

Bar Strategy 2000

A document proposed by the Cape Bar which formulates the position of the GCB on various issues was discussed by the GCB at its annual general meeting in July 1999. The document, including the proposals set out in the conclusion (paragraph 38), was unanimously adopted by the GCB.

Introduction

- 1 It is nearly ten years since the GCB formulated a formal statement of policy. It was in the immediate aftermath of the commitment by the then government to the implementation of a new democratic dispensation, the termination of the successive States of Emergency and other political restrictions, and the release from prison of leading members of the liberation movements. It was in these terms: "The Bar identifies itself fully with the ideals, aspirations and challenges presented by a new democratic South Africa.
- 2 As a body of independent practitioners, the Bar is committed to providing specialised legal representation, at fair fees, to all persons who require such services.
- 3 By providing this representation, as well as facilities for the protection of human rights, access to justice for indigent persons and alternative dispute resolution, the Bar serves all the people of South Africa.
- 4 We shall continue to strive towards the attainment of justice for all according to the rule of law and to support reforms designed to achieve this goal.
- 5 The Bar is committed to:
 - the maintenance of an independent judiciary;
 - ensuring that the Bar is representative of all sections of the South African population;
 - providing greater access to justice by the expansion of legal services to all who require them, while maintaining the high standards, professional integrity and independence which are established hallmarks of the Bar".
- 2 In the intervening decade, the GCB, while from time to time adopting a pub-

lic stance in relation to important issues thought to impinge upon the administration of justice or the interests of the profession, has not had occasion to take stock of its own position generally in relation to changed circumstances, or to outline a particular strategy in response to these. The danger of that state of affairs continuing is twofold: that we fail to take stock of new challenges to the future of the advocates profession and the way these interact with each other; and that we react both defensively and in an essentially *ad hoc* way to these. The fact that the GCB only meets in plenary session once a year, and otherwise functions through widely-spaced executive meetings of busy sole practitioners, points up the problem.

- 3 It also has to be said that in the intervening decade the GCB has not succeeded in achieving a satisfactory degree of representativity as regards race and gender in its makeup. This has resulted in organisations such as BLA and Nadel viewing the organised Bar with distrust. This state of affairs needs to be addressed.
- 4 This proposal emanates from a restructured Bar Council. It contemplates enhanced representivity of other Bars, and of the GCB itself. This is seen as vital to the future of the Bar. The goals articulated in 1990 remain as important as ever; the fact that the Bar has not made real progress in relation to all is a serious concern.
- 5 The nub of our proposal is that our last AGM of the century would be a good time to take general stock, and to outline our priorities and commitments in an overall strategy for the future.
- 6 The proposal seeks to do so in relation to three themes: the role of the GCB in

the administration of justice; its role in relation to the wider legal profession; and its role in recruiting, training and generally promoting the needs of advocates.

The GCB and the administration of justice

– The GCB and the criminal justice system

- 7 The continued escalation in crime levels in South Africa constitutes without doubt the singlemost threat to South African society. It discourages foreign investment and domestic growth, it gives rise to resort to self-help, it undermines popular support for constitutional democracy, and it causes abject suffering.
- 8 It is *proposed* that the GCB identify an enhanced contribution by the advocates' profession, in conjunction with other components of the legal system, to the improvement of the criminal justice system as a first priority.
- 9 The premise for this approach is that the state-run justice system in South Africa, as in a number of other countries, lacks capacity and effectiveness to deal with the crime situation. On 9 September 1997, the Minister for Safety and Security officially confirmed that during the first half of 1997, while over 180 000 new cases were taken on by prosecutors, during the same period only 153 700 cases could actually be finalised. The total number of reported crimes increased from 2 385 295 in 1994 to 2 733 363 in 1997. During the same period, however, both the number of prosecutions and convictions declined alarmingly (by 39,9% and 41,5% respectively). The conviction rates for 1997 for three serious crimes (murder, car-hijacking and rape) were just 32%, 19% and 16% respectively).
- 10 In relation to commercial crime, a situation of near paralysis has resulted from the paucity of skilled investigating officers and commercially-skilled state prosecutors.
- 11 During the past year, the GCB has raised with the Minister of Justice the use of the Bar as a resource in criminal pros-

ecutions. The Minister has expressed interest in the proposal. In an important new analysis for the South African Institute of Race Relations, Schonteich (*Unshackling the Crime Fighters: Increasing Private Sector Involvement in South Africa's Criminal Justice System* (1998) 70) refers to the expertise of private legal practice in relation to commercial crime in the following terms:

"They have qualified and experienced personnel to handle intricate fraud cases. While outsourcing such prosecutions to the private sector might be an additional expense to the state in the short term, the long term benefits of an increase in a number of successful convictions would be considerable. White collar crime has reached alarming proportions. Through the effective combating of such crime, the economy as a whole would benefit. Moreover, diverting selected cases to the private sector will permit state prosecutors to concentrate their efforts on other priority crimes".

12 It is also *proposed* that, in addition to commercial crime in relation to which the Bar is able to offer a specialisation not generally available in the public service, the GCB take up with the Department *the wider use of advocates in prosecuting*. This was once the position in South Africa, and still is in many countries. The Department has found itself in continuing conflict with its own internal professional prosecuting staff in relation to competitive conditions of employment. Its cleft stick is that the Department must itself bear enormous overhead costs (through providing offices, equipment, training, fringe benefits and pensions), which ultimately curtail its capacity to offer competitive take-home pay. The Department should be asked to investigate (perhaps through a task team, or even a judicial commission of enquiry) the relative efficiency and economies of the prevailing as opposed to the proposed approach.

The Cape Bar is further prepared in principle to participate in, in conjunction with the Department, a pilot scheme in the Western Cape.

– Enhanced use of arbitration

13 The backbone of South Africa's justice system is, and must continue to be, its

system of courts. It is however at a huge cost, and drawing on scant resources, that they strive to offer a complete range of services to litigants. In a country such as ours, their primary focus (as with public health and education), unavoidably has to be on the needs of the indigent.

14 Again, commercial skills at the Bar, its existing experience in arbitrations, and the existing arbitration bodies provide a way to alleviate the strain on the justice system. At the same time, commercial needs can be met more expeditiously. Arbitrations are invariably organised by the parties themselves to a timetable they devise, and to which they can bind the arbitrators. So too they are able to provide at the outset for appeal mechanisms and dates, to ensure a final resolution of the matter within months (in some cases, within weeks). At the same time it must be accepted that arbitrations are no substitute for an efficient court system, and that their enhanced use must not in any way undermine the administration of justice through the courts.

15 This is a very important aspect as regards foreign investment. The South African Law Commission last year submitted to the Minister of Justice a report and draft Bill on International Arbitration, the effect of which is to introduce into South African law the New York Convention and the Uncitral Model law. Without these mechanisms, foreign corporations are not disposed to use South Africa as an arbitration venue. For the first time there is the prospect that it could become a serious arbitration venue, particularly within the context of Africa (and regard being had to cross-border economic initiatives such as the Maputo corridor, growing trade with East and West Africa, and the international supply of water and electricity by South Africa).

16 A related project by the Law Commission for a modernised domestic arbitration statute is also expected to be accomplished this year.

17 Thus far arbitrations have only functioned on a spasmodic and *ad hoc* basis outside Johannesburg. Recent initiatives by Pretoria and Cape Town point to the need for local Bars to investigate the setting up of local (or at least regional) arbitration centres. 18 It is *proposed* that constitu-

ent Bars be asked to investigate and report on practical ways of extending current arbitration initiatives to all major centres in South Africa, to the GCB National Executive at its meeting in January 2000.

– Parliamentary Committee

19 The Parliamentary Committee of the GCB (traditionally a committee convened by the Cape Bar, and led by its chair) has scrutinised for possible comment all Bills tabled in Parliament. The task has become a very onerous one. Over the past year, for instance, some 143 Bills were scrutinised in this way, and of these 23 were the subject of written submissions to Parliament.

20 While the task is burdensome, it is *proposed* that the GCB continues with this practice, as there are indications that in a number of instances its recommendations and criticisms – which focus on the administration of justice and the interests of the profession – have been of assistance in the legislative process. So far as is known, the GCB is the only professional body to offer Parliament and the public this service.

– Laws and Administration Committee

21 This too is an important GCB function. It focuses on pre-parliamentary matters (especially Law Commission papers and draft Bills, important White and Green Papers produced by government departments, and commissions of inquiry). It is *proposed* that the incoming committee chair ensures that the committee *automatically* reviews every Law Commission paper and draft Bill, all departmental Green and White Papers, and Commission reports.

– Judicial Appointments

22 There are indications that serious difficulties are being experienced in obtaining suitable persons for appointment to the High Court Bench. As already indicated, the High Court plays a pivotal role in the justice system in South Africa, and it is imperative to the survival and enhancement of the administration of justice – and to the capacity of our members to enjoy fulfilling professional lives – that the quality of the Bench be enhanced.

23 Evident problems include the following:

• **Working conditions**

In several centres, working conditions for the judiciary have deteriorated. They are not well served as regards equipment and support personnel. To the significant detriment of the judicial office the judges are obliged to bear heavy loads under unpropitious working conditions.

It is *proposed* that the GCB ask each constituent Bar to consult with its members and local Bench in this regard, and submit a memorandum to the GCB by 30 September identifying current shortcomings relating to High Court functioning.

• **Judicial training to promote representivity**

24 The GCB has expressed its public commitment to the enhancement of representivity (by reference in particular to race and gender) in the ranks of the judiciary. Unfortunately, a number of eligible senior black lawyers have declined to allow their names to go forward for nomination. A consequence has been in certain instances the appointment of persons with insufficient experience.

It is *proposed* that the GCB formally offer to the Department its support for judicial training programmes, to be carried out under the aegis of the judiciary, in conjunction with the Department, foreign agencies (such as the Commonwealth Judicial Training Institute), and the organised profession.

• **Drawing on the ranks of the senior Bar**

25 There is a general perception amongst many senior white lawyers that, regard being had to their race and gender, they enjoy no real prospect of judicial appointment and thereafter, promotion. The consequence has undoubtedly not only been the effective withdrawal of many senior white advocates from the ranks of those eligible for nomination for appointment, but their unwillingness to serve as acting judges. (This latter aspect is considered separately below).

26 It is *proposed* that the GCB convey formally both to the Minister of Justice, the Chief Justice (as chair of the Judicial

Service Commission) and the chair of the Parliamentary Portfolio Committee on Justice its serious concern that this perception has taken root, and seek their assistance in addressing it. The GCB must do all it can to ensure that the South African Bench is able to draw on the ranks of the country's best practitioners, while bearing in mind the need to address representativity.

– **Acting Judicial appointments**

27 A particular problem which has emerged is the staffing of High Court Benches with acting appointments. The larger divisions currently only function by virtue of the fact that at any given time, about one quarter of their strengths is drawn from acting judges. In this regard, the following is noted:

- A considerable disincentive to taking up acting appointments is the inconsistent attitude adopted towards many senior members of the Bar: that their services are indeed required (and the Bar itself criticised if these are not forthcoming) as acting judges, while the general perception is that their candidacies for permanent appointment elicit at best no enthusiasm, and often active hostility.

- It is also important that all appointees as acting judges enjoy the respect of the legal community. It is accordingly important that they be fully supported in taking up such appointments.

It is *proposed* that the GCB (in offering its assistance in terms of paragraph 21 above) raise with the JSC the need for prospective acting judges with limited court experience first to receive judicial training before taking up acting appointments.

- The Department continues to fail to understand the significant financial burden for most practitioners of taking up acting appointments, and to pay appropriate allowances. The current chambers allowance is only R140 per day; for many (in particular senior) counsel in the larger centres, basic monthly overheads may average R8 000 to R12 000 per month. This means that practitioners not only sustain loss of income consequent upon the disruption to their practices when acting as judges, but that the Department expects them further to meet a shortfall of some R5 000 to R9 000 a month as regards the

chambers allowance.

- Further difficulties result from the fact that in some divisions, there are evident logistical failures as between Judges President and the Department, as a consequence of which acting appointments are left unconfirmed until the last moment, making it near-impossible for practitioners to plan their professional lives.

It is *proposed* that all these matters be taken up urgently by the incoming GCB chair with the Judges President, the Minister, the Director-General of Justice and the JSC.

– **Pro bono service**

28 The Legal Resources Centre has asked the Cape Bar Council (in response to a previous suggestion by it) to indicate which members might be available to take on appropriate *pro bono* work. It is *proposed* that each Bar be asked to undertake the same exercise, and to report to the GCB by 30 September.

– **Public defender**

29 It is *proposed* that the Johannesburg Bar Council report to the GCB on progress made in relation to the public defender pilot project, with a view to its implementation at other Bars.

– **Legal Aid**

30 The GCB has played an active role during the past year supporting the new Legal Aid Board (now chaired by Judge Navsa) in tackling the continued legal aid crisis. It is *proposed* that all Bars ensure that the situation as it relates to junior members is particularly closely monitored.

The Bar in relation to the profession

– **An independent referral profession**

31 It is *proposed* that the GCB, and the constituent Bars, reiterate on all appropriate occasions that the essential characteristic of the South African Bar is its continued functioning, on the basis of being an important element in civil society in our constitutional democracy, as an independent referral profession.

32 It is further *proposed* that Mr Sidney Kentridge QC, undoubtedly the most re-

spected and forceful exponent of this view, be invited to give a public lecture (or failing that, contribute a piece to *Consultus*) articulating why that approach best serves the administration of justice and as an element supporting constitutional democracy.

– Legal practitioners' legislation

33 The likelihood of legislation in this regard was raised at the Umhlanga Rocks GCB conference a year ago. The GCB appointed as a consequence a committee to consider a response to the anticipated legislation. The committee has not achieved that function.

34 It is *proposed* that the incoming chair of the GCB as a matter of priority convene a task group to consider the legislative proposals and draw up a response for consideration by the GCB Executive and the chairs of the constituent Bars by January 2000. It is particularly urgent that the position of "independent" advocates be addressed.

– Relations with the attorneys' profession

35 The GCB must continue its regular consultations with the attorneys' profession through the LSSA. In this regard it is *proposed* that at the July 1999 GCB AGM the report undertaken by the Johannesburg Bar at the July 1998 AGM regarding recurrent issues of debate finally be tabled and resolved.

– The GCB and the Bars internally


36 It is evident that the matters to which the GCB must continue to give close attention are (sequentially) the recruitment of promising new members, regard being had in particular to embracing the balance of race and gender; professional training at the Bar; financial assistance; an appropriate examining system; means to assist in particular young practitioners commencing practice; enhancing access to commercial work, including the problem of perceived discriminatory briefing patterns. In short, a transformation programme focused on skills enhancement and greater membership balance as regards gen-

der and race must be pursued. There are no grounds for complacency.

37 It is *proposed* that the GCB request constituent Bars to circulate by 30 September proposals, adopted by each in relation to substantive transformation issues.

Conclusion

38 In conclusion it is *proposed* that the GCB:

- Reiterate its commitment to the 1990 statement of policy.
- Adopt the proposals set out in this document.
- Request all constituent Bars to commit themselves to implementing these in practical ways within the respective time frames indicated, and to report back to the GCB Executive in January 2000 as to concrete measures to be implemented or implemented.
- Communicate this strategy and its adoption to the Chief Justice, the Minister, other professional bodies, the Portfolio Committee on Justice, Bar members and the public. 

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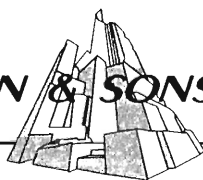
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