The Legal Practice Bill

Submission by the General Council of the Bar of South Africa to the Minister of Justice

1 Introduction

1.1 The GCB welcomes the decision of the Minister of Justice to meet with bodies representative of the wider legal professions on 20 April 2001. It believes this creates an important opportunity to find a way forward in relation to the issue of regulation of the wider profession based on co-operation and not conflict.

1.2 More specifically the reason for seeking the meeting is to convey and debate the profession's concerns about central aspects in the (third) draft Legal Practice Bill produced by the department's policy unit, and to table positive proposals aimed at achieving a Bill which meets the requirements of legal and social policy, practicality and affordability.

1.3 Just prior to the meeting, and (so far as we are aware) without prior consultation with the judiciary, a letter has been publicly released in response to the important memorandum by Judge President Ngoepe and his colleagues serving on the Pretoria and Johannesburg high court Benches (see 7.1 below). The letter, which appears to have been drafted by the policy unit, gives cause for deep concern. While acknowledging the need for consultation with the judiciary, it suggests – without proposing any framework to accomplish this – that this can be achieved before the end of the month. This, and the tone and content of the letter, suggests that the essential decisions have already been taken. It regrettably also in its terms indicates an imperfect understanding of the profession. The minister himself has however fortunately clarified (in an important public statement during the JSC hearings on 4 April 2001) that he considers no draft Bill even to exist at present.

1.4 As an indication of its own commitment to finding a solution based on co-operation between government, the wider profession and other interested parties, the GCB itself has prepared a draft Bill and explanatory memorandum. This is attached. While it has had the benefit of discussing earlier drafts in the summit meetings attended by AFT, BLA, the GCB itself, the LSSA, Nadel and the SA Criminal Law Bar, which gave rise to a number of revisions, it has had no such opportunity in relation to the present draft. Nor has it yet been able to canvass the views of other interested parties, such as the judiciary, prosecutors and paralegals. It would also wish to ascertain the views, and meet queries, of the parliamentary drafting experts and others within the Department of Justice who appear not to have been adequately involved in the process culminating in the policy unit's third draft.

1.5 The GCB is confident that given a reasonable timeframe the wider legal profession, including not only practitioners in private practice but those employed by the State, will find common cause on most if not all important issues. The recent meetings to which we have referred have shown that there exists a huge commitment to, and a great deal of optimism about, the profession's present efforts to agree upon an equitable, all-encompassing and practical framework for the various branches of the profession. That energy and commitment, so evident in recent discussions amongst practitioners, and with important implications for workability and cost, will be lost irretrievably if an endeavour were to be made simply to impose the Bill in its present form, and at the present stage of an essential consultation process.

2 Essential requirements for regulation of legal practice

2.1 We have just suggested what these are: compliance with principle, practicality and affordability.

2.2 The **principle** in question is the independence of the profession. The international references and analysis in the memoranda by the Gauteng judiciary, the IBA, the UN Special Rapporteur are included under 7 below. The wider profession stands united on this issue.

2.3 South Africa's Constitution is rooted in the existence of an independent judiciary. An independent judiciary does not exist in a vacuum. It is drawn overwhelmingly from the profession, and it requires an independent profession if cases are to be argued "without fear or favour" before it. In the summary of Sir Sydney Kentridge QC:

"During the years of apartheid in South Africa, there were frequent threats from the government to place the Bar under the control of a central council with government-nominated members. This proposal was consistently and successfully resisted by the whole of the Bar, including those many members who normally supported the government in policies and legislation. It was well understood that to remove the control of the profession from the provincial Bar Councils and General Council of the Bar would have meant the end of the independence of the profession. What was also well understood was that the independence of the Bench was inextricably linked with the independence of the Bar."

See further Mahomed CJ in (1997) 114 *SALJ* 604 at 606-608; Alexander QC "An Independent Bar" (1988) 105 *SALJ* 54. Lord Benson "The future of the legal profession in South Africa: is fusion the answer?"(1988) 105 *SALJ* 421.

2.4 The **practicality** requirement is obvious: what can perform the task of regulation, now, in accordance with the principle of independence, and affordably? The answer must be: the existing professional bodies, recognised for that purpose (and accountable to) a national Legal Practice Council and under the ultimate control of the courts.

2.5 The **affordability** inquiry is crucial. On our proposal, the existing professional bodies would continue to finance regulation of the profession. The only additional component of State expenditure would relate to the National Council and the Legal Practice Ombudsman.

3 The GCB proposed approach

3.1 This is more fully set out in the memorandum to the draft GCB Bill (see 6 below). What follows is a brief summary.

3.2 The central premise for the GCB draft is that <u>all</u> legal practitioners should fall under the Bill, which should promote effective regulation by an independent wider profession under the control of the courts. No individual practitioner, if the public is to be

protected, should be able to practise law outside its ambit. At the same time important elements in rendering access to justice such as prosecutors and paralegals (and of course state attorneys) should be acknowledged as part of the wider profession, with a voice in national regulatory issues, such as the requirements for legal education and vocational training.

3.3 The GCB draft provides for a major regulatory divide in the wider profession. This is between those who take money direct from the public, and those who do not. Attorneys (and those who practised as "independent" advocates until this was held unlawful by the Supreme Court of Appeal in the *De Freitas* decision last month) fall into the former category. Advocates, prosecutors and paralegals fall into the non-money-taking category.

3.4 The professional lives of the two classes differ fundamentally. This is true of their vocational training (book-keeping and practice management are essential requirements for the former mode, but not the latter), and their practice requirements (the need for Fidelity Fund-type coverage, financial reporting and audit duties, disciplinary inquiries – invariably focussed on financial matters in the case of attorneys, and often requiring accounting analysis and evidence – and applications to strike off).

3.5 **The GCB draft accordingly provides for a compulsory membership for those who practise on the money-taking basis: for a transitional period, of the existing law societies and thereafter of such provincial re-configuration as the council may advise is necessary. The others – advocates, prosecutors and paralegals – must be members of accredited professional associations relating to the different professions.** For transitional purposes existing bodies are so designated; the council may however review their status (and also consider new applications for accreditation) according to criteria laid down in the Bill. The GCB does not suggest that these bodies are ideal in every respect in their present form. There may well be transformational issues which require to be addressed in the transitional period before full accreditation is achieved.

3.6 Corporate lawyers should not fall under the Act. They do not purport to offer services to the public. They are in no sense officers of the court: they are employees with a single duty as employees to a single client. As a matter of legal policy the courts and the legal profession alike have steadfastly opposed the intermittent attempts over the years (the latest attempt is not new) to gain full professional standing for corporate lawyers.

3.7 **What this model does is to locate daily regulatory responsibility at the only level it is practical to do so: with the existing bodies.** The national council will perform the functions appropriate to such a body: accreditation, investigation of associations for compliance and holding them accountable to it, reporting to the minister and parliament, and determining policy issues. It will also keep national registers of practitioners.

3.8 The policy unit has previously suggested that the constitutional right to freedom of association is compromised by a model which obliges all legal practitioners to be members of recognised professional associations. This is not so. The policy unit's model itself entails a compulsory registration (but with a national statutory body, a model which, the wider profession agrees, is unworkable and unacceptable). Secondly, similar requirements are common in labour legislation, where for reasons of sound social policy both employees and employers are required at times to be represented through collective bodies. Thirdly, it misconceives the test laid down by the Constitutional Court: regulatory requirements said to infringe a constitutional right are nonetheless sustainable if they are rationally connected to a legitimate and authorised purpose. Requiring practitioners for the public good to practise only under the aegis of recognised (and accountable) professional associations so as to ensure their proper regulation plainly meets that test.

3.9 **The model also ensures a national council truly representative of the wider profession, and which is independent.** The contrast with the council conceived by the policy unit – fully 17 of 20 members being chosen one way or another by the executive in the form of the minister – is marked.

3.10 The position of the judiciary as the ultimate regulator of legal practitioners is retained. Regulation thus becomes a practical balance between the professions themselves as primarily responsible, secondly the courts, and thirdly a supervisory and co-ordinating national council.

4 Unacceptable features of the policy unit draft Bill

These have been ventilated at length before. In summary they are these:

4.1 The express and inflexible modelling of the draft on legislation for the construction and property industry: the refusal, in short, to recognise the need for an independent legal profession. This is despite the unanimous national and international opposition – founded on principle and international instruments – collated in 7 below. The policy unit's failure, evidently in all its public communications, to recognise the legal profession's fundamentally important constitutional role in a democratic society is distressing. If the policy unit is unable to discern the difference between accountants (or professions in the building and property industries) and legal practitioners, when it comes to appropriate regulatory models then its insight into the profession is questionable.

4.2 Specifically in that regard, the failure to provide for the council to comprise a majority of practitioner members, duly appointed by professional associations and not by the executive.

4.3 The failure adequately to recognise and provide for the inclusion of <u>all</u> legal practitioners – those who render legal services to the public – under the Bill.

4.4 The failure to accept the consequences of functional diversity in the wider profession: in particular, between those who take money from the public, and those who do not (see 3.4 above).

4.5 The failure to deal squarely (through the three drafts of the Bill) with advocates as advocates: legal practitioners who practise on the referral principle. The fact that appropriate circumstances (eg accepting instructions for pro bono work from LRC-type institutions, or – as with the UK BarDirect-type model from prescribed institutions, as Cameron JA alluded in his separate judgment in

De Freitas) may lead to *the profession* ameliorating the principle in its specific application does not detract from this. Yet from the outset – in its discussion paper and through the three drafts of the Bill – the policy unit has been set on establishing a species of non-referral advocates – when any legal practitioner wishing to practise on that basis may do so through membership of a law society.

4.6 The failure to recognise the utter impracticality of a national council managing the process of legal regulation in a "top down" way.

4.7 The assumption that professional associations would be willing to bear the burden of regulatory activities without substantial autonomy to do so (within the terms of the Bill and accountable to the council).

4.8 The failure to provide any costing for the current draft Bill (or for that matter, either of its predecessors).

4.9 The failure to consult the judiciary in relation to any of its draft Bills and at any stage, despite the contemplated interference with its common law and existing statutory powers as ultimate regulators of legal practitioners.

4.10 The lack of reality: the failure to grasp the degree to which regulation *has* to be performed by the profession itself (and this through the existing professional bodies); that these bodies cannot be expected to do so if their independence is subverted; and the lack of budget to carry the burden of public regulation.

5 Consensus and dissensus in the wider profession

5.1 The wider profession has met at three summit meetings to discuss unacceptable features of the current draft Bill.

5.2 The results of this process appear from the following documents:

(a) The minutes of 24 February 2001, and media release.

(b) The minutes of 10 March 2001, and media release.

(c) The GCB / AFT draft minutes of the Task Group meeting of 28 March 2001.

6 Memorandum to the GCB Draft Legal Practice Bill

6.1 The Bill creates for the first time three things: a single regulatory framework for the wider legal profession; a single national supervisory council (the Legal Practice Council) as regards the regulation of legal practitioners; and an office of Legal Practice Ombudsman for the greater protection of the public. It protects the public by requiring legal practitioners to be members of professional associations recognised for that purpose by the council, and which are accountable to it. The council itself is a body founded on the constitutional values of accountability, transparency and independence of the legal profession.

6.2 The Bill includes within its scope attorneys, notaries and conveyancers; advocates; prosecutors and paralegals. The need to develop the professional standing and independence of prosecutors as officers of the court is thus served, as is the growing role of paralegals in offering access to justice. At the same time the Bill intends to ensure that the serious problems in the past relating to those who have sought to practise as legal practitioners with no or inadequate professional regulation, is avoided.

6.3 All legal practitioners will be required to be members of professional associations recognised by the Legal Practice Council. Different mechanisms are created for the recognition of those legal practitioners practising on a basis which entails receiving money direct from the public (essentially attorneys and those who previously practised as advocates on a non-referral basis, until this was declared unlawful by the Supreme Court of Appeal in March 2001), and those practising on a basis which does not entail taking money direct from the public (advocates, paralegals and prosecutors).

6.4 For transitional purposes designated professional associations of advocates, prosecutors and paralegals will have a deemed recognition for a period of one year, in which time they will have to apply for accreditation. It will be open to advocates, prosecutors and paralegals to form new associations if they satisfy the council that these comply with statutory requirements intended to ensure their integrity, viability and ability to offer the public access to justice.

6.5 Those who practise on the former (money-taking) basis must do so as members of the existing law societies (or on the conversion of the latter to provincial law societies, as members of these).

6.6 Both the recognised professional associations for the non-money-taking professions and the law societies will exercise original powers of ethical and other rule-making, professional discipline, practical legal training and related matters. Appeals in disciplinary matters will lie with his or her leave to the Legal Practice Ombudsman, who will also have important powers to investigate. The professional bodies will also report in prescribed respects to the Legal Practice Council.

6.7 The Legal Practice Council will operate at national level and at the regulatory apex. Its members will comprise legal practitioners, save for a representative of the Department of Justice (appointed by the minister), a nominee of the Society of University Teachers of Law, a nominee of the Consumer Council, and a judge as its chairperson. His or her role is to enhance the independence of the council and to articulate the concerns of the judiciary in relation to issues of practice which relate to the courts. The practitioner members will comprise an allocation as between advocates, attorneys, paralegals and prosecutors; they will be nominated by the recognised professional associations with due regard to the needs of representativity in relation to race, gender and demographic distribution.

6.8 The Legal Practice Council will determine applications for accreditation by bodies of non-money-taking practitioners; impose conditions; inspect professional associations for compliance; advise the Minister and associations; and determine strategic policy with regard to legal practice.

6.9 The Bill introduces important changes for South African legal practice. At the same time it secures the fundamental independence of the legal profession as an important institution of civil society in South Africa. It recognises that an independent judiciary and magistracy are essential to the operation of a constitutional democracy, and that these in turn require an independent legal profession. It is premised on the co-operation of the profession, and supervision by the council. Additional cost to the State will be limited to the council's meetings and small secretariat, and costs of the Legal Practice Ombudsman.

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