



Peter Hodes SC

The TRC

During October 1997 the GCB made detailed written submissions on the legal system to the Truth and Reconciliation Commission which held hearings in Johannesburg on this subject on 27, 28 and 29 October 1997. Elsewhere in this edition of *Consultus* a summary of our submissions by Jeremy Gauntlett SC is to be found. The work done by the drafting committee was monumental and the submissions were received with acclaim by all who read them and with whom I came into contact. Jules Browde SC, whose career at the Bar spanned the relevant period which fell to be considered by the TRC, presented our submissions orally to it. As he was required to be in court later that morning for a trial, the various questions which were put by the TRC members and the commission's legal representative were answered by Malcolm Wallis SC. An important achievement was the fact that the GCB was able to make a single submission and that it was unnecessary for its constituent Bars to make separate ones. This clearly heightened the impact of the information which we placed before the TRC.

Legal education and pupillage

In terms of recent legislation provision has been made for a four year LLB degree, although a five year LLB will still be available to those who wish it. The four year LLB resulted from discussions over the past few years between the GCB, the ALS, the Department of Jus-

tice, NADEL, the BLA and the Society of University Teachers of Law.

In these discussions it has been generally accepted that the LLB should be followed by one year's practical legal training. While certain of the role players have suggested that the year's legal training should take place at or through the universities, it is generally accepted that the universities are not up to this task themselves. The GCB has adopted the view that it is solely responsible for the practical legal training of those who wish to be members of its constituent Bars. The ALS shares this view.

There have, however, been important developments of late. In an address to the Transvaal Law Society in late 1997, Arthur Chaskalson, the President of the Constitutional Court, called for the introduction of a one year internship. He expressed the view that such internship would help alleviate or eliminate the problems of the foundering legal aid system and at the same time afford young lawyers access to legal practice, bearing in mind the inability of many new graduates to procure articles of clerkship with attorneys. Johnny de Lange, the chairperson of the Portfolio Committee of Justice, has supported Chaskalson P's proposals.

The suggestion of a one year internship was considered in detail at the GCB executive committee meeting on 31 January 1998. The proposals by Chaskalson P would in effect mean that one year would be spent by aspirant advocates and attorneys in public defenders' offices and doing legal aid work either through the Legal Aid Board or legal aid clinics. They would receive a "survival" salary whilst so occupied. Most exco members were of the view that the proposed internship had the potential to be used effectively in order to achieve a number of goals enabling junior practitioners to work their

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way into a meaningful and successful practice and that the GCB stance should be that the internship idea has interesting possibilities and that the GCB would like to get involved. The following proposals were adopted by exco:

- 1 That in principle the GCB expressed its support for a year of internship for aspirant legal practitioners, provided it embodies a satisfactory programme of training and suitable options as to the form of legal service to be performed during the internship, bearing in mind the individual's wishes and future career intentions, so that there is some flexibility and choice.
- 2 That the GCB prepare proposals for discussions under which the Bar could act as an accredited agency supporting an internship programme in respect of aspirant advocates.
- 3 That the GCB consider whether the Bar should offer to act as a pilot project for such a system of internship.

The GCB is, however, insistent that pupillage fall under its aegis alone. From the beginning of this year the prescribed period for pupillage is five months. The idea that has crystallised is that once a pupil has successfully completed her or his pupillage, she or he will then spend seven months in the service of the state, either in public defenders' offices or performing legal aid work or, otherwise, working in government offices, such as that of the Commissioner for Inland Revenue or the Master's office where relevant experience can be acquired. A survival salary will be paid during this period. A sub-committee has been appointed to draft proposals regarding a future internship programme.

During February, Jeremy Gauntlett SC and I, together with two representatives of the ALS, met with Chaskalson P in order to discuss his proposal of >

internship in the light of our new suggestions in this regard.

On 10 March Johann Gautschi SC, Jeremy Gauntlett SC and I, together with Ashwin Trikamjee and Etienne Horn of the ALS, met with the Minister of Justice to discuss the internship proposal. We raised with him the idea of twelve months' training, consisting of five months' pupillage – including the National Bar examination – and seven months' internship. It was agreed that the relevant departmental officials would discuss with the GCB and attorneys' profession the issues raised with the Minister with a view to seeing if consensus could be reached on this subject.

Legal aid

An important legal aid forum was convened from 15 to 17 January this year. At this forum Chaskalson P's idea of a one year compulsory internship received considerable support, while certain people contended that professional examinations, including the national Bar examination, should be abolished. The GCB's attitude is unwavering in this regard, viz, that there have to be professional examinations and pupillage for which the GCB, and nobody else, should be responsible.

The entire structure of legal aid, and with it the Bar's contribution to the judicare system, is being reconsidered. The GCB is playing and intends to continue playing an important role in representing the interests of the public and of its members in devising an acceptable legal aid system.

A draft legal aid guide was distributed at the legal aid forum and has been circulated to all Bars. The GCB is to make submissions in respect of this guide.

Funding for pupils

USAID will be making available some R800 000,00 to pupils from formerly disadvantaged backgrounds. The relevant scheme should be implemented within the next few months. This will be of great assistance to many pupils who might otherwise find it very difficult, if not impossible, to join the advocates' profession.

Thus far the GCB bursary scheme has been of limited assistance to applicant pupils, with the amounts provided for the successful applicants being inconsiderable. It is highly advisable that the GCB bursary committee follow the lead of the Cape Bar and procure sponsorship for the funding of pupillage scholarships. This is a matter which will be addressed without delay.

Recruitment

As I mentioned in my contribution in 1997 November *Consultus* 85, it is imperative that more members of formerly disadvantaged groups join the Bar. Improved bursaries will assist in this regard, but this will not be sufficient. Moreover, a period of training of one year as now proposed by the Bar would mean that those entering the profession after pupillage would have greater experience, and at the same time during the internship period they will be in receipt of a salary. Further steps are, however, necessary in order to persuade the best graduates, and those of more advanced years, to become members of the Bar. In this regard emphasis will need to be placed on the recruitment of more black members. It is imperative that each Bar pulls its weight in this regard.

Case management

In its third and final report the Hoexter Commission unanimously concluded that radical reform is essential to rectify a situation where defended actions through the High Court progress too sluggishly and are too expensive because of unnecessary delays. It concluded that case management and court-annexed alternative dispute resolution are urgently required in South Africa. Elsewhere in this edition a letter from Mr Justice David Ipp of the Supreme Court of Western Australia summarises the true purport of case management. The new rule 37A procedure, which applies only to the Cape Provincial Division - as discussed in this edition by Ben Griesel SC (see p 47) – was welcomed by the Commission as the first step in this country towards case management. In-

asmuch as the new rule 37A already has application in the CPD, the commission stated that that division is the obvious choice for the venue of a monitored case management pilot project. It added that this should be preceded by the installation of a computer system together with the appropriate software, the appointment to the court's personnel of the CPD of a case management controller and by the compilation by the Judge President of the CPD of a list of suitably qualified and experienced mediators within the metropolitan area of Cape Town who are prepared to preside at mediation sessions held as part of a court-annexed mediation service.

These proposals by the Hoexter Commission are to be welcomed. The Bar has for some time been in the forefront in pressing for the institution of case management. It is to be hoped that the Department of Justice is in a financial position to carry out these proposals without delay.

Independent advocates

In *The Society of Advocates of Natal v De Freitas and Another (Natal Law Society intervening)* 1997 (4) SA 1134 (N), the Natal Bar was successful in an important application which it brought against one De Freitas, who is a member of the Independent Advocates' Association of South Africa (IAASA). The Full Bench of the Natal Provincial Division suspended De Freitas from practice for six months and rejected a counter-application by the second respondent, IAASA. The court held that the Society of Advocates of Natal was correct in its contention that it is not proper – save in certain very limited circumstances – for an advocate to take work except on the instructions of an attorney. Once that principle was established it was guilty of misconduct.

Neither De Freitas nor IAASA applied for leave to appeal to the Supreme Court of Appeal, but they decided to challenge the judgment by way of an approach to the Constitutional Court. This was somewhat curious as no constitutional challenge had been pursued in argument before the Full Bench.

They applied for a certificate in terms of rule 18(e) of the Constitutional Court Rules. The Full Court held that there was no prospect of the attack on the *locus standi* of the Society being successfully sustained in the Constitutional Court, while a majority of judges held that none of the requirements of the relevant Rule was satisfied in respect of the point that the rule of professional conduct in question contravened the rights of IAASA's members freely to engage in economic activity. Application for leave to appeal to the Constitutional Court was launched by De Freitas and IAASA, out of time we believe.

At the time of writing, judgment is awaited in the GCB's application for the name of Van der Spuy SC, a committee member of IAASA, to be struck from the role of advocates.

The Bar and the attorneys' profession

Since my election as chairman I have had a very cordial working relationship with the chairman of the ALS, Ashwin Trikamjee. Members of the GCB exco have met with representatives of the ALS on two occasions during the past six months when issues of mutual concern have been debated.

Two of the issues raised by the attorneys have yet to be resolved. In the first instance the question of joint court appearances between advocates and attorneys as counsel (often referred to as "mixed doubles") has not been resolved. The GCB's approach is that while there can be no inflexible rule, the determining factor is what is in the interests of the client. We require an application to be made to the relevant constituent Bar council for such an appearance to be permitted, once the council is satisfied that this is in the best interests of the client. We have emphasised to the attorneys that they are now free to appear in the High Court themselves, whether singly or as co-counsel. It is important that we continue to stress the need for the Bar to retain its independence, come what may. "Mixed doubles" holds a threat for that very independence.

The defaulters' list is a further cause of disagreement between the professions. We maintain that this list is an important means of protecting members, particularly younger ones, from possible exploitation. Certain Bar councils have decided that it is advisable to follow the approach of the Natal Bar, viz, that in appropriate circumstances a deferred payment system over a pe-

riod of up to six months may be agreed upon, by prior arrangement. Other Bars do not consider such a scheme to be acceptable.

On 16 March 1998 the ALS disappeared, to be replaced by the Law Society of South Africa, with half of its members from the "establishment" and the other half from NADEL and the BLA. On that day I attended the ceremony at which this new body came into being. During the address by the presidents of NADEL and the BLA and by the Minister of Justice, the question of the fusion of the two branches of the legal profession was raised pertinently for future debate. From what was stated on this occasion, it is clear that several organisations are intent on bringing the divided profession to an end. The GCB and its constituent Bars have consistently expressed the considered view that it is in the best interests of the public that the Bar and the attorneys' profession should continue to exist separately. This will have to be debated in depth with the various role players who are involved in the administration of justice, as will the future shape of the legal profession, as part and parcel of the process of transformation of South African society. 

Butterworths Prize

The 1997 Butterworths Prize for the article containing the most useful and best-motivated law reform proposal has been awarded to Prof Beaty Naudé of Unisa for her contribution "Dealing with the victims of crime – the role of the legal profession" (1997) 10 *Consultus* 57.

Juta-prys

Die 1997 Juta-prys vir die beste bydrae in *Consultus* is aan Bertus Bergenthuin van die Pretoriase Balie toegeken vir sy bydrae "Die oorsprong van die advokaatsberoep" (1997) 10 *Consultus* 49.