

# The Bar and the future: The General Council of the Bar's decision

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**A**t the Annual General Meeting of the General Council of the Bar (GCB) held in Durban in July last year, a committee of six Bar leaders under my chairmanship was appointed to consider and report on the Bars' policies and strategies for the future. We were mandated to address fundamental questions concerning the future role of the Bar in South Africa, including the structure of the legal profession and the judiciary, and whether the Bar should support rights of audience for qualified attorneys in the Supreme Court. In addition, we were to review the major professional and ethical rules and practices which govern the conduct of advocates as members of the Bar and consider the desirability of changing or adopting them.

A Scottish lawyer once said:

The practice of law is more than a mere trade or business and . . . those

who engage in it are the guardians of ideals and traditions to which it is right that they should from time to time dedicate themselves anew.<sup>1</sup>

I believe it is fair to say that the Bar Leaders' Committee (to which I shall refer as "the Committee"), approached its task in just such a spirit of dedication, whilst at the same time being mindful of the need for the profession to remain dynamic and to play a leadership role in an evolving democratic society.

The Committee consisted of myself, as chairman, Brian Southwood, SC (vice-chairman of the GCB and leader of the Pretoria Bar), Hans de Bruin, SC (leader of the Orange Free State Bar), Malcolm Wallis, SC (leader of the Natal Bar), Wilfred Thring, SC (then leader of the Cape Bar and now a Judge in the Cape Provincial Division) and John Myburgh, SC (then leader of the Johannesburg Bar and now a Judge

in the Transvaal). The Committee conducted a wide-ranging enquiry into the present structure of the legal profession and its relationship to the judiciary. It investigated the effect of the proposal to allow attorneys to appear in the superior courts, as well as the desirability of changing or amending the existing rules of practice at present followed by the Bar to take account of changing social and economic conditions.

The report of the Bar Leaders Committee was submitted to the GCB towards the end of 1991 and considered by the Executive Committee ("Exco") at its meeting in January 1992.

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At that meeting, with regard to the important question of the future structure of the profession and

whether attorneys should enjoy rights of audience in the Supreme Court, the following resolution was adopted:

The GCB is of the view that a commission of enquiry, manned by a person or persons having the support of all sections of the community, including the legal profession, be appointed as soon as practicable to consider the structure and role of the Courts and legal profession, including matters such as:

1. The quality of legal services afforded to the public and the establishment of a comprehensive system of legal aid;
2. The qualifications and requirements for entry into the profession;
3. The structure or re-structure of the Supreme Court and in this regard:
  - 3.1 the establishment of specialised Courts, e.g. labour, matrimonial, commercial, MVA and criminal Courts;
  - 3.2 the qualifications and requirements upon which the right of audience should be accorded in those Courts;
  - 3.3 the machinery to be established for the selection and appointment of Judges in the Supreme Court and the qualifications and requirements for such appointments.

The GCB's decision to call for a commission of enquiry was based on the consideration that differing opinions on the subject exist amongst members of the legal profession and in the Bars themselves, that it has proved virtually impossible to obtain unanimity between the two branches of the profession and that so important a change requires the input of the Bench, the Department of Justice and other lawyer organisations such as Nadel and the Black Lawyers Association. A further consideration was that the rights of audience issue cannot be considered in isolation from broader questions such as the threshold academic qualification for practitioners in the superior courts, whether the court system should itself be re-structured, and who should qualify for appointment to the Supreme Court Bench. It was felt that a commission which enjoys the confidence of all interested parties (and not only official bodies such as the GCB and the Association of Law Societies (ALS)), would give all concerned an opportunity to be heard on these matters, pivotal as they are to the administration of justice in this country. The future structure of the legal profession, rights of appearance in the superior courts, and the appointment of Judges are issues

which will become even more vital in a future South Africa with a Bill of Rights justiciable by the courts.



A meeting was held with representatives of the ALS the day after the GCB Exco meeting to discuss further the ALS' proposal that attorneys be granted the right to appear in the Supreme Court. After a searching debate and a frank exchange of views, it was agreed that the ALS would consider the GCB's proposal that a commission of enquiry be appointed by the professions after consultation with all interested parties, and that if the ALS approved the proposal, the specific terms of reference of the commission would be settled, after consultation with the other interested parties. What has been mooted is that the commission be a private one, presided over by an eminent retired Judge, acceptable to and enjoying the confidence of all interested parties. This would ensure that the commission's recommendations would in due course receive serious consideration by the government and are likely to be adopted. At the time of writing, the GCB was still awaiting the ALS' response, but I believe that there is a good prospect that the GCB's proposal will reach fruition.



At the Exco meeting a number of other important recommendations by the Committee were considered and adopted by the GCB. These included the following:

## Case-flow management

The Committee recommended that attempts be made to persuade the South African judiciary to adopt a system of "case-flow management" in order to promote efficiency and reduce delay in the Supreme Court. Such a system would obviously require more active participation by the Judges at the pre-trial stage. It was felt, however, that this would lead, as has happened in other countries such as Australia and Canada, to a much more efficient disposition of the court's roll and the earlier settlement of many cases, with a resultant reduction in the work-load of Judges. The Committee also recommended the adoption of an expedited list or so-called "fast track system"

for cases of compelling urgency. A further recommendation was that the Rules of the Supreme Court should be under constant review by standing committees consisting of Judges, advocates and attorneys with active litigation practices. It considered that the existing machinery of the Rules Board was too cumbersome and slow-moving for modern requirements and did not always take account of the differing needs and conditions encountered in different divisions in the various parts of the country.

## Shortage of judges

The Committee also expressed concern about the acute shortage of Judges in some divisions. It recommended that consideration be given to the introduction to a system of "Masters" (senior practitioners at the Bar) to deal with interlocutory and unopposed matters, similar to that extensively used in England. It proposed that a pilot project be instituted in one or more of the larger urban centres where the size of the Bar and volume of work would justify recourse to such a system of "Masters". The Committee suggested that, as an alternative to a system of case-flow management, after the close of pleadings, matters could be referred to the Master who would give detailed directions as to the matters to be attended to before the trial could commence, such as further discovery, amendments to pleadings and further particulars for trial, thereby helping to streamline the litigation process. This is the system which operates with great success and efficiency in England.

## Expert evidence

The Committee also recommended that, where expert evidence is to be deduced at the trial, a copy of the expert's report be furnished to the Court rather than a mere summary of his evidence, as is the English practice. The Committee also favoured the introduction of something akin to the English practice whereby the parties are required, before the commencement of the trial, to exchange written statements containing the evidence which each intends to adduce at the trial and the witness, when called, merely confirms the contents of his/her statement instead of giving evidence in chief, whereupon he/she is cross-examined.

The GCB resolved that every effort be made to persuade the judiciary to adopt reforms in Court procedures along these lines.

## Jury system rejected

The GCB agreed with the Committee's recommendation that the re-introduction of a jury system in South Africa was neither feasible nor desirable.

## Briefs directly from certain bodies

A recommendation was adopted that the Uniform Rules of Professional Ethics be amended to permit counsel to accept consultation and opinion work in non-litigious matters direct from professional firms in matters falling within the ambit of the latter's expertise, and from corporate in-house legal advisers who have the qualifications of an advocate or attorney. This recommendation was made after an exhaustive review of the rationale for requiring counsel to be briefed by attorneys and not to accept work direct from the lay client. It was felt that while briefing of counsel by attorneys in litigious matters was indispensable, briefing by professional (as opposed to lay) clients for consultation and opinion work, where the attorney's intervention would often be unnecessary, costly and inefficient, is a desirable innovation. This innovation was recently adopted by the English Bar. The recommendation was also approved by the GCB, subject to the right of constituent Bars not to follow it.

The recommendation that in non-litigious matters counsel be permitted to accept briefs from the Legal Resources Centre and the University Legal Aid Clinics, as long as they are represented by a duly qualified advocate or attorney, even if he is not an admitted practitioner, was also adopted.

## Partnerships

The GCB accepted the recommendation that to permit partnerships by allowing advocates to enter into partnerships, either with one another or with non-advocates, would be contrary to the public interest and more likely to increase the cost of litigation than reduce it. The committee's motivation was that such partnerships would restrict the client's choice

of advocate; render advocates less accessible to the public; reduce competition between advocates, reduce standards and increase costs.

## Full-time practice

The GCB also adopted the recommendation that the rule requiring members of the Bar to practise full-time and not to participate in other callings while so practising, should be retained, as being in the public interest.

## Chambers

Also adopted was the recommendation that it was in the public interest, as well as that of the Bar, to preserve the existing rule requiring members of the Bar to keep chambers approved by their Bar Councils. The committee considered that professional and ethical considerations, together with the savings in costs which flow from the sharing of library and other facilities under the present system, far outweighed any benefit which could possibly accrue from allowing members of the Bar to practise in premises remote from one another.

## Advertising

In regard to advertising, the committee came to the conclusion that the public interest did not require advertisement of their services by advocates to the general public, inasmuch as they are not permitted to receive work direct from lay clients. The choice of advocate is made by another practising professional lawyer, viz. the attorney, who is invariably in a position to select appropriate counsel, there consequently being no need for advocates to advertise themselves to the general public. The committee considered, however, that advocates should be permitted to make themselves, their qualifications and their specialities known to attorneys by means of a professional directory or law list, subject to the control of the Bar Councils. The GCB accepted this recommendation, as well as one that the Bar rules prohibiting or restricting publication by members of certain legal matter using their own names and qualifications, taking part in broadcasts or lectures, or appearing on television, be repealed. However, the rules prohibiting Counsel from commenting on pending cases or on cases in which they

have been involved, are to be preserved.

## Research by juniors

The GCB also adopted the Committee's recommendation that there should be a greater utilisation of the talents of junior counsel to carry out research tasks under the direction of more senior advocates. The junior would be briefed and paid by the attorney for a specific and restricted research task to assist the counsel engaged on the case, thereby reducing costs, saving time and affording the junior a valuable opportunity to gain experience under the guidance of the senior colleague involved in the matter.

## Communication with universities

Also adopted was the recommendation that, in order to attract the best qualified candidates to the Bar, liaison committees be appointed by each Bar to maintain ongoing communication with the law faculties at the universities in its region and to seek contact with senior students who are suitable candidates for the Bar, by arranging for them to read in chambers and exposing them to interesting court cases.

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I wish to thank the members of the Committee and particularly Wilfred Thring, SC (now Thring, J.), for their time and assistance to me in the preparation of the report. It is hoped that in due course, the Committee's report, dealing with matters which will continue to be of vital significance to the Bar in the years ahead, will be published in full in the pages of *Consultus*. In this way, individual members of the Bar will have the opportunity of focusing on some of the basic principles and practices which go to the heart of the advocates' profession, but which are seldom subjected to the soul searching self-examination which every profession needs from time to time.

## FOOTNOTE

1 HP MacMillan. An address entitled: "The Ethics of Advocacy" (1916). ■