

**Written comments and representations on the draft Regulations relating
to the Protection, Promotion, Development and Management of Indigenous
Knowledge**

Submitted by
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Pursuant to
General Notice 2647 of 2022 (GG 47292, 14 October 2022)
General Notice 2722 of 2022 (GG 47453, 4 November 2022)

These comments are submitted pursuant to the invitation extended by the Minister of Science and Innovation on the publication of the “Regulations relating to the Protection, Promotion, Development and Management of Indigenous Knowledge Systems” (the “Draft IKS Regulations”) in General Notice 2647 of 2022 (GG 47292, 14 October 2022) (“GN 2647”) and General Notice 2722 of 2022 (GG 47453, 4 November 2022) (“GN 2722”).

1 Introduction

The Draft IKS Regulations are intended to be the regulations pursuant to section 31(1) of the Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2029 (the “Act”). At the outset, it is important to note that there appear to have been two published versions of the Draft IKS Regulations, namely, those published in General Notice 2647 of 2022 (GG 47292, 14 October 2022) (“GN 2647”), and those published in General Notice 2722 of 2022 (GG 47453, 4 November 2022) (“GN 2722”). The major difference between the Draft IKS Regulations in GN 2647 and those in GN 2722 appears to be that the latter draft also contains what seems to be the schedules to the regulations. If these written submissions appear to be imprecise, for example, using an expression such as “what seems to be”, it is simply because the quality of drafting of the Draft IKS Regulations leaves much to be desired, and suggests a lack of attention to detail that

is troubling when it comes to legislative drafting, or the drafting of secondary legislation. Unfortunately, this lack of precision and professionalism no longer comes as a surprise. The public and legal professions have become accustomed to having to “fill in the gaps”, or make sense of what has been enacted. For example, GN 2722 does not indicate where Schedule 1 (or Annexure 1) starts, so it is just assumed what precedes Schedule 2 must form part of Schedule 1. As will become clear, the aforementioned issue cannot simply be described as an oversight.

There may be another, more fundamental, reason for the poor drafting of the Draft IKS Regulations. The IKS Regulations do suggest that, despite the rhetoric of the purported benefits to the protection of indigenous knowledge, the issue of what constitutes indigenous knowledge, as feared, appears not to have been clearly conceptualised, which may be one of the reasons for the lack of much-needed detail.

Given the fact that the Draft IKS Regulations in GN 2722 are more complete, as it includes the draft schedule, the following submissions and comments refer to the aforementioned version of the draft regulations.

Advisory panel

Regulation 2(1)(d)

In order to ensure that there is an appropriate composition of persons with suitable expertise on the Advisory Panel, Regulation 2(1)(d) should make clear that the specialists referred in this category do not include persons already listed in Regulation 2(1), that is, Regulations (2)(1)(a) to (c).

Accreditation of assessors

Regulation 3(1)

As already noted, there is no express indication of what Annexure (or Schedule) 1 (or Schedule 1) comprises, and the assumption is that what precedes Schedule 2

(and follows Regulation 12) must be part of Annexure (or Schedule) 1. An even more glaring example of the lack of precision and clarity is the fact that Annexure (or Schedule) 1 contains no “Form A”, as provided for in Regulation 3(1). The relevant form appears to be Form 10.

Regulation 3(2)

The Draft IKS Regulations adopt a very “lazy” and unhelpful approach to reviewing administrative decisions. Regulation 3(2) simply provides that the relevant administrative decision will be subject to the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). The effect of this will be that should someone seek to challenge the administrative decision, it will be necessary to challenge the decision in court, i.e., judicial review of the decision. Needless to say, that is a costly and time-consuming exercise. Given that some of the persons wishing to challenge decisions made under the Act may be laypersons and may not be well-resourced, there should, ideally, be a cheaper and less formal way to challenge administrative decisions (at least initially). Thus, there should be an internal review provided for by the regulations to facilitate the challenging of administrative decisions.

Regulation 3(3)

Should there not be prescribed standards (or a code of conduct) for assessors? Regulation 3(3) provides that not complying with the “accreditation procedures” amounts to unprofessional conduct, but the Draft IKS Regulations only provide for the application procedure. To simply state that not following the accreditation procedure amounts to unprofessional conduct is not of much use as an applicant can, in any event, simply be denied accreditation if their conduct has been considered to be unacceptable or inappropriate.

Where are the standards (or the code of conduct) by which assessors are to be assessed to determine if they are acting professionally, once they have been accredited as assessors? None have been provided.

Recognition of prior learning

Regulation 4(1)

Once again, the Draft IKS Regulations refer to a form that is not provided for in Annexure (or Schedule) 1: there is no “Form B”, as provided for in Regulation 4(1). The relevant form appears to be Form 11.

Also, “knowledge” should be spelt with a lowercase “k”.

Regulation 4(2)

What is the “in” in the phrase “designation/in/discipline” meant to refer to? Also, “scope” in (a) should be spelt with a lowercase “s”.

Regulation 4(3)

Where is Regulation 4(3)?

Regulation 4(4)

See the comments concerning Regulation 3(2), which are equally applicable to Regulation 4(4).

Regulation 4(5)

First, no Schedule 3 has been published.

Should there not be prescribed standards (or a code of conduct) for practitioners? Regulation 4(5) provides that not complying with the “certification/recognition procedures” amounts to unprofessional conduct, but the Draft IKS Regulations only provide for the application procedure. To simply state that not following the certification/recognition procedures amounts to unprofessional

conduct is not of much use as an applicant can, in any event, simply be denied accreditation if their conduct has been considered to be unacceptable or inappropriate.

Where are the standards (or the code of conduct) by which practitioners are to be assessed to determine if they are acting professionally, once they have been accredited as practitioners, as required by section 15(8) of the Act? None have been provided.

Register of designations

Regulation 5(1)

Regulation 5(1) provides no further elaboration of what is provided for in section 16(1)(a) of the Act, and, accordingly, is of no use.

Registration of indigenous knowledge

Regulation 6(1)

The Draft IKS Regulations again appear to misdescribe the relevant form provided for in Schedule 1: there is no “Form C”, as provided for in Regulation 4(1). The relevant form appears to be Form E.

Regulation 6(2)

The Draft IKS Regulations again appear to misdescribe the relevant certificate provided for in Annexure (or Schedule) 1: there is no “Form D”, as provided for in Regulation 4(1). The relevant form appears to be Form F.

Register of indigenous knowledge

Regulation 7(1)

The reference in Regulation 7(1) to “Form E” in Annexure (or Schedule) 1 does not appear to be the relevant form. There does not appear to be a relevant form in Annexure (or Schedule) 1.

Amendment of the register

Regulation 8(1)

The reference in Regulation 8(1) to “Form F” in Annexure (or Schedule) 1 does not appear to be the relevant form. The corresponding form appears to be Form G.

Regulation 8(4)

The phrase “from a curator” should be “from the Curator”.

Access to and use of indigenous knowledge

Regulation 9(1)

The reference in Regulation 9(1) to “Form G” in Annexure (or Schedule) 1 does not appear to be the relevant form. There does not appear to be a relevant form in Annexure (or Schedule) 1.

Also, there is an additional bracket (“”) in the reference to section 26(1)(a), which should be removed.

Dispute resolution committee

Regulation 10(2)(c)

The word “practicing” should be “practising”.

Offences and penalties

Regulation 11

The proposed fine of 40% of the annual turnover of a juristic person is, quite frankly, preposterous. Such a figure is improbable to bear any relation to the possible harm caused by the “infringing” use of indigenous knowledge. It does, however, reflect a possible underlying — and misguided — mindset behind the drafting of the Act. There is clearly a perception that vast amounts of money are being made (or will be made) by the exploitation of indigenous knowledge. In fact, if anything, the Act is more likely to serve to disincentivise use of indigenous knowledge commercially. The reason for this is that the transaction costs might just be too high for the possible returns.

The problem of the preposterous level of the fine is compounded by the fact that it is not clear when indigenous knowledge will be infringed. For example, will there be infringement of indigenous knowledge if such knowledge has merely inspired a subsequent work, or must the subsequent work have taken a substantial (or essential) part of the indigenous knowledge (however that may be assessed)? Or would there be infringement if there is some form of passing off in relation to the indigenous knowledge. Given that these issues are yet to be determined, why would anyone want to commercially use any indigenous knowledge? If that is the case, the Act will not have achieved one of its main objectives. The point is that if indigenous knowledge has any commercial use, such use should be encouraged, because it is only through such use that there will be any benefit flowing to the relevant community. Accordingly, third parties should be encouraged to use indigenous knowledge, and to that end, it would be more appropriate to set any fine with reference to a reasonable royalty that would have been payable under a licence agreement. While there may be a punitive element to the amount payable because of a failure to obtain the required licence, it could, for example, be prescribed to be double the reasonable royalty.

Short title and commencement

Regulation 12

There should be a double quotation mark (") after "Knowledge".

Form 10 (Application for accreditation of indigenous knowledge assessors)

The following requirement on Form 10 amounts to circular reasoning: "Portfolio of evidence of relevant teaching and/or practical experience as an assessor". How can an applicant have experience as an assessor if they have never been accredited as an assessor? Should the persons not instead prove their suitability to be assessors?

Furthermore, and again for the person who would be applying for the first time, the requirement of "Proof of registration with NIKSO against a Professional Designation" seems to be impossible to meet, unless there is something that is not being made clear through such requirement.

Criteria for accrediting assessors

Again, would the following requirement be able to be met by a new applicant: "a track record of a minimum of 15 years of practice in the field, AND have obtained a NIKSO Certificate of Competence Designation"?

Checklist

The checklist does not list proof of teaching or practical experience, which is stated earlier, as also mentioned above.

Form 11 (Application for certification and registration of indigenous knowledge practitioners)

Competencies (Interpersonal skills)

What is "Integrity & Trust Perceptive"?

Competencies (Communication skills)

What is “Ability to active, reasoning...”?

General comments

What is the duration of the various appointments, such as, for those of assessors and practitioners?

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