

REPUBLIC OF SOUTH AFRICA

TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK AMENDMENT BILL

*(As amended by the Select Committee on Cooperative Governance and Traditional Affairs
(National Council of Provinces))
(The English text is the official text of the Bill)*

(MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS)

[B 8D—2017]

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[] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

To amend the Traditional Leadership and Governance Framework Act, 2003, so as to make provision for extended timeframes within which kingship or queenship councils and traditional councils must be established; to provide for extended timeframes within which community authorities have to be disestablished; to align the term of office of tribal authorities, traditional councils and kingship or queenship councils with the term of the National House of Traditional Leaders; and to provide for matters connected therewith.

Amendment of section 3A of Act 41 of 2003, as inserted by section 5 of Act 23 of 2009

1. Section 3A of the Traditional Leadership and Governance Framework Act, 2003 (hereinafter referred to as the principal Act), is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection:
- “(1) (a) Once the President has recognised a kingship or queenship, that kingship or queenship must, within **[one year]** two years of the recognition, establish a kingship or queenship council.
- (b) A kingship or a queenship that has been confirmed by a decision of the Commission in accordance with this Act prior to its amendment by the Traditional Leadership and Governance Framework Amendment Act, 2009 (Act No. 23 of 2009), must, within two years from the commencement of the Traditional Leadership and Governance Framework Amendment Act, 2018, establish a kingship or a queenship council.
- (c) A kingship or a queenship other than a kingship or queenship contemplated in paragraph (b) that has been recognised before the commencement of the Traditional Leadership and Governance Framework Amendment Act, 2018, must, within two years of such commencement establish a kingship or queenship council.”;
- (b) by the substitution in subsection (2)(c) for subparagraph (ii) of the following subparagraph:
- “(ii) 40% of members elected democratically[, **by an electoral college consisting of all senior traditional leaders who fall under the kingship or queenship**] as contemplated in paragraph (d).”; and

- (c) by the substitution in subsection (2) for paragraph (d) of the following paragraph:

“(d) Each traditional **[community]** council falling within the area of jurisdiction of the kingship or queenship concerned must **[in the prescribed manner,]** elect one person from the elected members of that council to serve as a member referred to in paragraph [(d)](c)(ii): Provided that where the number of persons so elected are less than the number of persons contemplated in paragraph (c)(ii), the traditional councils must each elect one additional person from the elected members of that council: Provided further that where the number of persons so elected exceed the number of members contemplated in paragraph [(d)](c)(ii), the persons elected by the traditional [communities] councils must elect from amongst themselves the number of persons contemplated in paragraph [(d)](c)(ii).”.

Amendment of section 3B of Act 41 of 2003, as inserted by section 6 of Act 23 of 2009

2. Section 3B of the principal Act is hereby amended—

- (a) by the substitution in subsection (2)(c) for subparagraph (ii) of the following subparagraph:

“(ii) 40% of members elected democratically**[, by an electoral college consisting of all senior traditional leaders who fall under the principal traditional council]** as contemplated in paragraph (d).”; and

- (b) by the substitution in subsection (2) for paragraph (d) of the following paragraph:

“(d) Each traditional council falling within the area of jurisdiction of the principal traditional community concerned must elect one person from the elected members of that council to serve as a member referred to in paragraph (c)(ii): Provided that where the number of persons so elected are less than the number of persons contemplated in paragraph (c)(ii), the traditional councils must each elect one additional person from the elected members of that council: Provided further that where the number of persons so elected exceed the number of members contemplated in paragraph (c)(ii), the persons elected by the traditional councils must elect from amongst themselves the number of persons contemplated in paragraph (c)(ii).”.

Amendment of section 28 of Act 41 of 2003, as amended by section 22 of Act 23 of 2009

3. Section 28 of the principal Act is hereby amended—

- (a) by the substitution for subsection (4) of the following subsection:

“(4) (a) A tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 3 and must perform the functions referred to in section 4: Provided that such a tribal authority must be reconstituted to comply with the provisions of section 3(2) within [seven years] two years of the commencement of [this Act] the Traditional Leadership and Governance Framework Amendment Act, 2018.

(b) If, prior to the commencement of the Traditional Leadership and Governance Framework Amendment Act, 2018, any tribal authority was reconstituted as contemplated in paragraph (a), but such reconstitution did not comply with all the requirements of section 3(2), such tribal authority is deemed to be a traditional council and must, within two years of the commencement of the Traditional Leadership and Governance Framework Amendment Act, 2018, be reconstituted in full compliance with the provisions of section 3(2).

(c) If the timeframes contemplated in paragraph (a) or (b) are not met, the Minister may, within one year after the timeframes have lapsed and

after consultation with the relevant Premier, take the necessary steps to ensure that the tribal authorities and traditional councils contemplated in paragraphs (a) and (b) are reconstituted as provided for in this subsection.

(d) A Premier must give notice in the *Provincial Gazette* of any reconstitution done in terms of this subsection.

(e) If a Premier has not issued a formula in accordance with section 3(2)(a), any guidelines that have been issued by the Minister as contemplated in that section shall be deemed to be such formula for the purposes of any reconstitution as contemplated in this subsection.

(f) The term of office of any tribal authority or traditional council that has been reconstituted in accordance with this subsection must, with effect from such reconstitution, be aligned with the term of the National House of Traditional Leaders.

(g) Following the reconstitution of any tribal authority or traditional council in terms of paragraph (a), (b) or (c), and taking into account the provisions of paragraph (f), any subsequent reconstitution from 2022 onwards, must be done in accordance with the provisions of section 3(2) and (3).”;

(b) by the substitution for subsection (5) of the following subsection:

“(5) (a) Any community authority that had been established in terms of applicable legislation and still existed as such immediately before the commencement of this Act, continues to exist until it is, subject to paragraphs (b), (c) and (d), disestablished in accordance with provincial legislation, which disestablishment must take place by notice in the Provincial Gazette within [five years] two years of the commencement of [this Act] the Traditional Leadership and Governance Framework Amendment Act, 2018, except where the traditional leadership related to that community authority is still under investigation by the Commission in terms of section 25(2) in which case the community authority concerned must be administered as if the relevant establishing legislation had not been repealed.

(b) In the absence of provincial legislation as contemplated in paragraph (a), the Premier of a province may, after consultation with any relevant member of the executive council of the province, the relevant community authority and the provincial house of traditional leaders, by notice in the *Provincial Gazette* disestablish such community authority.

(c) A notice contemplated in paragraphs (a) and (b) must regulate the legal, practical and other consequences of the disestablishment, including—

- (i) the transfer of assets, liabilities and administrative and other records to an appropriate authority;
- (ii) the vacation of office of any office bearer of such a community authority; and
- (iii) the transfer of staff of such a community authority in accordance with applicable legislation.

(d) If the timeframe contemplated in this subsection is not met, the Minister may, within one year after the timeframe has lapsed and after consultation with the relevant Premier, community authority and provincial house of traditional leaders, take the necessary steps to ensure that the relevant community authority is disestablished in accordance with the provisions of this subsection.”; and

(c) by the addition of the following subsection:

“(12) The term of office of a kingship or queenship council established in accordance with the provisions of section 3A(1) must, with effect from the date of such establishment, be aligned with the term of the National House of Traditional Leaders.”.

Short title

4. This Act is called the Traditional Leadership and Governance Framework Amendment Act, 2018.

**MEMORANDUM ON THE OBJECTS OF THE TRADITIONAL
LEADERSHIP AND GOVERNANCE FRAMEWORK AMENDMENT
BILL, 2017**

1. BACKGROUND

- 1.1 The Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) (hereinafter referred to as the Act), came into operation on 24 September 2004.
- 1.2 The Act contains certain transitional provisions in section 28. One of the main purposes of transitional provisions is to deal with what existed immediately before the new law came into operation and to provide legal certainty. Section 28(4) of the Act therefore deals with tribal authorities that existed prior to the coming into operation of the Act.
- 1.3 Originally, section 28(4) determined that tribal authorities would be regarded as traditional councils as contemplated in section 3 of the Act, however with the proviso that they had to meet certain requirements namely, the requirements contained in section 3(2) of the Act. In other words, the tribal authorities had to be reconstituted in accordance with the provisions of section 3(2) and only once that has been done, would they be deemed to be traditional councils. Section 28(4) further required that such reconstitution had to be done within one year from the commencement of the Act. The requirements of the said section 3(2) are, in brief, that the size of traditional councils should be limited to 30 members; a third of the members should be women; and the council must consist of 60% selected and 40% elected members.
- 1.4 The timeframe of one year was however not met. The Act was therefore amended in 2009 to extend the original one year timeframe to seven years [Traditional Leadership and Governance Framework Amendment Act, 2009 (Act No. 23 of 2009)]. However, the manner in which the particular provision of the 2009 Amendment Act was drafted, meant that the seven year timeframe was to be determined with effect from the date of commencement of the original Act (24 September 2004) and not from the date of commencement of the 2009 Amendment Act. This means that the extended timeframe of seven years lapsed on 23 September 2011. Furthermore, the 2009 Amendment Act introduced two new principles relating to the composition of traditional councils, namely that the number of members of a traditional council had to be determined by means of a formula to be issued by the Premiers and that such formula has to be “in accordance with” guidelines to be issued by the Minister.
- 1.5 The first set of guidelines was issued on 21 April 2011. Thereafter each province had to issue a formula taking into account the guidelines and reconstitute the tribal authorities, all of which had to be done by no later than 23 September 2011. It should be noted that new guidelines were issued in 2015 to address shortcomings of the 2011 guidelines.
- 1.6 Therefore, unfortunately, in most instances the extended timeframe was also not met.
- 1.7 Furthermore, 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.

- 1.8 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.
- 1.9 Another challenge is that the terms of office of traditional councils must be aligned to the term of office of the National House of Traditional Leaders (NHTL). The term of office of the NHTL expires in August 2017. This means that all tribal authorities and traditional councils must be reconstituted in 2017.
- 1.10 To address the above mentioned challenges and to ensure alignment of the terms of office of reconstituted tribal authorities and traditional councils with that of the NHTL, it is necessary to once again extend the timeframe for such reconstitution. Therefore, this Bill proposes to amend section 28(4) of the Act accordingly. However, the proposed amendment does not only seek to extend the timeframe, but also determines what is to be done in any instance where the extended timeframe cannot be met. This is further explained in the clause by clause analysis hereunder.
- 1.11 To some extent, a similar challenge exists in respect of the establishment of kingship and queenship councils and the disestablishment of community authorities. All these challenges are addressed in this Bill as explained hereunder.
- 1.12 The Department of Traditional Affairs (DTA) is fully aware of the fact that the Act is to be repealed by the Traditional and Khoi-San Leadership Bill [B23-2015] (TKLB) which is currently being considered by Parliament. The TKLB addresses the challenges referred to above. However, since it is uncertain when the TKLB will be enacted and due to the fact that there is uncertainty as to whether there is any existing statutory provision that can be used for the reconstitution of tribal authorities and traditional councils in 2017, it is advisable to amend the Act to ensure that such enabling provisions are in place in 2017.

2. OBJECTS OF BILL

- 2.1 The objects of the Bill are to—
 - (a) make provision for extended timeframes within which kingship or queenship councils and traditional councils must be established;
 - (b) provide for extended timeframes within which community authorities have to be disestablished; and
 - (c) align the term of office of tribal authorities, traditional councils and kingship and queenship councils with the term of the NHTL.

3. CLAUSE BY CLAUSE ANALYSIS

- 3.1 Clause 1 of the Bill proposes to amend section 3A(1) of the Act by extending the period within which a recognised kingship or queenship must establish a kingship or queenship council. The Act currently determines that a kingship or queenship council must be established within one year from the date of recognition of the kingship or queenship.
- 3.2 A number of kingships were recognised on 5 November 2010 (Government Notice 1027, Government Gazette 33732) following decisions by the then Commission on Traditional Leadership Disputes and Claims. Therefore their councils were supposed to be established by 4 November 2011. This was however not done. There is also a queenship that was recognised in May 2016 and the queenship council should therefore have been established by May 2017. To make provision for the establishment of these kingship and queenship councils, it is proposed to amend section 3A(1) of the Act by extending the period to two years from the date of commencement of this Amendment Bill.

- 3.3 The proposed amendments to section 3A(2)(c)(ii) and (d) intend to provide clarity on how the members of the 40% component of a kingship or queenship council must be elected. In terms of the proposed amendments, such members must be elected by the relevant traditional councils from amongst the elected component of such councils. It therefore seeks to ensure that the members who are to be part of the 40% component of a kingship or queenship council, are also persons who were democratically elected by the relevant traditional communities to serve as members of the traditional councils. Furthermore, the proposed amendments address a technical error. The current section 3A(2)(d) has a cross-reference to paragraph “(d)(ii)” of the principal Act; there is no such paragraph and the cross-reference is corrected to refer to paragraph “(c)(ii)”.
- 3.4 The proposed amendments to section 3B of the Act are similar in content to the amendments discussed under paragraph 3.3 above. The only difference is that in this instance, the amendments deal with the composition of principal traditional councils.
- 3.5 Clause 3 seeks to amend section 28(4) and (5) of the Act in order to address the challenges discussed under paragraphs 1.2 to 1.10 above. Clause 3(a) of this Bill amends section 28(4) of the Act by extending the timeframe within which tribal authorities must be reconstituted as traditional councils. The clause also makes provision for instances where reconstitution did take place but did not meet all the statutory requirements. Provision is also made for instances where provinces have not issued a formula. In such cases, the guidelines that were issued by the Minister in terms of section 3 of the Act will be regarded as being the formula. The clause furthermore authorises the Minister to take the necessary steps to reconstitute tribal authorities and traditional councils in instances where the new timeframe is not met. The clause also provides for the alignment of the terms of office of reconstituted tribal authorities and traditional councils with the term of office of the NHTL.
- 3.6 Clause 3(b) of the Bill seeks to extend the timeframe within which community authorities had to be disestablished. The Act determines that such disestablishment had to be done in terms of provincial legislation and within five years from the commencement of the Act, thus by no later than 23 September 2009. Unfortunately, very few provinces made provision for this in their legislation. Clause 3(b) therefore also proposes an alternative instrument that can be used in the absence of provincial legislative provisions.
- 3.7 Clause 3(c) is a consequential provision and seeks to ensure that the terms of office of the kingship and queenship councils are aligned with the term of office of the NHTL.
- 3.8 Clause 4 contains the short title of the Bill.

4. FINANCIAL IMPLICATIONS FOR STATE

Traditional councils consist of a 60% selected and a 40% elected component. Provinces budget every five years for the election of the 40% components.

5. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 5.1 The proposed amendments to the Act as contained in this Bill relate to implementation challenges. The majority of provisions of the Act are implemented by the provincial departments responsible for traditional leadership. The DTA has therefore, on 8 July 2016, discussed these challenges with representatives of the said provincial departments and they indicated their support for the proposed amendments.
- 5.2 The Bill was also presented to representatives of the provinces during a meeting of the Traditional Affairs Technical and Governance Forum

(TATGOF) held on 19 and 20 May 2016 and again at a TATGOF meeting held on 25 and 26 August 2016.

- 5.3 The Bill was presented at a *Lekgotla* held by the National House of Traditional Leaders and representatives from the provincial houses of traditional leaders on 23 August 2016.

6. CONSTITUTIONAL IMPLICATIONS

None.

7. COMMUNICATION IMPLICATIONS

Once enacted, the provincial departments responsible for traditional leadership will inform all tribal authorities and traditional councils of the process to be followed in 2017 to ensure the proper and timeous reconstitution of the structures.

8. PARLIAMENTARY PROCEDURE

- 8.1 The State Law Advisers and the national Department of Traditional Affairs are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 76(1) or (2) of the Constitution, since it deals with “traditional leadership” which is listed in Schedule 4 to the Constitution.
- 8.2 The State Law Advisers are of the opinion that it is necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains provisions pertaining to customary law or customs of traditional communities.