



Comments

to the

The Director-General: Justice and Constitutional Development

on the

The Lower Courts Bill, 2022 and the Magistrates Bill, 2022

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Introduction

1. The Centre for Applied Legal Studies ("CALs") would like to thank the Director-General of the Department of Justice and Constitutional Development for the opportunity to make comments on the Lower Courts Bill, 2022 and the Magistrates Bill, 2022.
2. CALs is a civil society organisation based at the School of Law at the University of the Witwatersrand. CALs is also a law clinic registered with the Legal Practice Council of South Africa. As such, CALs connects the worlds of both academia and social justice.
3. CALs' vision is that of a society in which historical justice and social justice are achieved through strengthened state institutions and where the state and other powerful actors are held accountable by marginalised actors themselves. CALs operates across a range of areas, including Civil and Political Rights; Business and Human Rights; Gender Justice; Home, Land and Rural Democracy; and Environmental Justice.
4. Our Civil and Political justice programme advances civil and political rights, such as the right to protest, the right to freedom of expression, the rights of the arrested and detained, and the right to access to information. In addition to this rights-based work, the Programme aims to protect and promote the systems and institutions of South Africa's constitutional democracy. This includes working to strengthen Chapter Nine institutions, supporting the transformation of the judiciary, and engaging with Parliament.

Comments on the Proposed Bills

5. Our interest in the Bills stems from a number of issues we have identified within the judiciary, however, for the purposes of these comments, we have limited ourselves to the following issues:
 - 5.1. Magistrates training;

- 5.2. Access to records;
- 5.3. Witness fees;
- 5.4. Audio-visual proceedings;
- 5.5. Permission letters; and
- 5.6. The issue of arrests.

A. *The Magistrates Bill, 2022*

The Training of Magistrates

6. As part of our judicial training programme, CALS has been involved in and conducted seminars and roundtable talks with judicial officials on a variety of topics facing the judiciary since the early 1990s. Thus, we are of the view that we are adequately equipped to provide comments on this issue as the issues we identified also apply to the training of magistrates.
7. Our Judicial Training program sought to sensitise judicial officials on how to deal with issues pertaining to vulnerable and marginalised persons such as impoverished people and groups, LGBTIQ+ people, women and children, those facing eviction, living in rural areas, and sex workers. Judicial officers and aspirant judicial officers who took part in these trainings and workshops appreciated discussions and capacitation on these matters.
8. We are, therefore, of the view that the Magistrates Bill should also require magistrates and aspirant magistrates to undergo similar training.
9. We understand that at the moment, this Magisterial training is exclusively conducted by the South African Judicial Education Institute ("SAJEI"); we hold the view that this

centralisation of learning robs magistrates of the opportunity to learn from other producers of knowledge.

10. We need courts that are competent, representative of the demographics of South Africa, and human rights-driven; in order to achieve these goals, we recommend that, the following steps needs to be implemented:

10.1. Establishment of a mechanism for professional development coordination.

The Department of Justice and Constitutional Development in collaboration with the Judicial Services Commission and the Magistrates Commission, facilitating the development of a professional development program for magistrates and judges that covers topics such as constitutional implications for all areas of the law, human rights, equality and discrimination under the Constitution, and case management.¹

10.2. A monitoring and evaluation metric that measures progress with the judicializing the magistracy and thereby expanding possibilities for magistrates to progress to higher courts.²

10.3. Recruit well-trained, representative, human-rights-focused, and people-friendly legal and semi-legal professions.³

10.4. Decentralise continuing and advanced education to include other producers of knowledge such as law schools and human rights organisations.

B. The Lower Courts Bill Submission

Clause Commented on	Proposal	Motivation
Section 15 (1) access of records to members of the public	“... must be accessible to the public under the supervision of the clerk or	The clause needs to make provision for those people who cannot afford to pay for

¹ Van Riet (1997) “The training of magistrates” *Forum* 137-139. Available at: <https://www.gcbsa.co.za/law-journals/1997/november/1997-november-vol010-no2-pp137-140.pdf>

² Ibid.

³ Ibid.

<p><i>“Subject to the rules, the records of the court, other than a record with reference to which a direction has been issued under section 153(2) or 154(1) of the Criminal Procedure Act, or with reference to which the provisions of section 154(2) (a) or 154(3) of that Act apply, must be accessible to the public under the supervision of the clerk or the registrar of the court at convenient times and upon payment of the fees prescribed from time to time by the Minister in consultation with the Cabinet member responsible for finance”.</i></p>	<p>registrar of the court at convenient times and upon payment of fees, after due consideration and application of a means/affordability test, determined and set by the Minister in consultation with the cabinet members responsible for finance. There will be an exemption for payment of fees for indigent people as determined through the application of the means test”.</p>	<p>access to records. The exemption should only apply to individuals who have proved that they do not have the means to afford the payment of the fees.</p>
<p><i>Section 47 (1) “The Minister may, in consultation with the Cabinet member responsible for finance, by notice in the Gazette prescribe a tariff of allowances which must be paid to a witness in civil proceedings or to any person who is to accompany any such witness on account of the youth or infirmity due to old age or any disability of such witness”.</i></p>	<p>“The Minister may, in consultation with the cabinet member responsible for finance, by notice in the Gazette, prescribe a tariff of allowances which must be paid to a witness in civil and criminal proceedings or to any person who is to accompany any such witness on account of the youth or infirmity due to old age or disability of such witness. Such allowance should apply in consideration of a means/affordability test in order to give priority to indigent people who need to attend court but are unable to do so due to lack of funds”.</p>	<p>The witness fee should be made available to witnesses in both civil and criminal proceedings. The provision should be qualified with a further provision that requires a means/affordability test to be implemented in order to determine the witness’s affordability. The fees should only be paid to witnesses for both civil and criminal proceedings who are indigent and meet the means test. Witnesses in criminal matters are just as important for the trial to proceed. There are many witnesses in criminal matters who receive warrants of arrest issued against them for failure to appear in court. Many of them do not appear because they do not have the means/transport money to travel to court. Therefore, to avoid the issuing of warrants and a waste of resources, witness fees should be made available in criminal matters.</p>
<p>Section 50 (1) “A court may,</p>	<p>“A court may, on application by any party to civil or</p>	<p>The provision should allow for both civil and criminal</p>

<p><i>on application by any party to proceedings in terms of this Act before that court or of its own accord, order that a witness, irrespective of whether the witness is in or outside the Republic, if the witness consents thereto, may give evidence by means of audio-visual link”.</i></p>	<p>criminal proceedings in terms of this Act before that court or of its own accord, order that a witness, irrespective of whether the witness is in or outside of the Republic, if the witness consents thereto, may give evidence by means of audio-visual link. Court hearings may also proceed by way of a hybrid system through the utilisation of both audio-visual link and physical court presence.</p>	<p>proceedings to be heard via audio-visual link. This will not only be a cost-saving measure but will also allow for more efficient proceedings, which in turn means that cases could be resolved at a faster rate. Furthermore, if the resources allow, court hearings should also proceed through a hybrid court system. Superior courts are now moving more and more towards virtual court hearings, where resources allow, and the system should be duplicated in the lower courts.</p>
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Provisions which are not included in the Bill

11. We would like to bring your attention to the following issue not included in the Bill and recommend that the be included in the Bill or in Regulations:

11.1. The Bill should make provision for Magistrates in lower courts to encourage the South African Police Services (“SAPS”) in both civil and criminal matters, to instruct it and emphasise to its members that the arrest of a suspect should be the last measure of resort. This is so that there are fewer actions against the SAPS for unlawful arrest and detention by members of the public who are unlawfully arrested. This will save time and valuable resources for the entire justice system. Summons and warnings should be preferred where appropriate and where it is not necessary for members to effect arrests.

Conclusion

12. In summation, we call upon the Department to introduce Magisterial Training that is decentralised and takes into consideration human rights issues. Lower courts ought to be more accessible and adapt to the online court systems as practiced by the Superior Courts. Benefits allowed for witnesses in civil courts should be extended to criminal

courts, with the implementation of a means test in order to ensure equitable use of state resources. Finally, Magistrates in lower courts ought to take an active role in ensuring that arrest and detention of suspects is the last measure of resort.

13. Thank you for providing the opportunity to provide input. For queries and further information, please contact Sithuthukile Mkhize (Head of Programme) at Sithuthukile.Mkhize@wits.ac.za. CALS would welcome any opportunity for further engagement on these Bills, including the opportunity to make oral representations.