

COMMENTS OF THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE DRAFT TRADITIONAL COURTS REGULATIONS AND DRAFT CODE OF CONDUCT ISSUED IN TERMS OF THE TRADITIONAL COURTS ACT, 2022

Introduction

The LSSA has received comments from the Department of Justice and Constitutional Development, inviting interested parties to submit written comments on the draft code of conduct and regulations made in terms of the Traditional Courts Act, Act No. 9 of 2022 (the Act).

The draft traditional courts regulations and code of conduct are made in terms of section 16 and 17 of the Act respectively, and the LSSA acknowledges that. The Regulations and Code of Conduct represent an important step in giving operational and ethical content to the Act, and in advancing access to justice within the constitutional recognition of customary law.

As an interested party we hereby confirm that we have considered the draft code of conduct and regulations made in terms of the Traditional Courts Act no. 9 of 2022 in respect of sections 16 and 17 of the said Act respectively. The LSSA thanks the contributions by their members; Ms Sha Singh and Mr Micheal Shackleton whose contributions are incorporated herein

We hereby submit the following corrective comments hereon:

- [1] Section 2(a) of the draft regulations refers to “any person” in our view should be changed to state “any legally suitable person” to avoid the appointment of criminal, mentally ill persons or a person lacking any other form of capacity.
- [2] with regard to the definitions stated in the draft code of conduct it is suggested that reference to the Constitution of the Republic of South Africa 1996 should include the words “as amended”. Also reference to the Traditional Courts Act No. 9 of 2022 should also include the words “as amended”

General Comments

The overall structure and intent of both the Regulations and the Code of Conduct. In particular, are supported and welcomed:

- The formalisation of administrative systems, including record-keeping, registers, and reporting obligations;
- The emphasis on training, oversight, and accountability; and
- The express anchoring of traditional courts within the constitutional values of fairness, dignity, equality, and access to justice.

These measures go a long way in addressing longstanding concerns regarding consistency, transparency, and procedural fairness in the functioning of traditional courts.

Independence, Impartiality and Procedural Fairness

The Regulations appropriately require presiding officers to take a pledge affirming fidelity to the Constitution and impartial administration of justice. This is a critical safeguard.

It is respectfully submitted, however, that further clarity would strengthen the framework, particularly by:

- Explicitly requiring recusal guidelines to be documented and communicated to parties at the outset of proceedings;
- Providing clearer guidance on conflicts of interest, especially in close-knit traditional communities where social proximity is unavoidable; and
- Ensuring that clerks, paralegals, and interns are adequately trained on procedural fairness and record integrity, as failures at an administrative level may undermine otherwise sound adjudicative outcomes.

Record-Keeping, access to Records and Review Mechanisms

We strongly support the detailed provisions on the recording of proceedings, retention of records, and structured referral to the High Court and Magistrates' Courts.

From a practical and constitutional perspective, it is suggested that consideration be given to:

- Developing minimum standards for electronic recording, where feasible, to reduce disputes about what transpired during proceedings;
- Ensuring that reasons for refusal of access to records are consistently recorded in writing, to support meaningful review; and
- Providing guidance to ensure that time periods for referral and review are communicated clearly to unrepresented litigants.

These measures would materially enhance the effectiveness of judicial oversight and reinforce confidence in traditional court outcomes.

Protection of Vulnerable Persons and Gender Equality

The reporting obligations relating to women and vulnerable persons are a particularly positive feature of the Regulations. They align with constitutional imperatives and South Africa's international obligations.

To strengthen this aspect, it is recommended:

- That gender-sensitivity and vulnerability-focused training be mandatory and recurrent, rather than once-off; and
- That the Code of Conduct expressly recognize substantive equality, acknowledging that identical treatment may not always result in fair outcomes.

Code of Conduct and Disciplinary Processes

The Draft Code of Conduct provides a clear ethical framework for all persons involved in the functioning of traditional courts. We express support on its emphasis on professionalism, integrity, and public trust.

However, to ensure legitimacy and acceptance, it is submitted that:

- Disciplinary procedures flowing from alleged breaches should be accompanied by clear timelines, notice requirements, and rights to respond;
- Investigations into breaches should expressly comply with audi alteram partem principles; and

- Outcomes of serious misconduct proceedings should be appropriately recorded and reported to enhance accountability and institutional learning.

CONCLUSION

The promulgation of the Draft Traditional Courts Regulations and the Draft Code of Conduct are supported, subject to the refinements proposed above. Collectively, these instruments constitute an important and considered effort to align the functioning of the traditional courts with the constitutional framework, ensuring that respect for customary law is harmonized with the imperatives of constitutional supremacy, procedural fairness and institutional accountability.

Furthermore, having considered the broader substance and intent of the draft documents, we are satisfied that the Regulations and the Code of Conduct will reinforce and affirm traditional customary law values while strengthening the role of Traditional Courts in expanding access to justice. They provide a clear and comprehensive ethical and procedural framework for traditional leaders and presiding officers, setting commendable standards regarding conduct, duties, attendance and professional relationships.

Accordingly, and based on the observations outlined above, we are confident that the Traditional Courts, once guided by these instruments, will operate fairly, uniformly, and in full compliance with South Africa's constitutional values. In addition, the measures proposed adequately safeguard human rights and uphold the applicable public law principles, thereby contributing meaningfully to a just, accessible, and constitutionally coherent traditional justice system.