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**PBO No. 930003292**  
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Your Ref: NOTICE 471 OF 2015  
Our Ref: HS/SS/MW

22 June 2015

**Attention: Dr R A Bester**

Director-General: Department of Traditional Affairs  
Private Bag X804  
PRETORIA  
0001

Email: [RinaldiB@cogta.gov.za](mailto:RinaldiB@cogta.gov.za) and [TrishaR@cogta.gov.za](mailto:TrishaR@cogta.gov.za)

Dear Sir

**Department of Traditional Affairs: Invitation to comment on the Draft Policy on the Customary Practice of Initiation in South Africa**

Your call for submissions on the above draft policy published for comment to be received by today month has reference. We ask you to:

- 1 consider our submission on the above;
- 2 consider amending the wording of the draft policy, in particular relating to the status of living customary law;
- 3 allow the LRC to make oral submissions at any workshops on the draft policy.

The Legal Resources Centre is a non-profit public interest law firm. Much of the work of our organisation is devoted to representing poor rural communities. The submission is based on information and evidence provided by our client rural communities.

The memo below covers the following areas which motivate more fully the conceptual approach:

	The LRC and its interest	
	The constitution and the status of living customary law	
	Customary law and consent by parents	
	International treaty law: the African Charter	
	Specific proposals including proposals for amendments	

We look forward to hearing from you regarding our proposals and we request to further motivate such in any participatory workshops that your department may hold to promote debate on this important social issue.

Yours faithfully,

**LEGAL RESOURCES CENTRE**

**Per:**

[Signed]

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Shirhami Shirhinda  
With Wilmien Wicomb and Henk Smith



**SUBMISSION TO THE:**

**Director-General: Department of Traditional Affairs**

**Private Bag X804**

**PRETORIA**

**0001**

**(Attention: Dr R A Bester)**

**[RinaldiB@coqta.gov.za](mailto:RinaldiB@coqta.gov.za) and [TrishaR@coqta.gov.za](mailto:TrishaR@coqta.gov.za)**

**In re: Department of Traditional Affairs: Invitation to comment on the  
Draft Policy on the Customary Practice of Initiation in South Africa**

**The Legal Resources Centre**

22 June 2015

	The LRC and its interest	
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## 1. The LRC and its interest

1.1. The Legal Resources Centre (LRC) is an independent non-profit public interest law clinic which uses the law as an instrument of justice. It works for the development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social economic or historical circumstances. The LRC, both for itself and in its work, is committed to:

- 1.1.1. Ensuring that the principles, rights and responsibilities enshrined in the Constitution are respected, promoted, protected, and fulfilled;
- 1.1.2. Building respect for the rule of law and constitutional democracy;
- 1.1.3. Enabling the vulnerable and marginalised to assert and develop their rights;
- 1.1.4. Promoting gender and racial equality and opposing all forms of unfair discrimination;
- 1.1.5. Contributing to the development of a human rights jurisprudence; and
- 1.1.6. Contributing to the social and economic transformation of society.

1.2. The LRC has been in existence since 1979 and operates throughout the country from its offices in Johannesburg, Cape Town, Durban and Grahamstown.

1.3. The LRC represented and continues to represent citizens and communities in litigation involving:

- customary law and its status
- communal land and new development on communal land including mining
- environmental regulation and mining.

- 1.4. We appeared on behalf of clients in the Constitutional Court in the matters of *Bhe*,<sup>1</sup> *Richtersveld*,<sup>2</sup> *Shilubana*,<sup>3</sup> *Mayelane v Ngwenyama*,<sup>4</sup> *Pilane*<sup>5</sup> and *Sigcau*.<sup>6</sup> Our clients include the communities that successfully challenged the constitutionality of the Communal Land Rights Act of 2004.<sup>7</sup>
- 1.5. The LRC also represents a number of communities in court litigation and administrative representations concerning the impact of the Traditional Leadership and Governance Framework Act.

## 2. THE STATUS OF LIVING CUSTOMARY LAW UNDER THE CONSTITUTION

- 2.1. The Constitution recognizes living customary law as an independent source of law. In *Bhe*, Langa JP (as he then was) held:

*Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.*

- 2.2. The Court based this confirmation of the constitutional recognition of customary law on section 30, 31, 39(2) and 39(3) and 211 of the Constitution.
- 2.3. Section 211(3) particularly enjoins every Court to apply customary law where it is applicable.

<sup>1</sup> *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

<sup>2</sup> *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).

<sup>3</sup> *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).

<sup>4</sup> *Mayelane v Ngwenyama and Another* [2013] ZACC 14; 2013 (4) SA 415 (CC)

<sup>5</sup> *Pilane and Another v Pilane and Another* [2013] ZACC 3; 2013 (4) BCLR 431 (CC)

<sup>6</sup> *Sigcau v Presidnet of the Republic of South Africa and Others* (CCT 93/12) [2013] ZACC 18; 2013 (9) BCLR 1091 (CC)

<sup>7</sup> *Tongoane and Others v The Minister of Agriculture and Land Affairs and Others* CCT 100-09. The Legal Resources Centre, with Webber Wentzel attorneys, represented four communities Kalkfontein, Makuleke, Makgobistad and Dixie in a challenge on the constitutionality of the Communal Land Rights Act of 2004. The Act was declared unconstitutional by the Constitutional Court in May 2010. Prior to the institution of legal proceedings on the CLRA, the LRC and its clients made extensive written and oral representations to the department and to parliament on the problematic and unconstitutional aspects, both procedural and substantive, of the CLRA Bill and the status of living customary law under the constitution and decisionmaking in terms of customary law.

- 2.4. Apart from the clear position that customary law is subject to the Constitution, section 211 also provides that customary law must be applied subject to “any legislation that specifically deals with customary law”. The courts have not yet provided clarity on what legislation is referred to here, or what it means for customary law to be subject to such legislation. The Constitutional Court has, however, indicated on two occasions that the presence of statutory regulation of customary governance rules does not preclude the application of living customary law. The Court, in *Sigcau*,<sup>8</sup> distinguished pointedly between the ‘statutory’ and ‘customary’ resolution of a succession dispute. In *Pilane*,<sup>9</sup> the majority held that “statutory authority accorded to traditional leadership does not necessarily preclude or restrict the operation of customary leadership that has not been recognized by legislation”.
- 2.5. Once the status of customary law itself and vis a vis other sources of law have been established, it is necessary to understand how the content of customary law should be ascertained. This is important in particular because the Court has acknowledged on different occasions that the very approach to finding and applying customary law can distort it.
- 2.6. As a starting point, the Court has laid down the following principles pertaining to the nature of customary law:
- 2.6.1. Customary law is “a system of law that [...] has its own values and norms”;
  - 2.6.2. Customary law is the law as practiced by the community; and
  - 2.6.3. It “develops [through practice] to meet the changing needs of the community”.
- 2.7. Those customary law ‘rules’ must be ascertained, following *Shilubana*, by considering at least the following four factors:
- 2.7.1. The past practice and tradition of the community. This entails a historical enquiry.
  - 2.7.2. The contemporary practice of a particular community.

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<sup>8</sup> *Sigcau v President of the Republic of South Africa and Others* [2013] ZACC 18; 2013 (9) BCLR 1091 (CC)

<sup>9</sup> *Pilane and Another v Pilane and Another* [2013] ZACC 3; 2013 (4) BCLR 431 (CC)

- 2.7.3. The impact of the development of the customary law on the people who live it. This entails a balancing of the facilitation of the development of customary law with the value of legal certainty and respect for vested rights.
- 2.7.4. Finally, in finding the content of customary law, the Court is obliged to promote the spirit, purport and objects of the Bill of Rights.
- 2.8. In addition to these factors, the Court has warned against the distortions of customary law that were common under the colonial and apartheid regimes, but that could continue if we do not understand customary law within its own context and with sensitivity to the nature of the system.

### 3. INTERNATIONAL TREATY LAW: THE AFRICAN CHARTER

- 3.1. The African *Charter on Human and Peoples' Rights*, to which South Africa acceded to on 9 July 1996,<sup>10</sup> provides that “every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion”, etc.<sup>11</sup> It further provides in article 3 and 4 that individuals are equal before the law and that every human is entitled to respect for his life and integrity. This is also supported by the responsibility on the State to eliminate discrimination against and afford protection to women and children.<sup>12</sup> Article 17 deals with the right to education, and states specifically that “every individual may freely take part in cultural life of his community and that the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State”.
- 3.2. The African Charter on the Rights and Welfare of the Child provides a general background against which the rights of children must be considered. It states the obligations of the state parties in regards to

<sup>10</sup> This instrument is binding upon South Africa.

Section 231 of the Constitution states:

“231 International agreements

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, ...

<sup>11</sup> Article 2 of the African Charter on Human and Peoples' Rights.

<sup>12</sup> Article 18(3): “The State shall ensure the elimination of every discrimination against women and also censure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”

children and provides a definition of 'a child'.<sup>13</sup> In article 3 it contains a non-discrimination clause, which states that "every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status". The Charter places the best interest of the child at the centre of all decisions or actions concerning the child.<sup>14</sup> Specifically relevant to the current application is article 21, which provides for protection against harmful social and cultural practices. This article says that States must take measures to eliminate practices which affect the "welfare, dignity, normal growth and development of the child". The Charter focusses on practices which are prejudicial to the health or life of the child or discriminating based on sex.

- 3.3. The African Commission on Human and Peoples' Rights<sup>15</sup> has given a definitive interpretation of the socio-economic rights contained in the Charter (but for the notable exclusion of group rights).<sup>16</sup> This interpretation is binding upon the signatories to the Charter.<sup>17</sup> The Guidelines provided by the Commission provide useful definitions of "indigenous populations/communities",<sup>18</sup>

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<sup>13</sup> Article 1: Obligation of States Parties

2. Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.

3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

Article 2: Definition of a Child

For the purposes of this Charter, a child means every human being below the age of 18 years.

<sup>14</sup> Article 4 of the African Charter on the Rights and Welfare of the Child.

<sup>15</sup> The African Commission on Human and Peoples' Rights ("the African Commission") is the body enjoined to interpret the African Charter and ensure that states parties comply with their obligations. It is required to "formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations." It is also empowered to "Interpret all the provisions of the present Charter".

<sup>16</sup> Contained in the Principles and Guidelines on the Implementation of Socio-Economic Rights contained in the African Charter. See [www.achpr.org](http://www.achpr.org).

<sup>17</sup> The Principles and Guidelines emphasize that All rights recognised in the African Charter must be made effective under national legal systems

<sup>18</sup> Indigenous populations/communities are, for the purposes of these guidelines, any group of people whose culture and way of life and mode of production differ considerably from the dominant society, whose culture depends on access and rights to their traditional land and the natural resources thereon, and whose cultures are under threat. They suffer from discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society, which often prevents them from being able to genuinely participate in deciding on their own future and forms of development.

“prohibited grounds of discrimination”<sup>19</sup> and “vulnerable and disadvantaged groups”.<sup>20</sup> It furthermore outlines what is meant by discrimination and equality in terms of the Charter on Human and People’s Rights. According to the Guidelines discrimination is “any discrimination against individuals in their access to or enjoyment of economic, social and cultural rights on any of the prohibited grounds is a violation of the African Charter. Discrimination includes any conduct or omission which has the purpose or effect of nullifying or impairing the equal access to and enjoyment of economic, social and cultural rights.” Equality deals specifically with the “entrenched patterns of sex/gender discrimination” and states are urged to “abolish those customary and traditional rules and practices which are major obstacles to the equal enjoyment of rights by women and girls”.<sup>21</sup> The Charter also protects the right to culture, but the Guidelines provide that “the right to culture protects positive African values consistent with international human rights standards, and implies an obligation on the State to ensure the eradication of harmful traditional practices that negatively affect human rights”.<sup>22</sup> When the rights to equality and culture are read together, they provide an opportunity for women to participate in the cultural activities and decision making relating to cultural practices. Finally, regarding children, the Guidelines provide that while children must have the ability to participate in the cultural life of the community, harmful social and cultural practices should be eliminated.

#### 4. Consent by initiates and parents

4.1. Our specific proposals for wording below details the proposal, namely that:

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19 Prohibited grounds of discrimination include but are not limited to race, ethnic group, colour, sex, gender, sexual orientation, language, religion, political or any other opinion, national and social origin, economic status, birth, disability, age or other status.

20 Vulnerable and disadvantaged groups are people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights. Vulnerable and disadvantaged groups include, but are not limited to, women, linguistic, racial, religious minorities, children, etc. See the Guidelines for a more complete list.

21 Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.

22 Article 17.2: “Every individual may freely, take part in the cultural life of his community. 3. The promotion and protection of morals and traditional values recognised by the community shall be the duty of the State.” The right to take part in cultural life vests in the individual and should be protected as such by states parties. It is integral to the way of life of individuals and communities, including promotion and preservation of their culture, heritage and institutions. It refers not only to the enjoyment of cultural activities and access to materials but to participation, policy-making and artistic freedom.

- 4.1.1. consent and permission be given by any adult initiate;
  - 4.1.2. if the initiate is below the age of 18 then the consent of the parents are also required;
  - 4.1.3. consent for initiation is required separately from any consent to circumcision;
  - 4.1.4. consent for male circumcision for an initiate below the age of 18 must be accompanied with consent by the parents;
  - 4.1.5. consent must be free and informed, and must occur verbally in front of independent adult witnesses and confirmed in writing at the time i.e. contemporaneously.
- 4.2. The Children's Act 38 of 2005 is the most important piece of legislation regarding the rights of children. Most importantly, it provides in section 9 that "in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied". In the context of social, cultural and religious practices, this means that "every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being".<sup>23</sup> It also provides a minimum age limit for male circumcision and requires proper counselling and consent of a child over 16 years of age before circumcision can take place.<sup>24</sup>
- 4.3. There are also a number of provincial acts and local by-laws that deal with consent to participate in initiation. According to the Free State Initiation School Health Act 1 of 2004 consent of the parents is required where the initiate is under the age of 18 years.<sup>25</sup> This consent must be in writing. Initiates over the age of 18 years do not require parental consent, but they must themselves provide consent in writing.<sup>26</sup> Finally, it provides that "it is an offence to admit an initiate to an Initiation School without his or her expressed informed consent or the consent of a parent".<sup>27</sup> A further piece of legislation is the Mpumalanga Ingoma Act 3 of 2011. This act provides that a person under 16 years of age may not attend an ingoma as a umkhethwa, and all minors require parental consent in the prescribed format to attend the ingoma.<sup>28</sup> "Any person who holds an

<sup>23</sup> Children's Act 38 of 2005 section 12(1).

<sup>24</sup> Section 12(8) & (9).

<sup>25</sup> Free State Initiation School Health Act 1 of 2004 section 3(1).

<sup>26</sup> Section 3(3).

<sup>27</sup> Section 4(3).

<sup>28</sup> Mpumalanga Ingoma Act 3 of 2011 section 5(1).

Ingoma, must at all reasonable times for the duration of an Ingoma have the consent forms completed in terms of subsection (1), pertaining to the abakhethwa attending an Ingoma, available for inspection.”<sup>29</sup> The Sedibeng District Initiation Schools Draft By-Laws regarding Health and the operation of initiation schools provides for admission to an initiation school for any male person above the age of 18 years and female person above the age of 16 years.<sup>30</sup> If the initiate is not 18 years old, parental consent is required in the prescribed form. (8) “No person may abduct or coerce or kidnap any other person and take him or her to an Initiation school.”<sup>31</sup> The City Of Tshwane Metropolitan Municipality: Promulgation of Health By-Laws for the Operation and Management of Initiation Schools of 26 May 2004 provides that anyone over the age of 15 years may attend initiation schools, but that anyone under 21 years must obtain parental consent.<sup>32</sup>

- 4.4. The Health Care Professions Council of South Africa provided Guidelines for Good Practice in the Health Care Professions. These guidelines provide a definition of what is meant by ‘informed consent’: “Patients must be given sufficient information in a way that they can understand, to enable them to exercise their right to make informed decisions about their care.” It further states that the right to an informed consent flows from the South African Constitution, the National Health Act, various other statutes, the common law and the HPCSA Guidelines. According to these guidelines, the South African courts have held that legally for a proper informed consent the patient must have:

- 4.4.1. Knowledge of the nature or extent of the harm or risk;  
4.4.2. Appreciated and understood the nature of the harm or risk;

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<sup>29</sup> Section 5(3).

<sup>30</sup> Sedibeng District Initiation Schools Draft By-Laws section 4(1) & (2).

<sup>31</sup> Section 4(8).

<sup>32</sup> City Of Tshwane Metropolitan Municipality: Promulgation Of Health By-Laws For The Operation And Management Of Initiation Schools section 4 Admission to an initiation school

(1) Any person who is 15 years of age or older may be admitted to an initiation school.

(2) If an initiate is under the age of 21 years, his or her parent or guardian must give consent in writing for the initiate to be circumcised, which consent must be given in the prescribed consent form as set out in Schedule 1 to these by-laws.

(3) Any person under the age of 21 years who admits himself or herself to an initiation school without the consent of his or her parent or guardian must be detained temporarily and may not be circumcised until the local police officer in charge has been notified and has obtained the consent of the parent or guardian in writing.

(4) Any person who is 21 years of age or older may be admitted voluntarily to an initiation school.

(5) No person may abduct or kidnap any other person and take him or her to an initiation school and have him or her admitted to the initiation school.

- 4.4.3. Consented to the harm or assumed the risk; and
  - 4.4.4. The consent must have been comprehensive, (i.e. extended to the entire transaction, inclusive of its consequences).
- 4.5. The guidelines also deal with the position of children: “Where a child is not legally competent to give or withhold informed consent, the parent or guardian may authorise investigations or treatment which are in the child's best interests.”

## 5. **The way forward**

- 5.1. Process: We note the consultation process adopted by the department in the preparation of the draft policy.
- 5.2. Given the clear injunction of the Constitutional Court that customary law and particular customary rules must be found and understood within its own context, and in particular following *Shilubana*, we submit that the Department is enjoined to investigate both historical and current practices on the ground and within communities (which does not mean merely consulting statutory recognised traditional leaders) as a starting point. Once a proper understanding of current practices within their own contexts exist, can the Department ensure that, through policy, the practices are developed, where necessary, to be brought in line with the Constitution.
- 5.3. The draft policy is ambivalent on the need for national framework legislation to guide provincial regulatory law and local government by-laws on the issue. The development of customary law alongside the promotion of children and women’s rights contained in the bill of rights, can occur either by way of policy interventions or by way of limited statutory intervention in the mode of national framework legislation, or by a combination of the two. However a first step would be to involve customary communities in such processes. The draft policy and the memorandum at the end of it explaining the consultation process followed in the past two years, did not include extensive information and consultation on the customary practices and their meaning, utility and impact of customary communities. Living customary law is made, shaped and developed by communities of customary practice. Their voices cannot be substituted by the leadership recognised and more often than not imposed by the TLGFA and its predecessors.

- 5.4. Furthermore, the absence of human rights organisation in the consultation process to date process is notable. We propose that the SAHRC, the Gender Commission and human rights NGO's should be more fully involved in the next stage.
- 5.5. Specific proposals on content: The motivation above should be read with the brief explanations and specific motivation given in respect of the text proposed. The proposed text appear in blocks:

## 6. Paragraph 2:

### 6.1. Definitions

Amend current definition:

"initiation" means any customary or cultural practice of traditional communities that is used by such communities as a rite of passage to adulthood in respect of male or female children **and may include similar practice to a development stage if not adulthood;**

"traditional community" means

~~a community recognised as such in terms of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) or part of a community;~~

**a community or part of a community which in terms of customary law engage in communal cultural and customary practices including initiation.**

~~"traditional leader" means a person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position and has been recognised in terms of the Traditional Leadership and Governance Framework Act, 2003;~~

- 6.2. Communities who practice customary law and who honour the institution of traditional leadership are not limited to those recognised under the TLGFA. In fact there is significant contestation of the status of a number of communities under the TLGFA which relies on the Apartheid imposed definitions and

establishment of tribal authorities under the Bantu Authorities Act of 1951. All communities and their leaders who practice and adhere to living customary law may participate voluntarily if the community so chooses in the practice of initiation. These may include communities and leaders which voluntarily choose to define themselves under the TLGFA as such.

- 6.3. Initiation under living customary law may entail various events and processes throughout the life of the child and young adult growing up in the community, not necessarily limited to the developmental stage of moving into adulthood. The policy should cater for all initiation practices and ceremonies, not limited to the adulthood phase.

## 7. Paragraph 3:

### 7.1. Background

Para 3.3

Include

- **Respect for children, women, elderly and their rights**
- **The development of living customary law that recognises the right of participation of all members of the community in community decision making**

- 7.2. The participation of community members in the process, the ceremonial events and in the planning, monitoring of the actual process and evaluation of its outcomes require elaboration and specific recognition of the outcomes sought in terms of the promotion of customary law and the draft policy.

## 8. Paragraph 4:

### 8.1. Problem Statement

Add to 4.4

**h) The legality and legitimacy of initiation schools are in the first place determined under customary law by the community**

**concerned. Statutory regulation can give effect to community decisions regarding the status of initiation schools approved by community decisions.**

**i) Adults that participate in the initiation of children and young adults can be held liable under civil and criminal law whether contained in statute law, common law or customary law for any contravention of the law or injury. Such adults and functionaries are not always aware that any contravention of the law, negligence or lack of diligence and care may attract civil and criminal liability.**

**j) Children and young adults, and their parents, participating in initiation may not always be aware of their rights under the law, including their rights to choose whether or not to participate in initiation and / or circumcision, and their responsibility not to unduly influence their peers.**

8.2. The proposed additions to the problem statement are self-explanatory and do not require any further elaboration or motivation.

## 9. Paragraph 5:

### 9.1. Objectives of Policy

Add

- c) To provide for traditional leadership to accept, **to the extent so required by the relevant customary law of their communities,** responsibility for the practice of initiation within their communities, in partnership with government and all other role-players.
- i) **To ensure that the participants in initiation, functionaries, adults and children are aware of their responsibilities and rights; and aware of the legal and other consequences of their conduct if the law is not complied with and / or the necessary care is not exercised**

## 10. Paragraph 6:

### 10.1. Legal Framework

Add to para 6.1

**Section 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.**

10.2. The confirmation of the constitutional recognition of customary law as a source of law is based on sections 30, 31, 39(2) and 39(3) of the Constitution, the latter significantly recognising any rights conferred by customary law as long as these are consistent with the Bill of Rights.

## 11. Ad paragraph 6.2(f):

11.1. *“(f) It is of utmost importance that all persons involved in initiation practices, including the children, be made aware of the provisions of the Children's Act. Section 305 of the Children's Act determines that a contravention of section 12(8) or failure to comply with section 12(9) is an offence and any person found guilty is liable to a fine or imprisonment of up to 10 years or both such fine and imprisonment.”*

11.2. We propose below that the relevant consent form should in no uncertain terms state that the participants know and understand the provisions of the Children’s Act including the right of choice of the child participant in initiation and circumcision.

Add to para 6.2

g) it is of utmost importance that traditional communities and all persons involved in initiation practices, including the children, be made aware of the provisions of the Children's Act, **and in particular the right to informed voluntary choice not to be circumcised, without fear of being judged or ostracised.**

## 12. Ad para 6.6 and 6.7

12.1. The lack of compatibility, coherence and consistency between:

12.1.1. various provincial initiation and circumcision statutes and regulations (e.g. Limpopo Circumcision Schools Act 6 of 1996 regulations of 2002),

12.1.2. municipal by-law (e.g. Tshwane, Sedibeng<sup>33</sup>, Polokwane<sup>34</sup>, Nelson Mandela Bay<sup>35</sup>) and

12.1.3. policy statements (e.g. White Paper on Customary Male Initiation Practice in the Eastern Cape Province, 2015<sup>36</sup>)

are disconcerting.

12.2. The draft policy fails to address a process whereby the various instruments will be aligned in the three spheres of government. More specifically the by-laws and provincial laws do not adequately provide for deep and broad community participation in the planning, execution and monitoring of initiation and circumcision practices and custom. Instead they rely on traditional leadership and municipal politicians to play the leading role in the regulation of customary practices.

12.3. The jurisdiction of local municipalities to regulate initiation schools, beyond the provision of municipal health services and the allocation of municipal land, is not clear.

12.4. The draft policy fails to provide a road map for the development of a national framework act to direct and align the provincial and municipal executive and legislative functions under the constitution.

## 13. Ad para 7.3 and 7.4

b) **a traditional communities elect and appoint** ~~leaders have to screen~~ principals of initiation schools, traditional surgeons and care-

<sup>33</sup> LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT (32/2000): PROMULGATION OF HEALTH BY-LAWS FOR THE OPERATION AND MANAGEMENT OF INITIATION SCHOOLS Gazette Number 317 Notice Number 1668 Gazette Date 2014-11-12

<sup>34</sup> LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT (32/2000): PHOKWANE LOCAL MUNICIPALITY: PROMULGATION OF HEALTH BY-LAWS FOR THE OPERATION AND MANAGEMENT OF INITIATION SCHOOLS Gazette Number 1850 Notice Number 135

Gazette Date 2014-11-03 Northern Cape

<sup>35</sup> CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996: NELSON MANDELA BAY METROPOLITAN MUNICIPALITY: HEALTH BY-LAWS FOR THE OPERATION AND MANAGEMENT OF INITIATION SCHOOLS Gazette Number 2322 Notice Number 35 Gazette Date 2010-03-24

<sup>36</sup> PROVINCIAL GAZETTE EXTRAORDINARY, 10 MARCH 2015 No. 3353

givers in accordance with the **living customary law of the relevant community** guidelines developed by the National House as contemplated in paragraph 7.2(b) of this policy, before such principals, traditional surgeons or care-givers will be allowed to participate in initiation practices and schools.

13.1. As explained above, it is not for TLGFA recognised senior traditional leaders and the NHTL to assume the role of communities and determine the appointment and criteria for appointment of community initiation principals, traditional surgeons and traditional nurses. The appointment of these depend of the customary law of the community concerned. The traditional leadership, or the chief or leader so recognised by the TLGFA may or may not play a prominent role in the appointment process.

13.2. The designation and choice of the care givers or nurses is not necessarily the responsibility of the traditional leader. Often, in living customary law, the parents and family of the initiate play an important role in their appointment. Similarly, under customary law, the traditional surgeon is not the appointee of a recognised traditional leader, but rather elected by the community or community of affected parents.

#### 14. **Ad para 8: Coordinating Structures**

14.1. The SAHRC and the Gender Commission should be represented on the NIOC and the PICCs.

#### 15. **Ad para 9:**

##### 15.1. **Operational Matters**

Para 9.2: replace b) and c):

~~(b) Before any prospective initiate may attend an initiation school, such initiate, his/her parents or customary or legal guardian and the traditional leader of the area where initiation is to be conducted must give written consent for the person to undergo initiation. All written consents must be handed to the principal of the initiation school and he or she must submit it to the PICC. Written consents must at least~~

~~indicate the identity number, full names and gender of the initiate.~~

~~(c) While according to customs there seems to be no minimum or maximum age for a person to undergo initiation, it is important that any prospective initiate must be old enough to understand the teachings about adulthood imparted at an initiation school. Therefore, although it is at this stage left to the parents or customary or legal guardians to decide whether a particular child is ready for initiation, it is submitted that the minimum age for a person to undergo initiation should be 16. Furthermore, the PICC should be able to refuse to allow a prospective initiate to undergo initiation based on any reasons or evidence brought to its attention which may indicate that the child is not yet ready for initiation or is unable or unwilling to assent to undergoing initiation. This may be related to, but is not limited to, the physical or mental capacity of the child. Note however that the proposed age of 16 will not legalise male circumcision; in instances where male circumcision is part of the initiation process the provisions of the Children's Act, 2005 shall still apply.<sup>34</sup>~~

**b) participation in any initiation is subject to the free informed consent of**

- **the initiate; and**
- **both parents.**

**Both the initiate and the parents have a right to choose whether or not to participate in initiation.**

**Both the initiate and the parents have a right to choose whether or not to the initiate wish to be circumcised.**

**c) the prescribed consent form shall be completed and attested to in writing to provide a record of the decision of the initiate and the parents. The identity numbers and ages of the initiate, parents and witnesses shall appear on the consent form.**

**Consent can be withdrawn at any time, and the initiate and parents shall each be given a copy of the consent form.**

**The consent form shall include the following further information and records:**

- a) The name of the traditional community and venue of the initiation school,
- b) The names and IDs, addresses, contact details of the following functionaries, with their signatures:
  - a. Any traditional leader of the community taking responsibility;
  - b. The principal of the initiation school;
  - c. The traditional surgeon;
  - d. The traditional care giver;
  - e. The medical practitioner who certified the mental and physical health and fitness of the initiate.
- c) Acknowledgement by the functionaries that they know and understand their obligations under the law, and that they may be held liable criminally and civilly for any contravention of the law, including the Children's Act of 2005, or any negligence or lack of care.

Copies of the consent form shall be:

- a) available for inspection at the initiation school,
- b) be forwarded promptly to the PICC and any other government department requesting same;
- c) listed in a register.

#### 16. Ad para 10: Offences

Add

Contravention of the law relating to initiation and circumcision may result in the listing of offenders in the National Child Protection Register, provided for in the Children's Act.