



MINISTRY
COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
REPUBLIC OF SOUTH AFRICA

TRADITIONAL AND KHOI-SAN LEADERSHIP BILL

[B23-2015]

FREQUENTLY ASKED QUESTIONS



traditional affairs

Department:
Traditional Affairs
REPUBLIC OF SOUTH AFRICA

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Traditional and Khoi-San Leadership Bill [B23-2015]

Question	Response
<p>1. Why is there a need for a new Bill since there are existing traditional leadership laws?</p>	<p>(a) It is important to note that the principles contained in the existing traditional leadership legislation, namely the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) (hereinafter referred to as the Framework Act) and the National House of Traditional Leaders Act, 2009 (Act No. 22 of 2009) (hereinafter referred to as the National House Act), are retained in the Bill.</p> <p>(b) However, during the implementation of both the Framework Act and National House Act, various gaps have been identified. Although the Framework Act was amended in 2009, the amendments did not address all shortcomings; for example, there is still no provision in the Framework Act for the recognition of a headmanship. The Framework Act also does not deal with the apparent proliferation of headmanship across the country. Furthermore, there is no provision for investigations in cases of uncertainty as to whether the criteria for the recognition of traditional leadership positions have been complied with. In the case of the National House Act, there are insufficient provisions relating to accountability and reporting.</p> <p>(c) In an analysis of the Framework Act, it was found that in order to address all shortcomings, basically all clauses of the Framework Act would require amendments, many of which would actually have to be totally redrafted. This would result in complicated amendments and renumbering of clauses.</p> <p>(d) Furthermore, the existing legislation does not make provision for the Khoi-San. The recognition of Khoi-San leaders and communities can only be done by means of enabling legislation (also see paragraph 2 hereunder).</p> <p>(e) To avoid any fragmentation of legislation dealing with similar matters, it was decided to prepare a single piece of legislation dealing with all aspects relating to traditional communities, leadership and structures, as well as the Khoi-San. This approach will enhance the uniform manner in which matters relating to traditional and Khoi-San affairs are dealt with across the country and will also address the limitations and other problems that have been identified in the existing legislation.</p>
<p>2. Why is legislation required for the recognition of the Khoi-San?</p>	<p>(a) Traditional communities and leaders have enjoyed statutory recognition, even prior to 1994. The Framework Act continues to make provision for such statutory recognition. The recognition of traditional communities and leaders are subject to specific criteria contained in the Framework Act. This is necessary to ensure that only legitimate traditional communities and leaders are recognised.</p> <p>(b) The Framework Act however does not make provision for the recognition of Khoi-San communities and leaders.</p> <p>(c) Therefore, to ensure that only legitimate Khoi-San communities and leaders are recognised as is the case with traditional communities and leaders, a statutory recognition process is provided for in the Bill. For this purpose, specific criteria have been developed based on the customs and customary law applicable to the Khoi-San.</p> <p>(d) The Bill however also makes provision for the integration of recognised Khoi-San leaders into existing houses of traditional leaders and they will therefore not have separate structures of this nature.</p>

<p>3. Why was the name (short title) of the Bill changed (compared to the short title of the 2013 version as published in the Government Gazette)?</p>	<p>(a) The Bill has had numerous short titles and was published in the Gazette in 2013 as the “Traditional Affairs Bill”. Prior to the publication of the Bill, the 2011 consultation version was known as the National Traditional Affairs Bill.</p> <p>(b) During the consultations on the Bill, various commentators expressed the view that the previous short titles did not reflect the content of the Bill, especially since the Bill does not only deal with traditional leadership matters, but also with the recognition of Khoi-San communities and leaders. The short title was therefore amended to “Traditional and Khoi-San Leadership Bill”.</p>
<p>4. Does the Bill address the claim of first nation status by certain Khoi and San communities?</p>	<p>(a) First nation status (as well as indigenous matters) are Constitutional matters and can therefore only be dealt with in the Constitution.</p> <p>(i) The Department of Traditional Affairs and the Department of Justice and Constitutional Development jointly developed the “South African Position Paper on Indigeneity and First Nation Status” and came to the conclusion that there are no indigenous people in South Africa as contemplated in the International Labour Organisation (ILO) Convention and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). South Africa’s point of departure is the principle of non-discrimination and equality before the law. The South African government subscribes to the principle of inclusiveness in its dealings with its citizens and permanent residents including the Khoi-San. To this end, the post-apartheid South Africa will not create a hierarchy of rights amongst its communities as occurred during the colonial and apartheid regimes.</p> <p>(ii) The former Department of Provincial and Local Government in the “Discussion Document on Khoi-San Governance Issues, 2007”, based on research conducted by the said Department, concluded that “within the South African context, there is no evidence that the Khoi-San communities had settled in parts of what later became the geographical area of 1910 South Africa before the settlement of other indigenous communities. It has to be concluded that it cannot be said that the South African ‘vulnerable’ indigenous communities should be accorded first nation status.”</p> <p>(iii) Furthermore, the African Commission undertook a research study in 2007 and came to the conclusion that in Africa, there were no people who qualified to be accorded the first nation status or exclusive indigenous status. In the South African context, the only outstanding issue regarding the Khoi-San people is their recognition which is now addressed in the Bill.</p> <p>(b) The recognition provisions contained in the Bill do not elevate the Khoi-San communities and leaders to a higher status than traditional communities and leaders, nor does it grant any special status (such as first nation status) to them. In terms of the Bill, the recognised Khoi-San leaders will, in respect of their recognised communities, perform the same kind of functions as recognised senior traditional leaders in respect of traditional communities.</p> <p><i>See clause 1(5) of the Bill.</i></p>
<p>5. How does the Bill promote constitutional principles?</p>	<p>(a) Clause 2 of the Bill prescribes that traditional and Khoi-San communities must transform and adapt customary law and customs so as to comply with the relevant principles contained in the Bill of Rights in the Constitution.</p> <p>(b) The coming into operation of the Framework Act and provincial legislation concluded a significant phase of a long-term process to find accommodation for traditional leadership within the present system of democratic governance. Traditional leadership is now in a position to uplift the standards of living of their people by, for example, participating in municipal councils in terms of section 81 of the Municipal Structures Act.</p>

	<p>(c) To be accepted as a partner in the new democratic dispensation required the transformation of the composition of traditional councils. The legislation transformed the composition of councils to provide for elements of democracy (40% members to be elected) and gender representation (at least one third of members to be women).</p> <p><i>See clause 2 of the Bill in respect of the constitutional principles. See clauses 16(2)(b), 17(3)(a), 28(3) and 49(2)(a) of the Bill in respect of female representation on structures. This requirement also applies to Khoi-San councils through clause 18(5) and section 81 representatives through the proposed amendments to section 81 as contained in schedule 3 to the Bill.</i></p>
<p>6. What are the roles of traditional leaders in the democratic South Africa?</p>	<p>(a) There is sometimes a perception that traditional leaders and their structures (such as traditional councils) form another sphere of government. Section 40(1) of the Constitution, 1996 clearly states that “<i>In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.</i>” There is no other or additional sphere of government.</p> <p>(b) It is furthermore clear from the Constitution that the three spheres of government are vested with executive and legislative powers. These powers separate government from other institutions, bodies or structures. Traditional leaders and their structures do not have such powers, not in terms of the Constitution or any other law.</p> <p>(c) Section 20 of the Framework Act determines that the national government or a provincial government may, through legislative or other measures, provide a <i>role</i> for traditional councils or traditional leaders in respect of certain functional areas. The section does not allow such governments to assign executive or legislative powers to traditional leaders or their structures.</p> <p>(d) The Bill also makes provision for the allocation of roles to recognised leaders and established councils, and states clearly that such roles may not include any decision-making powers. The Bill furthermore requires of any department that allocates such roles to monitor the execution of such roles.</p> <p>(e) The functions and roles of traditional leaders and councils as contained in the Framework Act and the Bill are of an advisory, facilitative, supportive and participatory nature. Such leaders and their structures will therefore contribute towards social cohesion.</p> <p>(f) The Afro-barometer study (2009) confirmed that traditional leaders still have an important role to play, especially in respect of the development of their communities. The functions of councils as contained in the Bill are mostly aimed at contributing towards the development of communities.</p> <p><i>See clause 25 of the Bill in respect of the allocation of roles. See clauses 19 and 20 of the Bill in respect of the functions of councils.</i></p>
<p>7. What kind of partnerships and agreements may traditional and Khoi-San councils enter into?</p>	<p>(a) The Bill is not providing a list of such partnerships and agreements. However, it states clearly that any partnership or agreement must be beneficial to the community.</p> <p>(b) Furthermore, to ensure that a partnership or agreement is indeed in favour of the community, the Bill requires of Premiers to ratify such partnerships and agreements before they can take any effect.</p> <p>(c) It was however realised that certain partnerships or agreements may be entered into in accordance with the provisions of other laws. Such partnerships and agreements are therefore excluded from the ratification requirement.</p> <p><i>See section 5 of the Framework Act and clause 24 of the Bill.</i></p>

<p>8. Who determines the salaries of recognised leaders?</p>	<p>(a) The Independent Commission on the Remuneration of Public Office Bearers (Remuneration Commission) has the responsibility to make recommendations in respect of the salaries, allowances and benefits of recognised leaders. Once such recommendations are made, the President has the authority to make a determination in this regard.</p> <p>(b) The Remuneration Commission may also make recommendations in respect of resources (tools of trade), but in this instance the law does not require a determination to be made. The recommendations therefore serve as a guide. To ensure uniformity in this regard, the Bill determines that the Minister may make a determination on resources based on the recommendations of the Remuneration Commission.</p> <p>(c) To ensure that the Remuneration Commission may also make recommendations in respect of the proposed Khoi-San leadership positions, the Bill intends to amend the relevant laws in terms of which the Commission operates, to include the new leadership positions.</p> <p><i>See the proposed amendments to the laws relating to public office bearers as contained in Schedule 3 to the Bill.</i></p>
<p>9. Can the existing Commission on Traditional Leadership Disputes and Claims (CTLDC) deal with applications for the recognition of Khoi-San communities and leaders, instead of the proposed Advisory Committee on Khoi-San Matters?</p>	<p>(a) The previous Commission on Traditional Leadership Disputes and Claims (which was known as the Nhlapo Commission) was appointed in 2004 to investigate disputes and claims lodged by traditional leaders. This Commission prioritised the claims relating to paramountcies and by the end of their term of office, finalised only 18 claims.</p> <p>(b) To deal with the outstanding disputes and claims that were lodged with the Nhlapo Commission, the Commission on Traditional Leadership Disputes and Claims (CTLDC) was established in terms of the Framework Act. The CTLDC is therefore the successor-in-law of the Nhlapo Commission. The Framework Act also allows for new disputes and claims to be lodged with the CTLDC, but on condition that such disputes and claims must have arisen since 1 September 1927. Furthermore, the Framework Act determines a cut-off date by which disputes and claims had to be lodged with the CTLDC (1 August 2010), and also determines that the CTLDC has to finalise all disputes and claims within 5 years. A total of 1 234 disputes and claims were referred to the CTLDC. The term of office of the CTLDC therefore comes to an end on 31 December 2015. The extension of the term of office is currently being considered in order to enable the CTLDC to finalise the more than 300 disputes and claims that will not be finalised by the end of December 2015.</p> <p>(c) The mandates of the Nhlapo Commission and the CTLDC did not include applications for recognition by Khoi-San communities and leaders.</p> <p>(d) In terms of the Framework Act, the members of the CTLDC must be knowledgeable regarding customary law, customs and the institution of traditional leadership. It is not a requirement that such members must have knowledge or expertise of Khoi-San customary law and customs. For the purposes of investigating and considering applications for recognition to be lodged by Khoi-San communities and leaders, it would be advisable that the members of the body which is to conduct such investigations should have knowledge and expertise in respect of Khoi-San customary law and customs. The Bill therefore proposes the establishment of an Advisory Committee on Khoi-San Matters. The Bill also provides for a specific period within which applications for recognition may be lodged by Khoi-San communities and leaders, as well as for the proposed Advisory Committee to deal with such applications within a period of three years.</p> <p><i>See clauses 52(1)(a) and 60(1)(b) of the Bill.</i></p>

<p>10. Does the Bill reinstate traditional community boundaries that existed prior to 1994?</p>	<p>(a) From a technical perspective it is important to note that the Bill does not refer to boundaries, but areas of jurisdiction. The area of jurisdiction is not a new concept and was already provided for in the Framework Act. The term “boundaries” is usually associated with municipal boundaries which are determined by the Municipal Demarcation Board. A municipal boundary provides the relevant municipality with executive and legislative powers within the particular area. The area of jurisdiction of a traditional council is not determined by the Demarcation Board and does not entrust any executive or legislative powers on the traditional council. In fact, the area of jurisdiction of a traditional council may even straddle over more than one municipal area.</p> <p>(b) Boundaries of countries for example are a result of historical events. In many instances the areas of jurisdiction of traditional councils are also a result of historical events. Each and every country is shaped by its history.</p> <p>(c) In pre-colonial Southern Africa, traditional and Khoi-San settlements in specific geographical areas were influenced by:</p> <ul style="list-style-type: none"> • The availability of water and other resources; • mining activities and trade; • pastoral and grazing land; • hunting, gathering and harvesting from the available natural local resources; • wars and disputes between and amongst communities, as well as outside communities and foreigners. <p>(d) The settlement or movement away from a geographical area did not automatically imply the establishment or relinquishing of such area of jurisdiction. Sociological and geographic allegiances were observed and adhered to by traditional and Khoi-San communities. These were often social and strategic relationships and agreements between local communities. The modern-day proclamation of areas of jurisdiction (fixture of set areas) actually goes against traditional settlement, land tenure and land usage patterns.</p> <p>(e) The issue of “boundaries” in Africa started in earnest during the 18th century when the European imperialists invaded Africa, led by King Leopold II of Belgium in pursuit of his dream to own a colony in Africa. He apparently was one of Europe’s richest men.</p> <p>(f) In order to understand the issues of boundaries it is important to reflect on the life of David Livingstone. Livingstone was a pioneer who explored the African continent and discovered the unimaginable wealth of “virgin” Africa with its unexplored natural resources. In his book titled <i>Scramble for Africa</i>, Parkenham (1991) maintains that Livingstone has spent much of his life exploring Africa. He was conceived as a missionary and philanthropist. He discovered a number of lakes in Africa. Twenty years of tramping across Africa had made Livingstone the best-known explorer at the time. His strategy to conquer the people of Africa was based on the 4 Cs:</p> <ul style="list-style-type: none"> • Commerce • Christianity • Civilization • Conquest. <p>(g) At first, European expeditions were too weak to challenge African rulers. It was initially safer to use blank treaty forms, which were explained to locals by empire minded missionaries, rather than to use ammunition. But paper imperialism soon proved inadequate. When effective occupation became necessary, conflict became inevitable. Livingstone died in May 1873. Before he died, he delivered an address at Cambridge University in December 1857, appealing and challenging his countrymen stating that:</p> <p style="padding-left: 40px;">“I beg to direct my attention to Africa; I know that in a few years I shall be cut off in that country, which is now open: Do not let it be shut again! I go back to Africa to try and make an open path for commerce and Christianity; do you carry out the work, which I have begun? I leave it with you!”</p> <p>He wanted to hand the baton to his fellow explorers to take the project forward. The Scramble gave Europe virtually the whole continent: including thirty new colonies and</p>
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	<p>protectorates. 10 million square miles of new territory and 110 million dazed new subjects, acquired by one method or another.</p> <p>Parkenham claims that “Africa was sliced up like a cake, the pieces swallowed by five rival nations - Germany, Italy, Portugal, France and Britain (with Spain taking some scraps)”. The partition of Africa commenced in 1893. Africa was described by Europeans as a country of “unspeakable richness waiting for an enterprising capitalist”.</p> <p>(h) In September 1876, King Leopold II convened a game changing Conference on Africa. This Conference reshaped and framed the history of the continent of Africa. A dozen celebrated explorers began to arrive in Brussels for what was to be the first geographical conference. The Conference opened on 12 September 1876. The Conference resolved that they should establish a structure called the “International African Association” under the stewardship of King Leopold II. It was also resolved that a government body called the “International Commission” should be established.</p> <p>(i) In 1951, the Black Authorities Act was promulgated to advance the apartheid ideology of dividing black people on a tribal basis and to use traditional leaders to advance indirect rule in designated areas. The following structures were established with both executive and legislative authority vested on traditional leadership:</p> <ul style="list-style-type: none"> • Territorial Authority • Regional Authority, and • Tribal Authority. <p>(j) In the 1960s, few African States became independent. In response to the demarcation distortions by the colonial forces, the Assembly of Heads of State and Government in its First Ordinary Session in Cairo from 17 to 21 July 1964, took the following resolutions to promote unity, peace and stability [resolution 16(1)]:</p> <ul style="list-style-type: none"> • Considering that border problems constitute a grave and permanent factor of dissention; • conscious of the existence of extra African maneuvers aimed at dividing African States; • considering further that the borders of African States, on the day of their independence constitute a tangible reality, • and most importantly, solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence. <p>(k) Furthermore, it should also be noted that the institution of traditional leadership was not created by the apartheid government. The institution has existed for centuries. It is however true that the apartheid government introduced certain laws in an attempt to formalize the institution.</p> <p>(l) It is not correct that all traditional leaders have areas of jurisdiction which are linked to a specific geographical area. There are in fact landless traditional leaders with communities who have lost their land through forced removals by the apartheid government; they therefore do not have a defined area of jurisdiction. Government is addressing these challenges through the land restitution and redistribution programmes.</p>
<p>11. Does the Code of Conduct apply to all traditional leaders?</p>	<p>(a) In terms of the definitions contained in the code of conduct it applies to all members of the National House, provincial houses and local houses of traditional and Khoi-San leaders, as well as all members of kingship or queenship councils, principal traditional councils, traditional councils, traditional sub-councils, Khoi-San councils and branches. It is therefore applicable to all recognised leaders.</p> <p>(b) The code of conduct provided for in the Bill is very comprehensive compared to the two-clause code of conduct in the existing Framework Act.</p> <p><i>See Schedule 1 to the Bill.</i></p>

<p>12. Does the Bill improve accountability of traditional leaders?</p>	<p>(a) At national level, the Bill makes provision for the National House of Traditional and Khoi-San Leaders to prepare a strategic plan, an annual performance plan and an annual report. This is to enhance the accountability of the House.</p> <p>(b) Although the existing National House Act requires of the House to prepare a report, the provisions are very vague and do not indicate what the content of the report should be; it is not even referred to as an “annual” report. The provisions that have been included in the Bill are aimed at providing clarity on what the report has to include and therefore should make it easier for the National House to prepare the report.</p> <p>(c) Once the Bill is enacted, the relevant provincial laws will have to be aligned with the new law to ensure similar accountability of the provincial and local houses.</p> <p><i>See clauses 38(1) and 43 of the Bill.</i></p>
<p>13. Why must traditional councils be reconstituted?</p>	<p>(a) Section 28(4) of the Framework Act determines that a tribal authority shall be deemed to be a traditional council. However, with the amendment of section 28(4) in 2009, it was required of such tribal authorities to comply with the provisions of section 3(2) of the Framework Act within 7 years from the commencement of the Act (thus by no later than 23 September 2011). In other words, the tribal authorities had to be reconstituted in line with the new legislative provisions. The amendment to section 3(2) of the Framework Act introduced the following new principles:</p> <ul style="list-style-type: none"> (i) The Premier of a province has to issue a formula in respect of the number of members of such councils (previously it was a fixed number). (ii) The Minister has to issue guidelines in this regard which guidelines must be taken into account by Premiers before issuing the formula. (iii) The councils have to consist of a selected and elected component, therefore introducing community participation through the election of members. <p>(b) Therefore, the conversion of a tribal authority into a traditional council was not automatic but subject to compliance with the provisions of section 3(2) of the Framework Act.</p> <p>(c) Although guidelines were issued in 2011, it was later realised that the guidelines had certain shortcomings. It would therefore be difficult for some provinces to issue the required formula. New guidelines were issued in July 2015.</p> <p>(d) The provinces have enacted traditional leadership legislation which also makes provision for the establishment of traditional councils. Most of the provincial laws were promulgated prior to the 2009 amendments to the Framework Act and are therefore not aligned to the amended version of the Framework Act.</p> <p>(e) The challenges with the reconstitution of the tribal authorities/traditional councils are acknowledged and it is the intention of the Bill to provide a final opportunity for the reconstitution.</p> <p><i>See clause 70(4) of the Bill.</i></p>
<p>14. How will the Bill ensure that structures such as houses of traditional leaders and traditional councils are constituted or reconstituted in line with the provisions of the Bill?</p>	<p>(a) As far as houses of traditional leaders are concerned, it should be noted that it is not compulsory to establish such houses. Section 212 of the Constitution determines that national or provincial legislation “may” provide for such houses.</p> <p>(b) In the case of traditional councils (which are compulsory), it is acknowledged that not all traditional councils have been reconstituted in line with the provisions of the Framework Act. The reasons for this vary from administrative to financial challenges. The Bill therefore determines that provinces have to reconstitute the traditional councils within one year from the commencement of the new law. If this requirement is not met, the national Minister may take the necessary steps to ensure such reconstitution. The existing legislation does not provide the national Minister with any authority in this regard.</p>

	<p>(c) Also, it is acknowledged that the requirement that at least one-third of the members of traditional structures should be women, may not have been met in all instances. To establish what the reasons for such non-compliance may be, the Bill, in clause 38(3), requires of the National House to investigate the reasons for such non-compliance and to make recommendations on how the required number could be reached.</p> <p><i>See clause 70(4), (5) and (6) of the Bill.</i></p>
<p>15. Why is the Advisory Committee on Khoi-San Matters not a Commission?</p>	<p>(a) The Advisory Committee on Khoi-San Matters as provided for in the Bill will assist government with the recognition process in respect of Khoi-San communities and leaders. The Advisory Committee will be tasked to investigate all applications for recognition and to make recommendations to the Minister in this regard. It will therefore be a specialised body with a unique function.</p> <p>(b) The existing Framework Act does not make provision for the recognition of the Khoi-San. It only deals with traditional leadership. For the purposes of traditional leadership claims, the Framework Act already makes provision for a Commission (the CTLDC) and this Commission is also included in the Bill. If the Advisory Committee on Khoi-San Matters is also to be known as a Commission, it could become quite confusing.</p> <p>(c) One of the differences between the CTLDC and the proposed Advisory Committee is that the CTLDC consists of persons who are knowledgeable of customary law, customs and the institution of traditional leadership, while the Advisory Committee will consist of persons who have qualifications or experience in or knowledge appropriate to anthropology, the history relating to the Khoi-San, and the customary law, customs and the institution of Khoi-San leadership. The CTLDC's term of office will soon come to an end, while the Advisory Committee will only be established once the Bill is enacted. Furthermore, provision is made for public participation with the appointment of members of the Advisory Committee (the public will be invited to nominate persons to be considered as members); there is no such requirement in respect of the appointment of the members of the CTLDC.</p> <p>(d) What is of importance, is the responsibilities and functions of a specific structure. Changing the name of the structure will not change the responsibilities and functions.</p> <p><i>See clauses 52 and 60 of the Bill.</i></p>
<p>16. Does the Bill address the alleged proliferation of headmen?</p>	<p>(a) Following the implementation of the Framework Act and subsequent provincial legislation, it has been alleged that there is a proliferation of the recognition of new headmen positions.</p> <p>(b) Although the Framework Act makes provision in section 11 for the recognition of headmen/headwomen, there is no provision for the establishment or recognition of the entity namely a headmanship/headwomanship. Another shortcoming of the Framework Act is that it does not contain specific criteria for the recognition of a headman/headwoman. A brief analysis has shown that most provincial laws dealing with traditional leadership have similar shortcomings. In the absence of such criteria, the validity of any "recognition" of headmen and headwomen in the past few years is uncertain. These shortcomings of the Framework Act are addressed in the Bill.</p> <p>(c) To address the proliferation challenge as such, the transitional provisions of the Bill makes provision for investigations to be conducted in order to establish whether headmenships and headwomenships that have been established do in fact meet the criteria for recognition. If not, then such entities will continue to exist until the death of the incumbent headman or headwoman whereupon the entity and the leadership position shall automatically be abolished.</p> <p>(d) The Bill proposes that these investigations be concluded within three years from the date of commencement of the Bill.</p> <p><i>See clause 70(1)(c) of the Bill.</i></p>

<p>17. Is there a difference between the criteria for recognition of traditional communities and Khoi-San communities?</p>	<p>(a) There are similarities between the criteria.</p> <p>(b) One of the differences between the criteria is that a traditional community occupies a specific defined geographical area while in the case of Khoi-San communities, there will not be a defined geographical area.</p> <p>(c) Another difference is of course the application of different customary laws and customs.</p> <p><i>See clauses 3(4), 5(1)(a) and 7(2) of the Bill.</i></p>
<p>18. Do the provisions of the Bill dealing with kingships also apply to the Khoi-San?</p>	<p>(a) No, the clauses of the Bill that deals with kingships and queenships are applicable to traditional communities.</p> <p>(b) It should be noted that the original Framework Act of 2003 did not make provision for kingships and queenships, and therefore also not for kings and queens. The relevant clauses of the Framework Act were only inserted in 2009 after research was conducted and evidence was found by the Nhlapo-Commission that there are indeed kingships amongst the traditional communities.</p> <p>(c) At this stage, no evidence has been provided that would conclusively prove that there were or are Khoi-San kingships.</p>
<p>19. Will the Khoi-San communities have their own structures, including houses?</p>	<p>(a) The Bill makes provision for the establishment of Khoi-San councils for each recognised Khoi-San community. These structures are similar to the traditional councils that are established for recognised traditional communities.</p> <p>(b) As far as houses are concerned, the Bill determines that recognised Khoi-San leaders may become members of the existing houses of traditional leaders at national, provincial and local level. Such houses will in future be known as houses of Traditional and Khoi-San Leaders. The Bill therefore proposes the integration of recognised Khoi-San leaders into the existing houses of traditional leaders to enable both the traditional and Khoi-San members of the houses to jointly promote the interests of their respective communities.</p> <p><i>See clauses 16 and 18 of the Bill in respect of councils; and clauses 28(1)(a), 49(2)(c) and 50(2) and (3) of the Bill in respect of houses.</i></p>
<p>20. How will recognised leaders participate in municipal affairs?</p>	<p>(a) Currently, section 81 of the Municipal Structures Act provides for traditional leaders to be identified for participation in the proceedings of a municipal council. The section also determines that regulations may be issued in respect of the roles of such identified traditional leaders. There is, however, no such regulations which determines norms and standards in this regard.</p> <p>(b) The Bill intends to amend section 81 in order to streamline the identification process and to set norms and standards in respect of their participation in the proceedings of a municipal council and their roles in this regard.</p> <p><i>See the proposed amendments to section 81 of the Municipal Structures Act as contained in Schedule 3 to the Bill.</i></p>
<p>21. What will be the role of the DTA in the implementation of the Bill once enacted?</p>	<p>(a) The Bill assigns the overall responsibility for the monitoring of the implementation of the new law to the national Department of Traditional Affairs. This also includes the monitoring of the implementation of section 81 of the Municipal Structures Act once amended as proposed in the Bill.</p> <p>(b) The DTA will of course also assist provinces to align their traditional leadership legislation with the new law.</p> <p><i>See clause 69 of the Bill.</i></p>

<p>22. What will happen in instances where a traditional or Khoi-San council is not performing?</p>	<p>(a) In cases where it would seem that a traditional or Khoi-San council cannot or does not fulfil its statutory or customary obligations, the Bill makes provision for the relevant Premier to appoint a suitable person to assist the council or to assume responsibility for the obligations of the council.</p> <p><i>See clause 22 of the Bill.</i></p>
<p>23. How are local houses to be constituted?</p>	<p>(a) Local houses are to be established for the areas of jurisdiction of local, district or metropolitan municipalities (currently it is for district and metropolitan municipalities). Provinces will have a discretion in this regard to determine which option would be most suitable in a particular instance.</p> <p>(b) Different permutations are provided for in respect of the composition of the local houses to ensure appropriate representation which will be based on the unique circumstances of each municipal area (it is therefore not a one-size-fits-all approach).</p> <p>(c) The clauses dealing with local houses are linked to the proposed amendments to section 81 of the Municipal Structures Act. In terms of the current section 81, the number of traditional leaders who may participate in municipal councils may not be more than 20% of the number of municipal councillors. This means for example, that in the case of 100 councillors, the number of traditional leaders who may participate may be as many as 20. However, in terms of the amendments contained in the Bill the future participation of traditional leaders in municipal councils will be limited to the chairperson of the relevant local house and two other members chosen by the members of the local house from amongst themselves. The proposed amendments to section 81 will therefore not only provide a national norm, but will also result in cost saving in many instances, especially in the case of large municipal councils. Provision is also made for instances where there are no local houses.</p> <p><i>See clause 50 of the Bill.</i></p>
<p>24. What are the financial implications in respect of the implementation of the Bill?</p>	<p>(a) The expected financial implications are addressed in the Memorandum on the Objects of the Bill.</p> <p>(b) Additional financial implications will be related to the recognition of Khoi-San communities and leaders. Such communities (or rather the councils established for such communities) will have to be assisted in a similar manner as the traditional councils. The recognised Khoi-San leaders will be remunerated based on a recommendation to be made by the Independent Commission on the Remuneration of Public Office Bearers.</p> <p>(c) It is not possible to predict with any degree of accuracy how many Khoi-San communities and leaders will apply for recognition and how many of such applications will eventually be recognised.</p>
<p>25. Does the 60/40% split between selected and elected members of traditional councils also apply to other councils?</p>	<p>(a) Yes, it applies to all councils, thus including the kingship/queenship councils, principal traditional councils and Khoi-San councils.</p> <p>(b) This requirement therefore ensures uniformity in the composition of the different councils.</p> <p><i>See clauses 16(2)(c), 17(3)(b) and 18(2)(b) of the Bill.</i></p>

<p>26. Who exactly are principal traditional leaders?</p>	<p>(a) Principal traditional leaders are a unique category of leadership positions which was created by law to cater for those paramountcies who were found not to meet the criteria of kingships, but they were at the same time found to be of a higher status than senior traditional leaders.</p> <p>(b) Only 5 of the previously recognised kingships will become principal traditional leaderships once the current incumbent kings pass away (it will thus happen by operation of law and is not a position for which anyone can apply).</p> <p><i>See the definitions of “principal traditional community” and “principal traditional leader” in clause 1 of the Bill, as well as clauses 70(7), (8) and (9).</i></p>
<p>27. Who will deal with traditional leadership disputes and claims once the term of the CTLDC comes to an end?</p>	<p>(a) It should be noted that the CTLDC may only deal with disputes and claims lodged with it before 1 August 2010. Any disputes and claims that were not lodged with the CTLDC before the cut-off date, must (in terms of the Framework Act) be dealt with by provinces in accordance with provincial legislation.</p> <p>(b) The Bill has a similar but improved provision and provides for a procedure to be followed by provinces when dealing with such disputes and claims.</p> <p>(c) It should be noted that these provisions of the Bill will also apply to certain Khoi-San cases.</p> <p><i>See section 25(5) and (9) of the Framework Act. See clause 56(8) of the Bill.</i></p>
<p>28. Does the Bill provide better control over the finances of traditional councils?</p>	<p>(a) It is acknowledged that existing legislation does not have adequate provisions regulating the financial accounts of traditional councils.</p> <p>(b) The Bill therefore makes provision for councils to open bank accounts and stipulates which kind of moneys may be paid into such accounts, as well as the purposes for which such moneys may be used. Provision is also made for existing bank accounts to be closed (including certain trust accounts). The Bill therefore makes provision for more effective control mechanisms with regards to the finances of councils.</p> <p><i>See clause 23(3) of the Bill.</i></p>
<p>29. Does the Bill impose identities?</p>	<p>(a) This question must be read with the question about boundaries as discussed under item 10 above.</p> <p>(b) Terminology such as tribes, tribal authorities, chiefs and paramount chiefs were some of the terms used by the apartheid government to refer to the structures and positions of the institution of traditional leadership. Each nation/traditional community/clan or ethnic group had its own terms used to refer to its structures and positions in their own languages which are still used even today. The current national framework legislation on traditional leadership uses the English terms and concepts which differ from those used by the apartheid government for uniformity purposes while most of the provincial legislation refers to the terms used by the provincial traditional communities in their own languages.</p> <p>(c) The Bill, in clause 1(2), states that nothing prevents any community from addressing their leaders by their customary designations.</p> <p>(d) Lastly, section 30 of the Constitution states that the right of persons to participate in any cultural life may not be inconsistent with the Bill of Rights. The Bill does not enforce any culture.</p>
<p>30. Does the Bill re-entrench tribalism and divided citizenship?</p>	<p>(a) The policy positions and legislative provisions by government are based on the majority rule since government operates on the basis of the principles of constitutional democracy. Claims that existing laws and the Bill re-entrench tribalism and divide citizenship are unfounded because people who reside in traditional communities do so</p>

	<p>by choice, knowing fully how the system of traditional leadership operates. Many of these community members leave the areas to work in urban areas but return upon retirement to reside within their traditional communities.</p> <p>(b) Section 18 of the Constitution, 1996, states that everyone has a right to freedom of association while section 21 determines that everyone has the right to freedom of movement. There is no provision in the Bill which prohibits any person to leave a traditional council area, neither is there any provision that forces a person to stay in such an area or to associate himself or herself with the particular structure in the area.</p>
<p>31. Does the Bill stray from the Constitution's understanding of customary law?</p>	<p>(a) Any law in South Africa is subject to the Constitution. In terms of section 211 of the Constitution, customary law and customs are also subject to the Constitution.</p> <p>(b) Clause 2 of the Bill states that traditional and Khoi-San communities must transform and adapt customary law and customs so as to comply with the principles contained in the Bill of Rights, in particular by –</p> <ul style="list-style-type: none"> ▪ preventing unfair discrimination; ▪ promoting equality; and ▪ seeking to progressively advance gender representation in traditional and Khoi-San leadership positions. <p>(c) Certain clauses in the Bill emphasize the importance of clause 2 by cross-referencing to it – see clause 3(11) and 5(2) of the Bill.</p> <p>(d) There is no provision in the Bill that deliberately restrict the application of customary law. Section 212 of the Constitution authorizes national government to legislate on the roles of traditional leadership as in institution at local level on matters affecting local communities, as well as to legislate on houses of traditional leaders. The Bill is in line with section 212 of the Constitution.</p>