

# **KEY PRINCIPLES UNDERPINNING THE TRANSFORMATION OF THE LEGAL PROFESSION**

## **BACKGROUND**

### **Consultation with the Legal Profession on the key principles underpinning the transformation of the Legal Profession**

This document set out key principles that constitute the basis for policies that are necessary to transform the legal profession. It forms the basis for consultation with the principal stakeholders in the legal profession. Through the consultations it is sought to solicit the views and comments of the stakeholders on the principles and any other principle that may be added with a view to record aspects in respect of which there is broad consensus as well as those where there are divergent views. It builds on the past discussion and engagement initiated under the previous administrations, including the recent discussion that which it was intended that it would culminate into a Memorandum of Understanding between the Minister and the legal profession represented by the General Council of the Bar (GCB) and the Law Society of South Africa (LSSA). The principles agreed to under the Memorandum of Understanding would then form the content of the Legal Practice Bill in relation to those aspects in respect of which there is contestation.

Although the discussion did not culminate into a Memorandum of Understanding as it was envisaged, it nonetheless provided a platform for constructive engagement between the Department and the Legal Profession. Flowing from these discussion there appeared to be a broad understanding on the principles discussed and the eagerness from all the participants to shift their initial position in respect of some of the principles discussed in an atmosphere of “give and take” to unlock the stalemate which had stifled progress in finalization of the Legal Practice Bill.

The principles discussed below reflect a middle ground from the part of the Department and reflect a significant shift from the position adopted in the

previous draft Bills. It is therefore expected of the Legal Profession to seriously consider the principles which the Department perceive as ground breaking in resolving the impasse which has surrounded the Legal Practice Bill over the last 12 years.

### **Constitutional imperatives guiding the transformation of the legal profession**

The impetus for the transformation of the legal profession is premised within the broader transformation initiatives undertaken by South Africa, as a country consolidating its efforts to uphold the norms and values enshrined in the Constitution. Such impetus is entrenched in the Preamble as it, calls for a healing of the divisions of the past to establish a society based on democratic values, social justice and fundamental human rights

A key challenge regarding the transformation of the legal profession relates to access to justice and specifically, equitable access to quality legal services by the people. This includes the quantity, race and gender diversity and geographic spread of legal practitioners. Rural areas and historically Black areas are generally under serviced with regard to access to legal services. Compounding the situation is the scarcity of legal skills in certain technical areas of the law such as commercial law and constitutional law and interpretation among lawyers from historically disadvantaged communities. There is also the question of affordability of legal services for poor communities, particularly in civil matters, an area where state funded legal assistance is currently limited.

The principles discussed in this document and the accompanying Legal Practice Bill are geared to achieve the following transformational goals:

- Ensuring access to the legal profession for previously disadvantaged persons and to remove all barriers to access the profession.

- providing accessible to legal services for the persons who require such services, to ensure equal protection and benefit of the law for all.
- Ensuring an efficient and effective legal profession which incorporates a people focused approach to the delivery of legal services.
- The enhancement of the accountability arrangements and responsiveness of the profession.

In order to achieve these goals:

- Firstly, with respect to legal qualification, there is support for training programmes for aspirant legal graduates, especially for those that come from historically disadvantaged backgrounds, to enable them to enter the profession and to be promoted in it.
- Secondly, with regard to the legal profession being diverse, it is argued that a mechanism should be put in place which ensures that legal services are evenly distributed in all areas and to all people.
- Thirdly, with respect to the legal profession responding to the needs of all South Africans, it is argued that legal services must be made affordable for the public.
- Fourthly, with regard to the profession being accountable, it is argued that in terms of government policy and law, the legal profession must be held publicly accountable for its actions or omissions.

The legal profession constitutes the pool from where judicial officers are appointed. A transformed legal profession is therefore a prerequisite for a transformed judiciary.

The envisaged legislation would form the basis for the implementation of the Legal Services Charter. The Charter, which was adopted by the

profession in 2007, constitutes a firm commitment by the legal profession to the fundamental principles of access to justice, including the following:

- Addressing challenges of entry to the legal profession, with specific emphasis on challenges experienced by Historically Disadvantaged Individuals (HDI's) by ensuring the availability of quality legal training and education and providing quality workplace learner ship opportunities.
- Devising and implementing measures to address the provision and availability of pro bono services and community-based paralegal services, thus ensuring access to affordable legal services for all the people in South Africa, particularly the marginalized, poor and the rural community.

## **KEY PRINCIPLES THAT FORM THE BASIS OF THE LEGAL PRACTICE BILL**

### **Principle I: Guaranteeing the independence of the Legal Profession**

The independence of the legal profession needs to be protected and strengthened. Practitioners should nominate their representatives on governing bodies. At the same time there needs to be regulation of the profession to protect the public and to ensure access to justice. The State has a primary responsibility in ensuring these aspects.

### **Principle II: The role of Government represented by the Minister responsible for the administration of justice is to promote and protect the independence of the legal profession and enhance access to justice**

The Minister, as the member of Cabinet responsible for the administration of justice of which the provision of legal services is an important aspect thereof must, through legislative and other measures, promote the independence of the legal profession, enhance access to justice and promote the interest of justice.

**Principle III: Establish a unitary legal profession consisting of attorneys and advocates**

The continued existence of the **referral rule** for practitioners practicing without Fidelity Fund Certificates is retained. the reality that there are different types of legal practitioners within the profession: those legal practitioners who currently practise as attorneys and those legal practitioners who currently practise as advocates.

Legal practitioners practicing without a Fidelity Fund Certificate may not practice in a partnership.

Legal practitioners practicing with Fidelity Fund Certificates may only form partnerships with other legal practitioners practicing with Fidelity Fund Certificates.

The establishment of a unitary legal profession in contrast to the option of a merged or fused profession entails the establishment of a single governance or regulatory framework for uniform norms and standards for all practitioners. This position differ from the approach adopted in the previous drafts which preferred a unified profession. The latter model would entail the integration and fusion of the Bar and side Bar.

**Principle (IV): Establishment of a single regulatory framework to unify the profession and to rationalize the governance structures established under the old Apartheid regime**

A single national body to regulate the legal profession made up of representatives of the two categories of the legal profession. The primary function and powers of the national body is to determine norms and standards for the profession, set the requirements for admission to the profession, oversee the

implementation of the Legal Services Charter, promote and protect the public interest and access to justice.

The composition of the national body must reflect South African demographics, with particular reference to race, gender and regional interests, in addition to ensuring representation from legal practitioners with fidelity fund certificates and those without.

The national body must be cost-efficient and manageable in terms of size and while the majority of its members will be legal practitioners, it is important that there is representation from law schools and persons representing the public interest.

The legal profession will be responsible for the nomination of members to the national body. The appointment will be by the Minister who will have the limited and bounded discretion to refuse to accept nominations only on grounds of lack of inclusivity. The procedure for nomination to be determined by the profession itself.

The core functions of regulation can thus be summarized as necessary to regulate entry to the legal profession, determining standards for training and education, determine rules for the conduct of practitioners and practice, enforcement of those rules and addressing complaints of the consumers of legal practice and providing redress.

#### **Composition of national structure and appointment of members:**

The composition of the NLPC should be such that its size facilitates / enhances efficiency and takes into account cost implications. While the majority of its members should be legal practitioners, there should also be a balance, where non-legal practitioners can play a role.

The Minister should, before making the appointments, be satisfied that the members of the NLPC, particularly the legal practitioners, collectively, reflect South African demographics and satisfy certain other criteria, for instance race, gender, disability and regional interests.

### **Role of national and regional structures:**

#### *The role of the national structure:*

The role of the NLPC is to develop national norms and standards for the regulation of the profession, for instance –

- (i) an overarching code of conduct for all legal practitioners, which can, if needs be, accommodate the distinctions between the two main streams of legal practitioners and how they practise law; and
- (ii) other identified areas relating to the regulation of the legal profession.

The development of these norms and standards by the NLPC, or some of them, at least, which are directly linked to policy issues, might need to be done after/in consultation with the Minister/Chief Justice/Parliament.

#### *The role of the regional structures/councils :*

While the role of the regional structures would be to implement the broader national regulatory framework as determined by the NLPC, two options present themselves in this regard:

- (i) In terms of the first option, the NLPC would operate at a high level, merely determining the national norms and standards and other regulatory issues, leaving the implementation thereof, at an operational/administrative level, to be carried out by the provincial structures. In other words, the national and provincial structures will each carry out certain identified / defined statutory functions.

- (ii) In terms of the second option, the regional structures would derive their statutory powers by way of delegation from the NLPC, which could be withdrawn should the need arise.

#### **Principle V: The No dominance rule**

The reality that the number of practising attorneys far exceeds the number of practising advocates and that mechanisms need to be put into place, where appropriate, to ensure that one group of legal practitioners is not dominated by another, for instance by means of deadlock-breaking mechanisms or weighted voting mechanisms;

The Bill contains a mechanism to ensure that there is **no dominance** by any category of legal practitioners over another in respect of the core values that affect that category and which will be specifically defined. The rule takes the form of weighting of votes in respect of defined issues or a veto..

#### **Principle VII: Admission requirements, Registration and Discipline**

All legal practitioners must be registered on a central roll of legal practitioners after complying with the academic and any other requirements which may be determined by law and being admitted as a practitioner by the High Court. legal practitioners shall be entitled to practice throughout the Republic, unless they have been struck off the Roll.

The minimum qualification and training applicable to legal practitioners shall be a LLB degree or a Bachelor's degree and a LLB degree; satisfactory completion of practical legal training and vocational training requirements and passing a competency based examination.

The form and content of the articleship and pupillage to be further negotiated and be regulated through Regulations.

**Principle IX: Designation of member States**

(To consult with John Makhubele to obtain WTO guidelines. GCB also undertook to provide detail input)

**Principle X: Fidelity Fund**

Fidelity Fund will continue in existence and must be regulated by a Fidelity Fund Board. The Fidelity Fund Board must be manageable in terms of size and there must be a reasonable balance between legal practitioners and non-legal practitioners who possess the required skills. The Minister will appoint members of the Board.

**Principle XI: Legal Community Service**

The prescription of legal community service may be prescribed by the Minister by Regulations on the recommendation of the National Council. Legal Community Service to be included as part of the articleship and pupillage and a minimum period be prescribed for admitted practitioners.

**Principle XII: Legal Services Ombud**

The Legal Services Ombud will be a retired judge appointed by the President upon the recommendation of the JSC. The mandate of the Ombud is to promote and protect the public interest, ensure the fair, efficient and effective investigation of complaints against legal practitioners, promote high standards of integrity in the legal profession and promote the independence of the legal profession.

The State to fund the Ombud.

**Principle XIII: Funding model**

In principle, the profession should fund the governance structures established under the Act. However, with regard to the funding of structures, the following is provided for-

- (a) The National Council and its sub structures are funded by fees payable by practitioners and an annual appropriation by the Fund
- (b) The Fidelity Fund Board is primarily funded by interest accruing to the Fund from trust accounts of legal practitioners, and other money that the Fund is lawfully entitled to, such as insurance payments, investments etc.

#### **Principle XIV: The recognition of voluntary associations**

The main object of a voluntary association is to promote and develop high standards of legal practice among its members and to promote the legitimate interests of its members.

The establishment of voluntary organisations is not prohibited. The Constitution guarantees the right of freedom to association already. The proposed legislation must therefore recognise these associations, if and when they are established and, where appropriate, require or urge the national and regional governance structures referred to above, to take the views of these voluntary organisations into consideration when, for instance -

- (i) making decisions on norms and standards;
  - (ii) establishing the provincial structures; and
  - (iii) dealing with the membership/composition of these structures,
- among others. The views of the regional structures, of course, would also have to be taken into account in these processes. The voluntary organisations would, it is envisaged, also use their lobbying powers in getting their representatives appointed on the national and provincial governance structures in order to have their voices heard in the regulation of the legal profession.

Voluntary associations have a critical role in enhancing the efficiency of the legal profession, in particular with regard to the development and implementation of respect of training programmes.

#### **Principle XV: Recognition of other providers of legal services including Paralegals**

Paralegals have a important role in the administration of justice ensure that the community have access to legal service in respect of matters that to not require technical application of the law. While the Legal Practice Bill seeks in the main to regulate attorneys and practitioners, it would be important that other providers of legal services including paralegals are regulated through a separate legislative measure.

#### **Principle XVI: Devolution of assets of the Societies to the Regional Council**

In principle it would be necessary for the assets of the regional societies to devolve to the regional councils. The Bill should allow a process of negotiation and set the duration for such purpose.

#### **Principle XVII: Legal Training**

Continuous legal training should be entrenched.

#### **Principle XVIII: Transitional Council**

The Transitional Council will operate as the Council, so presumably the funding will be as per the Council. The establishment of a Transitional Council, the primary function of which is to facilitate the smooth implementation of the Bill. This body will be composed of representatives of existing bodies within the broader legal profession and it will prepare for the establishment of the permanent national body and regional bodies.

