The draft Legal Practice Bill

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Much of the April 2001 edition of *Advocate* was taken up with the genesis of the third draft of the Legal Practice Bill (produced by the Policy Unit of the Department of Justice) and the dangers which it posed for the continuation of an independent Bar. A re-reading of the correspondence and memoranda which are summarised in that edition demonstrates that at that time the most immediate concerns about the Bill were the political composition of the envisaged National Council (with its concomitant threat to the independence of the legal profession) and the failure of the Bill to recognise the continued separate existence of advocates. As the GCB pointed out at the time, the first and second drafts of the Bill did not make any reference to advocates, let alone their continued existence and it was only in the third draft that it was expressly recognised that lawyers might continue to practise on a referral basis.

After some skirmishing between the GCB on the one hand and the Minister of Justice and the Policy Unit on the other, the minister agreed to hold a meeting with representatives of the wider legal profession on 20 April 2001. Prior to that meeting, an agreement had been reached between the GCB and the LSSA that the two bodies would present a united opposition to what appeared to be an attempt by government to exercise control over the legal profession though a council the majority of which was to consist of members appointed by the minister. It came as something of a surprise therefore when, shortly before the meeting was to begin, the LSSA informed the GCB that it would not oppose the referral of the Bill by the department to parliament.

In the event, and after some frank discussions about and trenchant criticism of the Bill at the meeting of 20 April 2001, the minister decided that the wider legal profession should itself attempt to reach agreement on a draft Bill and appointed Geoff Budlender to chair a representative drafting team to achieve that objective. That decision represented a major victory for the legal profession in general and the GCB in particular, which had vigorously opposed certain central principles enshrined in the Bill which would have had the effect of compromising the independence of the legal profession and the survival of the Bar as a self-regulating professional organisation.

It was immediately recognised by representatives of the legal profession forming part of the task team that the drafting itself would have to be done by a much smaller body and that the larger team (consisting of 20 or so representatives) would have to meet a plenary session from time to time to give guidance to the drafting team. The latter team ultimately consisted of Geoff Budlender as chairman, a government draftsman, Prof Cheryl Loots representing the department's Policy Unit, a representative of the GCB and a representative of the LSSA.

It quickly became apparent that the Department was willing to step back from its initial proposals concerning the composition of the National Council and was prepared to accede to the principle that the majority of the council should be composed of representatives nominated by the legal profession. The next major issue which then arose pitted the LSSA against the GCB in a contest which dominated much of the proceedings to follow. In essence, the LSSA proposed a single body comprising all members of the legal profession, which would elect representatives to the National Council. Although the LSSA was prepared to grant a relatively minor degree of autonomy to the Bar in the form of a "chamber" within the organisation, it was clear that they did not see their way clear to recognising a separate voice for the Bar, let alone that the Bar should continue to regulate and discipline its own members. Although in theory the new "South African Legal Practice Society" would be a new statutory institution it became clear that in reality it would simply constitute an amalgam of the existing provincial Law Societies, controlled by attorneys and fashioned by and large to suit their needs.

The GCB's response was to propose a system in terms of which professional organisations capable of disciplining, regulating and training their members would be permitted to do so (subject to ultimate control by the National Council) through a process of accreditation. The National Council would, in terms of this model, accredit organisations on the basis of appropriate objective criteria.

Ultimately the majority of the drafting team (including Geoff Budlender and Prof Cheryl Loots) and the task team accepted the GCB's model, which has now been incorporated in the departmental draft which will be sent to the minister.

The LSSA rejected the accreditation model in its entirety and persisted with its own draft (which was produced at a late stage of proceedings) and has insisted that it be accorded equal status with the departmental draft. In the event the chairman proposed that he send both Bills to the minister with an accompanying memorandum which will simply set out the facts without labelling either Bill as the "official" or "unofficial" Bill. Those facts will however record that the departmental draft, which incorporates the GCB's fundamental model of accredited organisations, was the draft which enjoyed the support of the majority of the members of the task team and is a product of

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extensive deliberation by and negotiations between its members.

At the heart of the acceptance by the majority of the task team of the GCB's model of accredited organisations lies an acceptance that the various Bars constitute a valuable pool of specialist legal skills which may be lost or diminished if the Bar's ability to regulate and discipline its own is destroyed or undermined. There is general agreement that the State will not be able to replicate the structures which the GCB and its constituent Bars presently maintain at no cost to the taxpayer and which are necessary to preserve the specialist skills which their members have.

At the time of going to press, the departmental draft has not been finalised. The final draft which will incorporate the department's reaction to proposals from all participants on the task team is due. Once it has been circulated, there will be a final opportunity for comment. We do not believe, however, that the final draft will differ structurally from the present one and, in the interests of keeping members informed of the process, an overview follows.

From the point of view of advocates' practice, the Bill introduces far-reaching changes to some hallowed principles, but it retains some and underscores yet others. A principle that goes, is absolute self-regulation. At present, the ten Bars and the GCB are self-regulatory in a virtually absolute sense. The difficulty has been that many advocates do not belong to the GCB, and the policing of their activities has become increasingly burdensome for the local Bars and the GCB. The Bill introduces a statutory council that will have ultimate control over all legal practitioners. Advocates will have only minority representation on the council. The redeeming features are that the majority of members of the council will be legal practitioners, and the creation of the concept of accredited organisations. These are voluntary organisations of legal practitioners that satisfy specified criteria for accreditation by the council, and then regulate, subject to ultimate council approval, the professional life of their members.

An important principle of present practice is the referral nature of the profession. A legal practitioner may decide to render legal services only on referral, and may belong to an accredited organisation that enforces such a rule. Such a practitioner need not hold a fidelity fund certificate. It follows that sole, independent, practitioners who choose to practise only on referral, and to regulate their own professional lives (subject to ultimate control), will continue to exist under the Bill. A more detailed summary of the Bill's main provisions are these.

The Bill is divided into 11 chapters. Chapter 8 (Trust Accounts) and chapter 7 (Legal Practice Fidelity Fund) principally concern attorneys, but the rest of the chapters affect advocates and attorneys alike. They are Definitions, Interpretation and Purpose of Act (chapter 1); Structures Regulating Legal Practice (chapter 2); Regulation of Legal Services and Legal Practitioners (chapter 3); Paralegal Practice (chapter 4); Professional Conduct, Establishment of Disciplinary Bodies and Office of Legal Services Protector (chapter 5); Lodging of Complaints Against Legal Practitioners, Council and Substructures of Council (chapter 6); Regulations and Rules (chapter 9); General Provisions (chapter 10); and Transitional Provisions (chapter 11).

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The stated purpose of the Bill (section 2) is to regulate the rendering of legal services. The concept of "legal services" is defined as "the provision of advice or assistance to the public relating to the enforcement protection or interpretation of legal rights or obligations". The more specific purpose of the Bill is set out in section 2(b). It is to create a framework for the effective rendering of legal services; for the development and maintenance of appropriate norms and standards for the rendering of legal services by legal practitioners and paralegal practitioners; for the regulation of the admission and enrolment of legal practitioners and paralegal practitioners; for the development of adequate training programmes for candidate legal practitioners and candidate paralegal practitioners; for engendering public confidence in legal practitioners and paralegal practitioners; and for participation of all legal practitioners in the legal profession.

The overarching body which is the ultimate repository of the power to regulate legal practitioners, is a new juristic person to be known as "The Legal Practice Council of South Africa" (section 3). The object of the council is to promote and protect the public interest *inter alia* by regulating the provision of legal services (section 9). The powers of the council include the power to do anything which is required for the proper and effective exercise or performance of its powers and functions (section 10(1)). The council has a chairperson and a vice-chairperson (section 5) and it is obliged to meet at least four times a year (section 11(1)(c)).

The important issue of the composition of the Legal Practice Council is dealt with in section 4. The members are all appointed by the minister. There are 19 members, one of whom is designated by the Legal Practice Fidelity Fund Board, but who has no right to vote at meetings and who may not be the chairperson. The other 18 members comprise 12 legal practitioners, two persons designated by organisations representing paralegal practitioners, one teacher of law, two persons representing the interests of users of legal services; and one person who by virtue of his or her knowledge and experience will, in the opinion of the minister, promote the objects of the council.

The 12 legal practitioners are to be designated by organisations representing legal practitioners (section 4(1)(b)). The manner in which they become designated is dealt with in section 4(2). The minister is obliged, after consultation with the council, to determine the organisations which will be entitled to designate legal practitioners for appointment to the council. The minister is obliged to determine the number of legal practitioners to be represented by each organisation.

In determining the appropriate organisation(s) that represent legal practitioners, and in determining the number

of legal practitioners to be designated by each such organisation, the minister is obliged to have regard to *inter alia* representivity in relation to race and gender, and a fair and effective representation of different categories of legal practitioners on the council. Provision is made in section 14 for the appointment by the council of an executive director and, after consultation with the executive director, for the appointment of staff.

An important structural phenomenon, apart from the Legal Practice Council itself, is the establishment of accredited organisations in part 2 of chapter 1. In terms of section 21 an organisation of legal practitioners (or paralegal practitioners) may apply to the council for accreditation as an accredited organisation. The council is obliged to grant accreditation if it is satisfied that the organisation complies with certain minimum standards. These include that it is a viable organisation with sufficient resources to perform its duties and functions, and that it has the capacity effectively to enforce its code of conduct and to exercise professional discipline in respect of its members.

Accredited organisations have statutory powers and functions (section 22). They are obliged to exercise professional discipline over their members, to make rules of professional ethics, and to receive into membership all applicants who qualify. An accredited organisation is entitled to provide practical legal training programmes for candidate legal practitioners, and to provide continuing legal education.

A code of conduct of an accredited organisation may not prevent a member from rendering any legal services which the member is otherwise entitled to perform in terms of the Act (section 22(3)), but it may require its members to be natural persons, and to render legal services for reward to the public only if briefed by a legal practitioner who is enrolled to practise with a fidelity fund certificate (section 22(3)(a)). In addition, the code of conduct of an accredited organisation may not prevent the member from rendering legal services or appearing in court together with a legal practitioner who is not a member of that organisation, solely for that reason (section 22(3)(b)).

It is envisaged that the General Council of the Bar will apply for accreditation. In terms of section 20(1), the GCB will be deemed, for a period of three years, to be an accredited organisation.

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Chapter 3 deals with *inter alia* admissions of legal practitioners. In terms of section 26 the High Court must admit an applicant as a legal practitioner if he or she is appropriately qualified. Once admitted, the council enrols the applicant as a legal practitioner (section 27). The council must keep a roll of legal practitioners which must reflect the identity of all those admitted and enrolled as legal practitioners and, in addition, particulars of all legal practitioners who are members of an accredited organisation (stating the name of the organisation), and who do not take work directly from the public (section 27(1)(f)). It is envisaged that legal practitioners hitherto known as advocates will be enrolled in this category.
Section 28 of the Act sets the qualifications for admission. They are an LLB degree after completing a period of study of not less than four years, and a period of not less than one year of practical legal training. The practical legal training is to consist of either work-place training and course work (as prescribed by the council or an appropriate accredited organisation), or pupillage (as prescribed by an accredited organisation). The concept of "course work" is defined as "a structured programme offered by either the council or an accredited organisation with the aim of assisting a candidate legal practitioner in attaining an adequate level of competency". The concept of "work-place training" means "the training of a candidate legal practitioner by his or her supervisor, by means of either service in terms of a learning contract; service in terms of a learning contract related to the office of the State Attorney; service in terms of a learning contract related to legal service in a legal clinic; service in terms of a learning contract entered into by arrangement with an accredited organisation; or any form of service which the council may from time to time determine". The concept of "pupillage" is defined as "a period of practical legal training which is supervised by one or more supervisors offered under the auspices of an accredited organisation whose members specialise in advocacy".

It follows that the gist of the provision is the extension of pupillage from four months to one year, after a four year LLB degree.

There is provision in section 31 for the Minister to prescribe legal community service. It is anticipated that any candidate legal practitioner who is undergoing practical legal training (included within which is pupillage) may appear in any court except the Constitutional Court, Supreme Court of Appeal, Labour Appeal Court, and Competition Appeal Court.

In terms of section 38 the High Court retains the jurisdiction to strike from the roll the name of a legal practitioner who is no longer a fit and proper person.

Chapter 4 deals with paralegal practice.

Chapter 5 deals with professional conduct, establishment of disciplinary bodies, and the office of the legal services protector. The council is obliged to draw up a code of conduct for all legal practitioners who are not members of accredited organisations, and those legal practitioners must comply with it (section 48). The council establishes regional investigating committees to investigate complaints of misconduct relating to legal practitioners who are not members of accredited organisations. Complaints concerning misconduct relating to legal practitioners who are members of an accredited organisation are to be dealt with in the manner and form stated in its code of conduct as approved by the council. Such a code of conduct (ie of an accredited organisation) governs all complaints and disciplinary proceedings in respect of members of that organisation (section 56(3)).

There is provision for the establishment of appeal tribunals to hear appeals in cases of legal practitioners who do not belong to accredited organisations. Part 2 of this chapter provides for the establishment of an office of a Legal Services Protector (section 50). The LSP is appointed by the President upon the recommendation of the Judicial Service Commission (section 52) and must be a judge or a retired judge. The LSP may investigate and make recommendations to the council, the minister, and parliament on any matter concerning the integrity and independence of the legal profession; he or she may investigate any alleged failure of the council or an accredited organisation to deal promptly, effectively, and fairly with any complaint.

The LSP may receive complaints from persons who are not legal practitioners (classically clients) (section 63). Upon receipt of such a complaint, the LSP reviews it and, as regards complaints concerning the form of the proceedings being reviewed, has the power to set aside the findings and to remit the matter back to the disciplinary body concerned (including a disciplinary body of an accredited organisation). Where the complaint concerns the outcome of an investigation, and provided there has been a substantial miscarriage of justice, the LSP has the power to set aside the findings and to remit the matter.

Chapter 7 deals with the Legal Practice Fidelity Fund. In terms of section 85(1) every legal practitioner who receives or holds money or property belonging to any person must be in possession of a fidelity fund certificate. This includes a practitioner who receives a deposit on account of fees or disbursements in respect of legal services to be rendered (section 85(3)). The provision implies that legal practitioners who practise on referral, and do not take money direct from clients, need not hold a fidelity fund certificate. This concept is taken further in section 97(1) of the Bill, which obliges every legal practitioner who holds money or property belonging to someone else, to operate a trust account practice in terms of chapter 8 of the Act.

Under the general provisions in chapter 10 provision is made for contingency fees. The principle that a contingency fee arrangement may not entitle the legal practitioner, in the event of success, to twice his normal fee, still applies (section 105(2)(a)). In the case of claims sounding in money, the aggregate of any such success fee may not exceed 25% of the total amount awarded to the client.

In terms of section 105(a) the minister may on the recommendation of the council make regulations permitting legal practitioners to take into partnership or as directors persons other than legal practitioners. This provision envisages multi-disciplinary practices.

Section 106 contains, for the first time, provisions concerning the status of senior counsel. These have not yet been finalised but the concept is that any person may apply to the minister to confer upon a legal practitioner the status of senior counsel. The minister consults the judge president and any appropriate accredited organisation. If the minister is satisfied that the legal practitioner is deserving of the status (the jury is still out on the criteria to be applied), he may recommend to the President that such status be conferred on the applicant.

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Chapter 11, containing transitional provisions, provides for the establishment of a transitional council pending the appointment of the national council. There are saving provisions relating to the recognition of legal practitioners presently admitted as attorneys, advocates, conveyancers, and notaries public (sections 114, 115).

The Bill is not guaranteed to become legislation. The structurally different draft Bill put up by the LSSA, in which self-regulating independent Bars and the GCB will effectively disappear, is being promoted by the organised attorneys' profession. It will be minister's call as to whether the task team's draft is jettisoned. 🕮