

# **The draft Legal Practice Bill 2000: Response of the General Council of the Bar**

A drafting committee has been convened by the GCB pursuant to a decision at its 55th Annual General Meeting on 28 July 2000, to work in conjunction with other organisations representative of legal practitioners in preparing a legislative model suitable for the realities of South African legal practice. That process is not yet accomplished.

At the meeting of the National Liaison Committee on Legal Education which was held in October 2000 the GCB submitted a memorandum as a preliminary response to the Legal Practice Bill ("LPB") (first draft) to clarify its own position, and to facilitate discussion. A second revised draft of the LPB has since been circulated. The revised draft shows no signs of the GCB's concerns being addressed. Instead, as the chairman of the GCB states in a letter addressed to the Minister of Justice and Constitutional Development,

"... we find a statute which ignores the existence of the Bar and which contains provisions directly destructive of its continuation.

"Two stark examples are the provision for all 'legal practitioners' (the words advocate or counsel are nowhere used in the Bill) to take work directly from the public and to manage trust funds, and for an executive-controlled Legal Council to administer the profession.

"The Bar is currently engaged in a wide range of activities designed to promote objectives that we believe Government shares. These include: the auxiliary staffing of the High Court (and now Regional Court) bench; legal education and vocational training; legal aid delivery; ethical enforcement; scholarship schemes (both funded by members personally and raised by them from business); transformation measures; and special co-operative measures under discussion with the Chief State Law Adviser regarding briefing by State Attorneys.

"We see in the approach of the Department's Planning Unit, its discussion paper last year and now its successive drafts of the Legal Practice Bill, no reflection either of this reciprocal relationship, nor of the broad

policy approach that I have stated in the third paragraph of this letter.

"The Bar now needs to know where, in broad terms and without trying to debate the detail of the Bill, Government stands. You will appreciate that this is critical to the GCB in deciding upon the future course of the supportive and co-operative measures with Government described above.

"The Bill suggests that Government is now set upon a course to eliminate the Bar, as an independent grouping of court specialists practising only on a referral basis, from the statute book. We find it hard to believe that this is intended. You will understand that we need to clarify this point without delay, if the Bar is both expected to continue to participate in the drafting process and from its own resources to continue to support Government as it seeks to do."

## **Concerns**

In its preliminary response to the draft LPB the General Council of the Bar expressed, *inter alia*, the following views:

### **Independence**

The GCB believes that it shares with other organisations significantly representative of legal practitioners the conviction that an appropriate legislative model will emanate only from a co-operative endeavour by practitioners themselves. Not only is this because practitioners will be closest to the realities of legal practice and organisational complexities which these generate (two good examples are the intricacies of Fidelity Fund regulation and the effective disciplining of practitioners), but that the legal profession as a whole needs to retain its fundamental independence and self-regulatory nature. It has to be said at the outset that the draft Bill reflects a very different ethos.

### **Realities of practice**

It must also be recorded at the outset that a fundamental concern is the extent to which the draft Bill reflects neither the realities of legal practice nor important

aspects of consensus achieved at the National Legal Forum at Uniša in November 1999. It has been explained to us that extensive drafting services have not been available to the Planning Unit, and that this has been compounded by the fact that the preliminary draft had to be produced by staff not even present at the Forum.

This is deeply unfortunate on at least two levels. One is that it places in question the purpose and utility of the Forum. The second is that, taken together with the contents of the draft, it suggests that the draft is more the product of the Discussion Paper circulated prior to the Forum, and subjected to extensive criticism in responses tabled at it, than of the Forum itself.

## **Four basic flaws**

At this stage we wish to say that the draft Bill is basically flawed in four key respects: its conflict with the Constitution; its failure to accord professional organisations (properly representative and compliant with acceptable regulatory requirements) an appropriate degree of independence and self-regulation; in modelling a Legal Practice Council on a basis directly opposed to that overwhelmingly agreed at the National Forum; and (turning to more detailed matters) as regards a succession of unsatisfactory individual provisions. We deal with each of these matters in that order.

### **Conflict with the Constitution**

The draft Bill is in conflict with the Constitution. An important chapter 9 Institution is the JSC, the composition of which is specifically stated to include advocates and attorneys. There is no indication that thought has been given to consulting the Minister of Justice and Constitutional Development about any constitutional amendment in this regard and its implications.

### **Independence and self-regulation**

- The approach of the draft Bill appears to be that because professional organisations are not prohibited, but are in fact permitted, that is adequate provision for them. We believe that that approach is perverse. It has been accepted (and was powerfully argued in the December 1999 *Consultus* by George Bizos SC, Deputy President Pius Langa and

Justice Johann Kriegler of the Constitutional Court and Sir Sydney Kentridge QC) that the independence of the legal profession is of critical constitutional importance. It is not just that the legal profession is a valued institution of civil society. It is that the legal profession, both because it provides overwhelmingly the country's judiciary and because of its professional service in daily legal practice, needs at all costs to be independent.

- This is best done by an approach not reflected in the Bill: by leaving the functioning of the profession to the profession, subject only to critical overrides to be found in any functioning democracy. These include: a determination of who qualifies to be a legal practitioner; ensuring that vocational training meets adequate standards; ensuring that proper disciplinary systems are in place; and the like. The GCB believes the balance is to be struck by requiring all practitioners to be members of professional organisations registered with an independent Legal Practice Council. The appropriate level of regulatory control must lie in registration of professional organisations, not in an attempt to regulate members of the organisations.
- The draft Bill wholly fails to make clear the relationship between the Legal Practice Council and professional organisations. Thus clause 5(b) states that one of the objects of the Council is to determine, maintain and enhance appropriate standards of practice and ethical conduct. One way in which this would ordinarily be done is through the promulgation of a binding code of professional ethics. But clauses 6 and 7 of the draft Bill, setting out the functions and powers of the Council, do not refer to this. Clause 11(5), by contrast, contemplates that “**voluntary professional associations**” will lay down rules of practice binding on their members – but that these may not be “**inconsistent with the provisions of this Act or any other law**”. What does all this mean? Why not provide clearly for the primary responsibility of professional organisations registered as such with the Council? And that if they fail to do that, then one of two consequences follow: withdrawal of registration of the organisation, and appropriate intervention

through a sufficiently independent office (such as the legal ombudsmen, as we proposed at the National Forum)? If, on the other hand, the draft Bill is intended comprehensively to regulate practice, it is not clear how (as clause 11(5) vaguely suggests) rules of practice could be inconsistent with the provision of any other law.

- The power to strike off and re-admit is given to the High Court (clauses 21 and 22). But in contrast clause 6(b) empowers the Council to remove the names of legal practitioners from the roll. Clause 22(1) also does not help: it suggests that in some cases the court may (will?) order someone else (the Council?) to re-enrol a legal practitioner.
- Similarly, as regards professional discipline, the draft Bill ascribes potentially overlapping roles to the legal ombudsman (clause 58), the Council and “**accredited disciplinary structures**” (see clause 60(1)). We revert to other unsatisfactory aspects of these provisions below. The important thing is that there is no clarity about the respective roles of the legal ombudsmen, the Council, the so-called structures and the high courts. What is meant by clause 61, which provides that the provisions of this part of the Act do not derogate in any way from the power which the Council has to take disciplinary action against legal practitioners and paralegal practitioners registered and enrolled by it? All this is superficial, muddled and full of potential for conflict.
- Yet more fundamental in the overall structure is the failure of the Bill to have explicit regard for the continuation of the Bar as a component of the wider legal profession, bound only to take work on a referral basis. The approach that because the Bar is not prohibited, therefore it is permitted is fundamental to this. Through clauses 11(2) and (5), it may be said, legal practitioners who wish to practise on this basis may do so. But what then of the fact that the draft Bill permits legal practitioners (thus *all* legal practitioners) to hold Fidelity Fund certificates and to operate, for example, trust accounts and to take work directly from the public (clauses 12, 16, 18 and 20)? It will inevitably be argued that any rule of a professional body prohibiting members from taking work directly

from the public is inconsistent with those provisions which specifically permit legal practitioners to do so.

- The Bar participates in the current drafting exercise because it has been given to understand by the Minister that its future existence is not in issue. If it is not in issue, then the Bill must provide for it. If the Planning Unit (or the Minister) however now intends to place the Bar's existence in issue, this needs now to be directly stated.
- It is not only the Bar as a functionally distinct component of the wider legal profession which suffers in this way. Thus while the draft Bill contemplates two rolls of practitioners (one for legal practitioners and another for paralegal practitioners: thus, see clauses 6(a) to (d)), there are virtually no operational provisions in the draft Bill dealing with the latter. In contrast stand clauses 16 and 17 which deal with the enrolment of legal practitioners. Thus while paralegal practitioners at least have the advantage over referral practitioners (the Bar) by being explicitly recognised, they are thereafter left to drift in a statutory ether.
- This is unsatisfactory, and it is unworkable. The premise for the Bill is that the legal profession is not serious about its independence, and will co-operate in its attenuation. It is evident from the National Legal Forum that that is a mistaken premise. The wider legal profession committed itself at the Forum to a co-operative endeavour in achieving new umbrella legislation which, to repeat, would reflect a high degree of independence and self-regulation. The draft Bill has, by contrast, put the profession through a blender, and is left, unsurprisingly, with confusion and uncertainty in the key respects we have indicated. More, its further tacit premise is that the professional organisations will nonetheless be willing to continue, but now to discharge a ventriloquist function for the Council. The alternative, of course, would be the imposition of extensive control through functionaries – staff of the Council – at a time when it has been made plain that national government budgeting for expanded functions of that kind is improbable.
- In short, government cannot have it both ways. If it wishes to control

through a council dominated by executive appointees and an extensive staff, it cannot expect acquiescence by the profession. If it wishes the profession, at substantially the profession's cost, to run services essential to access to justice (thus vocational training, legal aid and *pro bono* work, assist in staffing of the bench, legal aid and the more) it must provide for explicit recognition and essential independence, subject only to the regulatory mechanism of organisational registration adopted in other constitutional democracies.

### The Council

- A central flaw is the Council. In the first place, it is disturbing that it should so little reflect the evident consensus at the National Legal Forum that this would be an independent regulatory body, not susceptible to executive control. The consensus was thus that it should be headed by a senior judge (a member of the Constitutional Court or Supreme Court of Appeal). The Bill however would have it that it can be headed by any judge, or even any retired judge, or (in a unique statutory formulation) a **"person of similar calibre"**. That is a plain breach of the consensus described, and will not be acceptable to legal practitioners concerned about professional independence.
- It is also unacceptable that the Council should be a large and unwieldy body, with representatives of professional organisations in a minority. The draftsman seems to be unaware of the implications of the important Latimer House Guidelines adopted for the Commonwealth. Even **"the representatives"** of the professional organisations are representatives at one remove: they are *selected* by the Minister from persons *nominated* by professional bodies (clause 3(b)). There is inexplicable bias in other respects. There are currently 2850 prosecutors in South Africa. They are represented by one person, despite their central involvement in legal practice – yet **"law teachers"** (far fewer in number and with little direct involvement in practice) are represented by two. The 2000 advocates, 13 000 attorneys and about 4000 candidate attorneys have four representatives (at least,

those the Minister chooses as their representatives). Moreover, the Council is to include two persons (again selected by the Minister) from persons nominated **"by organisations representing consumers of legal services or considered by the Minister to be representative of the interests of consumers of legal services"** (clause 3(1)(i)). The draftsman is understandably vague in her contemplation; the discretion is effectively without limit.

- But apart from its composition, the contemplated Council represents other serious problems. We have already pointed to the marked confusion as to the relative roles of the Council, the High Court, the ombudsman and the "structures". It is important at the outset that a functional choice be made. It is this: is the Council to be an umbrella watchdog body (based on several international models) with a power to give and to withhold registration of organisations (and their disciplinary and ethical rules, vocational training programmes and the like); or is Government set upon a body meeting extensively and frequently to micro-manage the profession? What costing (in compliance with the strict requirements laid down in respect of all legislation of this kind last year) has been done in respect of the lesser and the greater scenarios?
- We concluded our critical response to the Discussion Paper circulated in August last year by the Planning Unit with a direct question as to costing and funding. It was not answered. The question had to be raised orally at the National Forum. The response there given by the Planning Unit was that (aside from a limited prospect of some Scandinavian funding), the profession would have to work on the basis that no additional funding was envisaged.
- Other obvious problems are these: Clause 87(1)(j) empowers the Council to **"prescribe the manner of assessment"** of *fees* for **"non-litigious work"** and associated *expenses*. The intention seems to be that the Council will, in relation to such fees and expenses, perform the function of the taxing master. The words **"prescribe the manner of"** are, however, confusing in that they may be taken to mean that the role of

the Council is to prescribe to the taxing masters how such fees and expenses should be "assessed".

- To sum up: We accept the desirability of a national council to serve the umbrella control function we have indicated. But it must be smaller, more representative of legal practitioners, and with a far less confused vision of what it is to do. The Bar and, we believe, other professional organisations concerned about professional independence and efficiency will not be willing to sacrifice these to a state-controlled bureau. It also does not believe that government itself wishes to assume greater administrative and financial burdens in that regard. The Planning Unit must say if we are wrong in that conviction and, if so, disclose to us the budgeting it has done in relation to its draft Bill. It must tell us if it seriously expects us to continue to sit as acting judges, magistrates, small claims commissioners, examiners, pupil-masters, legal aid liaison functionaries, disciplinary committee members at our own cost, and now to do so without professional independence in the essential respects indicated. That expectation will be disappointed.
- There is a middle way: it is to put the primary responsibility on professional organisations to keep their own houses in order, to make them accountable to the Council in that regard, and to deprive them (and through them, their members) of the capacity to practise if they fail to offer access to justice in an acceptable way.

### General provisions

- As already indicated, the purpose of this memorandum is a purely preliminary identification of serious flaws in the Bill. Its vision and its overall scheme is, we believe, fundamentally flawed for the reasons already indicated. With both that in mind and the fact that we believe that a realistic model must emanate from the drafting process currently under way within the profession itself, we confine our observations in what follows to more evident matters in individual clauses. We also do not deal with matters which fall within the particular expertise of the attorneys' profession, and which relate to it.

- It is not clear whether the Bill permits any voluntary organisation to exclude legal practitioners from its own membership. It is also not clear whether, if a body has its own accredited disciplinary structure, it may through such structure expel members from membership, where the grounds for doing so arise from what is a breach of its own rules but not a breach of the provisions of the Act.
- The draft Bill requires that aspirant legal practitioners complete, in addition to one year of practical legal training as candidate legal practitioners, 200 hours of “**unremunerated practical legal training**” either while at university or thereafter. At least 100 hours of the latter “**must be in the nature of community service**” (clause 13(1)(b)). It is not clear whether this requirement must be met by applicants with foreign legal qualifications or inadequate legal qualifications, which are considered separately by the special “**panel for the recognition of legal qualifications**” (in terms of clauses 14 and 15).
- Enrolment as a legal practitioner does not, in terms of the Bill, carry with it the right of appearance in the courts. A separate application to a High Court is required (see clauses 18(4) and (5)). Clause 11(3) causes confusion in this regard, however, because it suggests that corporate legal advisers may appear in court on behalf of their employers if they have “**been admitted as a legal practitioner**”. However, such admission must be “**in terms of section 18 of this Act**” – ie the provision dealing with the granting of rights of appearance by the High Court.
- As to professional discipline, the draft Bill ascribes potentially overlapping roles to the “**legal ombud[sman]**” established by clause 57, the Council and “**accredited disciplinary structures**”. A two-stage procedure is prescribed, namely “**an investigation**” (see clauses 67 to 72) and “**an inquiry**” (clause 73). An inquiry will be convened only if the report of an investigation “**reveals prima facie evidence which ... makes it desirable that an inquiry ... be instituted**” (clause 73(3)). It would thus appear that the same body which conducted the investigation must conduct the ensuing enquiry. In the case of a legal practi-

tioner, the sanctions which may be imposed if a finding of “**unprofessional or dishonourable or unworthy conduct**” is made, are limited to a fine of up to R10 000,00, a caution or reprimand or a ban (temporary or indefinite) on the employment of candidate legal practitioners (clause 73 (6)(a)).

- Clause 74 provides for what it calls “appeals” to “a competent court” against the finding at an inquiry. As the appeal “**shall be prosecuted as if it were an appeal from a judgment of a magistrate’s court in a civil matter**” it seems – this too is left unclear – that the appeals would lie to the High Court (see clause 74(4)).
- It is not clear from the Bill whether the person presiding at a disciplinary inquiry, instead of imposing the sanctions described above, may recommend that an application be made to court in terms of clause 21 for removal from the roll. Clauses 73 and 74 certainly do not say so, and it may therefore be that the conduct of an inquiry precludes the sanctions of removal from the roll and suspension from practice (see below as to the muddle surrounding the possibility of a suspension order).
- As to applications for removal, it is to be noted that “**accredited disciplinary structures**” are not specified in clauses 21(2) as bodies which may bring applications for removals. That is correct, in conflict with long practice essential, the courts have said, the proper regulation of the legal profession, Bar Councils will be precluded from doing so. Although it might be thought that an “**accredited disciplinary structure**” is an “organisation” for the purposes of clause 21(2), the inclusion there of express references to the ombudsmen and the Council (ie the two other organs of disciplinary powers) points the other way.
- On the face of it, clause 21(1) does not allow courts to order a legal practitioner’s suspension, as distinct from removal of the roll; contrast clause 20(1) which refers to orders of suspension.
- We have already referred to the unacceptable muddle between the jurisdictions of the ombudsmen, the council, the accredited disciplinary structures and the High Courts, respectively.

## Conclusion

The draft suffers from obvious defects. In the first place, it is unacceptably in conflict with important elements of consensus reached at the National Legal Forum. Secondly, it suffers from the lack of a clear vision. If the vision entails effectively expropriation of the assets of the Law Societies and stripping them and the Bars of their effective autonomy (subject to regulatory override), then it needs to be costed and proceeded with on the basis that it will meet with the strongest opposition from most elements of the profession. If however it is an endeavour to create an appropriate national regulatory structure, respected for its independence and which through its mechanisms (thus registration of organisations and ultimate accountability to it, buttressed to by an ombudsman performing the role appropriate to that office), then it has been poorly executed.

What is needed is candour and clarity as regards the policy choice. It also requires the costing exercise proposed in our response to the discussion paper twelve months ago, and again at the Forum eleven months ago. We believe that the current top-down model is muddled, lacking in principle, and poorly executed in detail. It is important that the profession is given some straight answers to the questions we have raised. If the Planning Unit is set on pursuing a draft which is inspired by its discussion paper and of the unacceptable level of draftsmanship of this draft and its predecessor, we need to know.

### JJ Gauntlett SC

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