortions through geographical boundaries

Clause 63 of the Draft Bill describes a process for the transitional recognition of pre-existing community groups, councils and leaders. It is unclear how the clause will be implemented in practice since it confusingly describes the simultaneous recognition of structures existing in law *prior to* the commencement of the Traditional Leadership and Governance Framework Act 41 of 2003 (“Framework Act”),³ and the recognition of structures created prior to the repeal of the Framework Act. **Clause 63** now also refers to structures established or recognised in terms of the TKLA prior to its repeal, but subject to the date of invalidity, being “*1 April 2021 and is the date on which the declaration of constitutional invalidity of the 2019-Act may take effect*”. Although the practical implication of this is unclear, what is clear is that the transitional process still uses as its building blocks the so-called “tribal” structures that were defined in law by successive undemocratic governments.

² Pages 97 – 98 of The Presidential Advisory Panel on Land Reform and Agriculture, 4 May 2019.

³ Or in terms of provincial legislation that is not inconsistent with the Framework Act or the 2019 Act.

The “tribes” that are deemed to have legal status under this Draft Bill, as in the Framework Act and TKLA, are those that were originally defined by colonial and apartheid government officials in terms of the Native Administration Act 38 of 1927 and that remained in existence throughout the Bantustan period up until the transition to democracy. In terms of the Draft Bill, these “tribes” would now again be recognised as traditional communities. Yet, historical narratives have revealed the crude and oppressive nature of the processes of consolidating people into ethnic groups or “tribes” to create separate legal realms in the so-called homelands. The concomitant legal recognition of “chiefs” to head “tribes” under the Native Administration Act has also been given new life under the Draft Bill – renamed to senior traditional leaders – despite the tainted history of some chiefs being appointed to facilitate an oppressive government’s agenda. In 1959, Nelson Mandela wrote:

Moreover, in South Africa, we all know full well that no Chief can retain his post unless he submits to Verwoerd, and many Chiefs who sought the interest of their people before position and self-advancement have, like President Luthuli, been deposed....Thus, the proposed Bantu Authorities will not be, in any sense of the term, representative or democratic.⁴

Mandela describes a process of manipulation by the apartheid government that resulted in many respected leaders, who enjoyed authority based on their legitimacy and customary affiliation by people, being replaced. The Draft Bill consciously maintains this status quo, and assumes that a commission created by the Framework Act has rectified these past manipulations (see further below), rather than starting anew.

In addition to the recognition of “tribes” with “chiefs”, the creation of the Bantustans was most directly achieved through the definition of geographical jurisdictions for “tribal authorities” in terms of the Bantu Authorities Act 68 of 1951. Through hundreds of Gazette notices, for every recognised “tribe” and “chief” a “tribal authority” was also established with a specified area of jurisdiction. This process was undertaken in the decades after the Bantu Authorities Act’s promulgation and was facilitated by a package of laws that restricted the occupation and ownership of most of the country’s land by black South Africans. The creation of tribal authorities sometimes went hand-in-hand with forced removals, as people were forced off their ancestral land and dumped in new areas with people unknown to them under the umbrella of one “tribal authority”. Together, these tribal authority jurisdictions formed the boundaries of the homelands and acted as territories of local government within the homeland governance systems.

These same geographical boundaries are reinforced through the Draft Bill’s explicit recognition of “tribal authorities” as traditional councils in **clause 63(4)**. Effectively, the same separate legal and geographical realms are recognised for traditional governance institutions as those defined during apartheid. Not only does this betray the Constitutional principle of “one law for one country”, it betrays historical struggles against the establishment of tribal authorities in areas like Pondoland. These struggles recognised that tribal authorities were representative of, and instrumental to, an oppressive regime’s distortion of customary laws and the nature of traditional governance systems. In 1962, Albert Luthuli noted:

⁴ Nelson Mandela “Verwoerd’s Grim Plot” (May 1959).

The modes of government proposed are a caricature. They are neither democratic nor African. The [Promotion of Bantu Self-Government Act] makes our chiefs, quite straightforwardly and simply, into minor puppets and agents of the Big Dictator. They are answerable to him and to him only, never to their people. The whites have made a mockery of the type of rule we knew. Their attempts to substitute dictatorship for what they have efficiently destroyed do not deceive us.⁵

The Draft Bill goes even further to entrench old boundaries. **Clause 63(21)** places an obligation on Premiers to map, and publish maps, of the area of jurisdiction of a traditional council if that area was previously defined in terms of national or provincial legislation prior to the commencement of the Bill.⁶ This mapping process may be an attempt by government to assert that the Bantustan boundaries will be revised under the TKLB. Yet, the mapping process does not explicitly require any consultation with ordinary people and is more likely to further cement the application of the jurisdictional boundaries established by the Bantu Authorities Act rather than drastically undo them. Clause 63(21) now includes a proviso which does not require mapping in instances where the area of jurisdiction of a traditional council has already been defined, mapped and published in terms of the TKLA prior to it being repealed, but subject to the date of invalidity. The area of jurisdiction for certain traditional councils in Limpopo, recognised and gazetted by the Premier on 14 June 2024⁷, may therefore stand despite ongoing traditional leadership disputes in the province.⁸ Many of the maps included in the Premier's gazette refer to and replicate areas of jurisdiction proclaimed in the 1950s and 1960s. If the Draft Bill is allowed to reproduce the history of the Bantustans, past struggles for democracy and the equal recognition of African customary values embodied in the Constitution will have been for nothing.

2. Draft Bill locks people into the authority of traditional leaders with no accountability or consultation mechanisms

The geographical boundaries entrenched by **clause 63** of the Draft Bill work in conjunction with provisions providing or allocating traditional leaders certain roles and functions at **clauses 15, 19, 20 and 25** to effectively establish territorial jurisdictions for traditional leaders. This creates the dangerous impression that traditional leaders have exclusive authority over people living within the traditional council boundaries, regardless of their cultural affiliations.

The result is that people are locked into precisely the same system of governance that, under colonialism and apartheid, was established without regard for the rights, choices and customary laws of people.⁹ The Draft Bill assumes that if you live within the geographical boundaries of the

⁵ Albert Luthuli *Let My People Go* (Collins, 1962) at 200.

⁶ Premiers are also able to unilaterally amend traditional council boundaries after they have been defined, following consultation with only the relevant traditional and municipal council concerned – see clause 16(18).

⁷ General Notice No. 434 of 2024 in Provincial Gazette No. 3546, published by the Premier of Limpopo.

⁸ See “Tsonga traditional leaders feel hard done by the state”, *Sunday World*, 12 February 2025 (available at <https://sundayworld.co.za/news/tsonga-traditional-leaders-feel-hard-done-by-the-state/>); “Balobedu prince says custom overlooked in endorsing his sister”, *Sowetan*, 14 January 2025 (available at <https://www.sowetanlive.co.za/news/2025-01-13-balobedu-prince-says-president-overlooked-custom-by-endorsing-his-sister/>); “Limpopo premier stumbles on hostile traditional leaders”, *Sunday World*, 8 August 2024 (available at <https://sundayworld.co.za/news/limpopo-premier-stumbles-on-hostile-traditional-leaders/>).

⁹ Thuto Thipe “The boundaries of tradition: an examination of the Traditional Leadership and Governance Framework Act” *Harvard Human Rights Journal* (November 2014).

former homelands today, you should be subject to the rule of a chief and tribal authority – regardless of your personal choices and the history of how “tribes” were constituted, and “chiefs” were deposed and appointed.

The popular saying ‘kgosi ke kgosi ka morafe’ or ‘inkosi yinkosi ngabantu’ shows that traditional leaders are supposed to gain their authority and legitimacy from the people they lead. Yet, the Draft Bill starts with the opposite idea that traditional leaders’ authority is based on the existence of a defined territory that was declared and established through government proclamation. The TKLB goes so far as to specify at **clause 3(4)** that in order for a traditional community to gain recognition, it must first have a senior traditional leader at the leadership level who is recognised by other traditional communities. In other words, traditional leaders are put at the centre of a traditional community’s customary law identity.¹⁰ The Draft Bill’s assumption is thus that traditional leaders create traditional communities, contrary to customary law which states that traditional leaders exist because traditional communities have recognised their legitimate authority. Therefore, the Draft Bill turns custom on its head, which is problematic and the opposite of what it purports to promote. This provision also fails to take into account instances where there are disputes over traditional leadership positions. What would be the outcome if a senior traditional leader is not recognised by other traditional communities based on a dispute, or if the requirements for recognition as a traditional community cannot be fulfilled? Traditional communities existing and affiliating with a particular traditional leader they legitimately recognise in terms of their practiced customs would be denied legal recognition.

This undermines the consensual and reciprocal nature of the relationship between traditional leaders and the people they lead according to customary law. Through **clause 63**’s top-down recognition of a traditional leader’s authority based solely on the distorted structures and boundaries created during apartheid, the Draft Bill removes the incentive for traditional leaders to be accountable to ordinary people. Instead, traditional leaders become more accountable to the government that provides them with certificates of recognition and salaries.

Govan Mbeki described how the imposition of the Bantu Authorities system similarly changed the nature of the relationship between traditional leaders and ordinary people:

Many Chiefs and headmen found that once they had committed themselves to supporting Bantu Authorities, an immense chasm developed between them and the people. Gone was the old give-and-take of tribal consultation, and in its place there was now the autocratic power bestowed on the more ambitious Chiefs, who became arrogant in the knowledge that the government’s might was behind them.¹¹

Yet, historically customary systems had built-in accountability mechanisms for situations where traditional leaders lost legitimacy or acted contrary to the interests of their people. Simply put, if people no longer wished to be ruled by a corrupt or incompetent leader, they would secede or support succession disputes to justify the leader’s removal.¹² Unpopular leaders did not reign for

¹⁰ Aninka Claassens “Back to the bad old days” *City Press* (11 October 2015).

¹¹ Govan Mbeki *South Africa: The Peasants’ Revolt* (International Defence and Aid Fund, 1984), at 119-120.

¹² Peter Delius “Contested terrain: land rights and chiefly power in historical perspective” in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa’s Communal Land Rights Act* (UCT Press, 2008) at 214ff.

long. When customary governance is no longer based on popular affiliation, but on a boundary defined in law, the power dynamics of the system are altered in a way that favours autocratic and patriarchal rule.¹³ This is particularly a problem in cases where the content of customary law is contested between traditional leaders and ordinary people. Where traditional leaders are put in a position where their authority cannot be challenged by ordinary people, there is opportunity for leaders to commit abuses or be involved in corrupt practices in the name of a version of “customary law” that is defined solely by the traditional leader and for the benefit of his personal interests.

One example that enjoyed widespread media coverage was the “customary law” rhetoric used by some to justify criminal acts by AbaThembu King Buyelekhaya Dalindyebo against his so-called “subjects”.¹⁴ Yet, it is doubtful that the victims would agree that the violent acts committed against them embody customary values or customary ways of dealing with disputes.¹⁵ Whose version of what is “customary” is to be protected by the law? Is our legal system recognising versions of customary law based on mutual respect and consensus, or versions of customary law based on intolerance and brutality? The undemocratic and unaccountable traditional governance system embodied by the Draft Bill seems to be inviting the latter.

LARC submits that the Draft Bill does not provide any independent mechanism through which ordinary community members can complain about the conduct of a traditional authority and demand accountability or a remedy, and that this should be rectified.

In terms of the **Code of Conduct**, only the Houses of Traditional Leaders or councils can action breaches of the Code.¹⁶ The Draft Bill unfairly requires people to trust that the Houses and councils will take honest action that serves their best interests, without any checks and balances in place to ensure that the institutions do not close ranks to protect an errant or abusive traditional leader, House member or council member. In LARC’s engagement with rural communities, community members always make it very clear how they expect their traditional leaders to conduct themselves. These include the expectation that traditional leaders live in and are close to the community to be accessible to the community members, which is considered key to facilitating positive relationships between them and community members. Traditional leaders are expected to be fair, consult with communities prior to making decisions, listen to every voice, treat everyone equally and be fair and just when resolving disputes. Community members expect traditional leaders to know and understand their culture, traditions and customs. Traditional leaders are also expected to be financially accountable to the community. These are some of the ideas, rooted in customary law, that are not considered when ordinary people are excluded from contributing to the content of the Code of Conduct. In order to ensure accountability, mechanisms for pursuing breaches of the Code of Conduct also need to exist *outside* of the institutions in which they can be committed. The content of the Code of Conduct is furthermore limited to conduct committed in the course of being

¹³ Aninka Claassens “Power, accountability and apartheid borders: the impact of recent laws on struggles over land rights” in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa’s Communal Land Rights Act* (UCT Press, 2008) at 262ff.

¹⁴ See for example, Thami ka Plaatjie “We jail a king at our peril” *City Press* (3 January 2016), and Phathekile Holomisa “Constitutional Court fails to give leadership on AbaThembu king matter” *Sowetan* (29 December 2015).

¹⁵ Nolundi Luwaya “King Dalindyebo’s disregard for customary law is the problem, not his conviction” *Daily Maverick* (15 January 2016); Sindiso Mnisi Weeks “Of a cruel king and the bitter battle for the soul of South Africa’s democracy” *Mail & Guardian* (15 October 2015).

¹⁶ See Schedule 1 to the Draft Bill. The reference to “councils” includes kingship/queenship councils, principal traditional councils, traditional councils, traditional sub-councils, Khoi-San councils and branches.



a member of a House of Traditional Leaders or council. The Code fails to deal with accountability and transparency in the relationship between traditional leaders or council members and ordinary people. These are major gaps.

The Draft Bill allows for the broad allocation of roles to traditional leaders at **clause 25**, as with section 25 of the TKLA. The Framework Act similarly allowed national or provincial government to give roles to traditional leaders or traditional councils at section 20, in respect of a closed list of subject areas such as land administration, the administration of justice, and agriculture. These provisions have resulted in at least two unsuccessful attempts to legislate far-reaching powers for traditional institutions over the last two decades. The first was the Communal Land Rights Act 11 of 2004, and the second was the Traditional Courts Bill 15 of 2008/1 of 2012. The Communal Land Rights Act never came into force and was struck down by the Constitutional Court in 2010.¹⁷ The 2008/2012 Traditional Courts Bill was met with fierce opposition during consultations by the provincial legislatures, at national Parliament, and in the media – such that it could not garner a majority of provincial votes to be passed in the National Council of Provinces. Much of the opposition to these two laws decried the ways in which they were based on rigid colonial and apartheid understandings of customary law and traditional leadership.

Based on the massive public outcry to the Traditional Courts Bill, the Department of Justice and Correctional Services made significant amendments and reintroduced a new version of the Traditional Courts Bill to Parliament during January 2017, which at first explicitly emphasised the voluntary and consensual nature of customary law.¹⁸ This version of the Bill was more acceptable to rural communities and civil society, despite some sections that still needed improvement. However, in 2018 the Portfolio Committee on Justice and Correctional Services unilaterally removed most of the references to customary law being a voluntary and consensual system, returning the Bill closer to the 2008/2012 version that was rejected by the public. It is this regressive version of the Bill that was signed into an Act, the Traditional Courts Act 9 of 2022 (hereafter “TCA”) in September 2023, but which is not yet operational. When the Act becomes operational it is likely to be challenged, like the previous version of the TKLA.

LARC submits that the Draft Bill must explicitly incorporate provisions which acknowledge and protect the principle of voluntary affiliation and consensual participation in customary law. This principle should further underpin any subsequent legislation and policy giving effect to the roles referred to in clause 25.

LARC notes with concern that the Department of Justice has used attrition to wear out rural communities’ dissent and has disregarded 15 years of public commentary outlining a suitable version of the TCA to regulate dispute management in traditional communities. As a result, an undemocratic version of the legislation has been forced through. LARC notes again with concern that the TKLA is following the same trajectory. Over a period of eight years before the TKLA was challenged in the Constitutional Court, the public made clear commentary on the substantive content of the TKLA that was suitable to regulate their lives. However, this rich commentary was

¹⁷ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).

¹⁸ See Traditional Courts Bill 1 of 2017 at Preamble, clause 2, clause 3(2), 4(2), and 5(2).



ignored by government and the legislatures and an undemocratic version of the Act was signed into law. It is concerning that the current version of the Draft Bill also does not respond to such commentary, and rural citizens will be required to make the same commentary again. This is a waste of time and resources when the Department is already in possession of this commentary in its records. A distressing pattern seems to be emerging of government and the legislatures actively acting against the public, particularly rural citizens, in violation of the Constitution.

Clause 25 of the Draft Bill is similar to section 20 of the Framework Act but substantially broadens the scope of government departments' discretion to provide roles to traditional leaders and councils. LARC maintains that, as with the TKLA, clause 25 of the Draft Bill does not provide sufficient guidance on what roles can be given to traditional leaders and councils and what procedures should be used to do so – contrary to the principles of administrative law.¹⁹ Instead, clause 25 states that roles can be given in respect of “any” of government’s functions, leaving the nature and extent of these functions completely open to interpretation. Furthermore, in terms of clause 25 it is completely up to the relevant government department to decide the process through which roles can be given to traditional leaders and councils. **Clause 25(2)(b)** merely stipulates that before a national department makes provision for such roles, it is required to obtain concurrence from the Minister and consult with the National House of Traditional and Khoi-San leaders. Similarly, a provincial department need only obtain concurrence from the MEC responsible for traditional affairs, and consult with provincial and local houses. Although the Draft Bill lays out these procedural steps, it fails to detail what, if any, processes a department must undertake internally and leaves this to the determination of the department concerned.

Not only does this render **clause 25** vague and uncertain, it creates the possibility for roles to be given through opaque administrative decisions, such as delegations, as opposed to public law-making processes in the national and provincial legislatures. The Draft Bill does not make mention of any input by members of the public in the process. Since these roles could have a far-reaching impact on the lives of people living in traditional communities, government should at a minimum be obligated to engage with their views before roles are allocated. More than this, the haphazard exercising of discretion by departments at national and provincial level could result in traditional leaders across the country having different roles to each other. This is particularly evident from **clause 25(5)(a)** of the Draft Bill, which indicates a clear expectation that departments will allocate specific roles to individual leaders and councils one by one. Media reports have furthermore highlighted the tensions existing between traditional leaders precisely because of the vastly different treatment they receive from provincial governments in respect of salaries and resources.²⁰ Inequality within the institution of traditional leadership could thus be worsened considerably.

LARC submits that the nature and scope of the roles and functions of traditional leaders and councils remains an area requiring urgent clarification, which clause 25 does not sufficiently address. On the contrary, the provision may contribute to further confusion and contestation for power.

¹⁹ Lauren Kohn “The failure of an arranged marriage: the traditional leadership/democracy amalgamation made worse by the draft Traditional Affairs Bill” *Southern African Public Law* 29(2) (2014).

²⁰ For example, see S’Thembiso Msomi “Xhosa king demands to be treated like (Zulu) royalty” *Sunday Times* (24 May 2015); Monica de Souza “King’s budget reeks of favouritism” *The Mercury* (27 August 2015).



The Draft Bill is silent on what the relationship will be between elected local government and traditional leaders, or what traditional leaders' roles will mean in relation to the Constitution's recognition of separate powers for separate branches of government. This is questionable in light of the Constitutional Court's finding in the 1996 *Certification* judgment that the Constitution explicitly does not provide traditional structures with governmental powers and functions.²¹ The Court explained as follows:

We do not feel that the objectors' interpretation... is correct. Had the framers intended to guarantee and require express institutionalisation of governmental powers and functions for traditional leaders, they could easily have included the words "powers and functions" in the first sentence of [Constitutional Principle] XIII.²²

In Chapter 12 of the Constitution, section 211(1) explicitly states that the "institution, status and role of traditional leadership" is recognised "according to customary law" and "subject to the Constitution". This means that traditional leadership can only be recognised *as it exists* in customary law. Chapter 12 thus supports a version of traditional governance that is democratic, accountable, transparent, and based on principles such as consensus and affiliation that are inherent to customary law. This version of traditional governance is the only one that meets constitutional muster as traditional leaders occupy a public role within South Africa's constitutional dispensation. **LARC submits that if the Draft Bill is instead an attempt to give powers that vest exclusively in the three spheres of government to traditional leaders and councils, then it is a dangerous and unconstitutional proposal.** Not only could it have the effect of creating a fourth tier of government contrary to the Constitution's framework, it would also be a distortion of the very nature of traditional leadership under customary law. Section 212(1) of the Constitution explicitly limits the role for traditional leadership institutions, through national legislation, at the local level on matters affecting local communities. Without more explicit delineation of these roles, and their limitations, the implementation of clause 25 by national and provincial departments in practice poses several risks of being in conflict with the Constitution.

The TKLB's drafters have attempted to avert criticism that it empowers traditional leaders to take over the functions of the three spheres of governance in the former Bantustan areas by including a qualification in **clause 25(1)** that a role can be given to traditional leaders "[p]rovided that such a role may not include any decision-making power". Although clause 25 says that a department must monitor the execution of the role and ensure that the execution thereof is consistent with the Constitution, it is unlikely that traditional institutions will be able to perform the "roles" that they have been given by government without making at least some decisions along the way. Moreover, if different traditional authorities are exercising a range of roles with varying terms and conditions across the country, monitoring will become an almost impossible task. By leaving the scope of the roles that could be provided to traditional institutions so vague, clause 25 of the Draft Bill is open to misinterpretation and abuse in practice. The qualification in clause 25(1) could thus in practice be rendered meaningless and do little to prevent ordinary people being disadvantaged by traditional authorities exercising roles against their best interests.

²¹ *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) – hereafter "Certification I".

²² Certification I at para 190.

As mentioned above, **LARC submits that the Draft Bill furthermore fails to incorporate a crucial limit on the exercise of power by traditional leaders in the form of community consultation generally and consent by land rights holders to decisions affecting their land.**²³

When the TKLB was first introduced in the National Assembly in 2015, **clause 24** allowed traditional and Khoi-San councils²⁴ to enter into any partnerships or agreements with a third party without any requirement to consult the affected community. After opposition at public hearings and much debate, a new prerequisite was included that such partnership or agreement be subject “to a prior consultation with the relevant community represented by such council”. This remains the requirement in terms of the Draft Bill.

Still, no reference is made in the Draft Bill as to who the relevant community will be and no minimum standards are set for the consultation. For example, where should it take place, who should be present, what information should be made available and how many consultation meetings should there be? There is also no obligation to obtain the consent of or consult the community again following the ratification of the partnership or agreement by the Premier – the Premier has the last say about whether an agreement will be beneficial for a community. In addition, the Draft Bill requires a Premier to review any partnership or agreement entered into, prior to the Draft Bill becoming an Act, by any of the listed councils within three years of the Bill commencing to determine if it meets the requirements in **clause 24**. Again, no reference is made to any requirement for community participation in this process. **Clause 63(22)(e)** now indicates that any partnership or agreement already reviewed prior to the repeal of the TKLA, but subject to the date of invalidity of 1 April 2021, is deemed to have been reviewed, even without meaningful and adequate community participation. There is also an underlying assumption that a traditional council will “represent” a community in all decisions that affect them.

Clause 24 fails to sufficiently address the fact that customary law is inherently participatory. People must be involved in decision-making within traditional communities and be free to have their say at public meetings. As held by the Pretoria High Court in *Baleni and Others v Minister of Mineral Resources and Others* [2018]:

“Where..land is held on a communal basis...the community must be placed in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom and community on whether they consent or not to a proposal to dispose of their rights to their land.”²⁵

Most importantly, in respect of agreements affecting land falling within the traditional community boundary, the Interim Protection of Informal Land Rights Act of 1996 (“IPILRA”) makes it clear that it is the affected landholders themselves who have the right to consent before their rights are deprived. The procedures laid out in IPILRA are more robust than the consultation included in clause 24 of the Draft Bill and grant greater strength to the rights of ordinary people as customary landowners. The customary land rights of individuals and communities cannot be usurped by traditional councils purporting to represent communities in commercial deals via clause 24. Sadly,

²³ Phiwe Ndinisa “New Bill leaves communities at mercy of leaders” *Business Report* (30 October 2015); Thabiso Nyapisi “Traditional bill strips people of their rights” *Sowetan* (6 January 2016).

²⁴ As well as councils at other hierarchical levels.

²⁵ Para 83, *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 (22 November 2018).

many rural activists have lost their livelihoods and lives in the struggle to uphold their rights to land in the context of mining activities and traditional leadership structures being the sole decision makers over communal land. Activists, particularly in KwaZulu-Natal and Eastern Cape, have been targeted based on their opposition to proposed mining.²⁶

LARC maintains that clause 24 insufficiently accounts for and protects the decision-making rights of land rights holders per IPILRA, as a manifestation of the tenure security rights in section 25 of the Constitution.

LARC remains concerned that using the word ‘notwithstanding’ as opposed to ‘subject to’ or ‘in addition to’ in **clause 24(3)** may result in IPILRA being circumvented or trumped by the Draft Bill’s procedure in clause 24. The reference to ‘a majority of relevant community members’ as the decision-making body is ineffective as it operates within the framework of the TKLB, and does not start with rights holders as IPILRA does. It starts with traditional councils and traditional leaders who represent the traditional communities. 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 being referred to in clause 24 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 deals over their land, including mining, who are never whole “tribes” but always the sub-groups and families whose homes, fields and grazing land are targeted for “development” activities.

In *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018], the Constitutional Court pointed out that:

“...IPILRA ensures that communities have a right to decide what should happen to land in which they have an interest. It offers communities legal protection to assume control over and deal with their land according to customary law and usages practiced by them. Most significantly,..IPILRA provides that no person may be deprived of any informal right to land without his or her consent.”²⁷

Consultation with public constituencies more generally is also an important aspect of South Africa’s participatory democracy and the rights of people to provide input on political processes and decisions that will affect them is well-established in the jurisprudence of the Constitutional Court.²⁸

In contrast, throughout the Draft Bill, provisions fail to require traditional leaders and government officials to properly consult ordinary people, even in relation to decisions that have far-reaching implications for people’s lives. This includes some decisions about which groups or sub-groups of people should be recognised, who should be recognised as traditional leaders and how many members there should be in traditional councils. Often, the Draft Bill does not even provide for

²⁶ “South African environmental activist shot dead in her home”, *The Guardian*, 23 October 2020 (available at <https://www.theguardian.com/world/2020/oct/23/south-african-environmental-activist-shot-dead-in-her-home>); “Xolobeni rocked by more violence”, *Sunday Times*, 3 April 2016 (available at <https://www.timeslive.co.za/sunday-times/news/2016-04-03-xolobeni-rocked-by-more-violence/>).

²⁷ Paras 95 and 96, *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41 (25 October 2018).

²⁸ See, as one example, *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

ordinary people living in traditional communities to be notified of decisions that have been taken that will affect them. Instead, the Draft Bill highlights consultation with powerful elites such as the Houses of Traditional Leaders, royal families and traditional councils. The Draft Bill therefore goes against the values of public participation in both customary law and the Constitution and privileges the voices of those people or groups who already have an advantage in rural and traditional politics.

Finally, in terms of the Draft Bill, a traditional or Khoi-San council can have its statements audited by any registered auditor, whereas in earlier versions of the 2015 Bill this was the responsibility of the Auditor-General. The Draft Bill fails even to place an obligation on the Auditor-General to review an audit performed by any other auditor. It simply says at **clauses 19(3) and 20(4)** that the Auditor-General “may” review any audit.

This is precarious given the lackluster efforts to manage and audit traditional councils’ financial documents effectively under the Framework Act. The Auditor-General has reportedly admitted that the financial statements of traditional authorities in the North West have not been audited since 1994.²⁹ This has had particularly severe consequences for mine-hosting communities in the province. According to a report by the Public Protector published during 2017, the trust account of the Bapo Ba Mogale was missing R600 million worth of mining revenue. Bakgatla Ba Kgafela traditional community members have also lost billions in mining and development revenue due to mismanagement and misconduct by the traditional authorities, as revealed in the findings of the Baloyi Commission.³⁰ The Bakgatla example reveals the dangers inherent in the “D-account” model that was adopted in the North West and which now forms the basis of **clause 23(3)** in the Draft Bill.³¹ Without strong regulatory frameworks and financial accountability mechanisms, it is not clear whether the lack of provincial oversight and refusal to intervene that exacerbated the Bakgatla experience has been rectified in the present Draft Bill.

For these reasons **LARC submits that more robust provisions are required to ensure financial accountability and transparency by traditional leaders and councils to community members and government.** Merely requiring an annual report on finances to the traditional community as per **clause 20(3)(b)**, is not sufficient to ensure proper financial accountability. Nor is it sufficient to defer this accountability to future regulations per **clause 23(1)**, which members of the public do not yet have sight of. In the almost four-year period since the TKLA commenced (and clause 23’s predecessor has been implemented), the minimum standards and financial controls referred to in that clause have yet to be published. This calls into question to what extent financial controls have been practised over traditional community funds during the TKLA’s implementation.

3. Draft Bill imposes tribal identities and suppresses countervailing forms of representation

By using the Bantu Authorities system as the default building blocks for the present-day recognition of traditional structures, the Draft Bill adopts many of the categories created under apartheid to

²⁹ Aninka Claassens “South Africa’s traditional leadership proposal, the TKLB, is desperate and dangerous” *Daily Maverick* (8 December 2016).

³⁰ Commission into Traditional Succession Disputes and Claims: Bakgatla Ba Kgafela Traditional Community, ‘Final Report’ (August 2019), available at <http://www.saflii.org/images/baloyi.pdf>.

³¹ Wilmien Wicomb (2021) “The In-Between World of Kgosi Nyalala Pilane: (Mis)Appropriation and Accountability among the Bakgatla-Ba-Kgafela in 21st-Century South Africa”, *Journal of Southern African Studies*, 47:2, 173-190.

define African people. These categories ignore the reality that rural areas are not made up of neat, separate “tribes”. In some places people with different histories were forcibly moved into the same area and labelled as a “tribe” during apartheid. These groupings continue to live side-by-side today, with complex and intertwined histories. Even people who have a history as independent landowners are still deemed to fall under the jurisdiction of traditional leaders that were imposed on them during apartheid. Yet, the Draft Bill adopts an understanding of their so-called “tribal” identities that ignores the fact that many “tribes” and “tribal authorities” were created through forced removals, land dispossession, and the imposition of pliable leaders. It is doubtful whether many existing customary groupings in South Africa would meet the demanding criteria for recognising new traditional communities included at **clause 3(4)** of the Draft Bill because the provision fails to understand this history. For example, groupings who were subjected to decades of government manipulation during the processes of Bantustan consolidation are unlikely to be able to demonstrate “a proven history of existence” that is “distinct and separate”. The same is true in respect of the recognition criteria for Khoi-San communities: the criteria at **clause 5(1)** are ahistorical and likely to severely limit the number of Khoi-San communities who qualify for recognition. Meanwhile other traditional communities received automatic recognition if they were previously recognised as “tribes”. These issues were repeatedly raised as concerns during the 2015 Bill’s legislative process in public submissions by persons who identified as Khoi or San. At a symposium hosted by the Commission on Khoi-San Matters in March 2024, several inputs by Khoi and San representatives bemoaned the difficulty they were having with completing the application forms, and providing the necessary evidence, to meet the criteria for recognition.³²

Due to the history described above, many people in the former Bantustan areas of South Africa dispute official “tribal” boundaries, or disassociate from the traditional community or leader who is their “official” representative. Yet, the Draft Bill does not allow people to “opt-out” of the traditional community or the traditional leader that they have been placed under by default, and there is no means through which to reconstitute identities and groups by choice, as part of an “opt-in” system of consensual affiliation. **Clauses 3 and 4** of the Draft Bill fail to facilitate processes of secession by sub-groups within a recognised traditional community, who cease to recognise the legitimacy of an official overarching authority in terms of customary law. Instead, to apply for changes to community recognition, sub-groupings are forced to interact with government via overarching traditional councils and leaders – even where these are precisely the institutions being challenged.

In this respect, the Draft Bill treats the recognition of Khoi-San groupings and authorities fundamentally differently. The Draft Bill sets up an “opt-in” system of consensual affiliation for Khoi-San communities whereby a Khoi-San leader’s authority only extends to people who have specifically taken steps to affiliate with a particular Khoi-San identity and leader. In terms of the Draft Bill, a person is not automatically Khoi-San because they live in a particular area. This provides a simple potential template for the recognition of all traditional groupings, which, importantly, does not rely on the boundaries of the former Bantustans as a default position.

³² Monica de Souza Louw “The government should not blame the Mogale judgment for Khoi-San Commission struggles” *Daily Maverick* (16 April 2024), available at <https://www.dailymaverick.co.za/article/2024-04-16-the-government-should-not-blame-the-mogale-judgment-for-khoi-san-commission-struggles/>.

In essence, the Draft Bill distinguishes between jurisdiction over land for traditional authorities in the former Bantustans, and jurisdiction over people for Khoi-San authorities. For the former Bantustans, the Draft Bill puts in place a hierarchy of traditional communities that occupy a geographical area over which traditional councils have jurisdiction and that are headed by traditional leaders. In other words, leaders and councils in the former Bantustans have authority that is connected to a particular piece of land and whoever lives on it. This is a replica of the “tribal” boundaries system entrenched through the Bantu Authorities Act, which was resisted fiercely by rural citizens and many people lost their lives doing so. On the other hand, Khoi-San leaders and councils do not have authority that is connected to a particular piece of land – instead, their jurisdiction extends only over people who elect to be part of the Khoi-San community. Khoi-San leaders and councils will have administrative seats based in one central location, not expanded areas of authority that go beyond an office. In the former Bantustans, traditional leaders and councils have authority not only at the traditional council office; the authority extends to all those living on the land included within the geographical jurisdictional boundaries derived from apartheid.

Government and Parliament maintain that a law like the TKLB is necessary to provide official recognition to Khoi-San customary institutions that have hitherto been neglected in the legal and political realm. Indeed, during previous parliamentary hearings on the 2015 Bill, often the Bill was inaccurately presented as being *only* about the recognition of Khoi and San communities. Yet, the provisions of the Draft Bill make it clear that, in respect of jurisdiction, government is not giving Khoi-San leadership structures the *same* recognition as traditional institutions in the former Bantustans. This fact was also highlighted by some submissions on the 2015 Bill. This is especially relevant in light of ongoing debates about land reform and government’s previous promises to some Khoi-San groups that changes in the law will allow them to claim back land that was historically taken away from them.

As stated earlier, the Draft Bill establishes a system of affiliation for Khoi-San communities that relies on self-identification to define membership. To practically implement this, the Draft Bill requires that Khoi-San people put their names, identity numbers and a certified copy of their valid identification document, physical addresses confirmed by documentary evidence, signatures and contact details on a list when applying for recognition as a community. The rigid bureaucratic procedure set out in the Draft Bill is problematic, yet government has set the precedent that it is possible to base customary community identity on affiliation rather than on territory. It is arguable that a similar system could be put into place for traditional communities in the former Bantustans. This would do away with the imposed apartheid and colonial tribal boundaries that currently form the basis for traditional governance under the Draft Bill. Moreover, the basic structure for an affiliation-based system was already contained in the recognition provisions for new traditional communities and councils contained in sections 2 and 3 of the previous Framework Act, which were then unfortunately undercut by the transitional mechanisms in section 28.

LARC thus supports the long-awaited recognition of Khoi and San communities and submits that an affiliation-based system should apply to *all* customary communities in South Africa, including Khoi-San and other traditional communities.



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If the Draft Bill retains the Bantustan boundaries system and prevents people from opting out of identities and institutions which they reject, it will be affirming many of the oppressive practices that the Framework Act elicited. One example is the practice of charging people within a traditional council area with compulsory fees called “tribal levies”.³³ Where people fail (or refuse) to pay these levies to a traditional council, they are denied approval for burial ceremonies and burial sites, allocation of stands, or proof of address letters that are essential for opening a bank account, obtaining a cellphone or applying for other civic services. Institutions will often only accept these letters if they have been stamped by a traditional council. As a result, if people live within a traditional council’s jurisdiction they must be up to date on their “tribal levies” in order to access basic services.

The Draft Bill is silent on the collection of “tribal levies” by the traditional council and only refers to “voluntary contributions” at **clause 23(3)**. There was a similar absence of prohibitive language in some provincial traditional leadership legislation promulgated under the Framework Act, resulting in the continued collection of “tribal levies” in practice. In Limpopo, traditional authorities were explicitly able to charge “tribal levies” upon every “taxpayer” in traditional areas in terms of provincial legislation.³⁴ These levies were imposed on communities without consultation, and those who failed to pay were fined and denied access to services or resources. The enabling legislative provision was declared inconsistent with the Constitution and invalid by the Limpopo High Court. It was additionally declared that customary law only permits voluntary levies, and only after consultation with the community about the need for, amounts and purpose of the levy.³⁵ The order of invalidity was confirmed by the Constitutional Court.³⁶ The Constitutional Court reiterated that:

“Just like the Constitution does not permit the Executive to tax, the Constitution does not confer such a power on traditional leaders, and does not allow that power to be delegated to them³⁷...the Constitution limits taxing powers to elected legislative bodies. It would be inconsistent with the Constitution to permit unelected, non-legislative bodies to impose taxes³⁸... In sum, under the Constitution, traditional leaders are not democratically elected legislative bodies, and therefore cannot impose taxes in terms of legislation. Neither can they impose taxes under customary law.”³⁹

To prevent potential antidemocratic and abusive practices being carried out by traditional structures, **the Draft Bill must include a provision that gives effect to these judgments by categorically preventing the collection of imposed “tribal levies” by any traditional authority.** This prohibition should also be included in provincial legislation emanating from the Draft Bill if it becomes law. Levies that are imposed must be deemed unlawful.

³³ Aninka Claassens “The resurgence of tribal taxes in the context of recent traditional leadership laws in South Africa” *South African Journal on Human Rights* 27(3) (2011).

³⁴ Section 25 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005.

³⁵ *Mohlaba and Others v Minister of Cooperative Governance and Traditional Affairs and Others* (2885/2016) [2023] ZALMPPHC (1 November 2023).

³⁶ *Mohlaba and Others v Minister of Cooperative Governance and Traditional Affairs and Others* [2024] ZACC 32 (20 December 2024).

³⁷ Para 21, *Mohlaba and Others v Minister of Cooperative Governance and Traditional Affairs and Others* [2024] ZACC 32.

³⁸ *Ibid* at para 23.

³⁹ *Ibid* at para 24.

Under the Framework Act, the “tribal” boundaries have also in practice resulted in the suppression of countervailing forms of customary representation. In the North West, for example, two cases about the standing of parallel forms of authority within the Bakgatla ba Kgafela traditional community have reached the Constitutional Court. In the first case, the traditional leader and traditional council attempted to ban community meetings called by any other customary structures, claiming exclusive authority to determine when issues affecting the community can be discussed in public meetings by ordinary people.⁴⁰ In this way, leadership at the “top” of the traditional hierarchy could quell dissent at village level and prevent talks about secession following widespread dissatisfaction among ordinary people about corruption and maladministration by the senior traditional leader and his councillors.⁴¹ In the second case, the same senior traditional leader obstructed a Communal Property Association chosen by the community from holding and managing land won through restitution.⁴² In both cases, the Constitutional Court found in favour of the co-existing forms of representation that had gained legitimacy and been recognised by the customary community locally – not the traditional leader or council. The rights of people living within the former Bantustans to call meetings and manage land independently of a traditional authority were upheld.

Yet, other cases demonstrate that traditional authorities are still able to obtain interdicts against, and contest the standing of, community groups or activists that challenge the legitimacy of traditional leaders or their unaccountable conduct. In some areas, this has resulted in brutal violence.⁴³

LARC submits that the Draft Bill should explicitly acknowledge the existence of countervailing structures and institutions in customary law and within traditional communities. The Draft Bill should explicitly protect the ability of traditional community members to exercise their democratic rights to: freedom of expression; assembly, demonstration, picket and petition; freedom of association; political rights; and freedom of movement and residence.

4. Draft Bill’s problems not mitigated by weak and failed transformative mechanisms

During the Framework Act’s drafting, Parliament justified retaining traditional institutions appointed and established in terms of apartheid legislation on the basis that provisions of the law would force these institutions to transform. The Framework Act thus included two primary mechanisms to mitigate the damage of entrenching old apartheid and colonial traditional leadership structures. The first mechanism required that traditional councils include 40% elected members and one third women members by a certain deadline. The second mechanism established was the

⁴⁰ *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (28 February 2013).

⁴¹ Evidence of the extent of this maladministration came to light through the processes of the Commission of Inquiry into Traditional Claims and Disputes within the North West Province, referred to above as the Baloyi Commission. See the Commission’s terms of reference in Premier: North West Province “Commission of Inquiry into the traditional leadership disputes in respect of the Bakgatla ba Kgafela community dispute, Batlhako ba Leema and Bapo I and II community disputes respectively” Proclamation 19 *Provincial Gazette Extraordinary* 7657 (15 June 2016).

⁴² *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* (CCT231/14) [2015] ZACC 25; 2015 (6) SA 32 (CC) (20 August 2015).

⁴³ Zoë Mahopo “Vigilantes pickaxe pensioner” *Sowetan* (13 June 2015); Tariro Washinyira “We will die for our land, say angry Xolobeni villagers as dune mining looms” *Mail & Guardian* (12 February 2016).

Commission on Traditional Leadership Disputes and Claims (popularly known as the “Nhlapo Commission”, named for its first Chairperson). The Framework Act mandated this Commission with investigating and assessing claims that in some areas illegitimate persons were holding official traditional leadership positions, or that legitimate positions had previously been undermined by the colonial and apartheid governments.

Yet, both of these mechanisms failed to achieve broad democratic transformation of traditional leadership structures. These failures carried through to the TKLA and they carry through to this Draft Bill.

Most provinces have failed to hold proper traditional council elections timeously over the last two decades, while in Limpopo, elections were held for the first time during 2024.⁴⁴ Provinces have largely failed to meet the deadlines set for transformation in the Framework Act⁴⁵ and the TKLA for over twenty years. Section 63(4)(a) of the TKLA gave tribal authorities that were established and recognised before the Framework Act commenced operation two years to reconstitute to comply with the requirements in section 16(2). The deadline was 31 March 2023. This timeframe shifted to 31 March 2024 in accordance with an intervention plan developed by the Department in terms of section 63(4)(c) of the TKLA.⁴⁶ Notably, the Ministerial formula to determine the number of members of a traditional council⁴⁷ was published in Government Gazette No. 45859 on 4 February 2022, but media statements subsequently revealed issues raised by traditional leaders regarding the gazetted formula. Consultations reportedly then took place between the Department and traditional leaders.⁴⁸ This culminated in a new formula being published on 22 February 2024 in Government Gazette No. 50161, just less than one working month before the election deadline.

Rural activists based in Limpopo reported that elections were hastily organised. Some elections were boycotted, and many communities were unaware of elections being held. Although the Premier of Limpopo gazetted a list of recognised traditional councils on 14 June 2024, the Minister of Cooperative Governance and Traditional Affairs stated in a written response published on 26 July 2024 that:

“...the revised formula for determining the number of members of traditional councils was only published in a government gazette on 22 February 2024, and as a result, all provinces could not conclude the process of constituting all their TCs [*traditional councils*] within

⁴⁴ Law, Race and Gender Research Unit *Law, Custom and Rights* newsletter (August/September 2011), available at http://www.cls.uct.ac.za/usr/lrg/downloads/LRG_News_AUG_SEPT2011.pdf. See also Land and Accountability Research Centre “Submission to National Council of Provinces on the Traditional Leadership and Governance Framework Amendment Bill, 2017” (10 November 2017), available at http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/LARC%20Submission%20to%20NCOP%20on%20TLGFAB_20171110.pdf; and General Notice No. 434 of 2024 in Provincial Gazette No. 3546, published by the Premier of Limpopo.

⁴⁵ Monica de Souza “Justice and legitimacy hindered by uncertainty? The legal status of traditional councils in North West Province” *South African Crime Quarterly* Vol 49 (September 2014).

⁴⁶ Department of Traditional Affairs Annual Performance Plan for 2023/2024, pages 48 and 53.

⁴⁷ Section 16(2) of the TKLA.

⁴⁸ Tweet/X post by Department regarding Ministerial meeting with Houses of Traditional Leaders dated 12 May 2023, available at <https://twitter.com/NationalCoGTA/status/1656943988404891650>; National Council of Provinces 2023 Budget Vote Speech by Minister Thembi Nkandimeng dated 9 June 2023, available at <https://www.cogta.gov.za/index.php/2023/06/09/cogta-national-council-of-provinces-ncop-2023-budget-vote-speech-by-minister-thembi-nkandimeng/>.

their respective provinces, hence no traditional council was constituted by 31 March 2024, and thus they have all not met the deadline.⁴⁹

The Minister further stated in the written response that a legal opinion obtained by the Department “advised and clarified that the cut-off date for the legal constitution of traditional councils should be 4 February 2025.”⁵⁰

Besides Limpopo, and according to published Provincial Notices, LARC is aware of traditional council elections having only taken place in Mpumalanga by this date.⁵¹ The Premier of Free State published a Provincial Notice on 4 February 2025 containing Regulations on the establishment of traditional councils, however it is unclear when elections for the 40% membership component took place.⁵²

The continued failure to transform these structures raises pertinent questions around their legal status and the viability of the model, yet again, being included in the Draft Bill. We elaborate on this below. It is also not clear if all traditional councils have correctly included at least one third women members as per **clause 16(2)(b)**. There have however been reports that where women *are* members on traditional councils, they are vulnerable to abuse by other councilors.⁵³

These failures have previously been acknowledged by the Department of Cooperative Governance and Traditional Affairs and resulted in the Traditional Leadership and Governance Framework Amendment Bill [B 8B—2017] (“Amendment Bill”) being introduced to the National Assembly in March 2017. The Memorandum attached to the Amendment Bill explicitly stated:

“although there are instances where provinces attempted to reconstitute the tribal authorities, various challenges have been identified in respect of such reconstitution. 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 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 Amendment Bill thus sought to offer a new opportunity within which tribal authorities could transition to traditional councils. The Amendment Bill was framed by the Department as a “stopgap measure” to bring about an alignment with the term of the National House of Traditional Leaders while the 2015 Bill was still being processed by Parliament. From the Draft Bill, it is unclear what the status of this amendment law is and whether it was ever substantially implemented. It appears

⁴⁹ National Assembly Question for Written Reply, Question Number 133 (date of publication: 26 July 2024).

⁵⁰ Ibid.

⁵¹ General Notice No. 615 of 2025 in Provincial Gazette No. 3766 published by the Mpumalanga MEC for Co-operative Governance, Human Settlements and Traditional Affairs (23 January 2025).

⁵² Traditional and Khoi-San Leadership Regulations on the Establishment of Traditional Councils, 2025, Provincial Notice No. 82 of 2024 in Special Provincial Gazette No. 90 (4 February 2025).

⁵³ Pearlie Joubert “Women’s minister whacks chiefs bill” *City Press* (22 September 2012).

to have commenced on 28 November 2019 as Act 2 of 2019, but it was not included in the legislation repealed by the TKLA when it later commenced and replaced the Framework Act on 1 April 2021. This Draft Bill also does not include the Amendment Act in the list of laws repealed. **LARC submits that the Department should clarify the status of the 2019 Amendment Act by including it in the list of legislation that would be repealed by the Draft Bill.**

Against a background of acknowledged failures, and further failures as the TKLA has been implemented since 2021, the Draft Bill retains the Framework Act's transformation mechanisms to mitigate **clause 63's** "transitional" re-entrenchment of colonial and apartheid traditional institutions. However, as with the TKLA, the Draft Bill makes the outcome of these failures unclear. In the Framework Act, it was far clearer that old tribal authorities would have a vulnerable legal status when they failed to meet the election and gender composition requirements for new traditional councils.⁵⁴ The Memorandum to the 2017 Framework Act Amendment Bill acknowledged this vulnerability: "As a result of the above-mentioned challenges, 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."

In comparison, the Draft Bill fails to set out concrete consequences for non-compliance with the newly stipulated timeframes, nor does it set out the consequences and legal status of decisions and deals that have been entered into by improperly constituted tribal authorities. Although the Draft Bill states that compliance with the composition requirements for traditional councils is mandatory, and that it must be carried out in terms of **clause 16(2)** of the Draft Bill within two years from the publication of the Ministerial formula, or within two years from the commencement of the Draft Bill, whichever is the later date,⁵⁵ there is no real apparent consequence for traditional councils who fail to meet the requirements in time. The Draft Bill merely states that the Minister of Traditional Affairs, after consulting with the relevant Premier, can intervene to "ensure" that traditional councils are reconstituted according to the legislative requirements.⁵⁶ This is hardly sufficient considering the lack of transformation of traditional institutions to date, despite an intervention plan already having been applied and extensions being granted for reconstitution. **LARC submits that the Draft Bill must, at a minimum, set out clear consequences for traditional authorities not meeting the reconstitution deadline and what their legal status will be based on failing to transform accordingly.**

Moreover, **LARC submits that the Department has an urgent responsibility to ensure that there is governance stability within traditional communities and clarity regarding the current status and permissible conduct of traditional governance institutions, particularly where they have continued to operate beyond their failed reconstitution. This intervention cannot wait for the processing of the Draft Bill to be completed by Parliament.**

The second transformative mechanism included in the Framework Act, and in the TKLB as initially introduced in 2015, was the Commission on Traditional Leadership Disputes and Claims. This Commission was unable to deal with the enormous volume of claims brought before it after the

⁵⁴ Centre for Law and Society "Questioning the legal status of traditional councils in South Africa" (August 2013).

⁵⁵ Clause 63(4)(a) and (b) of the Draft Bill.

⁵⁶ See Clause 63(4)(e) of the Draft Bill.

Framework Act first came into force, so provincial committees were set up to distribute the load. Meanwhile, many of those cases that were dealt with by the Commission or its provincial committees are still being challenged in court. For example, in June 2013 the Constitutional Court declared that the President's dethronement of AmaMpondo King Justice Mpondombini Sigcau, based on a decision by the Commission, had no legal effect.⁵⁷ Until late 2024, litigation was still ongoing to resolve this leadership dispute.⁵⁸ There was also a concerning lack of transparency around provincial committee reports and recommendations after their investigations had been concluded – in North West province some claimants resorted to litigation to uncover the outcomes of their claims. At the end of 2015, this litigation forced North West Premier Supra Mahumapelo to publicly announce the North West committee's findings in respect of the incumbent to the Bakgatla ba Kgafela senior traditional leadership position.⁵⁹ The committee found that the current incumbent should be deposed with immediate effect since he was appointed through the interference of the former Bophuthatswana government and contrary to Bakgatla ba Kgafela customary law.⁶⁰ Yet, because the Commission had only the power to make recommendations (following a 2009 amendment of the Framework Act), it was within the Premier's discretion to implement the Commission's findings or reject them⁶¹ and he subsequently set up his own Commission of Inquiry, the Baloyi Commission previously mentioned.⁶² Even the findings of that Commission about who should occupy the senior traditional leadership position have not been fully implemented.⁶³ This raises doubt about the extent to which re-entrenched apartheid structures have actually been, and could ever have been, transformed by a mechanism such as the Commission.

The Department has explained that the Commission's work is complete and, as such, the Draft Bill (as with the TKLA) does not include a Commission or alternative mechanism to deal with historical disputes about legitimacy and succession emanating from traditional communities in the former homelands. The Draft Bill only provides procedures for resolving newly arising disputes. Yet, many of these disputes remain visible and ongoing – not only through legal challenges or unresolved litigation, but also within local community politics. Sometimes new iterations of old disputes arise. The Commission's work thus seems far from over⁶⁴ and it is questionable whether its intended purpose has actually been achieved.

⁵⁷ *Sigcau v President of the Republic of South Africa and Others* (CCT 93/12) [2013] ZACC 18; 2013 (9) BCLR 1091 (CC) (13 June 2013).

⁵⁸ *Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and Others* (CCT167/17) [2018] ZACC 28; 2018 (12) BCLR 1525 (CC) (11 September 2018); *Wezizwe Feziwe Sigcau and Another v The President of the Republic of South Africa and Others* (961/2020) [2022] ZASCA 121; [2022] 4 All SA 315 (SCA) (14 September 2022); *President of the Republic of South Africa v Sigcau and Others* [2024] ZACC 21 (3 October 2024).

⁵⁹ Bafokeng Land Buyers' Association "Merafe Ramono, the new chief of Bakgatla-ba-Kgafela" (12 January 2015, press statement).

⁶⁰ Commission on Traditional Leadership Disputes and Claims: North West Provincial Committee *Report and recommendations on the traditional leadership dispute of Bakgatla Baga Kgafela by Mr Merafe Ramono against Kgosi Nyalala Pilane for Senior Traditional Leadership position* (2014).

⁶¹ Monica de Souza Louw "Will North West premier depose tainted tribal leader?" *GroundUp* (25 January 2016).

⁶² Commission into Traditional Succession Disputes and Claims: Bakgatla Ba Kgafela Traditional Community, 'Final Report' (August 2019), available at <http://www.saflii.org/images/baloyi.pdf>.

⁶³ "Bitter legal battle over Bakgatla-Ba-Kgafela continues", *Sunday World*, 25 February 2025 (available at <https://sundayworld.co.za/news/bitter-legal-battle-over-bakgatla-ba-kgafela-continues/>); "Bakgatla ba Kgafela rally behind reinstated Nyalala Pilane", *Sunday World*, 5 February 2025 (available at <https://sundayworld.co.za/news/bakgatla-ba-kgafela-rally-behind-reinstated-nyalala-pilane/>).

⁶⁴ In 2018, the Portfolio Committee on Cooperative Governance and Traditional Affairs expressed disappointment that the budget allocations to the Department of Cooperative Governance and Traditional Affairs decreased the funding for dispute resolution as it was "inconsistent with the Department's objective of reducing the number of traditional leadership disputes and claims over the medium term". See "Report of the Portfolio Committee on Cooperative



LARC submits therefore that it is unlikely that the preservation of colonial and apartheid structures and jurisdictions has been sufficiently mitigated by transformative mechanisms in the Draft Bill and preceding legislation.

New developments for the Department's consideration

LARC would also like to raise the following concerns and new developments since the TKLA was declared constitutionally invalid by the Constitutional Court:

- Over the past few years there have been many media reports of headmen being murdered in KwaZulu-Natal, which seem to have been triggered by outstanding salary payments for the position. The Draft Bill has not taken this new development into consideration and has failed to put measures in place to prevent or address the root causes of this violence against traditional leaders.
- It is concerning that the TKLB seems to have been drafted without any regard for the factors considered by the Constitutional Court in declaring the TKLA constitutionally invalid. One of these factors is language. The Constitutional Court highlighted this as one of the serious procedural flaws of Parliament's public participation process - the fact that the Bill was provided in English only. The Draft Bill is still provided in English only, even though the Department is inviting commentary from areas where English does not feature as the most commonly spoken language. Considering the language profile of rural areas and traditional communities, it is imperative that the Draft Bill (and any subsequent versions) be published in multiple indigenous languages.
- To reiterate, it is concerning that the Draft Bill contains the same substantive flaws highlighted by the public in the 2015 Bill, despite the Department having a record of the public's commentary. This means the public will be required to make the same commentary again. The TLKA and the Draft Bill seem to be following the same pattern as the Traditional Courts Act, with unjust and unfair outcomes for rural citizens.

Conclusion

As outlined above, it is **LARC's submission that the Draft Traditional and Khoi-San Leadership Bill of 2024 should be rejected outright** on the basis that it re-entrenches the "tribal" boundaries and structures that underpinned the creation of the Bantustans under apartheid. Any democratic recognition of authority for traditional institutions cannot be based on these boundaries, but must instead be based on a system of customary affiliation. Traditional communities should be defined in terms of self-identification, not according to apartheid "tribal" classification. This means that the basic schema of the Draft Bill is flawed, and requires an overhaul based on the lived experiences and histories of customary groupings. In the Bill's treatment of Khoi-San institutions, a precedent has been set for the recognition of customary identity through affiliation rather than territory. This could provide the starting point for an alternative approach to the regulation of

Governance and Traditional Affairs on the Annual Performance Plan and Budget Vote 4 of the Department of Cooperative Governance and Traditional Affairs, dated 8 May 2018" (Committee report tabled in the National Assembly on 9 May 2018).



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traditional institutions in the former Bantustan areas of South Africa. In this respect, LARC again highlights the significant and helpful recommendations made in the High Level Panel report.

While the TKLB claims to provide Khoi and San communities with long overdue recognition, throughout the Draft Bill, emphasis is more on the recognition, powers and benefits of traditional authorities. It is **LARC's submission that, instead, the Draft Bill should emphasise consensual customary law, accountability, consultation, transparency, "opt-in" cultural identities and the needs of customary communities.**

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