Quo Vadis?  
The GCB and the Legal Practice Council

Craig Watt-Pringle SC, chair, General Council of the Bar of South Africa

I attended the International Bar Association’s (IBA) annual conference in Rome, over the period 7 to 12 October 2018, as Chairman of the General Council of the Bar of South Africa (GCB), with my Deputy, Moss Mphaga SC.

The IBA is the largest association of its kind and the conference attracted thousands of delegates. Apart from the interesting and pertinent topics aired at the conference, it offers the opportunity to meet both formally and informally and to confer with the leaders of other bars with which we have common interests, such as the Bar of England and Wales, the Irish Bar, the Bar of Hong Kong and so on.

Our counterparts in the attorneys’ profession send delegates to the IBA conference inter alia in order to network and forge useful professional links with international law firms. The delegates and speakers are not limited to practising lawyers. One of the delegates and speakers was, for example, the head internal legal counsel at Microsoft, one of the largest corporations in the world.

Whilst the GCB can go toe to toe with its counterparts in other jurisdictions when it comes to pupillage and advocacy training, we lag way behind some bars in promoting the services which our members are capable of rendering in areas of alternative dispute resolution (principally arbitration and mediation) outside of our own borders. I will return to this topic below.

By 1 November 2018, the Legal Practice Council (LPC) will have been constituted in terms of the Legal Practice Act 28 of 2014 (LPA). A question frequently posed to me as chairman of the GCB is, what does this mean for the constituent bars and for the GCB? It has even been assumed that the effect of the LPC will be to abolish the existence of the GCB, or at least any reason for its continued existence.

The question is a valid one. I would, however, suggest that in light of the LPC being charged with the regulatory function traditionally carried out by the GCB and the constituent bars (collectively, “the bar”), the focus ought to be on areas in which the bar can more effectively serve its constituency, rather than viewing the era of the LPC as the death knell of the bar.

I propose to tackle this question by considering first of all why the bar came into existence and what it means to its members; and secondly, by considering the anticipated role of the LPC and then discussing the proposed focus of the bar.

Prior to the LPA, there was no statutory governing body for advocates. Any person who qualified to be admitted as an advocate could be so admitted and immediately commence practice without undergoing pupillage or becoming a member of any bar. The bars are and always have been voluntary associations and the GCB is an association to which the bars voluntarily belong.

The bars required their members to practice from chambers and have established professional ethics committees for the purposes of guiding, regulating and enforcing appropriate standards of professional conduct. In addition, the bars invested in libraries and common rooms and eventually required new members to do a period of pupillage followed by an assessment of competence before they could actually commence practice.

In the process, the bar has developed a body of practitioners whose leading members are as good as any in the world and who generally practice to a high standard, are held and adhere to a high ethical standard, and whose services are much sought after.

For decades, our judges were exclusively drawn from the ranks of senior members of the bar and many still are. The public sets store by “counsel’s opinion” and especially that of senior counsel. When referring to “counsel” they are generally referring to members of the bar and not to any person who has been admitted as an advocate.

Our members are routinely appointed as arbitrators and to undertake commissions of enquiry and other similar adjudicative roles. Our members have been called upon to appear and to preside as judges and appeal judges in neighbouring states. Despite their entitlement for over thirty years to appear in litigious matters, attorneys still entrust the more important matters to our members.

Apart from the recognition enjoyed by members of the bar from the litigating public and briefing attorneys, the legislature has recognised the bar as the main representative of the advocates’ profession, by granting to the constituent bars and the GCB locus standi to apply for the suspension or striking off of any advocate and the bar has, at its own expense, frequently done so. Of even greater significance is the fact that our courts have adopted the standards set by the bar for the professional conduct of its members as the common law benchmark for all advocates.

In short, the bar has a very strong brand. I would suggest that...
the most reputable attorneys’ firms – large and small – brief advocates exclusively from the bar. The bar’s brand is attributable to the standards that briefing attorneys and the public have become accustomed to and these standards have been achieved and attained because of the fact that we practice from approved chambers and as members of a community of self-regulating professionals.

The importance of practicing from chambers cannot be over-emphasised. Senior members pass on, mentor and share their experience with younger members, drawing them into matters that they would otherwise not be exposed to. Juniors exchange experiences with one another and pass on work. Members grow in this community in a manner that would not occur if this close association were to be lost. Those who practice to a particularly high standard set the bar for the rest. Competition amongst peers raises the general standard. Ethical standards are more easily maintained when practising cheek-by-jowl with your peers, where your conduct is open to scrutiny and your reputation is rightly perceived as your only real asset.

Pupillage is an institution originally set up and progressively developed by the bar in order better to equip its junior members to commence practice and to ensure a minimum standard before they are “let loose on the unsuspecting public” and that they have better prospects of succeeding in practice. This too was not done out of any externally imposed imperative to regulate the profession, but for purposes of advancing transformation, the standards of the profession and in the process, serving the public interest.

The fact that the bars are voluntary associations has meant that the thousands of professional hours spent on work carried out by the bar councils, the bar sub-committees, pupil lecturers, mentors and advocacy trainers has been done largely at no cost to the fiscus, the public or indeed the individual members of the bar, save to the extent that individual members have donated their time and resources voluntarily. This enormous investment by members was at least in part to give back to the association from which they had benefited, to advance transformation and the administration of justice, and to ensure the continued well-being of the bar.

The bars and groups or sets of chambers within the bar have set up transformation initiatives. The success of these initiatives is a hotly contested subject but the fact remains that such transformation initiatives as are evident within our profession, are typified by these voluntary efforts, some of which require voluntary funding by members of the bar, as well as other voluntary forms of commitment of time and effort.

In conclusion on this point, members of the bar not only benefit from the extensive infrastructure that has been built up over decades, but from being associated with the brand that is “the bar”.

The GCB’s most important role in the recent past has been associated with its coordination of the pupillage program and its contribution via the National Bar Examination Board, a highly respected, independent body comprising judges, retired judges and dedicated members of the bar who have ensured that the assessment of pupil advocates across the country is of a uniformly high standard.

The GCB’s coordination of advocacy training and in particular the workshops which it organises for the training of new advocacy trainers, for advanced advocacy training (such as for example advocacy training in relation to expert witnesses for junior practitioners) has been extremely beneficial to our junior members. The GCB’s advocacy training related interactions with our colleagues at the bars of England and Wales, Scotland, Ireland, Republic of Ireland, Namibia, Zimbabwe, Nigeria, Pakistan, Singapore, Hong Kong, Australia, New Zealand and Malaysia has served to enrich the advocacy training which we are able to give and has provided those of our members who have been fortunate to train in those jurisdictions invaluable comparative experience of the challenges facing other bars and the ways in which they are meeting those challenges.

In more recent years the GCB has established a sub-committee on transformation and encouraged and monitored the establishment of policies on gender equality and sexual harassment.

Another invaluable contribution members make to the administration of justice is to review the applications of candidates for judicial appointment. The process involves an overview of each candidate’s past performance – particularly their judgments whilst acting as judges. The exercise includes researching whether the candidate’s judgments have been taken on appeal, and if so, how they were regards by the appeal court. These reviews are very well received by JSC Commissioners, particularly since any areas of concern may be taken up with the candidate during the interviews. The feedback received is that they are a significant aid to the important task of identifying appropriate candidates for judicial appointment.

Indeed, the GCB has the right to appoint two commissioners to the JSC and to nominate members of the National Forum, the interim body set up to usher in the LPC. It also has representation on the Chief Justice’s committees set up to foster efficiency in the courts and the administration of justice.
On the disciplinary front, the GCB has provided an appellate forum for disciplinary decisions taken at bar level and also resolved fees disputes on the rare occasions these were not resolved at bar level. It has also taken the initiative where the bars have either been unable or in rare instances, unwilling, to act in specific cases. It thus constitutes another level of oversight in regard to the conduct of practising advocates.

Similarly, fees disputes dealt with at bar level are on rare occasion resolved on appeal by the GCB.

The impact of the LPC
Of the GCB’s traditional functions, those that the LPA impacts the most obviously and directly are its disciplinary functions, its regulation of fees through the resolution of fees disputes and its self-imposed responsibility for pupillage training and assessment.

The LPC has prescribed procedures for the investigation and prosecution of disciplinary matters. Whilst it is probable that members of the bar will serve on the LPC committees and tribunals set up to do so, the bar will not have any formal role. That does not mean that the bar ought to wash its hands entirely of the role that it has traditionally played in holding its members to account. Nor should the bar discard the notion that it may be desirable, in the protection of its own reputation (or “brand” if you prefer) to hold its members to its standards, which may be a higher standard than those imposed by the committees functioning under the auspices of the LPA – particularly if the bar’s disciplinary functions turn out to be more effective than those of the LPC.

Similarly, the LPC will play a statutory role in both the regulation of advocates’ fees and in resolving fee disputes. In my view, that too does not imply that the bar ought to wash its hands of the opportunity to foster voluntary dispute resolution overseen by the bar between members and their attorneys or clients, in preference to the formal LPC route. Depending on the efficacy of the LPC’s process, the bar’s may be preferred in many cases. The LPC would presumably be pleased if fewer disputes have to be resolved by it.

As for the training and assessment of pupils, the GCB and constituent bars intend to apply for accreditation (as expressly envisaged by the LPA) to continue taking in pupils, training them and assessing them for admission as full practicing members of the profession.2 It is difficult to conceive how the LPC, without making use of the considerable experience and expertise of the members of the bar, can aspire to offer training to an acceptable standard. Whilst the bar has until now done so, the bar’s capacity has been limited. There is a difficult tension in issue: on the one hand, the bar has made and should continue to make a considerable contribution. On the other, the bar has finite resources, and the LPA’s objective is to broaden access to the profession. The bars should continue to play a constructive role whilst this issue is addressed.

It goes without saying that the LPC will affect our members in a myriad ways, which we cannot at this stage accurately predict but that is a matter separate from the question at hand, which is: Is there a future for the constituent bars and the GCB once the LPC is in full swing?

It follows that the most severe impact on the bar, insofar as its formal role within the advocates’ profession is concerned, is that it will no longer have jurisdiction to discipline non-members via the courts; it will no longer have a final jurisdiction on disciplinary and fee disputes involving its members and it will no longer alone set the standards of training and assessment of new entrants to the profession. It will require accreditation in order to continue its work in the fields of prescribed training and assessment of pupils.

Having said that, all of the advocates elected to the LPC have been drawn from the bar and they will bring influence to bear on these important issues.

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Joffre Esley
The bar after the LPC

In my view, the LPC will not take care of advocates’ needs as the bar does and the bar, or “the bar”, will remain highly relevant.

Why is this so?

Firstly, the LPC is made up of twenty-three members, only six of whom are practising advocates. Ten are attorneys. Three are Ministerial appointees, two are academics and the remaining two are representatives of the Legal Aid Board and the Fidelity Fund, respectively. Whilst we regard attorneys as our colleagues and friends, their interests and ours are by no means perfectly aligned and when their interests are at variance with ours, we can expect them to look after theirs.

Secondly, the LPC is there as the statutory regulator of the legal profession. The LPC is not primarily there to promote the interests of the legal profession in the same way that the bar has been, let alone the interests of advocates in particular. In any event, practising advocates numerically make up only about fifteen percent of all practicing lawyers.1

Thirdly, the LPC can only operate within the confines of its statutory mandate. The bar can within reason keep evolving and adapting to the needs of its members, which may include the protection of its interests and of its individual members.

The fact that advocates will henceforth be governed by a statutory body on which its members constitute a small minority raises the unfortunate, but probably real, need for the bar to act both as lobbyist and, on occasion, protector of its members from unfair or possibly even unlawful treatment at the hands of the LPC and its structures.

That is not to say that the bar is or ought to be antagonistic to the LPC. The status quo was undoubtedly flawed. Members of the bar may have been regulated to an acceptable degree, but the absence of formal regulation, training and assessment of new entrants to the profession falling outside of the bar has been a lacuna which has not served the profession, the courts or the public well. By far the majority of serious complaints of unprofessional conduct received by the bar have been directed at advocates who are not members of the bar.

The advent of the LPC will, if it performs its mandate effectively, result in the bars being able to direct more attention to the interests of the bar, rather than its governance. The Bar of Eng-
The GCB and the Legal Practice Council chair’s contribution

Land and Wales employs a senior executive whose mandate is to boost the exposure of its members to international appointments as arbitrators and barristers. Both at the IBA conference and at the Commonwealth Law conference in Melbourne in 2017, I met clerks of chambers whose main purpose in being there was to network with lawyers from jurisdictions other than their own. We have no equivalent and have fallen way behind our counterparts in the UK and elsewhere in this respect. It is time that we directed more of our attention to such matters.

Michael Kuper SC of the Johannesburg Bar and the organisation he founded and still heads, AFSA, have done much to foster private arbitration in Southern Africa. In its first year of establishing an international arbitration centre, AFSA already has some 32 international disputes being administered under its auspices. The bar ought to be more proactive in this regard.

In conclusion, I propose that our best interests will be served by the bar continuing to exist in order both to uphold and advance its professional standards, to advance the interests of the advocates’ profession specifically, to play a crucial role in relation to transformation, training and assessment of pupils and in the ongoing education of its members both generally and as a key component of transformation.

The bar must play its part in the formal structures of the LPC and also advance its interests both within and outside of those structures.

It is my understanding that the LPC will not require advocates to practice from approved chambers, as the bar currently does. By this I mean that whilst the LPC Code of Conduct requires members to “keep chambers at a place suitable for the practice of an advocate”, the actual building does not require approval by the LPC, as is currently the position with the bar. Under the LPA Code advocates may still only exceptionally consult at the offices of the instructing attorney or the client, or at home and only if this does not compromise independence. The LPA permits advocates to accept briefs directly from clients provided they are in possession of a fidelity certificate. As such they do not form part of the referral bars who only accept briefs from attorneys or justice centres. Our bar is strictly a referral bar, and it is important that it remains so, through the structure of the GCB and constituent bars.

The dual requirements that we practice from approved chambers and that we practice exclusively as members of a referral profession are key to our brand as “the bar”. It is of the very essence of our profession that we continue to maintain these requirements of membership. It not, we risk the loss of a brand that took over a century to establish and its enormous capacity to contribute to the administration of justice in a way that only an independent, cohesive and distinct referral profession of associated advocates can. There is much to cherish in the established bar, and my hope is that as a profession, we embrace the LPA and LPC for what they can do for the legal profession, but retain and build on the best features of the bar as well.

Craig Watt-Pringle SC
Chairperson
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22 October 2018

Endnotes
1 Section 7 (2) of the Admission of Advocates Act 74 of 1964 reads: Subject to the provisions of any other law, an application under paragraph (a), (b), (c) or (d) of subsection (1) for the suspension of any person from practice as an advocate or for the striking off of the name of any person from the roll of advocates may be made by the General Council of the Bar of South Africa or by the Bar Council or the Society of Advocates for the division which made the order for his or her admission to practice as an advocate or where such person usually practises as an advocate or is ordinarily resident, and, in the case of an application made to a division under paragraph (c) of subsection (1), also by the State Attorney referred to in the State Attorney Act, 1957.

2 Section 6 (5) (G) of the LPA provides that the LPC: “may accredit training institutions that offer:
(i) practical vocational training courses which contribute towards the qualification of legal practitioners and candidate legal practitioners; and
(ii) compulsory post-qualification professional development.”

3 There are no accurate figures on advocates in private practice. There are about 26 000 attorneys registered with the law societies and the GCB has about 2 800 members.

4 Arbitration Foundation of South Africa.