

It is hard to understand this sudden anathema. The referral system is not the only one in the world, but it is a respected one, shared by several Commonwealth countries, including Britain.

It allows functional diversity; it permits a pool of practitioners who choose to specialise essentially in court work, in free competition with each other. Nothing compels a member of the public to use their services; for five years, attorneys have had rights of audience in every court in the land. What advocates as referral practitioners (rather like medical specialists) have to offer is not a broad range of client services but dedicated time for specific forensic tasks for which, by aptitude and focused vocational training, they are suited.

Why abolish this? The acid test must be what is best for the availability of skilled legal services to the South African public. Drawing on 45 years' experience of legal practice in South Africa, Bizos has warned of the repercussions for access to justice if the Bar is swept away. At present smaller attorneys' firms have access to the skills of all South Africa's advocates. Each counsel is ethically bound (by the cab-rank rule, which says advocates must take a brief if available) to do the work in which he or she is versed. Each competes for that brief with his or her neighbour.

However, the policy unit (in the letter it prepared for the minister) insists that

this is wrong. Advocates should form partnerships. The proposition is mystifying. How can this promote competition? How can it promote access to justice? Some advocates (if the Luddite ambition is attained) will be absorbed by existing large and flourishing attorneys' firms. Others – inevitably groups of the most established advocates – will form their own specialist partnerships. The briefing of one partner will sterilise the others from involvement in the same case.

The sadness is not just the potential destruction. It is that the thinking is wildly out of touch. It reflects no understanding – or practical experience – of the realities of legal services in South Africa.

The challenge for South African lawyers is clear. In the memorable image of Judge Johann Kriegler, lawyers cannot be islands of privilege in a sea of misery. There must be transformation, but it must be transformation in the rigorous sense used by Australia's High Court Judge Michael Kirby – not simply change, but change for the better.

This means a profession more representative of the face of South Africa, offering the South African public and its institutions internationally competitive skills, and doing so efficiently as well as affordably.

The changes proposed by the Bill must be seen against the backdrop of a justice system in a deep and worsening


crisis. The Portfolio Committee on Public Accounts and now the independent inquiry by former judge Mervyn King castigate its mismanagement. It lacks resources, and it is badly run.

The Bill's crass surgery will take away capacity, not enhance it.

At our own costs, we in the Bar train aspiring advocates, conduct examinations and advocacy training, administer disciplinary inquiries and legal aid defences, and fund bursaries. We scrutinised 132 parliamentary Bills last year and criticised 97. We provide (in acting appointments) up to a third of some High Court Benches, and now we staff (without being paid) regional courts too.

Are we seriously expected to continue to do all this when deprived of our independence and the way we practise? Does the minister really believe he has alternative resources to offer with which to carry out the broader work that the Bar has tried to do?

The policy unit has always admitted that there are none.

To destroy the Bar as an independent referral profession is to destroy a sinew of our constitutional democracy. It will send an unmistakable message to those who would invest in South Africa, and who monitor closely the quality and independence of its professions. It will hurt, not help, the public. We will not be party to it." 

It is in the public interest

In a reply to Gauntlett's article in the Sunday Times, Dr Penuell Maduna, Minister for Justice and Constitutional Development, writes that the purpose of the Bill is to promote the public interest. He makes these points:

- Our Constitution guarantees every citizen the right to choose their trade, occupation or profession freely, but provides that the practice of these may be regulated by law.
- Given that the proposed legislation will regulate corporate, public-service and paralegal practitioners, the proposal that eight out of 20 council members be nominated by advocates and attorneys in private practice may well be seen as erring on the side of generosity. Other sectors have only one representative and, despite the fact that the purpose of the legislation is to protect the public interest, provision is made for only two members to be appointed to represent consumers of legal services.
- The allegation that the council will "control the legal profession in a way that it has never been controlled before" is misleading. Almost 90% of private legal practitioners are attor-

neys and they have always been strictly regulated by societies established by and operating in terms of legislation.

- Large numbers of advocates practise without being regulated by any professional body.
- An important difference between the law societies and Bar councils and the proposed council is that the members of the former are entirely elected by advocates and attorneys. This presents a problem when they are tasked with protection of the public interest. Public perceptions that these societies tend to favour attorneys in conflicts with clients have been frequently documented in the media.

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It is in the public interest

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- He seems to suggest the “independence” of advocates is based largely on the fact that they take instructions only on referral from attorneys, and alleges that the Bill will abolish the referral system because “it requires all lawyers to take work directly from the public”.
- Finally, the judiciary’s independence does not depend upon its members being drawn from the Bar. The continuance of the advocate’s profession depends upon the expertise they offer, not upon petty job reservation.

Confusion: working off Third Draft Bill

In his reply to the Minister’s letter Jeremy Gauntlett wrote as follows on 4 February 2001:

“The letter from Minister Penuell Maduna, ‘Aim of the lawyers’ Bill is to protect the public interest,’ dismisses the Bar’s critique of the Legal Practice Bill as based on ‘factual inaccuracies,’ and a call for ‘petty job reservation.’

On January 11, the minister accepted the Bar’s proposal (first made in

October) that we meet to discuss our differences. We welcome that step forward and would not want to pre-empt the matter here. We are sure the minister does not intend that either. But one matter requires immediate correction: the attempt to characterise our critique as riddled with errors.

What the minister’s letter does not disclose is that he is working off a different text to ours. The confusion is unsurprising, because what he appears now to use is, in fact, the third draft of the Bill.

This draft, moreover, was posted on a departmental web-page two days before Christmas and without notice to all those bodies the Policy Unit affects to consult.

To add to the muddle, the draft was rendered inaccessible without use of an appropriately-named ‘Acrobat Reader.’ In these circumstances, the head of the Policy Unit went on leave, setting a unilateral deadline of January 31 for responses.


The new draft removes some of the inanities in its predecessor to which the professional associations had to draw attention. But major structural flows remain; it is these which, at the level of basic policy, we shall be glad to raise with the minister.

Chief among these is the inspiration, now disclosed, for the attempt to impose a statutory council of ministerial nominees on lawyers. It includes, we are now told, the statutory council for quantity surveyors.

To resist this has little to do with ‘petty job reservation’.”

The appointment of judges in England

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appeals and then hears the odd civil trial. I am looking forward to the day that the racial injustices of the past have been fully abolished, and that each and every individual in South Africa can again compete on merit – or am I dreaming? 

Serving the public interest

Writing in *Counsel* April 2000 Jonathan Hirst QC, the (then) chairman of the Bar of England & Wales is sharply critical of the English Access to Justice Act 1999 which provides for the establishment of the Criminal Defence Service (CDS). It allows the new service to “employ persons to provide representation” to defendants in criminal proceedings.

Hirst raises the following points:

- “He who pays the piper ...?”

We are also entitled to ask why a partial nationalisation of the provision of defence advocacy services is a desirable objective in its own right, given this (the British) Government’s general move away from the state sector. Defendants are always bound to suspect that a state employed defender is not fully independent of the prosecution being brought by the State. The lessons from the US bear this out.

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