

FOR MEETING OF PORTFOLIO COMMITTEE ON 24 JULY 2013

NOTE TO PC: ALL RE-NUMBERING AND CROSS REFERENCES WILL BE DEALT WITH WHEN THE BILL IS NEARING COMPLETION

REPUBLIC OF SOUTH AFRICA

LEGAL PRACTICE BILL

(As introduced in the National Assembly (proposed section 75), explanatory summary of Bill published in Government Gazette No. of)(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

BILL

To provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that reflects the diversity and demographics of the Republic;¹ to provide for the establishment, powers and functions of a single South African Legal Practice Council and Regional Councils in order to regulate the affairs of legal practitioners and set norms and standards; to provide for the admission and enrolment [and registration]² of legal practitioners; to regulate the professional conduct of legal practitioners so as to ensure accountable conduct; to provide for the establishment of an Office of a Legal Services Ombud and the appointment, powers and functions of a Legal Services Ombud; to provide for [an Attorneys] a Legal Practitioners Fidelity Fund and [an Attorneys Fidelity Fund] a Board of Control for the Fidelity Fund;³ to provide for the establishment, powers and functions of a Transitional South African Legal Practice Council; and to provide for matters connected therewith.

Preamble

WHEREAS section 22 of the Bill of Rights of the Constitution establishes the right to freedom of trade, occupation and profession, and provides that the practice of a trade, occupation or profession may be regulated by law;

AND BEARING IN MIND THAT—

- * the legal profession is regulated by different laws which apply in different parts of the national territory and, as a result thereof, is fragmented and divided;
- * access to **[affordable]**⁴ legal services is not a reality for most South Africans;
- * the legal profession is not representative of the demographics of South Africa;
- * entry into the legal profession is, in some respects, dependent on compliance with outdated, unnecessary, and overly restrictive prescripts;
- * access to the legal [services] profession is limited;

¹ The PC requested the Department to give effect to LASA's proposal in respect of the long title but not to use the word "strong" legal profession.

² See footnote at heading of clause 30.

³ The PC requested the Department to consider a revised PC name for the Attorneys Fidelity Fund in view of the proposal that advocates can take briefs directly from members of the public.

⁴ In some comments the question was raised what is "affordable" and "affordable" for who?. For consideration of the PC.

AND IN ORDER TO—

- * provide a legislative framework for the transformation and restructuring of the legal profession into a **[unified]** profession which is representative of the Republic's demographics under a single regulatory body; ⁵
- * ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld;
- * ensure that legal services are **[affordable and within the reach of the citizenry]** accessible; ⁶
- * regulate the legal profession, in the public interest, by means of a single statute;
- * remove any unnecessary or artificial ⁷ barriers for entry into the legal profession;
- * strengthen the independence of the legal profession; and
- * ensure the accountability of the legal profession to the public.

[BE IT THEREFORE ENACTED by the] Parliament of the Republic of South Africa enacts as follows:—

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⁵ Adv Holomisa raised the question whether the Bill proposes a unified profession or a single/unified regulatory body that represents both the attorneys' and advocates' professions. The PC requested the Department to consider this nuance and adapt the Bill accordingly for consideration by the PC.

⁶ A question was raised during public hearings as to the meaning of "citizenry". It might be appropriate to remove this phrase. For the PC's consideration.

⁷ As suggested by UNISA and LSSA and agreed to by the PC.

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CHAPTER 1
DEFINITIONS, APPLICATION AND PURPOSE OF ACT

Definitions

1. In this Act, unless the context otherwise indicates—

"Admission of Advocates Act" means the Admission of Advocates Act, 1964 (Act No. 74 of 1964);

"advocate" means a legal practitioner **[practising without a Fidelity Fund certificate]** who is admitted and enrolled as such under this Act;⁹

"appeal tribunal" means an appeal tribunal established in terms of section **[37(5)] 42**¹⁰;

"assessment" means the process under which it is determined whether a candidate legal practitioner has successfully attained the level of competence referred to in section 28;

"attorney" means a legal practitioner **[practising with a Fidelity Fund certificate]** who is admitted and enrolled as such under this Act;¹¹

"Attorneys Act" means the Attorneys Act, 1979 (Act No. 53 of 1979);

"Auditor-General" means the person appointed as the Auditor-General in terms of section 193 of the Constitution;

"bank" means a bank as defined in section 1 of the Banks Act, 1990 (Act No. 94 of 1990), and registered, otherwise than provisionally, or regarded as having been registered as a bank in terms of Chapter III of that Act;

"Board" means the **[Attorneys] Legal Practitioners Fidelity Fund Board** established in terms of section 62;

"candidate attorney" means a person undergoing practical vocational training with the view to being admitted and enrolled as an attorney;

"candidate legal practitioner" means a person undergoing practical vocational training, either as a candidate attorney or as a pupil;

["Charter" means the Legal Services Sector Charter as adopted by the legal profession of the Republic and the Minister in December 2007;]¹²

⁹ As agreed to by PC on the basis of comments on LSSA in respect of this definition, but without a reference to the Admission of Advocates Act, 1964, as suggested by LSSA, because this is dealt with in the transitional provisions: see clause 113.

¹⁰ See clause 42 and footnotes in that regard.

¹¹ As agreed to by PC on the basis of comments on LSSA in respect of this definition, but without a reference to the Attorney Act, 1979, as suggested by LSSA, because this is dealt with in the transitional provisions: see clause 113.

¹² The status of the Charter in the Bill was questioned in the PC,

"code of conduct" means a written code setting out rules and standards relating to ethics, conduct and practice for legal practitioners and its enforcement through the Council and its structures which may contain different provisions for advocates and attorneys and different provisions for different categories of legal practitioners;

"conveyancer" means any attorney who is admitted and enrolled [registered and enrolled]¹³ to practise as a conveyancer in terms of this Act [or a person referred to in the definition of "conveyancer" in section 102(1) of the Deeds Registries Act, 1937 (Act No.47 of 1937)];¹⁴

"Council" means the South African Legal Practice Council established in terms of section 4;

"court" means any court in the Republic as defined in section 166 of the Constitution;

["day" means an ordinary day;]¹⁵

"Department" means the Department of Justice and Constitutional Development;

"disciplinary body" means—

- (a) an investigating committee;
- (b) a disciplinary committee; or
- (c) an appeal tribunal,

as the case may be;

"Director-General" means the Director-General of the Department;

"Fidelity Fund certificate" means the certificate referred to in section 85;

"financial year" means the financial year of the Fund referred to in section 60;

"Fund" means the **[Attorneys] Legal Practitioners** Fidelity Fund¹⁶ referred to in section 54;

"High Court" means the High Court of South Africa established by section 6 of the Superior Courts Act, 2013, or, if the context indicates otherwise, the Division thereof having jurisdiction;¹⁷

"justice centre" means an office of Legal Aid South Africa and includes a satellite office;

"law clinic" means—

¹³ Clause 24(2) provides that a "High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary"

¹⁴ As agreed to by PC on the basis of comments on LSSA in respect of this definition. Also see consequential amendment in this regard in the Schedule to the Bill, with the inclusion of an amendment to the Deeds Registries Act, 1937.

¹⁵ As agreed to by PC in light of comments of LASA and R Naidoo, because "day" is already defined in the Interpretation Act, 1957.

¹⁶ The PC requested the Department to consider a revised name for the Attorneys Fidelity Fund in view of the proposal that advocates can take briefs directly from members of the public.

¹⁷ The question is raised whether the Bill should not take into account the recent approval of the Superior Courts Bill by Parliament. For the PC's consideration and guidance.

(a) a centre for the practical legal education of students in the faculty of law at a university in the Republic; or

(b) a law centre controlled by, or which is, a non-profit making organisation, which, subject to section 34(8), provides legal services to the public free of charge;¹⁸

"Legal Aid South Africa" means the Legal Aid Board established in terms of section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969);

"legal practitioner" means an advocate or attorney [**registered**] admitted and enrolled as such in terms of sections 24 and 30, respectively;¹⁹

"LLB degree" means a Bachelor of Laws, also referred to/known as a degree of baccalaureus legum, referred to in section 26;²⁰

"magistrates' court" means a regional court or a district court established in terms of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944);

"Master" means a Master of the High Court [**acting within the powers conferred upon him or her by law**];²¹

"Minister" means the Minister of the Department of Justice and Constitutional Development;

"notary" means any attorney who is admitted and enrolled [**registered and enrolled**] to practise as a notary in terms of this Act;²²

"Ombud" means the person appointed by the President as a Legal Services Ombud in terms of section 48;

"practical vocational training" means training required in terms of this Act to qualify as a candidate attorney or pupil in order to be admitted and enrolled as an attorney or advocate;

"prescribed" means prescribed by regulation and **"prescribe"** has a corresponding meaning;

"pupil" means a person undergoing practical vocational training with a view to being admitted and enrolled as an advocate;

¹⁸ PC agreed to await the input of SAHRC on definition of "law clinic". During the public hearings on the Bill, the SAHRC indicated that this definition should be extended to include the SAHRC.

¹⁹ LASA suggests that this definition should be extended to include candidate legal practitioners. The Department raises the question whether clause 2 should not rather be extended. A candidate legal practitioner, in our opinion, is not a fully fledged legal practitioner. See Department's proposal in respect of clause 2.

²⁰ A proposal of the Department for consideration by the PC. See also clause 26(1)(a) of the Bill in respect of which the PC requested the Department to make certain that, in addition to the current 4 year undergraduate LLB degree contained in the Bill, the Bill also includes the possibility of a person who does a BA LLB, B Comm LLB, BSc LLB, etc which some universities offer, the duration of which is normally 5 years if the undergraduate degree contains certain prescribed law subjects with the view to the LLB.

²¹ As agreed to by PC on the basis of comments on LSSA in respect of this definition.

²² Clause 24(2) provides that a "High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary"

"**Regional Council**" means a Regional Council referred to in section 23;

"**Roll**" means the Roll of Legal Practitioners referred to in section 30(3);

"**rules**" means the rules of the Council;

"**this Act**" includes any regulation, rule or notice made or issued in terms of this Act; and

"**trust account practice**" means a practice conducted by =

(a) one or more attorneys who are; or

(b) an advocate referred to in section 34(2)(b) who is,²³

in terms of this Act, required to hold a Fidelity Fund certificate.

Application of Act

2. This Act is applicable to all legal practitioners and all candidate legal practitioners.²⁴

Purpose of Act

3. The purpose of this Act is to—

- (a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld;²⁵
- (b) broaden access to justice by putting in place—
 - (i) a [**structure**] mechanism²⁶ to determine fees chargeable by legal practitioners for legal services rendered [**that are affordable and within the reach of the citizenry**];²⁷
 - (ii) measures to provide for the rendering of community service by candidate legal practitioners and practising legal practitioners; and²⁸
 - (iii) measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that reflects the demographics of the Republic;

²³ See clause 34(2)(b) which deals with advocates taking briefs directly from the public.

²⁴ The Department raises the question whether this insertion should not be included? See also comments of LASA in respect of definition of "legal practitioner".

²⁵ As suggested by the GCB in respect of clause 3(a) and tentatively agreed to by PC. The whole issue of a fee structure to stand over.

²⁶ See option of Department in respect of clause 35 regarding fees.

²⁷ The comments of the GCB in respect of clause 3(b)(i) to stand over.

²⁸ The comments of the GCB in respect of clause 3(b)(ii) to stand over.

- (c) create a single unified statutory body²⁹ to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of **[a unified,]** an³⁰ accountable, efficient and independent legal profession;
- (d) protect and promote the public interest;
- (e) provide for the establishment of an Office of Legal Services Ombud;
- (f) provide a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners and candidate legal practitioners; and
- (g) create a framework for the—
 - (i) development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners;
 - (ii) regulation of the admission and enrolment of legal practitioners; and
 - (iii) development of adequate training programmes for legal practitioners and candidate legal practitioners.

CHAPTER 2

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Part 1

Establishment, powers and functions of South African Legal Practice Council

Establishment of Council

4. The South African Legal Practice Council is hereby established as a body corporate with full legal capacity, and exercises jurisdiction over all legal practitioners and candidate legal practitioners as contemplated in this Act.

Objects of Council

5. The objects of the Council are to—
- (a) facilitate the realisation of the goal of a transformed and restructured legal profession that is **[unified,]**³¹ accountable, efficient and independent;

²⁹ Refer to remarks of Adv Holomisa in this regard: Is it a unified profession or a unified regulatory body? GCB suggests that the word “unified” be deleted. The matter to stand over.

³⁰ Refer to remarks of Adv Holomisa in this regard: Is it a unified profession or a unified regulatory body? GCB suggests that the word “unified” be deleted. The matter to stand over. PC, however, requested the Department to consider this.

- (b) ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice; ³²
- (c) promote and protect the public interest;
- (d) regulate all legal practitioners and all candidate legal practitioners;
- (e) preserve and uphold the independence of the legal profession;
- (f) enhance and maintain the integrity and status of the legal profession;
- (g) determine³³, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners;
- (h) promote high standards of legal education and training, and compulsory post-qualification professional development;
- (i) promote access to the legal profession in pursuit of a profession that reflects the demographics of the Republic;
- (j) ensure accessible and sustainable training of law graduates aspiring to be admitted and enrolled as legal practitioners;
- (k) uphold and advance the rule of law, the administration of justice, and the Constitution of the Republic;
- [(l) implement the Charter;]³⁴ and**
- (m) give effect to the provisions of this Act in order to achieve the purpose of this Act, as set out in section 3.³⁵

Powers and functions of Council

6. (1) The Council must do all that is necessary or expedient to achieve its objects referred to in section 5, and may, having due regard to the Constitution, applicable legislation and the inputs of the Ombud and Parliament—

- (a) acquire or hire movable or immovable property;
- (b) develop, hypothecate, let, sell or otherwise dispose of its movable or immovable property;
- (c) make donations and grants in support of projects related to its objects;

³¹ Refer to remarks of Adv Holomisa in this regard: Is it a unified profession or a unified regulatory body? GCB suggests that the word “unified” be deleted. The matter to stand over. PC, however, requested the Department to consider this.

³² For consideration by the PC.

³³ GCB suggests that the word “determine” should be replaced with the word “monitor”. PC indicated this must stand over.

³⁴ The status of the Charter in the Bill was questioned in the PC,

³⁵ LSSA suggests that clause 5 should also include a reference “to promote the interests of the legal profession, subject to the overriding interests of the public”. Ms Smuts indicated that there should be a clear distinction between regulatory functions “trade union” functions. PC indicated this is to stand over.

- [(d) perform any act in respect of **[negotiable instruments or the electronic transfer of moneys]** relating to its financial affairs as may be necessary;]*³⁶
- (e) institute or defend legal proceedings on behalf of the Council;*
- (f) impose monetary penalties;*
- (g) invest Council funds;*
- (h) borrow or raise money;*
- (i) insure against any risk;*
- (j) delegate any of its powers and functions to its committees or Regional Councils, subject to any conditions it may impose, which delegation does not—*
- (i) divest the Council of the power or function so delegated; and*
- (ii) preclude the Council from varying or setting aside any decision made under a delegation;*
- (k) develop³⁷ norms and standards to guide the conduct of legal practitioners, candidate legal practitioners and the legal profession;*
- (l) advise the Minister with regard to matters concerning the legal profession and legal practice;*
- (m) provide financial support to organisations or institutions providing legal education and training including legal education and training for purposes of compulsory post-qualification professional development, with the object of enhancing the standards of legal services and increasing access to justice;*
- (n) provide financial support to legal practitioners, organisations or institutions for the purposes of providing work-place training opportunities for candidate legal practitioners in deserving cases, including the payment of stipends to pupils;³⁸*
- (o) provide financial support to non-profit organisations and institutions promoting access to justice for poor people;*
- [(p) consider and grant bursaries and loans [to students, candidate legal practitioners and legal practitioners for the purposes of legal education and research;]***³⁹

³⁶ As suggested by UNISA in respect of clause 6(1)(d) and supported by the PC. However, the question has been raised by the State Law Advisers whether paragraph (d) should not be deleted since clause 6(1)(r) and (t) would address this? For guidance by the PC.

³⁷ GCB suggests that the word “determine” should be replaced with the word “monitor”. PC indicated this must stand over.

³⁸ Mr Jeffery suggested that the Council must also be empowered to facilitate/enable the payment of stipends/remuneration to pupils, who are currently not paid at all while they do pupilage. It is suggested for consideration by the PC that this be addressed in clause 27 as suggested in that clause or in clause 94(1)(b).

³⁹ AFF suggests that this function should remain with the Fund and should not be a responsibility of the Council. See clause 58 as a consequential amendment.

- (q) pay for services rendered at the request of the Council with the object of enhancing the professional standards of legal practitioners;
- (r) do all things necessary for the proper and effective performance of its functions or the exercise of its powers;
- (s) pay out of pocket expenses to Council members; and
- (t) do all things necessary for, or conducive to the attainment of the objects of the Council **[and the Charter]**⁴⁰, as may be prescribed.

(2) The Council, in order to perform its functions properly—

- (a) must employ an executive officer and such officials or staff as may be necessary to enable it to carry out its functions and determine the remuneration and other conditions of service of its officials and staff;
- (b) may establish, promote, arrange, administer or assist in the establishment, promotion, arrangement or administration of insurance, medical-aid, pension, provident or benevolent schemes for the benefit of its officials and staff and the dependants of such officials and staff;
- (c) may conclude agreements with any person or organisation for the performance of any particular act or particular work or the rendering of particular services for the purposes of furthering the objects of the Council;
- (d) may enter into contracts in connection with the performance of its functions or the exercise of its powers;
- (e) may pay an honorarium or an allowance to any person to cover expenses reasonably incurred by him or her in connection with any act performed on the request of the Council or in terms of its directions on behalf of or for the benefit of the Council and the furtherance of its objects;
- [(f) may enter into deeds of suretyship to the satisfaction of the Master in order to provide security on behalf of a legal practitioner in respect of work done by such legal practitioner—**
 - (i) as an executor in the estate of a deceased person;**
 - (ii) as a trustee or liquidator in an insolvent estate;**
 - (iii) as a curator to the person or property in the case of a person who is unable to manage his or her own affairs; or**
 - (iv) in any other similar capacity or by any other person in such capacity where a legal practitioner acts on behalf of the person concerned;]**⁴¹

and

⁴⁰ PC indicated that the status of the Charter in the Bill should stand over.

(g) may publish or cause to be published periodicals, pamphlets and other printed material for the benefit of practitioners or the public.

(3) The Council must, subject to this Act —

(a) **[register and]** enrol a duly admitted legal practitioner as such; and

(b) keep a Roll of **[registered]** legal practitioners and decide on—

(i) the form of the certificates and the Roll to be kept;

(ii) the maintenance of the Roll or issuing of certificates; and

(iii) the reviewing of the Roll and the manner in which alterations may be made to the Roll.

(4) The Council must, in the rules, with regard to fees and charges which are payable to the Council, determine—

(a) application fees as provided for in this Act;

(b) annual fees, or portion thereof, in respect of a part of a year, payable to the Council by **[attorneys] legal practitioners**⁴² for Fidelity Fund certificates: Provided that any determination made in terms of this paragraph must be made in consultation with the Board;⁴³

(c) annual fees payable by all of legal practitioners who are admitted and enrolled in terms of section 24(1) as practising legal practitioners;

(d) the date on which any fee is payable;

(e) the fees, or portion thereof, payable in respect of any examination conducted by the Council or on behalf of the Council; and

(f) any other fee or charge it considers necessary, as contemplated in this Act.⁴⁴

(5) The Council, with regard to education in law and legal practice generally —

(a) may, subject to sections 5 and 7 of the Higher Education Act, 1997 (Act No. 101 of 1997), conduct visits to any educational institution which has a department, school or faculty of law;

(b) may advise the Council on Higher Education established in terms of the Higher Education Act, 1997, regarding matters relevant to education in law;

(c) may consult with the South African Qualifications Authority established by the National Qualifications Framework Act, 2008 (Act No. 67 of 2008), or any structure

⁴¹ AFF points out this is currently a responsibility of the Board, as set out in section 40A of the Attorneys Act, 1979 and is also duplicated in clause 77(3) of the Bill and should therefore be deleted. PC agreed.

⁴² The PC requested the Department to amend the Bill where necessary to give effect to the proposal that advocates can take briefs directly from members of the public for consideration by the PC.

⁴³ As suggested by the AFF and agreed to by PC. (See also clause 22(1)(b).

⁴⁴ In accordance with proposal of R Naidoo in respect of clause 6(4)(f), for consideration by PC.

- established by it, to determine competency standards for the purposes of registration;
- (d) may conduct any examination for the purposes of practical vocational training;
 - (e) may determine, after consultation with relevant role-players and legal practitioners in general, conditions relating to the nature and extent of continuing education and training, including compulsory post-qualification professional development;
 - (f) must, in the prescribed manner, create a mechanism to—
 - (i) provide proper, appropriate and **[transformational]**⁴⁵ legal education and training, having due regard to our inherited legacy and new constitutional dispensation; and
 - (ii) offer legal education and training to aspiring and newly appointed legal practitioners, as well as continued training for experienced legal practitioners;
 - (g) 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) and compulsory post-qualification professional development;
 - (h) must report annually to the Minister on —
 - (i) the number of new law graduates **[registered]** enrolled with the Council;
 - (ii) the effectiveness of the training requirements for entry into the profession; and
 - (iii) measures adopted to enhance entry into the profession, including the remuneration of candidate legal practitioners and continuing legal education to develop skills of legal practitioners,

to make recommendations to the Minister regarding legislative and other interventions to improve access to the profession and access to justice broadly; and
 - (i) must, at the request of the Minister, advise the Minister on multi-disciplinary legal practices which the Minister may consider for the purposes of developing policies and legislative and other interventions in respect of multi-disciplinary legal practices.

Composition of Council⁴⁶

⁴⁵ It was suggested that the word “transformational” could be deleted because transformation features in the Preamble and clauses 3 and 5.

⁴⁶ The PC flagged clause 7 in its entirety and comments thereon, but did make some preliminary proposals for the Department to work on, for consideration by the PC, as reflected in the clause.

7. (1) The Council consists of the following members:

- (a) 16 legal practitioners, comprising of 10 practising attorneys and six practising advocates, elected in accordance with **[a] the procedure [determined by the Council in terms of the rules] prescribed by the Minister –**
- (i) in terms of section 97(1)(a)(i); or
- (ii) in terms of this section, in consultation with the Council, if the procedure referred to in subparagraph (i) requires revision any time after the commencement of Chapter 2;⁴⁷
- (b) **[one] two** teachers of law⁴⁸ **[or legal academic nominated] designated** by **[law teachers, legal academics or organisations representing law teachers or legal academics] the South African Law Deans Association;**⁴⁹
- (c) subject to subsection (4), three fit and proper persons [appointed] designated by the Minister, who, in the opinion of the Minister and by virtue of their knowledge and experience, are able to assist the Council in achieving its objects; **[and]**
- (e) one person **[nominated] designated** by Legal Aid South Africa; and
- (f) one person designated by the Board, who may not be a legal practitioner.⁵⁰

(2) In constituting the Council as provided for in subsection (1),

consideration must be given to—

- (a) the objects of the Council;
- (b) achieving representivity with regard to—
- (i) race;
- (ii) gender; and
- (iii) disability;
- (c) ensuring adequate regional representation when making a nomination in respect of subsection (1)(a); and
- (d) ensuring that the members of the Council, amongst them, have experience in and knowledge of—

⁴⁷ For consideration by the PC.

⁴⁸ The question was raised whether more than one teacher of law should not be designated.

⁴⁹ This provision is in line with section 178(1)(g) of the Constitution, dealing with the composition of the Judicial Service Commission, as far as teachers of law is concerned. Section 7(1)(k) of the SAJEI Act refers to the SA Law Deans Association. This is also in line with the proposal of the LSSA in respect of clause 7(1)(b). The PC also raised the question whether members of the Council should be “designated” or “nominated”. Section 178 of the Constitution dealing the composition of the Judicial Service Commission is again relevant. Where “nomination” is used in section 178, an appointment must then be made. Where “designation” is used, no appointment is made. It is therefore suggested that the term “designation” be used throughout in clause 7 to allay any concern of another functionary having a role to play in the eventual appointment of Council members.

⁵⁰ The PC requested the Department to consider the inclusion of a representative of the Board of AFF, as provided for in the TC in clause 96(1)(e). It might be appropriate that the Board’s appointee should not be a legal practitioner. For the PC’s consideration and guidance. If all the proposals of the PC are accepted, the Council will consist of 23 members which will facilitate decision-making in the sense that there will not be an even number of members.

- (i) the provision of legal services;
- (ii) the principles promoting access to justice;
- (iii) legal education and training;
- (iv) consumer affairs;
- (v) civil and criminal proceedings and the functioning of the courts and tribunals in general;
- (vi) the maintenance of professional standards of persons who provide legal services; and
- (vii) the handling of complaints.

ALTERNATIVE OPTION FOR SUBCLAUSE (2) (Now subclauses (2) & (3):

(2) The need for the Council to reflect broadly the racial and gender composition of South Africa must be considered when the Council is constituted in terms of this section.⁵¹

(3)⁵² When constituting the Council the following factors must, as far as practicable, be taken into account:

- (a) the objects of the Council;
- (b) Representation of persons with disabilities;
- (c) regional representation; and
- (d) experience and knowledge of –
 - (i) the provision of legal services;
 - (ii) the principles of promoting access to justice;
 - (iii) legal education and training;
 - (iv) consumer affairs;
 - (v) civil and criminal proceedings and the functioning of the courts and tribunals in general;
 - (vi) the maintenance of professional standards of persons who provide legal services;
 - (vii) the handling of complaints; and
 - (viii) anti-competitive practices and/or competition law.⁵³

(4)⁵⁴ A person referred to subsection (1)(c) may not be designated as a member of the Council if he or she—

⁵¹ This provision is similar to section 174(2) of the Constitution, dealing with the appointment of judicial officers.

⁵² For consideration by the PC in the light of the concerns raised that the current subclause (2) might give rise to unnecessary obstacles in constituting the Council and also give rise to unnecessary legal challenges.

⁵³ The PC raised the question whether provision should also not be made for the inclusion of a person with experience in competition law.

- (a) is a public servant;
- (b) is a member of Parliament, any provincial legislature or any municipal council; or
- (c) is an office-bearer or employee of any party, movement or organisation of a party-political nature.

Membership of Council

8. (1) A member of the Council must—

- (a) be a South African citizen;
- (b) be a fit and proper person; and
- (c) subscribe to the objects of the Council.

(2) The following persons are disqualified from becoming or remaining members of the Council:

- (a) An unrehabilitated insolvent;
- (b) a person declared to be of unsound mind by a court of the Republic;
- (c) a person who has been convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, other than a conviction for an offence committed prior to 27 April 1994 associated with political objectives;
- (d) a person[s] who [vacated] has been removed from⁵⁵ office in terms of section 12; or
- (e) a member of the Board or any of its committees.

Chairperson and deputy chairperson of Council⁵⁶

9. (1) At the first meeting of the Council, the members of the Council must elect and appoint a chairperson and deputy chairperson from among themselves.

(2) The chairperson and the deputy chairperson hold office for a period of three years from the date of their election and may be re-elected for one further term,

⁵⁴ Although the entire clause 7 has been held in abeyance for further discussion, the proposal by the Department in its Response document, namely to include a provision similar to section 6 of the ICASA Act, 2000, is included for consideration pending further discussions on this clause.

⁵⁵ Consequential amendment flowing from clause 12 for the PC's consideration.

⁵⁶ Technical proposal for PC's consideration in interests of uniformity. See clause 66 dealing with chairperson and deputy chairperson of the Board.

unless such chairperson or deputy chairperson resigns or ceases to be a member of the Council.

(3) The deputy chairperson must, if the chairperson is absent or is for any reason unable to act as chairperson, perform all the functions and exercise all the powers of the chairperson.

(4) If both the chairperson and deputy chairperson are absent from any meeting, the members present must elect a person from among themselves to preside at that meeting and the person so presiding must, during that meeting and until the chairperson or deputy chairperson resumes duty, perform all the functions and exercise all the powers of the chairperson.

(5) If both the chairperson and deputy chairperson have been given leave of absence, the members of the Council must elect a person from among themselves to act as chairperson until the chairperson or deputy chairperson resumes duty or **[vacates]** is removed from office in terms of section 12.

(6) If the office of chairperson or deputy chairperson becomes vacant, the members of the Council must, at the first meeting thereafter or as soon as **[may be convenient]** possible thereafter⁵⁷, elect from among themselves a new chairperson or deputy chairperson, as the case may be.

(7) A chairperson and deputy chairperson may vacate office as such, without relinquishing his or her membership of the Council, unless his or her membership has been terminated in accordance with section 11.

Term of office of members of Council⁵⁸

10. A member of the Council holds office for a term of three years⁵⁹, but may **[be re-appointed at the end of that term]** serve as a member for one further term if he or she is again so elected or designated, as the case may be.⁶⁰

⁵⁷ Aligned with clause 100(6) for the PC's consideration.

⁵⁸ See clause 68: Technical alignment for the PC's consideration.

⁵⁹ The PC requested the Department to find out how long members of law societies hold office currently and to look at other statutory bodies in this regard. The various law societies have different periods but it would seem as if the general rule is a maximum of two terms of approximately 3 years. In terms of the Auditing Profession Act, 2005, members of the Regulatory Board hold office for a period of 2 years which is renewable once. In terms of the Engineering Profession Act, 2000, members of the Council hold office for a period of 4 years which is renewable once. In terms of the Architectural Profession Act, 2000, members of the Council hold office for a period of 4 years which is renewable once. In terms of the Health Professions Act, 1974, members of the Council hold office for a period of 5 years which is renewable once. In terms of the ICASA Act, 2000, members hold office for a period of 4 years which is renewable once.

⁶⁰ Adapted in accordance with comments of LSSA in respect of clause 10 and agreed to by the PC.

Termination of office

11. (1) A person ceases to be a member of the Council when that person—
- (a) is no longer eligible in terms of section 8 to be a member;
 - (b) resigns; **[or]**
 - (c) **[vacates his or her] is removed from**⁶¹ office in terms of section 12;
 - (d) in the case of a legal practitioner referred to in section 7(1)(a), ceases to be a practising legal practitioner, for whatever reason; or⁶²
 - (e) is appointed as a judicial officer.⁶³
- (2) A member may resign after giving at least three months' written notice to the Council, but the Council may, on good cause shown, accept a shorter period.

[Vacation of] Removal from⁶⁴ office

12. (1) **[A member of the] The Council [must vacate] may remove a member of the Council from [his or her] office on account of—**
- (a) a conviction for any misconduct/offence under this Act or a conviction for any offence which, in the opinion of the Council, debars him or her from serving as a member of the Council;
 - (b) incapacity or incompetency which, in the opinion of the Council, debars him or her from serving as a member of the Council;
 - (c) absence from three consecutive meetings of the Council without the permission of the chairperson, except on good cause shown;
 - (d) a request by the body which or person who **[nominated,] elected or [appointed] designated** that member in terms of section 7, on good cause shown by the body or person in question;
- ALTERNATIVE TO PARAGRAPH (d):***
- (d) a request by the body which or person who **[nominated,] elected or [appointed] designated** that member in terms of section 7, on good cause shown by the body or person in question, upon confirmation thereof by the High Court;⁶⁵

⁶¹ Consequential amendment flowing from clause 12.

⁶² Pursuant to the comments of UNISA in respect of clause 12.

⁶³ Adapted in accordance with comments of C Erasmus in respect of clause 11 and agreed to by the PC.

⁶⁴ In light of PC's queries regarding this provision and other similar provisions in the Bill, namely clauses 69 and 102, dealing with vacation of office from AFF Board and TC, respectively, the question arises whether it would not be more appropriate for the heading of the clauses to be "Removal from office"? Removal from office is moreover referred to in subclauses (2) and (4). The PC also requested the Department to look at other similar provisions in respect of other statutory bodies. Ms Louw has the information in question which the PC can be briefed on.

- (e) engaging in any activity that, in the opinion of the Council, undermines the integrity of the Council; or
- (f) the sequestration of his or her estate.

(2) If the Council has commenced proceedings for the removal of a member, it may suspend that member from office.

(3) A member who is suspended from office may not perform or exercise any of the powers or functions of that office or receive any allowances.

(4) The Council must follow due process of law if it intends to remove a member from office, as determined by the Council in the rules.⁶⁶

[Filling of v] Vacancies in Council and filling thereof⁶⁷

13. (1) A vacancy in the Council occurs when—

(a) the term of office of a member expires or terminates as contemplated in section 11⁶⁸;

(b) a member dies;

(c) a member [**vacates his or her**] is removed from⁶⁹ office as contemplated in section 12; or

(d) the resignation of a member takes effect.

(2) A vacancy must be filled as soon as practicably possible in accordance with the [**procedure referred to in**] provisions of⁷⁰ section 7.

Dissolution of Council

14. (1) The Minister may dissolve the Council if the Minister, on good cause shown, loses confidence in the ability of the Council to perform its functions effectively and efficiently or on any reasonable grounds.

(2) The Minister may dissolve the Council only after having—

⁶⁵ The PC requested that an option be developed in terms of which a person can only be removed from office at the instigation of the body that designated that person with the intervention of the court. Similar wording is found in the Firearms Control Act. For the PC's consideration.

⁶⁶ The PC raised the question whether the processes to be followed in removing a member should not be spelt out, possibly in subordinate legislation. It is proposed that internal processes of this nature be spelt out in rules to be made by the Council. Alternatively, they could be dealt with in regulations. This would entail a consequential insertion in clause 95 dealing with rules that the Council may make.

⁶⁷ See clause 67: The Department suggests an alignment with the wording,, for the PC's consideration: technical amendments.

⁶⁸ A proposal by the Department for consideration by the PC.

⁶⁹ Consequential amendment flowing from clause 12.

⁷⁰ A proposal by the Department for consideration by the PC.

- (a) provided the Council with reasons for losing confidence in its abilities;
- (b) given the Council a reasonable opportunity to respond to those reasons; and
- (c) afforded the Council a hearing on any submissions received.

(3) The Minister must, before dissolving the Council in terms of this section, appoint a judge discharged from active service in terms section 3 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), to conduct an investigation and make recommendations to the Minister.

(4) (a) If the Minister dissolves the Council, the Minister must, having regard to the provisions of section 7, appoint an interim Council, consisting of at least seven persons.

(b) The interim Council must be appointed within 21 days after the dissolution of the Council and must be appointed for a period determined by the Minister, which period must not exceed six months.

(5) (a) The Minister must from among the members of the interim Council designate a chairperson of the interim Council.

(b) The interim Council must elect a deputy chairperson from among its members and the deputy chairperson holds office for such period as the interim Council may determine at the time of his or her election.

(6) The chairperson of the interim Council may, at any time of his or her own accord, or must, at the written request of not fewer than five members, convene a special meeting of the interim Council.

(7) Five members of the interim Council form a quorum for a meeting of the interim Council.

(8) Sections 15, 16, 17 18, and 19 apply with the necessary changes required by the context in respect of the interim Council.

ALTERNATIVE OPTION: CLAUSE 14(1) TO (3)

14. (1) If the Minister loses confidence in the ability of the Council to perform its functions effectively and efficiently, the Minister must—

- (a) provide the Council with reasons for losing confidence in its abilities;
- (b) give the Council a reasonable opportunity to respond to those reasons; and
- (c) afford the Council a hearing on any submissions received.

(2) If, after taking the steps provided for in subsection (1), the Minister still does not have confidence in the ability of the Council to perform its functions effectively and efficiently, he or she must request the Ombud to conduct an investigation and make recommendations to him or her.

(3) If, after receiving the recommendations from the Ombud as contemplated in subsection (2), the Minister still does not have confidence in the ability of the Council to perform its functions effectively and efficiently, the Minister may approach the High Court with an application for an order that empowers the Minister to dissolve the Council.

Part 2

Operation of Council

Meetings of Council

15. (1) The Council must hold at least four meetings in each year at venues to be determined by the Council and may, in addition, hold any further meetings as the Council may determine.

(2) The Council must meet as soon as practicable after the appointment of its members.

Quorum and procedure at meetings of Council

16. (1) The majority of the members of the Council constitutes a quorum at any meeting of the Council.

(2) The Council must determine a procedure in the rules for convening meetings and the procedure for the conduct of meetings.

(3) The Council must keep a record of its proceedings.

Decisions of Council⁷¹

17. (1) A decision of the majority of the members present at a meeting constitutes the decision of the Council.

(2) In the event of a deadlock in the voting the chairperson has a casting vote in addition to a deliberative vote.

⁷¹ The PC requested that this clause be held in abeyance for further discussions, especially in light of GCB's comments on the provision that advocates should have a veto right in respect of matters peculiar to advocates.

Committees of Council

18. (1) The Council may—

- (a) establish one or more committees, consisting of—
 - (i) members of the Council only; or
 - (ii) members of the Council and any other⁷² suitable persons except employees of the Council,
 to assist the Council in the exercise of its powers and performance of its functions; and
- (b) dissolve a committee at any time.

(2) The Council—

- (a) must determine the powers and functions of a committee;
- (b) must appoint a member of a committee as chairperson of such committee;
- (c) may, after complying with due process of law, remove a member of a committee at any time; and
- (d) may determine a committee's procedure.

(3) The Council must, in the rules, determine the procedure for the conduct of meetings of a committee.

Executive officer and employees of Council

19. (1) The Council must appoint an executive officer for the Council, who is the accounting officer of the Council.

(2) The executive officer must, in addition to such function as may be assigned to him or her in terms of this Act—

- (a) perform or exercise any powers and functions assigned to him or her by the Council;
- (b) supervise the employees of the Council; and
- (c) account for the assets and liabilities of the Council.

(3) The Council may appoint any other employees it deems necessary to assist the executive officer in the performance of his or her functions.

(4) The procedure for the appointment of the executive officer and other employees of the Council must be determined by the Council in terms of the rules.

⁷² Adapted pursuant to LSSA comments on clause 18(1)(a)(ii).

(5) The Council must have due regard to representivity with reference to race, gender and disability when appointing the executive officer and other employees.

ALTERNATIVE OPTION

(5) The need for the staff of the Council to reflect broadly the racial and gender composition of South Africa must be considered when the executive officer and other employees of the Council are appointed in terms of this section.⁷³

(6) The Council must, in the rules, determine the conditions of service of the executive officer and the other employees of the Council.

Executive committee of Council

20. (1) The Council must establish an executive committee and determine its powers and functions in the rules.

(2) The executive committee consists of—

- (a) the chairperson and deputy chairperson of the Council; and
- (b) four other members appointed by the Council.⁷⁴

(3) The Council must have due regard to representivity with reference to race, gender, disability, attorneys, advocates and regional representation, when establishing an executive committee.

ALTERNATIVE OPTION

(3) The need for the executive committee to reflect broadly –

- (a) the racial and gender composition of South Africa; and
- (b) representation of attorneys and advocates, as well as regional representation, must be considered when the executive committee is established in terms of subsection (1).⁷⁵

(4) The executive committee is responsible for the day to day functioning and administration of the Council in between meetings of the Council.

(5) The Council may direct the executive committee to perform such tasks as it considers appropriate.

⁷³ The PC requested the Department to reconsider this provision and all other similar provisions in the Bill to ensure uniformity and to address concerns raised that the current subclause (5) might give rise to unnecessary obstacles in constituting the Council and also give rise to unnecessary legal challenges.

⁷⁴ The LSSA argues that the Council should have the authority to determine the size and composition of the executive committee. The PC requested the Department to look at other similar provisions where executive committees are established. Ms Louw has the information in question which the PC can be briefed on.

⁷⁵ The PC requested the Department to reconsider this provision and all other similar provisions in the Bill to ensure uniformity and to address concerns raised that the current subclause (3) might give rise to unnecessary obstacles in constituting the Council and also give rise to unnecessary legal challenges. It is modelled along the lines of section 174(2) of the Constitution.

(6) A member of the executive committee holds office for so long as he or she is a member of the Council, unless he or she is removed as a member of the executive committee by the Council, or his or her membership in the Council terminates in terms of this Act.

(7) (a) The chairperson of the Council is *ex officio* chairperson of the executive committee.

(b) The Council must, from among members of the executive committee members, designate a **[chairperson and]** deputy chairperson of the executive committee.⁷⁶

(8) The executive committee may meet as often as it deems necessary and dispose of its business in the manner it considers appropriate.

Delegation of powers and assignment of functions of Council⁷⁷

21. (1) The Council may resolve to delegate **[in writing]**⁷⁸ any of its powers or assign any of its functions to—

- (a) a member of the Council;
- (b) a committee of the Council;
- (c) the executive committee; **[or]**
- (d) a Regional Council; or
- (e) the executive officer or an employee of the Council.⁷⁹

(2) A delegation or assignment in terms of subsection (1)—

- (a) is subject to any conditions and directions as the Council may impose; and
- (b) does not divest the Council of the responsibility for the exercise of the power or the performance of the duty or function.

(3) The Council may confirm, vary or revoke any decision taken in consequence of a delegation or assignment, but no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

Finances, expenditure and accountability of Council

⁷⁶ Adapted in accordance with the proposal by the LSSA in respect of clause 20(7) and agreed to by the PC.

⁷⁷ The LSSA was of the view that a delegation should be able to be further delegated. The PC was of the view that this is inappropriate in light of maxim *delegatus delegare non potest*.

⁷⁸ As suggested by the PC. The resolution will necessarily be in writing.

⁷⁹ As suggested by the LSSA and agreed to by the PC.

22. (1) The funds of the Council consist of—

- (a) fees, including subscription fees payable in terms of this Act;
- (b) an annual appropriation made by the Fund, the amount of which is determined by the Board after/in⁸⁰ consultation with the Council; and
- (c) any other monies received by the Council in terms of this Act or accruing to the Council from any other source.

(2) Expenditure incidental to the exercise of the powers or the performance of the functions of the Council in terms of this Act or any other law must be defrayed from the funds of the Council.

(3) The executive officer—

- (a) must deposit all monies received by the Council with a bank approved by the Council;
- (b) may invest any monies of the Council which are not required for immediate use with a bank approved by the Council or in such other manner as the Council may determine in the rules;
- (c) is charged with the responsibility of accounting for money received or paid out for or on account of the Council; and
- (d) must cause the necessary accounting and other related records to be kept, including proper records of all the assets and liabilities of the Council.

(4) The records referred to in subsection (3)(d) must be audited by a registered accountant and auditor appointed by the Council.

Establishment of Regional Councils⁸¹

23. (1) The Council must, subject to subsection (2), establish Regional Councils and may delegate to the Regional Councils such powers and functions which, in the interest of the legal profession are better performed at regional level.

(2) (a) The Council must establish at least three/four Regional Councils and the following factors must be taken into account:

- (i) There may not be more than one Regional Council per province;
- (ii) the location of the seats of the Divisions of the High Court;
- (iii) the efficient attainment of the Council's objects;

⁸⁰ See also clause 6(4)(b).

⁸¹ The PC flagged clause 23 in its entirety and comments thereon, but did make some preliminary proposals for the Department to work on, for consideration by the PC, as reflected in the clause, for instance that there may not be more than one Regional Council per province.

- (iv) availability of resources, cost-effectiveness and feasibility;
- (v) the interests of legal practitioners and candidate legal practitioners;
- (vi) regional needs, interests and sensitivities; and
- (vii) the interests of the public.

(b) The Minister must prescribe the areas of jurisdiction of Regional Councils **[after]** in⁸² consultation with the Council, if the areas of jurisdiction of Regional Councils require revision any time after the commencement of Chapter 2.

(3) The Regional Councils must carry out any powers and functions as may be determined by the Council or set out in this Act.

(4) Regional Councils must be elected in accordance with a procedure determined by the Council in the rules.

(5) Regional Councils must be constituted[—

(a)] in such a manner so as to reflect the composition of the Council as far as legal practitioners are concerned[; **and**

(b) by taking into account the following factors:

- (i) The efficient attainment of the Council's objects;**
- (ii) cost effectiveness;**
- (iii) the interests of legal practitioners;**
- (iv) regional needs, interests and sensitivities;**
- (v) availability of resources; and**
- (vi) the interests of the public].**

CHAPTER 3

REGULATION OF LEGAL PRACTITIONERS AND CANDIDATE LEGAL PRACTITIONERS⁸³

Admission and enrolment

24. (1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.

⁸² It is suggested that regulations in this regard must be made in consultation with the profession and provision should be made for a deadlock-breaking mechanism: see clause 94.

⁸³ The Department raises the question whether this insertion should not be included? See also comments of LASA in respect of definition of "legal practitioner"

(2) **[A] The**⁸⁴ High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she—

- (a) is duly qualified as set out in section 26;
- (b) is a—
 - (i) South African citizen; or
 - (ii) permanent resident in the Republic;
- (c) is a fit and proper person to be so admitted; and
- (d) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules.

(3) The Minister may, **[after] in**⁸⁵ consultation with the Council, make regulations in respect of admission and enrolment to—

- (a) determine the right of appearance of foreign legal practitioners to appear in courts in the Republic and to practise as legal practitioners in the Republic;
- (b) give effect to any reciprocal international agreement to which the Republic is a party, regulating—
 - (i) the provision of legal services by foreign legal practitioners; or
 - (ii) the admission and enrolment of foreign legal practitioners; or
- (c) if it is in the public interest, permit a person or category of persons concerned, to expeditiously commence practising as a legal practitioner by virtue of his or her academic qualifications or professional experience.⁸⁶

Right of appearance⁸⁷ of legal practitioners and candidate legal practitioners⁸⁸

⁸⁴ See proposed new definition of High Court.

⁸⁵ See revised clause 94.

⁸⁶ With regard to Legalwise's comments in respect of clause 24(3)(c), namely that corporate lawyers should be allowed to appear in court, the PC requested research on the position of corporate lawyers acting for their employers in other jurisdictions, esp USA and USA.

⁸⁷ The PC raised the question whether the current legislative arrangement pertaining to attorneys contained in the Right of Appearance in Courts Act, 1995, and their right to appear in all courts should not, to an extent, be retained. This Act provides that an attorney may not appear in the "Supreme Court" (High Courts and Supreme Court of Appeal) and the Constitutional Court, subject to the following: The attorney must have an LLB degree and must have practised as an attorney for at least 3 years. An attorney who wishes to obtain the right of appearance in the Superior Courts must apply to the registrar of the relevant High Court. If the registrar is satisfied that the attorney complies with the statutory requirement, the registrar must issue a certificate. The PC was of the provisional view that, because the focus of training for attorneys differs to that for advocates, in that advocates focus on court work and advocacy, it might be appropriate to retain the current framework. The amendments in this clause give effect to this and are for the PC's consideration.

⁸⁸ Ms Adams raised the question whether the right of appearance of candidate legal practitioners should also not be specifically addressed in the Bill. The PC was of the provisional view that the current statutory arrangement in respect of candidate attorneys should possibly be retained. This could be done in respect of candidate attorneys but not in respect of pupils since there is no statutory basis for them at present. It is, however, pointed out that clause 94(1)(h) of the Bill requires the Minister to make regulations relating to "the right of appearance of candidate legal practitioners in court or another institution." In keeping with the PC's request, see proposed clause 25(5).

25. (1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practising.

(2) A legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution⁸⁹, subject to subsections (3) and (4).⁹⁰

(3) An attorney who wishes to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court on behalf of any person must apply to the registrar of the Division of the High Court in which he or she was admitted and enrolled as an attorney for a prescribed certificate to the effect that the applicant has the right to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court and which the registrar must issue if he or she is satisfied that the attorney -

- (a) has been practising as an attorney or has been performing community service as an attorney at any law clinic as provided for under the Attorneys Act, 1979, for a continuous period of not less than three years: Provided that this period may be reduced in accordance with rules made by the Council if the attorney has undergone a trial advocacy training programme approved by the Council as set out in the Rules;
- (b) is in possession on an LLB degree; and
- (c) has not had his or her name struck off the Roll or has not been suspended from practice or that there are no proceedings pending to strike the applicant's name from the Roll or to suspend him or her; or
- (d) has gained appropriate relevant experience, as may be prescribed by the Minister in/after consultation the Council, if the attorney complies with paragraph (c).

(4) (a) An attorney wishing to apply for a certificate contemplated in subsection (3) must serve a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules.⁹¹

(b) A registrar of a Division of the High Court who issues a certificate referred to in subsection (3) must immediately submit a certified copy thereof to the Council.

⁸⁹ A proposal of the Department for the PC's consideration: See section 8(1) of the Attorneys Act, 1979.

⁹⁰ With regard to ESKOM's comments in respect of clause 25, namely that corporate lawyers should be allowed to appear in court, the PC requested research on the position of corporate lawyers acting for their employers in other jurisdictions, esp USA and USA.

⁹¹ See also proposed consequential amendment to clause 30(3).

(5) (a) A candidate attorney is, subject to paragraph (b), entitled to appear –

- (i) in any court, other than the High Court, the Supreme Court of Appeal or the Constitutional Court; and
- (ii) before any board, tribunal or similar institution on behalf of any person, instead of and on behalf of the person under whose supervision he or she is undergoing his or her practical vocational training.

(b) A candidate attorney may only appear in a regional division established under section 2 of the Magistrates' Courts Act, 1944 (Act No.32 of 1944), as contemplated in paragraph (a) if he or she has previously practised as an advocate for at least one year or has undergone at least one year of practical vocational training.

Minimum qualifications and practical vocational training

26. (1) A person qualifies to be admitted and enrolled as a legal practitioner, if that person has—

[(a) satisfied all the requirements for –

- (i) the degree of *baccalaureus legum* of any university in the Republic after pursuing for that degree a course of study of not less than four years; or**
- (iii) a law degree obtained in a foreign country, which is equivalent to the *baccalaureus legum* and recognised by the South African Qualifications Authority established by the National Qualifications Framework Act, 2008 (Act No. 67 of 2008)];**

(a) satisfied all the requirements for the LLB degree obtained at any university registered in the Republic, after pursuing for that degree –

- (i) a course of study of not less than four years; or
- (ii) a course of study of not less than five years if the LLB degree is preceded by a bachelor's degree other than the LLB degree, as determined in the rules of the university in question and approved by the Council; or

(b) satisfied all the requirements for a law degree obtained in a foreign country, which is equivalent to the LLB degree and recognised by the South African Qualifications

Authority established by the National Qualifications Framework Act, 2008 (Act No. 67 of 2008);⁹² and

~~[(b)]~~~~(c)~~ undergone all the practical vocational training requirements as a candidate legal practitioner, including community service as contemplated in section 29, prescribed by the Minister; and

~~[(c)]~~~~(d)~~ passed a competency based examination or assessment for candidate legal practitioners as may be determined in the rules.

(2) An attorney qualifies to be enrolled as a conveyancer, if he or she has passed a competency based examination or assessment of conveyancers as determined in the rules by the Council.

(3) An attorney qualifies to be enrolled as a notary, if he or she has passed a competency based examination or assessment for notaries as determined in the rules by the Council.

Practical vocational training

27. The Council must in the rules, determine the minimum conditions and procedures for the registration and administration of practical vocational training, including a mechanism to deal with the payment of stipends or allowances to pupils.⁹³

Assessment of practical vocational training

28. (1) The Council must in the rules, determine a procedure and issue directions pertaining to the assessment of persons undergoing practical vocational training.

(2) The purpose of assessment in terms of subsection (1) is to establish whether, in the opinion of the Council, the person has attained an adequate level of competence as determined in the rules, for admission and enrolment as a legal practitioner.

⁹² The PC requested the Department to make certain that, in addition to the current 4 year undergraduate LLB degree contained in the Bill, the Bill also includes the possibility of a person who does a BA LLB, B Comm LLB, BSc LLB, etc which some universities offer, the duration of which is normally 5 years if the undergraduate degree contains certain prescribed law subjects with the view to the LLB. See also proposed new definition of "LLB degree" in clause 1.

⁹³ Mr Jeffery suggested that the Council must be empowered in clause 6 to facilitate/enable the payment of stipends/remuneration to pupils, who are currently not paid at all while they do pupillage. It is suggested for consideration by the PC that this be addressed in clause 27 as suggested here or clause 94. For the PC's consideration.

(3) The assessment referred to in subsection (1) must be carried out by the Council or an appropriate institution or organisation engaged by the Council to conduct the assessment on its behalf.

(4) The Council must in the rules, determine the criteria for a person, institution, organisation or association to qualify to conduct an assessment in terms of this section.

[Prescription of c] Community service

29. (1) The Minister must, after/in consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister, and such requirements may include—

- (a) community service as a component of practical vocational training by candidate legal practitioners ; or
- (b) a minimum period of recurring community service by legal practitioners upon which continued **[registration]** enrolment as a legal practitioner is dependent.

(2) For the purposes of this section, "community service" includes service involving—

- (a) the delivery of free legal services to the public in terms of an agreement between the candidate legal practitioner or the legal practitioner with a community based organisation, trade union or non- governmental organisation;
- (b) the provision of legal education and training on behalf of the Council, or on behalf of an academic institution or non-governmental organisation approved by the Council;
- (c) service as a judicial officer, including as a commissioner in the small claims court;
- (d) service to the State, approved by the Minister after consultation with the Council;
- (e) service on regulatory structures established or recognised in terms of this Act;
- (f) any other service as may be determined by the Council in the rules; or
- (g) any other service which the candidate legal practitioner or the legal practitioner may want to perform with the approval of the Minister.

ALTERNATIVE OPTION:

[Prescription of c] Community service

29. **[(1)]** (a) The Minister must, **[after]** in consultation with the Council, prescribe **[the requirements for]** make regulations relating to community service **[from a date to be determined by the Minister, and such requirements may include—**

- (a) **community service]** as a component of practical vocational training by candidate legal practitioners, not exceeding two/three months⁹⁴ [; **or**
- (b) **a minimum period of recurring community service by legal practitioners upon which continued registration as a legal practitioner is dependent.**

(2) For the purposes of this section, "community service" includes service involving—

- (a) **the delivery of free legal services to the public in terms of an agreement between the candidate legal practitioner or the legal practitioner with a community based organisation, trade union or non- governmental organisation;**
- (b) **the provision of legal education and training on behalf of the Council, or on behalf of an academic institution or non-governmental organisation approved by the Council;**
- (c) **service as a judicial officer, including as a commissioner in the small claims court;**
- (d) **service to the State, approved by the Minister after consultation with the Council;**
- (e) **service on regulatory structures established or recognised in terms of this Act;**
- (f) **any other service as may be determined by the Council in the rules; or**
- (g) **any other service which the candidate legal practitioner or the legal practitioner may want to perform with the approval of the Minister.]**

(b) The Minister must, on the advice of the Council, make regulations relating to community service by legal practitioners.

[Registration] Enrolment with Council⁹⁵

⁹⁴ This might be too long..

⁹⁵ The question is raised whether this heading is technically correct, that is whether it deals with "registration" or "enrolment". Clause 24(2) provides that a High Court "must admit to practise and **authorise** to be enrolled as a legal practitioner, conveyancer, notary or any persons who satisfies the court". Further, should clause 30(1)(a) not rather speak to "enrolment" than "registration"? See also clause 30(2) which refers to "enrol". Depending on the PC's view in this regard, consequential amendments would be required throughout the Bill which would still have to be done. At present, in terms of the Attorneys Act, 1979, enrolment takes place at the court where the person is admitted. See sections 15, 20 and 21. The Bill, on the other hand, envisages the court admitting a person as a legal practitioner and authorising him or her to be enrolled, which enrolment seems to take place at the Council in terms of clause 30, rather than at the court which is currently the position. Similarly, section 3 of the Admission of Advocates Act, 1964, provides that a court "shall admit to practise and authorise to be enrolled as an advocate any person who upon application ... satisfies the court that ...". In the case of advocates, the enrolment currently takes place in the Department since the Director-General: Justice and Constitutional Development is responsible for the roll of advocates. (See section 8 of this Act.)

30. (1) (a) A person duly admitted by the High Court and authorised to be enrolled to practise as a legal practitioner must apply to the Council in the manner determined in the rules, for **[registration and for enrolling]** the enrolment of his or her name on the Roll.

(b) The application referred to in paragraph (a) must—

- (i) be accompanied by the fee determined in the rules;
- (ii) indicate whether the applicant intends to practise as an attorney or an advocate and, in the case of an advocate, whether he or she intends practising with or without a Fidelity Fund certificate; and
- (iii) be submitted to the Council in the manner determined in the rules through the Regional Council where the legal practitioner intends to practise.

(2) The Council must enrol the applicant as an attorney, advocate, notary or conveyancer, as the case may be, if he or she complies with the provisions of this Act.

(3) The Council must keep a Roll of Legal Practitioners, as determined in the rules, which must reflect—

- (a) the particulars of practising and non-practising legal practitioners and, in the case of advocates, whether they practise with or without a Fidelity Fund certificate;
- (b) the name of every person admitted as a legal practitioner in terms of this Act and the particulars of the order of court in terms of which he or she was admitted;
- (c) the name of every person readmitted as a legal practitioner and the particulars of the order of court in terms of which he or she was readmitted;
- (d) the names of all persons who were admitted and enrolled as legal practitioners before the commencement of this Act, and the particulars of the orders of court admitting them;
- (e) the particulars of any order of court in terms of which any legal practitioner has been suspended, whether the order was made before or after the commencement of this Act, or particulars of any court order in terms of which the name of any such person has been ordered to be struck off the Roll; **[and]**
- (f) any amendment or endorsement against the enrolment of a legal practitioner as contemplated in section 40(3)(a)(v); and
- (g) the particulars of every attorney who has been issued with a certificate relating to right of appearance in the High Court, the Supreme Court of Appeal and the Constitutional Court referred to in section 25(3).⁹⁶

⁹⁶ Consequential amendment to clause 25(3) for the PC's consideration.

(4) Any document issued by the Council in terms of which it is certified that—

- (a) a person has been admitted and enrolled to practise as a legal practitioner;
- (b) a person has been readmitted to practise as a legal practitioner;
- (c) a person has been suspended from practice as a legal practitioner; or
- (d) the name of a person has been struck off the Roll,

is, on its mere production, *prima facie* proof of the facts stated therein.

(5) The registrar of the High Court which makes an order—

- (a) admitting and authorising a person to practise and be enrolled as a legal practitioner;
- (b) readmitting and authorising a person to practise and be enrolled as a legal practitioner; or
- (c) that the name of a person be struck off the Roll or that suspends a person from practice as a legal practitioner under this Act or any other law,

must immediately, after the making of that order, forward a certified copy thereof to the Council through the Regional Council having jurisdiction.

(6) The Roll referred to in subsection (3) must be –

- (a) published on the website of the Council;
- (b) updated every month by the Council; and
- (c) available for inspection by members of the public during business hours of the Council and Regional Councils.⁹⁷

Cancellation and suspension of [registration] enrolment

31. (1) (a) The Council must cancel or suspend the [registration] enrolment of a legal practitioner if—

- (a) [a] the High Court orders that his or her name be struck off the Roll or that he or she be suspended from practice[; or
- (b)] (b) The Council may cancel or suspend the enrolment of a legal practitioner if he or she has erroneously been [registered] enrolled, or has been [registered] enrolled on information that is subsequently proved to be false.

⁹⁷The PC requested the Department to include provisions which facilitate access to the Roll, either by way of access on the Council's website or by way of publication in the Gazette, taking into consideration practical and financial implications. Department to revert on the Gazette approach. Enquiries from the Government Printer indicate that the cost per page to publish in the Gazette is approximately R600. The financial implications would be considerable if this approach is adopted. It can be mentioned that register of debt collectors is made available on the website of the Council for Debt Collectors in terms of the Debt Collectors Act, 1998.

(2) The Council must, before the cancellation or suspension of enrolment of a legal practitioner in the case of subsection (1)(b), notify such legal practitioner and give him or her an opportunity to be heard.⁹⁸

(3) The Council must, as determined in the rules, notify the person referred to in subsection (1) of the cancellation or suspension of **[registration] enrolment**.

(4) The Council must, at the written request of any **[registered] enrolled** legal practitioner, cancel his or her **[registration] enrolment** and remove his or her name from the Roll, but where an investigation into any alleged improper conduct by that person is in progress or is to be held, the **[registration] enrolment** may not be cancelled until the investigation has been concluded.

(5) Despite the cancellation or suspension of the **[registration] enrolment** of a person in terms of this section, that person remains liable for any fee, arrears or penalty imposed by the Council for the period that he or she was **[registered] enrolled**.

Conversion of **[registration] enrolment**

32. (1) A legal practitioner may, at any time, as determined in the rules and upon payment of the fee determined by the Council in the rules, apply to the Council to convert his or her **[registration]enrolment** as an attorney to that of an advocate and *vice versa*.

(2) The Council may impose any conditions as it considers appropriate to give effect to the conversion and the provisions of this Act relating to **[registration] enrolment**.

(3) The Council may make rules setting out the circumstances under which a legal practitioner can apply for the conversion of his or her **[registration] enrolment** and any requirements such legal practitioner must comply with.

Authority to render legal services⁹⁹

33. (1) Subject to any other law no person other than a legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward —

⁹⁸ In line with the comments of the LSSA in respect of clause 31(2), the PC suggested that clause 31(2) should only be applicable to clause 31(1)(b).

⁹⁹ The PC indicated that in its eventual report to the NA reference should be made to the comments of the Competition Commission regarding the inclusion of paralegals in the Bill as well as in-house lawyers and estate agents.

- (a) appear in any court of law or tribunal in which only practitioners are entitled to appear; or
- (b) draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.

(2) No person other than a legal practitioner may hold himself or herself out as a legal practitioner or make any representation or use any type or description indicating or implying that he or she is a legal practitioner.

(3) No person may in expectation of any fee, commission, gain or reward, directly or indirectly,¹⁰⁰ perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary, unless that person is an advocate, attorney, conveyancer or notary, as the case may be.

(4) A legal practitioner who is struck off the Roll or suspended from practice may not—

- (a) render services as a legal practitioner directly or indirectly for his or her own account, or in partnership, or association with any other person, or as a member of a legal practice; or
- (b) be employed by, or otherwise be engaged, in a legal practice without the prior written consent of the Council, which consent may not be unreasonably withheld, and such consent may be granted on such terms and conditions as the Council may determine.

(5) Any person who contravenes the provisions of this section is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment.

Forms of legal practice

34. (1) An attorney may render legal services in expectation of any fee **[determined in accordance with this Act]**, commission, gain, or reward as contemplated in this Act or any other applicable law,¹⁰¹ upon receipt of a request directly from the public for that service.

¹⁰⁰ Adapted in accordance with the comments of the LSSA in respect of clause 33(3) and agreed to by the PC.

¹⁰¹ As requested by the PC to cover contingency fee agreements in terms of the Contingency Fees Act.

(2) (a) An advocate may render legal services in expectation of a fee commission, gain or reward **[determined in accordance with this]** as contemplated in this Act or any other applicable law-

~~[(a)](i)~~ upon receipt of a brief from an attorney; or

[(b)](ii) upon receipt of a request directly from a member of the public or from a justice centre¹⁰² for that service, subject to paragraph (b) [: **Provided that such request complies with any regulation that the Minister may make after consultation with the Council]**.

(b) An advocate contemplated in paragraph (a)(ii) may only render those legal services rendered by advocates before the commencement of this Act as determined by the Council in the rules,¹⁰³ if he or she –

- (i) is in possession of a Fidelity Fund certificate and conducts his or her practice in accordance with the relevant provisions of Chapter 7, with particular reference to sections 84, 85, 86 and 87;
- (ii) has complied with the regulations that the Minister must make in consultation with the Council and Board, jointly, relating to the acceptance of briefs directly from members of the public; and
- (iii) has notified the Council thereof in terms of section 30(1)(b)(ii).¹⁰⁴

ALTERNATIVE:

(c) An advocate may render legal services in expectation of a fee, commission, gain or reward as contemplated in this Act or any other applicable law upon receipt of a request directly from a justice centre for that service, in which event the provisions of paragraph (b) do not apply.¹⁰⁵

¹⁰² A justice centre is defined in clause 1 as an office of Legal Aid South Africa, including a satellite office thereof. This insertion is at the request of LASA which requests that LASA be exempted from the requirement of an attorney having to brief an advocate in criminal matters, which, it points out, reflects current practice. LASA points out that the briefing attorneys must be in court together with the advocates briefed which gives rise to practical challenges. A further option in this regard is to possibly insert a new paragraph (c) in subclause (2) to deal with this request. See proposed new paragraph (c) for consideration.

¹⁰³ See clause 56(b) and (c): When looking at clause 56 and the other clauses relating to the Fund and its liability, the question arose whether advocates should be able to be executors of deceased and insolvent estates, for instance? In other words, should the proposal that advocates be allowed to take direct briefs lead to the conclusion that they can also render legal services which, to date, was the exclusive preserve of attorneys. While the position of conveyancers and notaries is clear in the Bill, namely that only attorneys who can practise as such, the question does arise regarding other work which is traditionally done by attorneys. This is not an aspect discussed in the PC and the PC's guidance is sought when this proposal was considered.

¹⁰⁴ The PC requested the Department to insert a provision in terms of which advocates may take briefs directly from the public if they are in possession of a Fidelity Fund certificate and if they comply with regulations that the Minister **must** make in consultation with the Council (and Board?) jointly in this regard. Numerous consequential amendments will be required in this regard, as indicated along the way.

¹⁰⁵ A justice centre is defined in clause 1 as an office of Legal Aid South Africa, including a satellite office thereof. This insertion is at the request of LASA which requests that LASA be exempted from the requirement of an attorney having to brief an advocate in criminal matters, which, it points out, reflects current practice. LASA points out that the briefing attorneys must be in court together with the advocates briefed, which gives rise to practical challenges. A further option in this regard is to possibly insert a new paragraph (c) in subclause (2) to deal with this request. See proposed new paragraph (c)

(3) The Council must determine rules relating to the briefing of advocates

=

- (a) by attorneys;
- (b) directly by members of the public;
- (c) and instruction of attorneys.¹⁰⁶

(4) Attorneys may only practise—

- (a) for their own account;
- (b) as part of a commercial juristic entity referred to in subsection (6) and as such, may only make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance, or otherwise with an attorney;
- (c) as part of a non-profit juristic entity established in terms of subsection (7);
- (d) as part of a law clinic established in terms of subsection (8);¹⁰⁷
- ~~[(d)]~~(e) as part of Legal Aid South Africa; or
- ~~[(e)]~~(f) as an attorney in the full time employment of the State.

(5) Advocates may only practise—

- (a) for their own account and as such may not make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance or otherwise;
- (b) as part of a non-profit juristic entity established in terms of subsection (7);
- (c) as part of a law clinic established in terms of subsection (8);¹⁰⁸
- ~~[(c)]~~(d) as part of Legal Aid South Africa;
- ~~[(d)]~~ **at a public interest legal centre;**¹⁰⁹ or
- (e) as a State Advocate.

(6) A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents—

- (a) its shareholding, partnership or membership as the case may be, is comprised exclusively of attorneys;
- (b) provision is made for legal services to be rendered only under the supervision of admitted and enrolled attorneys; and

for consideration. This option does not require the advocate briefed by LASA to comply with paragraph (b), namely to have a Fidelity Fund certificate, etc.

¹⁰⁶ A proposal by the Department for consideration by the PC, in accordance, to some extent, with the comments of the GCB in respect of clause 34(3).

¹⁰⁷ The PC requested the Department to include in subclauses (4) and (5), a reference to a law clinic established in terms of subclause (8). See also comment of Wits Law Clinic in respect of clause 34(4).

¹⁰⁸ The PC requested the Department to include in subclauses (4) and (5), a reference to a law clinic established in terms of subclause (8).

¹⁰⁹ The PC suggested that this paragraph be deleted.

- (c) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for—
- (i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and
 - (ii) in respect of any theft committed during their period of office.

(7)¹¹⁰ A non-profit juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents—

- (a) its chairperson and the majority of members of its governing body is comprised **[exclusively]** of legal practitioners in accordance with rules determined by the Council;¹¹¹
- (b) provision is made for legal services to be rendered only under the supervision of admitted and enrolled legal practitioners;
- (c) provision is made for at least one person in its employ to be an attorney;
- (d) it may not make over to, share or divide any portion of its professional fee whether by way of partnership, commission, allowance or otherwise;
- (e) its income and property is not distributable to its members or governors except as reasonable compensation for services rendered; and
- (f) upon its winding-up, **[or]** dissolution or voluntary deregistration¹¹², any asset remaining after all liabilities have been met, are transferred to another non-profit organisation having similar objectives to it.

(8) A law clinic may be established by any university in the Republic provided that—

- (a) it is constituted and governed as part of the faculty of law at that university;
- (b) all legal services at the law clinic are rendered by a legal practitioner or rendered under the supervision of such a person;
- (c) the legal services rendered by it are accessible to the public;
- (d) the legal services rendered by it must be rendered to the recipient of such service free of charge, except that the law clinic may recover any amounts actually disbursed on behalf of the recipient of the service;

¹¹⁰ LSSA argues that the charging of fees should not be permitted in the case of non-profit juristic entities. The PC's guidance is requested.

¹¹¹ The PC suggested that consideration be given to relaxing the current rule in this regard by allowing a non-profit juristic entity to operate even if not all its members of its governing body are not legal practitioners. The PC flagged this for further consideration.

¹¹² In terms of the Non – Profit Organisations Act, 1997, another manner in which a non-profit entity can be dissolved is by way of voluntary deregistration.

- (e) it may not undertake work in connection with the administration or liquidation or distribution of the estate of any deceased or insolvent person, mentally ill person or any person under any other legal disability, or the judicial management/business rescue or the liquidation of a company, nor in relation to the transfer or mortgaging of immovable property, nor in relation to the lodging or processing of claims under the Road Accidents Fund Act, 1996 (Act No. 56 of 1996),¹¹³ or any amendment thereof or such other work as the Council may determine in the rules;
- (f) its income and property is not distributable to its governors or employees, except as reasonable compensation for services rendered; **[and]**
- (g) it may not make over to, share or divide any portion of its professional fee whether by way of partnership, commission, allowance or otherwise; and
- (h) it complies with the requirements determined by the Council in the rules, for purposes of engaging candidate legal practitioners.¹¹⁴

(9)¹¹⁵ The Minister may/must, after/in consultation with the Council and the Board, prescribe—

- (a) a framework for the creation and recognition of limited liability legal practices; and
- (b) the terms and conditions applicable to such practices.

(10) Any legal practitioner/person who contravenes any of the provisions of this section is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment.¹¹⁶

(11) The Council must, within 2/3 years, investigate and make recommendations to the Minister on the creation of other forms of legal practice and the statutory recognition of paralegals, taking into account best international practices, the public interest and the interests of the legal profession, with the view to legislative and other interventions in order to improve access to the legal profession and access to justice generally.¹¹⁷

¹¹³ This Act is in the process of being repealed.

¹¹⁴ See comments of LSSA in respect of clause 34(8). Section 3 of the Attorneys Act, 1979, currently requires a law clinic to be accredited by the council of a law society before that law clinic may engage candidate attorneys. For consideration and guidance by the PC.

¹¹⁵ The PC requested the Department to include an option in terms of which the Minister must make regulations in this regard. The PC flagged this for further consideration.

¹¹⁶ The PC requested that the Department insert a criminal sanction for an advocate who takes briefs directly from members of the public without complying with the proposed subclause (2). However, see clause 84(4) and its footnote.

¹¹⁷ This subclause is for the consideration of the PC, at its suggestion, that a provision be inserted to empower the Minister to consider new forms of legal practice, including paralegals, in the future.

Fees [structure] of legal practitioners, juristic entities and justice centres¹¹⁸

35. A legal practitioner, juristic entity or Legal Aid South Africa may only charge fees in respect of legal services as—

- (a) are in accordance with the fees **[structure determined]** as may be prescribed in terms of this Act, taking into account—
 - (i) the importance, significance, complexity and expertise of the legal services required, as well as the seniority or experience of the legal practitioner concerned;
 - (ii) the volume of work required and time spent in respect of services rendered; and
 - (iii) the financial implications of the matter at hand; or
- (b) may be determined in law.

ALTERNATIVE OPTION:

Fees in respect of legal services¹¹⁹

35. (1) Fees in respect of legal services (litigious and non-litigious legal services) rendered by legal practitioners, juristic entities, law clinics or Legal Aid South Africa referred to in section 34 must be in accordance with the tariffs made by the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985).

(2) The Rules Board for Courts of Law must, when setting the tariffs as contemplated in subsection (1), take into account –

- (a) the importance, significance, complexity and expertise of the legal services required;
- (b) the seniority and experience of the legal practitioner concerned, as determined in this Act;
- (c) the volume of work required and time spent in respect of the legal services rendered; and

¹¹⁸ The PC flagged this clause and the comments thereon for further deliberations but did request the Department to prepare a few proposals/options for consideration by the PC, namely the creation of a statutory body consisting of lawyers and non-lawyers, the mandate of which will be to make recommendations to the Minister on fees. Such an option would be an alternative to using the Rules Board for purposes of determining fees. The PC also requested the Department to include experience/seniority as one of the determining factors to be taken into consideration when fees are determined.

¹¹⁹ The PC requested the Department to prepare options. The PC will be addressed on this option rather than establishing an advisory body, as suggested by the PC. This option will also entail consequential amendments to the Rules Board for Courts of Law Act, 1985, which are contained in the Schedule to the Bill. This option, if accepted by the PC, will also entail the deletion of clauses 94(1)(i) and 97(1)(a)(vi).

(d) the financial implications of the matter at hand.

CHAPTER 4

PROFESSIONAL CONDUCT AND ESTABLISHMENT OF DISCIPLINARY BODIES

Code of conduct

36. (1) The Council must develop a code of conduct that applies to all legal practitioners and all candidate legal practitioners and may review and amend such code of conduct.

(2) The code of conduct serves as the prevailing standard of conduct, which legal practitioners, candidate legal practitioners and juristic entities must adhere to, and failure to do so constitutes misconduct.

(3) The Council must take all reasonable steps to—

- (a) publicise the existence of the code of conduct;
- (b) inform members of the public of the contents of the code of conduct, including its enforcement procedures; and
- (c) inform members of the public of how and where to obtain a copy thereof.

(4) The code of conduct and every subsequent amendment must be published in the *Gazette* and the rules.

(5) Before the Council publishes a code of conduct or amendment thereof under this section, the Council must publish a draft of the proposed code of conduct in the *Gazette* together with a notice, calling on interested persons to comment in writing within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice.

Establishment of disciplinary bodies

37. (1) The Council must, when necessary, establish investigating committees, consisting of at least three persons,^{120/} appoint/designate a person or persons¹²¹ to conduct investigations of all complaints of misconduct against legal practitioners, candidate legal practitioners or juristic entities.

¹²⁰ A proposal by one of the members of the PC for consideration.

¹²¹ Mr Swart raised the question whether it is necessary to appoint a committee to investigate and whether it would not be more appropriate to appoint or designate a person or persons for this purpose. For the PC's consideration. (If this proposal is

(2) An investigating committee must, after investigating a complaint, if it is satisfied that the legal practitioner, or the candidate legal practitioner concerned —

- (a) may be guilty of misconduct, refer the matter to the Council for adjudication by¹²² a disciplinary committee; or
- (b) is not guilty of misconduct, inform the Council, the complainant and the legal practitioner, candidate legal practitioner or juristic entity of its finding and the reasons for it, whereafter the complainant may take the matter on judicial review in terms of section 6 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), if the complainant is aggrieved by -
 - (i) the manner in which the investigating committee conducted its investigation;
or
 - (ii) the outcome of the investigating committee.¹²³

ALTERNATIVE TO PARAGRAPH (b):

- (b) is not guilty of misconduct, inform the Council, the complainant and the legal practitioner, candidate legal practitioner or juristic entity of its finding and the reasons for it, whereafter the complainant may appeal in terms of section 42, if the complainant is aggrieved by –
 - (i) the manner in which the investigating committee conducted its investigation;
or
 - (ii) the outcome of the investigating committee.

(3) The Council must, when necessary, establish disciplinary committees, consisting of at least three persons,¹²⁴ to adjudicate complaints against legal practitioners and candidate legal practitioners referred to it in terms of subsection (2)(a), and must also designate one of those persons as chairperson/presiding officer thereof.¹²⁵

[(4)¹²⁶ Investigating committees and disciplinary committees must be established with due regard to—

accepted, consequential amendments will be necessary, among others, to the definition of “disciplinary body” in clause 1 which refers to an investigating committee and elsewhere in this Chapter.)

¹²² A technical proposal by the Department for consideration by the PC. See clause 37(3), which seems to indicate that complaints are referred to the Council by the investigating committee in terms of clause 37(2)(a).

¹²³ A proposal for consideration by the PC. At present the Bill, in clause 41(1)(a)(i), allows a complainant who is aggrieved by the outcome of an investigating committee to apply to the Ombud for a review of the decision of the investigating committee, which clause may be deleted if the review function of the Ombud is taken away as suggested by the PC. A further option in this regard is the possible insertion of a provision in clause 42 of the Bill to allow the complainant to appeal against the decision of the investigating committee not to institute a disciplinary hearing, a more inexpensive remedy than having to apply to court for review proceedings in terms of PAJA. The PC’s guidance is sought.

¹²⁴ A proposal by one of the members of the PC for consideration.

¹²⁵ The PC requested that the clause specifies who elects the chairperson.

¹²⁶ See proposed new subclause (4) for consideration by the PC to address concerns of the PC in this regard and to ensure consistence with other similar clauses in the Bill.

- (a) the ease of access by members of the public resident in various parts of the Republic;
- (b) the need to promote the efficient resolution of complaints made in terms of this Act;
- (c) representivity in respect of the constitution of the committee with regard to—
 - (i) race;
 - (ii) gender;
 - (iii) national and regional demographics; and
 - (iv) the inclusion of members of the public, as may be prescribed;
- (d) the need to provide a cost-effective disciplinary system; and
- (e) the requirements of administrative justice.]

(4) (a) The need for [investigating committees and]¹²⁷ disciplinary committees to reflect broadly the racial and gender composition of South Africa must be considered when they are established.¹²⁸

(b) When establishing [investigating committees and] disciplinary committees the following factors must, as far as practicable, be taken into account:

- (i) the ease of access by [members of the public resident in various parts of the Republic]¹²⁹ persons necessary for the finalisation of the matters in question;
- (ii) the need to promote the efficient resolution of complaints made in terms of this Act;
- (iii) national and regional demographics; and
- (iv) the inclusion of members of the public, as may/must be prescribed by the Minister in/after consultation with the Council;
- (v) the need to provide a cost-effective disciplinary system; and
- (vi) the requirements of administrative justice.

[(5) Where a legal practitioner, candidate legal practitioner or juristic entity is aggrieved by the outcome of the disciplinary hearing, such legal practitioner, candidate legal practitioner or juristic entity may lodge an appeal with an appeal tribunal as contemplated in section 42.

(6) (a) An appeal tribunal must consist of not less than three and not more than five persons appointed by the Council, subject to subsection (4), with the exception of paragraph (c)(iv) of that subsection.

¹²⁷ The question was raised by a PC member whether investigating committees should not be distinguished from disciplinary committees when it comes to their establishment in terms of demographics. For guidance by the PC.

¹²⁸ This provision is similar to section 174(2) of the Constitution, dealing with the appointment of judicial officers.

¹²⁹ The PC raised questions regarding the meaning of the portion in bold. For the PC's consideration.

(b) The members of the appeal tribunal must be legal qualified with relevant expertise.]¹³⁰

[(7) The Council may in the rules, determine procedures to be followed by disciplinary bodies established in terms of this section.]¹³¹

[(8) Where a complainant is aggrieved by the outcome of a complaint, the complainant may lodge an application for a review with the Legal Services Ombud in terms of section 41.]¹³²

Procedure for dealing with complaints of misconduct and procedure to be followed in disciplinary hearing

38. (1) The Council must make rules to determine the procedure to be followed by disciplinary bodies established in terms of section 37¹³³ for dealing with all complaints of misconduct relating to legal practitioners, whether practising as an advocate or an attorney, candidate legal practitioners or juristic entities, and such complaints must be lodged in writing with the Regional Council¹³⁴ having jurisdiction on the matter.

(2) Before the Council makes any rule contemplated in subsection (1) or amends any rule, the Council must publish a draft of the proposed rule or proposed amendment in the *Gazette* together with a notice, calling on interested persons to comment in writing within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice.

(3) Particulars of all disciplinary hearings, including the particulars of –
(a) the allegations of misconduct being dealt with; and
(b) the members of the [investigating committees and]?? disciplinary committees in question;
(c) the parties involved in the dispute¹³⁵; and

¹³⁰ Mr Jeffery was of the view that these subclauses do not belong in clause 37 but should possibly be transferred to clause 42, dealing with appeals against decisions of disciplinary committees.

¹³¹ The Department raises the question whether subclause (7) is correctly placed in clause 37 because clause 38 already requires the Council to make rules determining the procedure to be followed in complaints of misconduct. For the PC's guidance.

¹³² Mr Jeffery was of the view that this subclause does not belong in clause 37 but should possibly be transferred to clause 42, dealing with appeals against decisions of disciplinary committees. It was also suggested that complainants aggrieved by the outcome of a complaint should also have to appeal to an appeal body, as is the case with legal practitioners who are aggrieved by the outcome of a disciplinary hearing. In other words, the Ombud should not have an appeal function, which would mean that clause 41, dealing with the review of disciplinary matters, falls away as it is not necessary.

¹³³ Wording taken from clause 37(7) for PC's consideration.

¹³⁴ The Department raises the question whether complaints should be lodged with the Regional Council and not with the Council: See clause 37(2)(a). This responsibility can always be delegated to the Regional Councils should the Council so decide.

¹³⁵ The PC's guidance is sought on this aspect.

(d) the outcome thereof and any sanction imposed in terms of section 40(3), if applicable,

must be -

- (i) published on the website of the Council;
- (ii) updated, at least, once every month by the Council; and
- (iii) available for inspection by members of the public during business hours of the Council and Regional Councils.¹³⁶

(4) The proceedings of all disciplinary hearings are open to the public, unless the chairperson/presiding officer of the disciplinary committee directs otherwise, on good cause shown, on application by a person having an interest in the matter.¹³⁷

ALTERNATIVE OPTION

(4) The chairperson/presiding officer of a disciplinary committee may, on good cause shown, on application by a person having an interest in the matter, direct that the proceedings of a disciplinary hearing be open to the public.¹³⁸

(5) (a) A decision of the majority of the members present at a disciplinary hearing constitutes the decision of the disciplinary committee.

(b) In the event of a deadlock in the voting, the chairperson/presiding officer has a casting vote, in addition to a deliberative vote.¹³⁹

Disciplinary hearing

39. (1) A disciplinary committee must conduct disciplinary hearings subject to the provisions of this section and the rules determined by the Council, as contemplated in section 38.

(2) A disciplinary committee may, for the purposes of this section, appoint a person to assist it in the performance of its functions.

(3) (a) A disciplinary committee may, for the purposes of a hearing, subpoena any person who—

- (i) in its opinion may be able to give material information concerning the subject of the hearing; or

¹³⁶ A proposal for consideration by the PC, in line with the comments of Mr Jeffery that disciplinary hearings must be transparent, giving information about the charges of misconduct and the composition of the investigating and disciplinary committees. If this proposal is accepted, similar provisions should be inserted in the appeal proceedings as contemplated in clause 42.

¹³⁷ The PC requested the Department to furnish information in this regard relating to the medical profession.

¹³⁸ The PC requested options on open or closed proceedings, for consideration by the PC.

¹³⁹ The PC requested that decision-making in disciplinary hearings should be regulated in the Bill. Wording borrowed from clause 17 of the Bill, dealing with decision-making in the Council.

- (ii) it suspects or believes has in his or her possession or custody or under his or her control any book, document or object which has any bearing on the subject of the hearing,

to appear before it at the time and place specified in the subpoena, to be questioned or to produce a book, document or object.

(b) A subpoena issued in terms of paragraph (a), must be—

- (i) in the form determined in the rules;
- (ii) signed by the chairperson of the disciplinary committee or, in his or her absence, any member of that committee; and
- (iii) served on the person concerned as determined in the rules.

(4) The disciplinary committee may retain a book, document or object produced in terms of subsection (3) for the duration of the hearing.

(5) The chairperson of a disciplinary committee may call upon and administer an oath to, or take an affirmation from, any witness at the hearing who was subpoenaed in terms of subsection (3).

(6) At a hearing the person charged—

- (a)
 - (i) may be present at the hearing of the proceedings;
 - (ii) may be assisted or represented by another person/legal practitioner¹⁴⁰ in conducting his or her defence proceedings;
 - (iii) has the right to be heard;
 - (iv) may call witnesses;
 - (v) may cross-examine any person called as a witness in support of the charge; and
 - (vi) may have access to documents produced in evidence; and
- (b)
 - (i) may admit at any time before conviction that he or she is guilty of the charge; and
 - (ii) may, in the case where he or she makes an admission in terms of subparagraph (i), be deemed to be guilty of misconduct as charged.

(7) (a) A witness who has been subpoenaed may not—

- (i) without sufficient cause, fail to attend the hearing at the time and place specified in the subpoena;
- (ii) refuse to be sworn in or to be affirmed as a witness;

¹⁴⁰ As suggested by the LSSA in respect of clause 39(6)(a)(ii) for guidance by the PC.

- (iii) without sufficient cause, fail to answer fully and satisfactorily to the best of his or her knowledge all questions lawfully put to him or her; or
- (iv) fail to produce any book, document or object in his or her possession or custody or under his or her control which he or she has been required to produce.

(b) A witness who has been subpoenaed must remain in attendance until excused by the chairperson of the disciplinary committee from further attendance.

(c) A witness who has been subpoenaed may request that the names of the members of the disciplinary committee be made available to him or her.

(d) The law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce a book, document or object in a civil trial before a court of law applies, with the necessary changes, in relation to the examination of, or the production of any book, document or object, to any person called in terms of this section as a witness.

(e) A witness may not, after having been sworn in or having been affirmed as a witness, give a false statement on any matter, knowing that answer or statement to be false.

(f) A person may not prevent another person from complying with a subpoena or from giving evidence or producing a book, document or object which he or she is in terms of this section required to give or produce.

(8) Any person who—

- (a) fails to comply with the provisions of subsection (7)(a)(i), (ii), (iii) or (iv);
- (b) contravenes subsection (7)(b), (e) or (f); or
- (c) obstructs or hinders any person in the performance of his or her functions under this section,

is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year.

(9) The record of evidence which has a bearing on the charge before the disciplinary committee, and which was presented before any commission which investigated an event or conduct is admissible without further evidence being led if—

- (a) the record is accompanied by a certificate from the chairperson of the body or commission; and
- (b) the certificate certifies that the investigation was lawful, reasonable and procedurally fair.

(10) If the misconduct with which the legal practitioner, candidate legal

practitioner or juristic entity is charged amounts to an offence of which he, she or it has been convicted by a court of law, a certified copy of the record of the trial and conviction by that court is, on the identification of the legal practitioner, candidate legal practitioner or juristic entity as the accused person referred to in the record, sufficient proof of the commission by him or her or it of that offence, unless the conviction has been set aside by a superior court.

Proceedings after disciplinary hearing and remedial action/sanctions¹⁴¹

40. (1) (a) After the conclusion of the hearing the disciplinary committee must, within 30 days, decide whether or not the legal practitioner, candidate legal practitioner or juristic entity is guilty of misconduct.

(b) If the disciplinary committee finds that the legal practitioner, candidate legal practitioner or juristic entity is guilty of misconduct it must—

- (i) inform the legal practitioner, candidate legal practitioner or representative of the juristic entity and the Council and Regional Council of the finding; and
- (ii) inform the legal practitioner candidate legal practitioner or representative of the juristic entity of the right of appeal as provided for in terms of section 42.

(2) A legal practitioner, candidate legal practitioner or representative of a juristic entity found guilty of misconduct in terms of this section may—

- (a) address the disciplinary committee in mitigation¹⁴² of sentence; and
- (b) call witnesses to give evidence on his or her behalf in mitigation of sentence.

(3) If found guilty of misconduct, the disciplinary committee concerned may call witnesses to give evidence in aggravation of sentence and may—

- (a) in the case of a legal practitioner—
 - (i) order him or her to pay compensation, with or without interest to the complainant, which order is subject to confirmation by an order of any court having jurisdiction in the circumstances in the prescribed manner;
 - (ii) impose upon him or her a fine not exceeding the amount determined from time to time by the Minister, on the advice of the Council, and published in the *Gazette*;

¹⁴¹ The word “sanction” is used in the body of this clause. For the PC’s consideration.

¹⁴² The PC requested the Department to include evidence in aggravation of sentence. This will not work in subclause (2) because this subclause refers to what the guilty practitioner may do. It is therefore suggested that factors in aggravation of sentence be inserted in subclause (3).

- (iii) temporarily suspend him or her from practising or from engaging in any particular aspect of the practice of law, pending the finalisation of an application referred to in subparagraph (iv)(bb);
 - (iv) advise the Council to apply to the High Court **[having jurisdiction]**¹⁴³ for—
 - (aa) an order striking his or her name from the Roll;
 - (bb) an order suspending him or her from practice;
 - (cc) an interdict prohibiting him or her from dealing with trust moneys; or
 - (dd) any other appropriate relief;
 - (v) advise the Council to amend or endorse his or her enrolment;
 - (vi) order that his or her Fidelity Fund certificate be withdrawn, where applicable;
 - (vii) warn him or her against certain conduct and order that such warning be endorsed against his or her enrolment; or
 - (viii) caution or reprimand him or her;
- (b) in the case of a juristic entity—
- (i) order it to pay compensation, with or without interest, to the complainant, which order is subject to confirmation by an order of any court having jurisdiction in the circumstances in the prescribed manner;¹⁴⁴
 - (ii) impose upon it a fine not exceeding the amount determined by the Minister, and published in the *Gazette*;
 - (iii) warn it against certain conduct;
 - (iv) advise the Council to apply to the High Court **[having jurisdiction]**¹⁴⁵ for the winding¹⁴⁶ up of the juristic entity; or
 - (v) caution or reprimand it; or
- (c) in the case of a candidate legal practitioner—
- (i) cancel or suspend his or her practical vocational training;
 - (ii) impose upon him or her a fine not exceeding the amount determined from time to time by the Minister, on the advice of the Council, and published in the *Gazette*; or
 - (iii) caution or reprimand him or her.
- (4) (a) A disciplinary committee may—
- (i) impose a combination of the sanctions in either subsection (3)(a), (b) or (c); and

¹⁴³ See proposed definition of High Court.

¹⁴⁴ In line with the comments of the GCB that a disciplinary committee should not have the power to give a compensation order without the intervention of the court.

¹⁴⁵ See proposed new definition of High Court.

¹⁴⁶ Terminology to be updated in accordance with new Companies Act, 2008.

(ii) postpone the taking of any steps or suspend the imposition of any sanction on conditions as it may determine.

(b) In addition to the sanctions referred to in subsection (3), a disciplinary committee may order the legal practitioner, candidate legal practitioner or juristic entity to pay the cost of the investigation or the disciplinary hearing.

(5) (a) If the taking of any steps or the imposition of any sanction has been postponed or suspended for a particular period, and if at the end of that period the disciplinary committee is satisfied that the legal practitioner, candidate legal practitioner or juristic entity concerned has substantially observed all the relevant conditions, the disciplinary committee must indicate in writing that no further steps will be taken or that the sanction will not be imposed.

(b) If a legal practitioner, candidate legal practitioner or juristic entity fails to comply with any conditions determined in terms of this section, the disciplinary committee may impose a sanction for non-compliance or execute the sanction originally imposed, unless the legal practitioner, candidate legal practitioner or juristic entity satisfies the disciplinary committee that the non-compliance was due to circumstances beyond his or her or its control, in which case the disciplinary committee may set further conditions as it deems fit.

(6) Any court with civil jurisdiction may, on the application of the disciplinary committee, grant an order for the recovery from the legal practitioner, candidate legal practitioner or juristic entity concerned of any amount such legal practitioner, candidate legal practitioner or juristic entity failed to pay in accordance with a sanction imposed in terms of this section, together with any interest thereon, after which the order so granted has the effect of a civil judgment of that court and must be executed in accordance with the law applicable in that court.

(7) (a) At the conclusion of a disciplinary hearing the disciplinary committee must notify the complainant, the Council and the Regional Council in writing of the outcome of the hearing.

(b) If the disciplinary committee finds that the legal practitioner, candidate legal practitioner or juristic entity is not guilty of misconduct it must inform the complainant of the right of appeal as provided for in terms of section 42.¹⁴⁷

¹⁴⁷ This wording is similar to the wording in clause 40(1)(b)(ii) above. This insertion gives effect to the proposal of Mr Jeffery that clause 41 should possibly be deleted and that complainants should have the same right of appeal as legal practitioners do as contemplated in clause 42.

(8) If the legal practitioner is found guilty of misconduct, the Council must publish the finding and the sanction imposed in terms of subsection (3) in the *Gazette* or on the Council's website, as provided for in section 38(3).¹⁴⁸

(9) The Council must give effect to the advice and decisions¹⁴⁹ of the disciplinary committee.

[Review by Legal Services Ombud ¹⁵⁰

41. (1) (a) Any complainant, other than the legal practitioner, candidate legal practitioner or juristic entity, who is aggrieved—

(i) by the manner in which a disciplinary body conducted an investigation or disciplinary hearing; or

(ii) by the outcome of an investigation or disciplinary hearing, may, as determined in the rules¹⁵¹, lodge a notice of application for review with the Ombud within 60 days of becoming aware of the outcome of the investigation or disciplinary hearing.

(b) The Ombud may, on good cause shown, condone the late filing of a review notice.

(2) A review in terms of subsection (1) must be conducted in accordance with the procedure determined by the Ombud.¹⁵²

(3) The Ombud must consider the application for review within 90 days of receipt of the notice contemplated in subsection (1)(a)(ii).

(4) Upon reviewing the matter, the Ombud—

(a) may, in respect of a review regarding—

(i) the manner in which an investigation or disciplinary hearing was conducted—

(aa) confirm the findings of the investigation and disciplinary hearing and the actions taken;

¹⁴⁸ This subclause might be unnecessary if the Departments' proposal in clause 38(3) is accepted. The PC's guidance is sought.

¹⁴⁹ Proposal of Department for consideration by the PC.

¹⁵⁰ The PC raised the question whether the Ombud should have review responsibilities. The PC requested the Parliamentary researchers to do comparative research on the powers of Financial Ombuds, locally and abroad. Implications, including financial implications, of publishing in the Gazette must be made available to PC.

¹⁵¹ We must remember to remove this power to make rules from clause 95 of the Bill if the PC accepts that clause 41 be deleted.

¹⁵² We must remember to remove this power of the Ombud to determine procedure from the relevant clause in the Bill (if the power is indeed spelt out) if the PC accepts that clause 41 be deleted.

- (bb) if he or she is satisfied that the procedure was substantially unfair, set aside the findings and actions taken and remit the matter, with or without directions; or
- (cc) if, in his or her opinion, there has been an unreasonable delay on the part of a disciplinary body, substitute his or her own decision for that of the disciplinary body; or
- (ii) the outcome of an investigation or disciplinary hearing —
 - (aa) confirm the findings and the actions taken; or
 - (bb) if he or she is satisfied that there has been a substantial miscarriage of justice, set aside the finding and substitute his or her own decision for that of the disciplinary body, or remit the matter, with or without directions; and
- (b) must notify the complainant, the legal practitioner, candidate legal practitioner or juristic entity and the disciplinary body in writing of the outcome of the review and the reasons for his or her decision.]

Appeal against conduct or?? decision/finding?? of [investigating committee or]?? disciplinary committee

42. (1) (a) Subject to section 44,¹⁵³ [A] a legal practitioner, candidate legal practitioner or juristic entity may, as determined in the rules and within 30 days of being informed of the decision by a disciplinary committee, lodge an appeal with an appeal tribunal established in terms of subsection (2) against a finding of misconduct by the disciplinary committee or against the **[sentence]** sanction imposed¹⁵⁴, or both.

(b) A complainant who is aggrieved by –

- (i) the manner in which an investigating committee conducted its investigation or the outcome of the investigating committee as referred to in section 37(2)(b); or
- (ii) the outcome of a disciplinary hearing referred to in section 40,
may, as determined in the rules and within 30 days of being informed of the decision by the investigating committee or the disciplinary committee, as the case may be, lodge an appeal with an appeal tribunal established in terms of subsection (2) against any conduct or finding of the investigating committee or disciplinary committee, as the case may be.

¹⁵³ See comments of LSSA in respect of clauses 37(5) and 42.

¹⁵⁴ Proposal of Department for consideration. Clause 40 uses “sanction” rather than “sentence”.

(2) (a) An appeal tribunal must consist of not less than three and not more than five persons appointed by the Council, one of whom the Council must designate as chairperson/presiding officer thereof.

(b) The members of the appeal tribunal must be legally qualified with relevant expertise.

(c) A decision of the majority of the members present at any proceedings of an appeal tribunal constitutes the decision of the appeal tribunal.

(d) In the event of a deadlock in the voting, the chairperson/presiding officer of the appeal tribunal has a casting vote, in addition to a deliberative vote.

~~[(2)](3)~~An appeal tribunal may—

- (a) dismiss the appeal against the finding/decision of an investigating committee or a disciplinary committee and confirm the finding or sentence or both; or
- (b) uphold the appeal against the decision of a disciplinary committee wholly or in part and set aside or vary the finding or sentence or both.

~~[(3)](4)~~If a legal practitioner, candidate legal practitioner or juristic entity who or which has been found guilty of misconduct lodges an appeal in terms of subsection (1), the decision of the disciplinary committee may not be enforced before the appeal tribunal has decided the appeal.

Monitoring by Legal Services Ombud¹⁵⁵

43. The Ombud may monitor—

- (a) the investigation of a complaint by an investigating committee; and
- (b) the conduct of a disciplinary committee during a disciplinary hearing.

Urgent legal proceedings

44. Despite the provisions of this Chapter, if upon considering a complaint, a disciplinary body is satisfied that a legal practitioner has misappropriated trust monies or is guilty of other serious misconduct, it must inform the Council thereof with the view to the

¹⁵⁵ If the Ombud's review powers as contemplated in clause 41 are done away with, a possibility raised by the PC, the question is raised whether clause 43 is still necessary. For the PC's guidance.

Council instituting urgent legal proceedings in the High Court [**having jurisdiction**]¹⁵⁶ to suspend the legal practitioner from practice and to obtain alternative interim relief.

Powers of High Court

45. (1) The provisions of this Act do not derogate in any way from the power of [**a**] the¹⁵⁷ High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity.

(2) Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner, legal entity or any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge.

CHAPTER 5 LEGAL SERVICES OMBUD

Establishment of Office of Legal Services Ombud

46. (1) The Office of the Legal Services Ombud for the Republic is hereby established, as a juristic person.

(2) (a) The Ombud may/must,¹⁵⁸ in consultation with the Minister and the Council, determine the seat of the Office of the Legal Services Ombud.

(b) The Office of the Legal Services Ombud may, with the approval of the Minister, in consultation with the Council, also conduct its activities away from its seat.

Objects of Ombud

47. The objects of the Ombud are to—

(a) protect and promote the public interest in relation to the rendering of legal services;

¹⁵⁶ See proposed new definition of High Court.

¹⁵⁷ See proposed new definition of High Court.

¹⁵⁸ A proposal of the Department for consideration by the PC.

- (b) ensure the fair, efficient and effective investigation of complaints of alleged misconduct against legal practitioners;¹⁵⁹
- (c) promote high standards of integrity in the legal profession; and
- (d) promote the independence of the legal profession.

Appointment and independence of Ombud

48. (1) The President must, as soon as practicable after the commencement of this Act and whenever it becomes necessary thereafter, after consultation with the Council, appoint a Legal Services Ombud.

ALTERNATIVE OPTION:¹⁶⁰

(1) (a) The President must, subject to paragraph (b) and subsection (2), and soon as practicable after the commencement of this Act and whenever it becomes necessary thereafter, after consultation with the Council, appoint a Legal Services Ombud.

(b) The President must appoint one of not more than five persons nominated by an (Ad hoc) Joint Committee of Parliament established in terms of the Joint Rules of Parliament for that purpose, according to the following principles, as the Legal Services Ombud:

- (a) Participation by the public in the nomination process; and
- (b) transparency and openness.

(2) The Ombud must be a South African citizen who is a fit and proper person to hold such office and who—

- (a) is a judge discharged from active service in terms of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001);¹⁶¹

[(a)](b) is admitted as an advocate or an attorney and who has, for a cumulative period for at least ten years after having been so admitted, practised as an advocate or as an attorney;

[(b)](c) is qualified to be admitted as an advocate or as an attorney and who has, for a cumulative period of at least ten years after having so qualified, lectured in law at a university;

¹⁵⁹ If the Ombud is not going to have review powers regarding disciplinary matters, as questioned by the PC, should this paragraph not be deleted.

¹⁶⁰ The PC requested the Department to prepare options regarding the appointment of the Ombud, for instance where Parliament or the National Assembly plays a role.

¹⁶¹ The PC did indicate a preference for a judge in this position. The matter was flagged.

~~[(c)](d)~~ has specialised knowledge of or experience, for a cumulative period of at least ten years, in the administration of justice, the law and the legal profession; or ~~[(d)](e)~~ has acquired any combination of experience mentioned in paragraphs ~~[(a)](b)~~ to ~~[(c)](d)~~, for a cumulative period of at least ten years.

(3) The Ombud is independent and subject only to the Constitution and the law and he or she must be impartial and exercise his or her powers and performance of its functions without fear, favour or prejudice.

(4) The Council must assist and protect the Ombud to ensure his or her independence, impartiality, dignity and effectiveness.

(5) No person may interfere with the functioning of the Ombud.

Powers and functions of Ombud¹⁶²

49. (1) In addition to the other powers and functions conferred on or assigned to him or her in this Act, and for the purposes of achieving the objects referred to in section 47, the Ombud—

- (a) may investigate and make recommendations to the Council and the Minister on any matter which he or she considers may affect the integrity and independence of the legal profession and public perceptions of the integrity and independence of the legal profession;
- (b) may, of his or her own accord or on receipt of a complaint, investigate any alleged failure by the Council, Regional Council or disciplinary body to deal promptly, effectively and fairly with a complaint;
- (c) must investigate any complaint made to him or her by a court and must report to the court on what steps he or she proposes to take in connection therewith;
- (d) may, in the case of a failure by the Council or Regional Council as contemplated in paragraph (b), report and make recommendations to the Minister;
- (e) must, in the case of a failure by a disciplinary body, report and make recommendations to the Council and require the Council to report to him or her regarding what steps it will take in this regard;
- (f) may review a decision of the Board in respect of a rejection, in whole or in part, of a claim arising out of the theft of trust money;¹⁶³

¹⁶² Further amendments to this clause will be done once the report back is done on the powers and functions of other Ombuds, as requested by the PC. It might also be worth to look at the powers and functions of the Public Protector in terms of the Interim Constitution.

¹⁶³ The LSSA argues that the Ombud should not have the right to review the rejection of a claim by the AFF.

- (g) may make recommendations to the Council and the Minister as to steps that ought to be taken to promote high standards of integrity in the legal profession; or
- (h) may, at any time prior to, during or after an investigation, if he or she is of the opinion that the facts disclose the commission of an offence by any legal practitioner, candidate legal practitioner or juristic entity, bring the matter to the notice of the National Prosecuting Authority.

(2) For the purposes of an investigation the Ombud may—

- (a) summon any person who may be able to furnish any information on the subject of the investigation or who has in his or her possession or under his or her control any book, document or other object relating to the investigation, to appear before the Ombud at a time and place specified in the summons, to be questioned or to produce that book, document or other object; and
- (b) designate a person to question that person, under oath or affirmation administered by the Ombud, and examine or retain for further examination or for safe custody the book, document or other object in question.

(3) A summons referred to in subsection (2) must—

- (a) be in the form determined in the rules;
- (b) contain particulars of the matter in connection with which the person concerned is required to appear before the Ombud;
- (c) be signed by the Ombud or a person authorised by him or her; and
- (d) be served as determined in the rules.

(4) (a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrates' court applies in relation to the questioning of a person in terms of subsection (2), and that person is not entitled to refuse to answer any question on the ground that the answer might expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers referred to in paragraph (a) are admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

(5) A person appearing before the Ombud by virtue of subsection (2)—

- (a) may be assisted at his or her examination by a legal representative; and
- (b) is entitled to any witness fees as he or she would be entitled if he or she were a witness for the State in criminal proceedings in a magistrates' court.

- (6) Any person who has been summoned to appear before the Ombud and who—
- (a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the Ombud from further attendance;
 - (b) at his or her appearance before the Ombud—
 - (i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce; or
 - (ii) refuses to take an oath or to make an affirmation after he or she has been asked by the Ombud to do so; and
 - (c) having taken an oath or having made an affirmation—
 - (i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her; or
 - (ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true,

is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year.

Remuneration and other terms and conditions of employment of Ombud

50. (1) The President, subject to subsections (2) and (3), determines the remuneration, allowances and other terms and conditions of service and service benefits of the Ombud, after consultation with the Minister and the Minister of Finance.

(2) The remuneration of the Ombud may not be less than the salary of a judge of **[a] the**¹⁶⁴ High Court, as determined by the President under section 2 (1) of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001).

(3) The remuneration and other terms and conditions of service and service benefits referred to in subsection (1) may not be reduced nor adversely altered during his or her term of office.

(4) The Ombud holds office for **[the] a period [determined by the President at the time of appointment] of seven years**¹⁶⁵ but may serve for one further term of seven years.

¹⁶⁴ See proposed new definition of High Court.

¹⁶⁵ The PC suggested a specific period. The Constitution provides that the Public Protector holds office for a single term of 7 years. For the PC's consideration.

Removal from office and filling of vacancy¹⁶⁶

51. (1) (a) The President may remove the Ombud from office on account of—

- (i) misconduct; or
- (ii) permanent inability to perform the functions of his or her office efficiently.

(b) The President must suspend the Ombud from office after the commencement of any proceedings instituted against the Ombud for misconduct.

(c) If the Ombud is suspended from office, he or she may not exercise or perform any powers or functions or receive any remuneration or allowances in terms of this Act.

(2) If the office of Ombud becomes vacant, the President must, subject to this Chapter, appoint another person to that office.

(3) Whenever the Ombud is for any reason unable to exercise or perform his or her powers or functions, or when the appointment of a person to the office of Ombud is pending, the President may, subject to this Chapter, appoint a person as acting Legal Services Ombud to exercise the powers and perform the powers and functions of the Ombud.

(4) The President must determine the remuneration, allowances and other terms and conditions of service and service benefits of the acting Legal Services Ombud, after consultation with the Minister and the Minister of Finance.

Staff, finances and accountability of Office of Legal Services Ombud

52. (1) In order to perform its functions the Ombud must—

- (a) employ a Director as the administrative head of the Office of the Legal Services Ombud;
- (b) employ such administrative staff as may be necessary; and
- (c) enter into contracts with service providers and accept liability for the expenses incurred as a result of such services being rendered.

¹⁶⁶ Removal from office will depend on the outcome of the deliberations of the PC on the appointment of the Ombud. If the National Assembly or Parliament are involved in the appointment/nomination for appointment of the Ombud, the National Assembly or Parliament may play a role in the removal from office. (See for example, section 110(8) of the Interim Constitution.

(2) The Ombud must appoint a Director for **[a determined term]** an agreed term not exceeding five years which may be renewed for one additional term not exceeding five years¹⁶⁷ and on the conditions as the Minister, in consultation with the Minister of Finance, may determine.

[(3) The Ombud may re-appoint the Director at the end of the term.]

(4) The Director, as the administrative head and chief executive officer of the Office of the Legal Services Ombud, is responsible for the general administration of the Office, and must—

- (a) manage and direct the activities of the Office of the Legal Services Ombud, subject to the direction of the Ombud;
- (b) appoint and supervise the administrative staff of the Office of the Legal Services Ombud; and
- (c) provide quarterly management reports to the Director-General: Justice and Constitutional Development.

(5) (a) The Minister must, after consultation with the Minister of Finance, determine the Director's remuneration, allowances, benefits and other terms and conditions of employment.

(b) The Minister must, after consultation with the Minister of Finance, determine the staff establishment of the Office, the remuneration, allowances, benefits, and other terms and conditions of appointment of **[each]** the members of staff.¹⁶⁸

(6) Expenditure in connection with the administration and functioning of the Office of the Legal Services Ombud must be defrayed from money appropriated by Parliament for this purpose.

(7) Monies appropriated by Parliament for this purpose—

- (a) constitute earmarked funds on the Departmental vote; and
- (b) may not be used by the Department for any other purpose unless the Ombud has been consulted and the National Treasury approves.

(8) Subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999), the Director-General: Justice and Constitutional Development—

- (a) is charged with the responsibility of accounting for money received or paid out for or on account of the administration and functioning of the Office of the Legal Services Ombud in accordance with National Treasury regulations; and

¹⁶⁷ The PC requested more specific terms in this regard.

¹⁶⁸ The PC suggested that the staff structure/establishment of the Office must be included, to be determined by the Minister.

(b) must cause the necessary accounting and other related records to be kept, which must be audited by the Auditor-General.

(9) The financial year of the Office is the period of 1 April in any year to 31 March in the following year, except that the first financial year of the Office begins on the date on which this Chapter comes into operation, as contemplated subsection (14), and ends on 31 March of the following year.

(10) The Office of the Legal Services Ombud may invest or deposit money that is not immediately required for contingencies or current expenditure—

- (a) in a call account or short-term fixed deposit with any registered bank or financial institution in the Republic; or
- (b) in an investment account with the Corporation for Public Deposits established by section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984).

(11) Within six months after the end of each financial year, the Director must prepare financial statements in accordance with established accounting practice, principles and procedures, comprising—

- (a) a statement, with suitable and sufficient particulars, reflecting the income and expenditure of the Office of the Legal Services Ombud during the preceding financial year; and
- (b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.

(12) The Auditor-General must audit the financial statements of the Office each year.

(13) The Office of the Legal Services Ombud may, after consultation with the Minister and the Minister of Finance—

- (a) acquire and alienate movable and immovable property; and
- (b) hire and let movable and immovable property.

(14) (a) The Office of the Legal Services Ombud must commence with its functions as from a date fixed by the Minister by notice in the *Gazette*.

(b) Before the date so fixed, the necessary arrangements must be made for the Office of the Legal Services Ombud to be accommodated, equipped and staffed in order to perform its functions properly.¹⁶⁹

Annual report

¹⁶⁹ The PC requested the Department to look at the corresponding provisions in the SAJEI Act. The relevant provisions in clause 52 are borrowed from the SAJEI Act: See sections 13 and 19 of the SAJEI Act.

53. (1) The Office of the Legal Services Ombud must prepare and submit to the Minister an annual report as determined in the rules within six months after the end of the financial year of the Office of the Legal Services Ombud.

(2) The annual report referred to in subsection (1) must include the following documents:

- (a) The audited financial statements prepared in terms of this Act;
- (b) the report of the Auditor-General prepared in terms of this Act;
- (c) a report of the activities undertaken in terms of the functions of the Ombud set out in this Chapter; and
- (d) a statement of the progress made during the preceding year towards achieving the objects of this Chapter.

(3) The Minister must table in Parliament each annual report submitted in terms of this Chapter.

CHAPTER 6

[ATTORNEYS] LEGAL PRACTITIONERS FIDELITY FUND

Part 1

Establishment of Fund and founding provisions

Continued existence of Attorneys Fidelity Fund

54. (1) Despite the provisions of section 118, the Attorneys Fidelity Fund established by section 25 of the Attorneys Act continues to exist as a juristic person under the name **[Attorneys] Legal Practitioners Fidelity Fund**.

(2) The Fund acts through the Board.

Revenue of Fund

55. The Fund consists of —

- (a) each amount which, immediately prior to the date referred to in section 119(4), is or was payable to or held on account of the Fund, and which is paid on or after such date of commencement;
- (b) annual contributions paid by applicants for the issue of Fidelity Fund certificates and any interest on, or penalties in respect of, overdue contributions;

- (c) interest paid to the Fund in terms of this Act;
- (d) income obtained from investments of the Fund;
- (e) money recovered by or on behalf of the Fund in terms of this Act;
- (f) money received by or on behalf of the Fund from any insurer;
- (g) any other money lawfully paid into the Fund; and
- (h) any other money accruing to the Fund from any other source.

Liability of Fund

56. (1) The Fund is liable to reimburse persons who suffer pecuniary loss, not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*,¹⁷⁰ as a result of theft of any money or other property given in trust to a trust account practice in the course of the practice of the attorney or advocate referred to in section 34(2)(b) as such, if the theft is committed—

- (a) by an attorney or advocate in that practice, or any person employed by that practice or supervised by that attorney or advocate;
- (b) by an attorney, advocate¹⁷¹ or person acting as executor or administrator in the estate of a deceased person; or
- (c) by an attorney, advocate¹⁷² or person employed by that attorney or that advocate, who is a trustee in an insolvent estate or in any other similar capacity,¹⁷³

excluding a curator to a financial institution in terms of the Banks Act, 1990 (Act No. 94 of 1990) or a liquidator of a mutual bank in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993).

Limitation of liability of Fund

57. (1) The Fund is not liable in respect of any loss suffered—

- (a) by a family member or a member of the household of the attorney or advocate referred to in section 34(2)(b) [found guilty of] who committed¹⁷⁴ the theft;
- (b) by any partner or co-director in the trust account practice in which the theft occurs;

¹⁷⁰ The PC requested that the provisions of the RAF Act be looked at. The PC did not make any final decision on this aspect.

¹⁷¹ This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

¹⁷² This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

¹⁷³ See footnote in respect of clause 34(2)(b).

¹⁷⁴ As suggested by the AFF and LSSA in respect of clause 57(1)(a). The word "committed" is used in the corresponding section 47 of the Attorneys Act, 1979.

- (c) as a result of theft committed by an attorney or advocate whose fidelity has been otherwise guaranteed by a person, either in general or in respect of a particular transaction, to the extent to which it is covered by the guarantee;
- (d) by any person as a result of any theft committed after the victim of the theft received notice in writing from the Council or the Board warning against the use or continued use of the legal services of the trust account practice concerned or the giving of any money or property in trust to that trust account practice and the person in question has failed to take reasonable steps after being so warned; or
- (e) by any person as a result of theft of money which an attorney or advocate¹⁷⁵ has been instructed to invest on behalf of **[the] such person [contemplated in paragraph (d)].**¹⁷⁶

(2) A claim for reimbursement as provided for in section 56 is limited—

- (a) in the case of money given in trust to a trust account practice, to the amount actually handed over, without interest, unless interest has been earned and given in trust to the practice, or unless the Board, in its discretion, decides to pay interest; and
- (b) in the case of securities or other property, to an amount equal to the average market value of such securities or property at the date when written demand is first made for their delivery, or if there is no average market value, the fair market value of such securities or other property as at that date, without interest.

(3) Only the balance of any loss suffered by any person after deduction from the loss of the amount or value of all money or other benefits received or receivable by that person from any source other than the Fund, may be recovered from the Fund.

(4) Subsection (1)(e) does not apply to money which an attorney or advocate¹⁷⁷ is authorised to invest where the attorney or advocate¹⁷⁸ acts in his or her capacity as executor, trustee or curator, or in any similar capacity, excluding a curator to a financial institution in terms of the Banks Act, 1990 (Act No. 94 of 1990), or liquidator of a mutual bank in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993).

¹⁷⁵ This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

¹⁷⁶ As suggested by the AFF and LSSA in respect of clause 57(1)(e). This is the same as section 47(1)(g) of the Attorneys Act, 1979.

¹⁷⁷ This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

¹⁷⁸ This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

(5) Subject to subsection (6), an attorney or advocate¹⁷⁹ must be regarded as having been instructed to invest money for the purposes of subsection (1)(e), where a person—

(a) who entrusts money to the attorney or advocate¹⁸⁰; or

(b) for whom the attorney or advocate¹⁸¹ holds money, instructs the attorney or advocate to invest all or some of that money in a specified investment or in an investment of the attorney's or advocate's choice.

(6) For the purposes of subsection (1)(e) an attorney or advocate¹⁸² is regarded as not having been instructed to invest money if he or she is instructed by a person—

(a) to pay the money into a trust account, if that payment is for the purposes of investing the money in that account on a temporary or interim basis only, pending the conclusion or implementation of any particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made and in respect of which investment the attorney or advocate¹⁸³ exercises exclusive control as trustee, agent or stakeholder, or in any fiduciary capacity;

(b) to lend money on behalf of that person to give effect to a loan agreement where that person, being the lender—

(i) specifies the borrower to whom the money is to be lent;

(ii) has not been introduced to the borrower by the attorney or advocate¹⁸⁴ for the purposes of making that loan; and

(iii) is advised by the attorney or advocate¹⁸⁵ in respect of the terms and conditions of the loan agreement; or

(c) to utilise money to give effect to any term of a transaction to which that person is a party, other than a transaction which is a loan or which gives effect to a loan agreement that does not fall within the scope of paragraph (b).

(7) An attorney or advocate who has been instructed to invest money as provided for in subsection (5) must, as soon as practicable after he or she has received that instruction, but prior to the receipt of the money to be invested, notify the person

¹⁷⁹ This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

¹⁸⁰ This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

¹⁸¹ This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

¹⁸² This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

¹⁸³ This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

¹⁸⁴ This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

¹⁸⁵ This insertion is dependent on the PC's decision in respect of clause 34(2)(b).

giving the instruction of the provisions of subsection (1)(e) in the form and manner determined by the Board in terms of subsection (8).

(8) For the purposes of subsection (7), the Board must issue directives determining the form and manner in which a notice referred to in that subsection must be given, and it may from time to time review and, if necessary, revise such directives.

(9) Any attorney or advocate who contravenes subsection (7) is guilty of an offence and on conviction is liable to a fine or to imprisonment for a period not exceeding two years.

(10) For purposes of subsection (1)(a), "family member", in relation to any person, means his or her parent, sibling, child, including an adopted child or a step-child, or spouse (whether by statutory, customary or religious law), and including a life partner who is a person living with that person as if they were married to each other. ¹⁸⁶

Purpose and application of Fund

58. Subject to the provisions of this Act, the Fund must be utilised for the following purposes:

- (a) Meeting the liability of the Fund referred to in section 56;
- (b) paying expenses incurred in operating the Board and the Fund, including the payment of remuneration or allowances and other service benefits to employees;
- (c) paying expenses incurred by the Board in investigating and establishing the validity of claims contemplated in section 56;
- (d) paying all expenses and legal costs incurred by the Board for the purposes of recovering money from the persons whose wrongful conduct gave rise to the claim;
- (e) refunding the costs or any portion thereof incurred by a claimant in establishing a claim or attempting to recover the whole or a portion of the claim from the person whose wrongful conduct gave rise to the claim;
- (f) paying legal expenses incurred in defending a claim made against the Fund, or otherwise incurred in relation to the Fund;
- (g) paying premiums in respect of contracts of insurance entered into in terms of sections 76 and 77;
- (h) paying allowances to members of the Board in relation to their services or their reasonable travelling and accommodation expenses incurred in relation to the

¹⁸⁶ As suggested by the AFF and A Landman in respect of clause 57(1)(a).

affairs of the Board and the Fund to be determined in consultation with the Council;¹⁸⁷

- (i) paying fees and expenses to the Council or its structures in respect of any function performed as agent for the Fund;
- (j) making an annual appropriation to the Council in terms of section 22(1)(b);
- (k) paying costs relating to the detection or prevention of theft of trust money;
- (l) refunding the bank charges or any portion thereof paid by an attorney or an advocate referred to in section 34(2)(b) in relation to the keeping of a trust account referred to in section 86(2) and (3);¹⁸⁸
- (m) paying interest in relation to section 56;
- (n) paying expenses relating to any function performed in terms of this Act; **[and]**
- (o) paying the audit and inspection costs or a portion **[of the costs]** thereof incurred by an attorney or advocate in relation to the obtaining of a Fidelity Fund certificate;¹⁸⁹ and
- (p) paying bursaries and loans to students, candidate legal practitioners and legal practitioners for the purposes of legal education and research.¹⁹⁰

[Attorneys] Legal Practitioners Fidelity Fund Account

59. (1) Money of the Fund must be deposited into a banking account held by the Fund at an institution registered as a bank, to the credit of an account to be known as the **[Attorneys] Legal Practitioners** Fidelity Fund Account.

(2) The Board may invest money which is deposited in terms of subsection (1) and which is not immediately required for the purposes mentioned in this Act.

Financial year of Fund

60. The financial year of the Fund is determined by the Board.

Fund exempt from certain tax and insurance laws

¹⁸⁷ As suggested by Mr Jeffery.

¹⁸⁸ As suggested by the AFF in respect of clause 58(l).

¹⁸⁹ As suggested by the AFF in respect of clause 58(o).

¹⁹⁰ See clause 6(1)(p): Proposal of AFF.

61. (1) The revenue of the Fund is exempt from the provisions of any law relating to the payment of income tax or any other tax or levy by the State.

(2) Any provision of any law relating to insurance (other than a law relating to the compulsory insurance of employees) or the provision of security in connection therewith, does not apply to the Fund.

Part 2

Operation of Fund

Establishment of Board

62. (1) **[An]** A Legal Practitioners Attorneys Fidelity Fund Board is hereby established to manage and administer the Fund.

(2) The Fund must be held in trust by the Board for the purposes mentioned in this Act.

Composition of Board

63. (1) The Board consists of the following persons:

- (a) Five legal practitioners **[nominated]** elected in accordance with a procedure determined by the Council in consultation with the Board,¹⁹¹
- (b) two persons, **[nominated]** designated¹⁹² by the Council, who, by virtue of their qualifications, expertise and experience in the field of finance, and whose names are [designated] submitted by the Independent Regulatory Board of Auditors or its successor; and
- (c) two fit and proper persons **[nominated]** designated by the Minister.¹⁹³

(2) In making the nominations referred to in subsection (1), the Council and the Minister must have due regard to—

- (a) the objects of the Board;
- (b) achieving representivity in regard to—
 - (i) race;

¹⁹¹ As suggested by the AFF in respect of clause 63(1). The question arises whether the procedure should not be prescribed by the Minister as is the case in clause 7 dealing with the composition of the Council. For the PC's guidance. It was suggested that the five legal practitioners must not be members of the Council. This is, however, dealt with in clause 65(2).

¹⁹² See clause 7 which also uses "designate" rather than "nominate".

¹⁹³ The PC flagged this paragraph at the request of Mr Swart to compare it with the outcome of the corresponding provision in respect of the Council.

- (ii) gender; and
- (iii) disability; and
- (c) ensuring adequate regional representation.

ALTERNATIVE OPTION

(2) The need for the Board to reflect broadly –

- (a) the racial and gender composition of South Africa;
- (b) representation of persons with disabilities; and
- (c) regional representation.

must be considered when the Board is established/constituted/when names of persons eligible are submitted as contemplated in subsection (1).¹⁹⁴

Powers and functions of Board

64. (1) In addition to the powers conferred upon it in this Act, and in the furtherance of the purposes of the Fund, the Board may—

- (a) invest any moneys which are not required for immediate use, in Government and other securities as may be prescribed by regulation, as provided for in section 72(3);
- (b) insure itself against risk;
- (c) conclude agreements;
- (d) institute or defend legal proceedings;
- (e) as determined in the rules, inspect or cause to be inspected the accounts of any attorney;
- (f) make rules relating to—
 - (i) contributions to the Fund and the issuing and costs of Fidelity Fund certificates;
 - (ii) the procedure for the appointment of the executive officer and other employees; and
 - (iii) any other matter concerning the Fund;
- (g) make an arrangement with any bank for the keeping of trust accounts opened in terms of section 86(2) and for the investment of money in separate trust savings or other interest bearing accounts opened in terms of section 86(3) and (4) to provide for one or more of the following:

¹⁹⁴ The PC requested the Department to reconsider this provision and all other similar provisions in the Bill to ensure uniformity and to address concerns raised that the current subclause (2) might give rise to unnecessary obstacles in constituting the Council and also give rise to unnecessary legal challenges. It is modelled along the lines of section 174(2) of the Constitution.

- (i) The payment of interest to the Fund on the whole or any part of the money deposited in terms of section 86(2) and the money invested in terms of section 86(3) and (4), as contemplated in section 86(5);¹⁹⁵
 - (ii) the manner in which the Fund is informed of amounts held in the accounts opened in terms of section 86(2), (3) and (4);
 - (iii) the auditing of interest calculations and account balances in the accounts opened in terms of section 86(2), (3) and (4) in the bank accounts; and
 - (iv) any other relevant matter;
- (h) consider claims against the Fund;
 - (i) through any person authorised thereto in writing by its chairperson, institute a prosecution for the misappropriation or theft of property or trust money, and the provisions of the laws relating to private prosecutions apply to such prosecution as if the Board is a public body:
 - (j) delegate to any of its employees the duty, subject to conditions that may be imposed by the Board, to consider any claims against the Fund; and
 - (k) generally take any other steps and perform any other acts as may be necessary for or conducive to the achievement of the objects of the Fund.

(2) The Board must appoint an executive officer to—

- (a) perform or exercise the powers and functions determined by the Board;
- (b) supervise the employees of the Board; and
- (c) account for the assets and liabilities of the Board.

(3) The Board may appoint any other employees as it deems necessary to assist the executive officer.

(4) The procedure for the appointment of the executive officer and other employees must be determined by the Board.

(5) The Board must have due regard to representivity with reference to race, gender and disability when appointing the executive officer and other employees.

ALTERNATIVE OPTION

(5) The need for the staff of the Board to reflect broadly –

- (a) the racial and gender composition of South Africa; and
- (b) representation of persons with disabilities,

must be considered when the executive officer and other employees are appointed in terms of this section.

¹⁹⁵Adapted in line with the comments of the LSSA in respect of clause 86(5)(b), read with clause 64(1)(g)(i).

(6) The Board must determine the conditions of service of the executive officer and the other employees of the Board.

[Qualification for m] Membership of Board¹⁹⁶

65. (1) A member of the Board must—

- (a) be a South African citizen;
- (b) be a fit and proper person; and
- (c) subscribe to the objects of the Board.

(2) The following persons are disqualified from becoming or remaining members of the Board:

- (a) An unrehabilitated insolvent[s];¹⁹⁷
- (b) a person declared to be of unsound mind by a court of the Republic;
- (c) a person who has been convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, other than a conviction for an offence committed prior to 27 April 1994 associated with political objectives; or
- (d) a person who has **[vacated his or her] been removed from**¹⁹⁸ office in terms of section 69; and
- (e) a member of the Council or any of its committees.

[Appointment of c] Chairperson and deputy chairperson of Board¹⁹⁹

66. (1) At the first meeting of the Board, the members of the Board must elect and appoint a chairperson and deputy chairperson from among themselves.

(2) The chairperson and deputy chairperson hold office for a period of three years from the date of their election and may be re-elected for one further term, unless such chairperson or deputy chairperson resigns or ceases to be a member of the Board.²⁰⁰

¹⁹⁶ Proposal for the PC's consideration. The amendment is intended to align heading with heading in respect of the Council: see clause 8.

¹⁹⁷ For the PC's consideration to bring it in line with the corresponding clause dealing with the Council in clause 8(2).

¹⁹⁸ A suggestion of the Dept to align this provision with the corresponding clause 8(2) dealing with the Council, for the PC's consideration.

¹⁹⁹ Technical proposal for the PC's consideration: See clause 9.

²⁰⁰ Aligned with clause 9(1) for the PC's consideration.

[(3) (a) When the period of office of a chairperson or deputy chairperson expires, that person remains in office until the next meeting of the Board.

(b) Should the chairperson or deputy chairperson vacate his or her office the office must be filled immediately by the members of the Board who must elect and appoint a chairperson or deputy chairperson from among themselves.]

(3) The deputy chairperson must, if the chairperson is absent or is for any reason unable to act as chairperson, perform all the functions and exercise all the powers of the chairperson.

(4) If both the chairperson and deputy chairperson are absent from any meeting, the members present must elect a person from among themselves to preside at that meeting and the person so presiding must, during that meeting and until the chairperson or deputy chairperson resumes duty, perform all the functions and exercise all the powers of the chairperson.

(5) If both the chairperson and deputy chairperson have been given leave of absence, the members of the Board must elect a person from among themselves to act as chairperson until the chairperson or deputy chairperson resumes duty or is removed from office in terms of section 69.

(6) If the office of chairperson or deputy chairperson becomes vacant, the members of the Board must, at the first meeting thereafter or as soon as possible thereafter, elect from among themselves a new chairperson or deputy chairperson, as the case may be.

(7) A chairperson and deputy chairperson may vacate office as such, without relinquishing his or her membership of the Board, unless his or her membership has been terminated in accordance with section 68A.

Vacancies in Board and filling thereof

67. (1) A vacancy in the Board occurs when—

- (a) **[a member's]** the term of office of a member expires or terminates as contemplated in section 68A;
- (b) a member dies;
- (c) a member **[vacates his or her]** is removed from office [in terms of] as contemplated in section 69; or

(d) **[a member's]** the resignation of a member takes effect.

(2) A vacancy in the Board must be filled as soon as **[practicable]** practicably possible in accordance with the provisions of section 63.²⁰¹

Term of office of members of Board

68. [(1)] A member of the Board holds office for a term of three years, but **[is eligible for re-appointment at the end of that term]** may serve as a member for one further term if he or she is again so elected or designated, as the case may be.²⁰²

[(2)] A member may, at any time and upon at least three months' **written notice to the Board, resign from office.**²⁰³

[(3)](2) Despite subsection (1), a member remains in office after expiry of his or her term of office until the commencement of the term of office of his or her successor.

Termination of office²⁰⁴

68A. (1) A person ceases to be a member of the Board when that person—

(a) is no longer eligible in terms of section 65 to be a member;

(b) resigns;

(c) is removed from office in terms of section 69;

(d) in the case of a legal practitioner referred to in section 63(1)(a), ceases to be a practising legal practitioner, for whatever reason; or²⁰⁵

(e) is appointed as a judicial officer.²⁰⁶

(2) A member may resign after giving at least three months' written notice to the Board, but the Board may, on good cause shown, accept a shorter period.

[Vacation of] Removal from office²⁰⁷

²⁰¹ These technical amendments are intended to align this clause with the corresponding provisions of clause 13, dealing with vacancies in the Council. For the PC's consideration.

²⁰² Aligned with the wording in clause 10, for the PC's consideration: technical amendment.

²⁰³ A technical proposal for the PC's consideration. In the case of the Council term of office and termination of office are dealt with in two separate clauses. See clauses 10 and 11. The question is raised whether this should be the case as well with the Board.

²⁰⁴ For the PC's consideration, emanating from footnote above.

²⁰⁵ Pursuant to the comments of UNISA in respect of clause 12.

²⁰⁶ Adapted in accordance with comments of C Erasmus in respect of clause 11 and agreed to by the PC.

²⁰⁷ A technical proposal for the PC's consideration, in line with what was done in clause 12, dealing with the Council.

69. (1) **[A member of the]** The Board must [vacate his or her] may remove a member of the Board from office on account of —

- (a) **[if he or she has been convicted of any—**
(i) misconduct under this Act; or
(ii) offence,]
a conviction for any misconduct/offence under this Act or a conviction for any offence which, in the opinion of the Board, debars him or her from serving as a member of the Board;
- (b) **[on account of]** incapacity and incompetence which, in the opinion of the Board, debars him or her from serving as a member of the Board;
- (c) **[on account of]** absence from three consecutive meetings of the Board without the permission of the chairperson, except on good cause shown;
- (d) **[pursuant to]** a request by the body which or person who [nominated] elected or designated that member in terms of section 63, on good cause shown by the body or person in question;

ALTERNATIVE TO PARAGAPH (d):

- (d) a request by the body which or person who [nominated] elected or designated that member in terms of section 63, on good cause shown by the body or person in question, upon confirmation thereof by the High Court;
- (e) **[if he or she has engaged]** engaging in any activity that, in the opinion of the Board, [may] undermines the integrity of the Board; or
- (f) **[if]** the sequestration of his or her estate [has been sequestered].

[(2) (a) The Board must suspend a member from office after the commencement of the proceedings by the Board concerning the removal of that member.

(b) A member who is suspended from office may not perform any powers or functions or receive any allowances.]

(2) If the Board has commenced proceedings for the removal of a member, it may suspend that member from office.

(3) A member who is suspended from office may not perform or exercise any of the powers or functions of that office or receive any allowances.

(4) The Board must follow due process of law if it intends to remove a member from office, as determined by the Board in the rules contemplated in section 64(1)(f).

Meetings and resolutions of Board

70. (1) (a) The Board may meet at any place in the Republic.

(b) The Board must, as soon as practicable after the appointment of its members, meet for the first time at the time and place determined by the Minister and thereafter at such times and places determined by the Board.

(2) The majority of the members of the Board constitutes a quorum **[for]** at²⁰⁸ any meeting of the Board.

(3) When the chairperson is absent or is not able to perform his or her functions, the deputy chairperson must act as chairperson, and if both the chairperson and deputy chairperson are absent or are not able to perform their functions, the members present must elect one from among themselves to preside at that meeting.

(4) A decision of the majority of the members present at a meeting constitutes a decision of the Board and in the event of an equality of votes the person presiding at the meeting has a casting vote in addition to a deliberative vote.

(5) A resolution in writing of the Board signed by all its members is regarded as if it had been passed at a meeting of the Board.

(6) The Board must determine the procedure for calling a meeting and the procedure to be followed at the meeting.

(7) In any advice or recommendation to the Minister, the minority views of any one or more members of the Board, as well as any report of a committee appointed in terms of section 71, must be included.

(8) The Board must keep a record of its proceedings.

Committees of Board

71. (1) The Board **[may]**—

(a) must appoint an executive committee consisting of the chairperson, deputy chairperson and two other members of the Board;

(b) may appoint committees relating to matters falling within the scope of its powers and functions, the members of which may be members of the Board or other persons;

²⁰⁸ Proposal for the PC's consideration. See clause 16(1).

- (c) may delegate to the executive committee or other committee any powers and functions as it may determine; and
- (d) may direct the executive committee or other committee, either generally or in a specific case, to advise the Board.

(2) The members of a committee must elect and appoint a chairperson unless the Board has appointed a chairperson: Provided that the chairperson of the Board is *ex officio* chairperson of the executive committee referred to in subsection (1)(a).

(3) A committee exercises its powers and performance of its functions in accordance with any policy directions of the Board.

(4) The Board may at any time dissolve any committee.

(5) The provisions of section 70 apply, with the necessary changes, to a meeting of a committee.

(6) The Board is not divested of any power or function delegated to a committee and may amend or rescind a decision of a committee.

Certificate in respect of liabilities of Fund and investment of money in Fund

72. (1) The Board must appoint an actuary to make recommendations to it on or before 31 March in any year regarding the amount which, in that actuary's opinion, will be required during the next ensuing year ending on 31 December, for the purposes of meeting the obligations of the Fund in terms of section 56, and the actuary must furnish the Board on or before the first-mentioned date with a certificate setting out the amount so recommended.

(2) The Board must, within 30 days after receipt of the certificate referred to in subsection (1), determine the amount required in the ensuing year for the purposes referred to in subsection (1).

(3) Any amount determined in terms of subsection (2) that is not immediately required for the purposes referred to in subsection (1) in any financial year must be invested in Government and other securities as may be prescribed by regulation.

Annual review by actuary

73. (1) Within three months after the end of each financial year, the actuary referred to in section 72(1) must review the financial soundness of the Fund and submit an actuarial valuation report to the Board and the Minister.

- (2) The actuarial valuation report must contain—
- (a) a statement—
- (i) reflecting the actuarial value of the assets and liabilities of the Fund;
 - (ii) on the financial soundness of the Fund; and
 - (iii) on whether in the financial year concerned, a surplus or deficit was present in the Fund and, if a deficit is present, specifying the amount required to enable the Fund to meet its obligations; and
- (b) an indication of—
- (i) the basis and method used to value the assets and liabilities of the Fund;
 - (ii) any changes to the basis and method used to value the Fund as compared with the actuarial report of the previous year;
 - (iii) any special consideration or restriction that the Board brought to the attention or made applicable to the actuary in performing the function in terms of this section; and
 - (iv) any explanatory note on any matter relevant to obtaining a true and meaningful reflection of the financial state of the Fund.
- (3) The Board must submit a report to the Minister if, at any stage after having regard to the assets and liabilities of the Fund, the value of the assets of the Fund is insufficient or is not increasing at a sufficient rate to meet payments for benefits that may be reasonably anticipated and the Minister must immediately submit that report to Parliament.

Contributions to Fund [by attorneys] legal practitioners

- 74.** (1) (a) Subject to the provisions of this section, every attorney, practising on his or her own account or in partnership, and every advocate referred to in section 34(2)(b), must, annually when he or she applies for a Fidelity Fund certificate, pay to the **[Fund] Council**²⁰⁹—
- (i) the amount as may be fixed by the Board from time to time in respect of the cost of group professional indemnity insurance arranged by the Board pursuant to the provisions of section 77(2); and
 - (ii) any other non-refundable amount as may be fixed by the Board from time to time.

²⁰⁹ Adapted in accordance with the comments of ESKOM in respect of clause 74(1)(a) and (5), although the Bill, in this regard, is the same as section 43 of the Attorneys Act, 1979.

(b) Any **[attorney]** legal practitioner referred to in paragraph (a) who commences to practise on or after 1 July in any year must, in respect of that year pay half of the contribution which is payable in terms of that paragraph for that year.

(2) **[An attorney]** A legal practitioner who applies under section 85(1) for the first time for a Fidelity Fund certificate must pay to the Fund, in addition to any contributions payable in terms of subsection (1), any single non-refundable contribution as the Board may determine.

(3) The Board may require **[an attorney]** a legal practitioner in respect of whom the Fund has been applied as a result of any of the circumstances referred to in section 58, to pay an additional annual contribution to the Fund of such amount and for any period as the Board may determine.

(4) (a) **[An attorney]** A legal practitioner who is not in possession of a Fidelity Fund certificate and who intends to commence to practise on his or her own account, in partnership or in a juristic entity, must, before commencing to practise, give notice of his or her intention to the Council and thereafter becomes liable to pay to the Fund the amount of the contribution referred to in subsections (1) and (2).

(b) **[Any attorney]** A legal practitioner who is in possession of a Fidelity Fund certificate but who intends to commence to practise for his or her own account, in partnership or in a juristic entity in the area of jurisdiction of **[any]** a Division of the²¹⁰ High Court other than that in which he or she usually practises for his or her own account or in partnership, must give notice of his or her intention to the Council.

(5) All contributions payable under this section must be paid to the Council, and the Council must remit the contributions to the Board within seven days of receipt thereof.

Audit

75. (1) The accounts of the Fund must be audited by a registered accountant and auditor appointed by the Board.

(2) A person appointed under subsection (1) must, in respect of each financial year of the Fund, draw up a balance sheet and income statement of the Fund and immediately submit certified copies thereof, together with his or her report thereon, to the chairperson of the Board and to the Council.

(3) Within one month of receiving the audited financial statements, the Board must submit an annual report to the Council and the Minister which must at least set out and contain—

- (a) the total number of persons who made claims in terms of this Act;
- (b) the total number of **[attorneys]** legal practitioners who paid contributions in terms of this Act;
- (c) the total number of persons who were paid claims and the monetary value of claims paid in terms of this Act; and
- (d) any other matters as may be prescribed by the Minister.

Re-insurance

76. (1) The Board may, in its discretion, enter into a contract with any person or corporation carrying on fidelity insurance business in terms of which the Fund will be indemnified to the extent and in the manner provided in that contract against liability to pay claims under this Act.

(2) A contract referred to in subsection (1) must be entered into in respect of **[attorneys]** legal practitioners referred to in section 84(1).

(3) A claimant against the Board does not have any right—

- (a) of action against any person or corporation with whom a contract of indemnity has been entered into in terms of this section; or
- (b) to any money paid by the insurer in accordance with that contract.

(4) Any money paid by an insurer in accordance with a contract of indemnity must be paid into the Fund for appropriation by the Board.

Provision of insurance cover and suretyships

77. (1) The Board may—

- (a) acquire or form, and administer a public company; or
- (b) together with any other person or institution, establish a scheme, underwritten by a registered insurer,

in order to provide insurance cover, subject to the provisions of the Short Term Insurance Act, 1998 (Act No. 53 of 1998), to **[attorneys]** legal practitioners in respect of any claims which may arise from the professional conduct of those **[attorneys]** legal practitioners.

(2) The Board may enter into a contract with a company or scheme referred to in subsection (1), or any company carrying on professional indemnity insurance business, for the provision of group professional indemnity insurance to **[attorneys]** legal practitioners to the extent and in the manner provided in the contract.

(3) The Board may enter into deeds of suretyship to the satisfaction of the Master in order to provide security on behalf of an attorney²¹¹ in respect of work done by that legal practitioner as—

- (a) executor in the estate of a deceased person;
- (b) a trustee in an insolvent estate;
- (c) a curator to the person or property in the case of a person who is unable to manage his or her own affairs; or
- (d) in case of any other similar capacity, by any other person in such capacity where an attorney acts as agent for the person concerned.

(4) The Board may levy premiums and fees for the provision of any insurance or security through any scheme established or public company administered by it in terms of the provisions of this Act or legislation repealed by this Act.

Part 3

Claims against Fund

Procedure for instituting claims against Fund

78. (1) No person has a claim against the Fund in respect of any theft contemplated in section 56, unless—

- (a) written notice of the claim is given to the Council and to the Board within three months after the claimant became aware of the theft or, by the exercise of reasonable care, should have become aware of the theft; and
- (b) within six months after a written demand has been sent to him or her by the Board, the claimant furnishes the Board with proof as the Board may reasonably require.

(2) If the Board is satisfied that, having regard to all the circumstances, a claim or the proof required by it has been lodged or furnished within a reasonable period, it may in its discretion extend any of the periods referred to in subsection (1).

Actions against Fund

²¹¹ This is dependent on the PC's decision in respect of clause 34(2)(b).

79. (1) The Fund is not obliged to pay any portion of a claim which could reasonably be recovered from any other person liable.

(2) The Fund may pay all reasonable expenses and legal costs incurred by a claimant in exhausting his or her rights of action against another person.

(3) The Fund may, in its discretion, before deciding whether to make full payment of a claim or any part of it, make an interim payment to the claimant of a portion of the amount for which his or her claim has been admitted.

(4) Any action against the Fund in respect of loss suffered by any person as a result of theft committed by **[an attorney]** legal practitioner, candidate attorney or employee of any attorney or juristic person, must be instituted within one year of the date of a notification directed to that person or his or her legal representative by the Fund, informing him or her that the Fund rejects the claim to which the action relates.

(5) In any action against the Fund all defences which would have been available to the person against whom the claim arose, are available to the Fund.

(6) Any action against the Fund may, subject to the provisions of this Act, be brought in any court having jurisdiction in respect of the claim.

Subrogation

80. (1) On payment out of the Fund of money in settlement in whole or in part of any claim under this Chapter, the Fund is subrogated, to the extent of the payment, to all rights and legal remedies of the claimant against any **[attorney]** legal practitioner or person in relation to whom the claim arose, or in the event of his or her death or insolvency or other legal disability, against any person having authority to administer his or her estate.

(2) A claimant who fails to co-operate with the Fund in the exercise of its subrogated rights is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.

Claims against future revenue of Fund

81. (1) If the Fund at any time has insufficient assets to settle all claims and judgments, the claims and judgments must, to the extent to which they are not settled, be charged against future revenue of the Fund.

(2) The Board may determine the order in which claims and judgments referred to in terms of subsection (1) are settled, and may, if the revenue of the Fund is not sufficient to settle all claims in full, settle any claim or judgment in whole or in part.

(3) Without limiting its discretion, the Board must, in applying the Fund towards the settlement of claims and judgments, consider the following:

- (a) The relative degrees of hardship suffered or likely to be suffered by the various claimants should their claims against the Fund not be settled in whole or in part;
- (b) subject to paragraph (a), the full settlement of relatively small claims, except in exceptional circumstances, before relatively large claims are settled to a greater extent than the small claims; and
- (c) in equal circumstances, the priority of claimants according to the dates of the judgments or the dates when the claims were admitted by the Board, as the case may be.

Indemnification in respect of certain acts

82. No action for damages may be instituted—

- (a) against the Fund, the Board or any member, official or employee of the Board in respect of anything done in the *bona fide* exercise or performance of its or his or her powers or functions in terms of the provisions of this Act; or
- (b) against the Council, a member of the Council or official or employee thereof, in respect of any notification issued in good faith for the purposes of section 79(4).

Preservation and disposal of records and documents in possession of Board

83. (1) Any record or document in possession of the Board relating to any claim instituted against the Fund must, subject to the provisions of subsection (2), be preserved at the office of the Board.

(2) The Board may, after the lapse of five years from the date which any claim to which any record or document relates is settled by the Board or adjudicated upon by the court or rendered unenforceable by lapse of time, direct that the record or document be removed to some other place of custody or be destroyed or otherwise disposed of.

CHAPTER 7 HANDLING OF TRUST MONIES

Obligations of **[attorney]** legal practitioner relating to handling of trust monies

84. (1) Every attorney or advocate referred to in section 34(2)(b), other than **[an attorney]** a legal practitioner in the full-time employ of the state as a state attorney, state advocate, legal adviser, state law adviser or in any other professional capacity and who practises or is deemed to practise—

(a) for his or her own account either alone or in partnership; or²¹²

(b) as a director of a practice which is a juristic person,

[and who receives or holds money or property belonging to any person,]²¹³ must be in possession of a Fidelity Fund certificate.

(2) No attorney or person employed or supervised by an attorney may receive or hold funds or property belonging to any person unless the attorney concerned is in possession of a Fidelity Fund certificate.²¹⁴

(3) The provisions of subsections (1) and (2) apply to a deposit taken on account of fees or disbursements in respect of legal services to be rendered.

(4) Any person who contravenes subsections (1) or (2) or section 34²¹⁵, in rendering legal services is—

(a) guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment;

(b) on conviction liable to be struck off the Roll; and

(c) not entitled to any fee, reward or reimbursement in respect of the legal services rendered.

(5) A Fidelity Fund certificate must indicate that the **[attorney]** legal practitioner concerned is obliged to practise subject to the provisions of this Act, and the fact that **[an attorney]** such a legal practitioner holds such a certificate must be endorsed against his or her enrolment by the Council.

(6) **[An attorney]** A legal practitioner referred to in subsection (1) who is obliged to be in possession of a Fidelity Fund certificate²¹⁶ who—

(a) transfers from one practice to another; or

²¹² The PC requested the Department to clarify the position of professional assistants (attorneys who work for attorneys' firms). As indicated by the LSSA in its comments in respect of clause 84(6), professional assistants do not have trust accounts.

²¹³ Adapted in accordance with comments of LSSA in respect of clause 84(1) and agreed to by the PC.

²¹⁴ The PC requested the Department to clarify what the intention of clause 84(2) is.

²¹⁵ See clause 34(10). The question arises whether clause 34(10) is necessary in light of this sanction. It might therefore be appropriate in this clause 84(4) to make reference to clause 34. For the PC's guidance.

²¹⁶ Adapted in line with the comments of LSSA in respect of clause 84(6) and agreed to by the PC.

(b) ceases to practise, must give notice of this fact to the Council and comply with the Council's relevant requirements in relation to the closure of that **[attorney's] legal practitioner's** trust account and in the case of paragraph (b) return his or her certificate to the Council.

(7) The Council may withdraw a Fidelity Fund certificate and, where necessary, obtain an interdict against **[an attorney] the legal practitioner concerned** if he or she fails to comply with the provisions of this Act or in any way acts unlawfully or unethically.

(8) The provisions of this section do not apply to **[an attorney] a legal practitioner** who practises in the full time employ of Legal Aid South Africa on a permanent basis.²¹⁷

(9) **[No legal practitioner who practises as an]** An advocate, other than an advocate referred to in section 34(2)(b), may not receive or hold money or property belonging to any person in the course of [the legal practitioner's] that advocate's practice [as an advocate] or in respect of any instruction issued to the [legal practitioner] advocate by an attorney or a member of the public.²¹⁸

(10) No legal practitioner in the full-time employ of the State or the South African Human Rights Commission²¹⁹ as a state attorney, legal adviser, state law adviser or in any other professional capacity may receive or keep money or property belonging to any person, except during the course of employment of such legal practitioner with the State, only on behalf of the State and for no other purpose.²²⁰

Application for and issue of Fidelity Fund certificates

85. (1) (a) **[An attorney] A legal practitioner** who is obliged in terms of section 84(1) to be in possession of a Fidelity Fund certificate must apply to the Council for such a certificate as determined in the rules.

(b) Every legal practitioner referred to in paragraph (a) who, for the first time, practises as such, must, within the period and after payment of the fee

²¹⁷ Adapted in line with the comments of LASA in respect of clause 84(8) and agreed to by the PC. Mr Jeffery also requested the Department to clarify the position of juristic entities and law clinics in this regard.

²¹⁸ For the PC's consideration to give effect to advocates being able to take direct briefs from the public.

²¹⁹ As requested by the SAHRC in its comments iro clause 84(10).

²²⁰ The PC flagged this provision and raised the question what the purpose of it is and whether it should not be placed elsewhere in the Bill. The PC also requested the Department to provide a definition of "State".

determined by the Council in the rules, complete a legal practice management course approved by the Council determined in the rules.²²¹

(2) An application in terms of subsection (1) must be accompanied by the contribution payable by applicants as determined in the rules.

(3) The Council must, in consultation with the Board, determine the amount of the contribution for the ensuing year, if any, and in the event of a contribution being charged, give notice thereof by publication in the *Gazette*.

(4) In determining the amount of the contribution, the Council and the Board must take into account—

- (a) the value of the Fund;
- (b) the extent of the expenses and liabilities which the Fund is likely to incur in the ensuing years; **[and]**
- (c) the actuarial valuation report referred to in section 73(2); and
- (d) whether the applicant has been the cause of any claims against the Fund in the past.²²²

(5) The Council may, in consultation with the Board, and taking into account the performance of community service which promotes access to justice—

- (a) exempt a category of **[attorneys]** legal practitioners from paying the whole or part of the contribution; or
- (b) exempt a particular **[attorney]** legal practitioner from paying the whole or part of the contribution after consideration of a written application from that **[attorney]** legal practitioner, if the Council is satisfied that there is good reason to do so.

(6) Upon receipt of an application in terms of subsection (1) the Council must, if it is satisfied that the applicant has—

- (a) complied with the provisions of this Chapter;
 - (b) paid the required contribution to the Fund;
 - (c) discharged all liabilities in respect of **[registration]** enrolment fees; and
 - (d) completed the application form as determined in the rules in every respect,
- immediately issue to the applicant a Fidelity Fund certificate that is determined in the rules.

(7) A Fidelity Fund certificate is valid until 31 December of the year in respect of which it was issued.

²²¹ Inserted pursuant to the comments of the LSSA in respect of clause 85, to the effect that a provision similar to section 13B of the Attorneys Act, 1979, should be inserted in the Bill, making the completion of a legal practice management course mandatory for first time practitioners who hold Fidelity Fund certificates.

²²² Adapted in line with the comments of UNISA in respect of clause 85 and tentatively agreed to by the PC.

(8) A document purporting to be a Fidelity Fund certificate which has been issued contrary to the provisions of this Act is null and void and must be returned to the Council on demand.

Trust accounts

86. (1) Every **[attorney]** legal practitioner referred to in section 84(1) who is obliged to be in possession of a Fidelity Fund certificate must operate a trust account.

(2) Every trust account practice must keep a trust account at a bank with which the Fund has made an arrangement as provided for in section 64(1)(g) and must deposit therein, as soon as possible after receipt thereof, money held by such practice on behalf of any person.

(3) A trust account practice may, of its own accord, invest in a separate trust savings account or other interest-bearing account any money which is not immediately required for any particular purpose.

(4) A trust account practice may, on the instructions of any person, open a separate trust savings account or other interest-bearing account for the purposes of investing therein any money deposited in the trust account of that practice, on behalf of such person over which the practice exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity.

(5) Interest accrued on money deposited in terms of this section must, in the case of money deposited in terms—

(a) of subsections (2) and (3), be paid over to the Fund and vests in the Fund²²³; **[or]** and

(b) subsection (4), be paid over to the person referred to in that subsection: Provided that 5% of the interest accrued on money in terms of this paragraph must be paid over to the Fund and vests in the Fund.²²⁴

(6) **[An attorney]** A legal practitioner referred to in section 84(1) who is obliged to be in possession of a Fidelity Fund certificate may not deposit money in terms of subsection (2), nor invest money in terms of subsection (3) and (4) in accounts held at a bank which is not a party to an arrangement as provided for in section 64(1)(g), unless prior written consent of the Fund has been obtained.

²²³ Adapted in line with the comments of the AFF in respect of clause 86(5).

²²⁴ Adapted in line with the comments of the AFF and LSSA in respect of clause 86(5).

(7) **[An attorney]** A legal practitioner referred to in section 84(1) who is obliged to be in possession of a Fidelity Fund certificate must comply with the terms of an arrangement concluded between a bank and the Fund as provided for in section 64(1)(g).

Accounting

87. (1) A trust account practice must keep proper accounting records containing particulars and information in respect of—

- (a) money received and paid on its own account;
- (b) any money received, held or paid on account of any person;
- (c) money invested in a trust account or other interest-bearing account referred to in section 86; and
- (d) any interest on money so invested which is paid over or credited to it.

(2) (a) The Council or the Board may, itself or through its nominee, at the cost of the Council or the Board, inspect the accounting records of any trust account practice in order to satisfy itself that the provisions of section 86 and subsection (1) are being complied with.

(b) If on an inspection it is found that these provisions have not been complied with, the Council or the Board may write up the accounting records of the trust account practice and recover the costs of the inspection and the writing up of the accounting records from the trust account practice concerned.

(3) For the purposes of subsections (1) and (2), "accounting records" include any record or document kept by or in the custody or under the control of any trust account practice which relates to—

- (a) money held in trust;
- (b) money invested in terms of section 86(2), (3) or (4) and interest thereof;
- (c) any estate of a deceased person or any insolvent estate or any estate placed under curatorship, in respect of which an attorney or advocate referred to in section 34(2)(b)²²⁵ in the trust account practice is the executor, trustee or curator or which he or she administers on behalf of the executor, trustee or curator; or
- (d) the affairs of the trust account practice.

(4) (a) Any money held in the trust account of a trust account practice in respect of which the identity of the owner is unknown or which is unclaimed after one

²²⁵ This insertion is dependent on the PC's decision in respect of clause 34(2)(b)

year²²⁶, must, after the second annual closing of the accounting records of the trust account practice following the date upon which those funds were deposited in the trust account of the trust account practice, be paid over to the Fund by the trust account practice.

(b) Nothing in this subsection deprives the owner of the money contemplated in paragraph (a) of the right to claim from the Fund any portion as he or she may prove an entitlement to.

(5) (a) An attorney or advocate referred to in section 34(2)(b) or an employee of a trust account practice must, at the request of the Council or the Board, or the person authorised thereto by the Council or the Board, produce for inspection a book, document or article which is in the possession, custody or under the control of that legal practitioner or such employee, which book, document or article relates to the trust account practice or former trust account practice of such attorney: Provided that the Council or the Board or person authorised by the Council or the Board may make copies of such book, document or article and remove the copies from the premises of that attorney or trust account practice.

(b) The **[attorney]** legal practitioner referred to in paragraph (a) or employee in question may not, subject to the provisions of any other law, refuse to produce the book, document or article, even though he or she is of the opinion that it contains confidential information belonging to or concerning his or her client.

(6) Any person who performs any function under this section, may not disclose any information which he or she obtained in the performance of such a function except—

- (a) for the purposes of an investigation or hearing by a disciplinary body;
- (b) to any person authorised thereto by the Council or the Board who of necessity requires it for the performance of his or her functions under this Act;
- (c) if he or she is a person who of necessity supplies it in the performance of his or her functions under this Act;
- (d) when required to do so by order of a court of law;
- (e) at the written request of the Ombud; or
- (f) at the written request of the National Prosecution Authority or any competent authority which requires it for the institution or an investigation with a view to the institution of any criminal prosecution.

(7) Any person who—

²²⁶ Adapted in line with the comments of the AFF in respect of clause 87(4)(a).

- (a) refuses or fails to produce a book, document or any article in terms of subsection (5);
- (b) contravenes subsection (6); or
- (c) obstructs or hinders any person in the performance of his or her functions under this section,

is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year.

Trust money and trust property of trust account practice

88. (1) (a) Subject to paragraph (b), an amount standing to the credit of any trust account of any trust account practice—

- (i) does not form part of the assets of the trust account practice or of any attorney, partner or member thereof or of any advocate referred to in section 34(2)(b); and
- (ii) may not be attached by the creditor of any such trust account practice, attorney, partner or member or advocate.

(b) Any excess remaining after all claims of persons whose money has, or should have, been deposited or invested in a trust account referred to in paragraph (a), and all claims in respect of interest on money so invested, are deemed to form part of the assets of the trust account practice concerned.

(2) Trust property which is registered in the name of a trust account practice, or jointly in the name of an attorney or trust account practice and any other person in a capacity as administrator, trustee, curator or agent, does not form part of the assets of that attorney or trust account practice or such other person.

Court may prohibit operation of trust account

89. The High Court may, on application made by the Council or the Board, and on good cause shown, prohibit any [**trust account practice**] legal practitioner referred to in section 84(1) who is obliged to be in possession of a Fidelity Fund certificate²²⁷ from operating in any way on its trust account, and may appoint a *curator bonis* to control and administer that trust account, with any rights, powers and functions in relation thereto as the court may deem fit.

²²⁷ Adapted in line with the comments of the LSSA in respect of clause 89.

Appointment of *curator bonis* in respect of trust account

90. (1) If any **[attorney, practising on his or her own account or as a partner or member of a trust account practice]** legal practitioner referred to in section 84(1) who is obliged to be in possession of a Fidelity Fund certificate —

- (a) dies;
- (b) becomes insolvent;
- (c) is struck off the Roll or suspended from practice;
- (d) is declared by a competent court to be incapable of managing his or her own affairs;
- or
- (e) abandons his or her practice or ceases to practise,

the **[Master]** High Court may, on application made by the Council, Board or by any person having an interest in the trust account of that **[attorney]** legal practitioner or trust account practice, appoint a *curator bonis* to control and administer that account, with any rights, powers and functions as the **[Master]** court may deem fit.²²⁸

(2) Where the **[attorney]** legal practitioner contemplated in subsection (1) is an attorney and was practising in partnership or as a member of a company with another attorney or attorneys, the **[Master]** court must allow the trust account to remain under the control of the remaining partners or members, unless there is good reason not to do so.

(3) If a trust account practice is sequestrated, liquidated or placed under **[judicial management]** business rescue procedures, whether provisionally or finally, the **[Master]** court may, on application made by the Council, Board or by any person having an interest in the trust account of that practice, appoint a *curator bonis* to control and administer that account, with any rights, powers and functions as the **[Master]** court may deem fit.

(4) The **[Master]** court may only grant an application provided for in subsection (1) or (2), on good cause shown by the Council, Board or any other person concerned, and after having given the trust account practice an opportunity to respond in writing to the application.

[(5) Any person who is prejudiced by a decision of a Master in terms of subsection (1), (2) or (3), may, within 30 days after obtaining knowledge of the decision, appeal against that decision to [a] the High Court, and the court may

²²⁸See LSSA's comments in respect of clause 90.

confirm or vary the decision or give any other decision as, in its opinion, the Master should have given.]

(6) Nothing in this section or section 89 may be construed as preventing any attorney who was practising in partnership with a legal practitioner [an attorney] referred to in subsection (1) who is an attorney, from operating on the trust account of the partnership.²²⁹

Rights of banks in respect of trust accounts

91. (1) (a) Any bank at which a trust account practice keeps its trust account, or any separate account forming part of a trust account, is not, by reason only of the name or style by which the account concerned is distinguished, deemed to have knowledge that the trust account practice is not entitled to all money paid into that account or with which that account is credited.

(b) The provisions of paragraph (a) do not relieve the bank from any liability or obligation which legally exists and to which it would be subject apart from the provisions of this Act.

(2) Despite subsection (1), a bank at which a trust account practice keeps its trust account, or any separate account forming part of a trust account, does not, in respect of any liability of the trust account practice to that bank not being a liability arising out of, or in connection with, any such account, have or obtain any recourse or right, whether by way of set-off, counterclaim, charge or otherwise, against money standing to the credit of that account.

(3) This section does not—

- (a) deprive any bank of any existing right;
- (b) take away or affect any claim, lien, counter-claim, right of set-off, or charge of any kind which a trust account practice has against, or on, any money held or received on account of any person; or
- (c) relieve any trust account practice which has invested any money referred to in subsection (1) in a trust or other interest-bearing account referred to in section 86, of any liability in respect thereof.

(4) Any bank at which a trust account practice keeps its trust account or any separate account forming part of its trust account, must, if so directed by the Council

²²⁹ Speak to the profession about this clause??

or the Board, furnish the Council or the Board with a signed statement of that account for the period determined by the Council.

CHAPTER 8 GENERAL PROVISIONS

Recovery of costs by **[attorneys]** legal practitioners rendering free legal services²³⁰

92. (1) Whenever in any legal proceedings or any dispute in respect of which legal services are rendered for free to a litigant or other person by **[an attorney]** a legal practitioner or law clinic²³¹, and costs become payable to that litigant or other person in terms of a judgment of the court or a settlement, or otherwise, that litigant or other person must be deemed to have ceded his or her rights to the costs to that **[attorney]** legal practitioner or practice or law clinic.

(2) (a) A litigant or person referred to in subsection (1) or the **[attorney]** legal practitioner or law clinic concerned may, at any time before payment of the costs referred to in subsection (1), give notice in writing to—

- (i) the person liable for those costs; and
- (ii) the registrar or clerk of the court concerned,

that the legal services are being or have been rendered for free by that **[attorney]** legal practitioner, law clinic or practice.

(b) Where notice has been given as provided for in paragraph (a), the **[attorney]** legal practitioner, law clinic or practice concerned may proceed in his or her or its own name, or the name of his or her practice, to have those costs taxed, where appropriate, and to recover them, without being formally substituted for the litigant or person referred to in subsection (1).

(3) The costs referred to in subsection (1) must be calculated and the bill of costs, if any, must be taxed as if the litigant or person to whom the legal services were rendered by the **[attorney]** legal practitioner, law clinic or practice actually incurred the costs of obtaining the services of the **[attorney]** legal practitioner, law clinic or practice acting on his or her or its behalf in the proceedings or dispute concerned.

Offences and penalties

²³⁰ Adapted in line with the comments of the GCB in respect of clause 92.

²³¹ Adapted in line with the comments of the GCB, Wits Law Clinic and LRC in respect of clause 92.

93. Any person who, in a practice, without the written consent of the Council, employs in any capacity any person who has been struck off the Roll or suspended from practice, while that person remains struck off or suspended, is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding one year.

CHAPTER 9 REGULATIONS AND RULES

Regulations²³²

- 94.** (1) The Minister may, and where required in the circumstances, must, after consultation with the Council make regulations relating to—
- (a) the areas of jurisdiction of Regional Councils;
 - (b) the practical vocational training requirements and conditions of employment/engagement for candidate legal practitioners, including the remuneration of pupils;²³³
 - (c) compulsory post-qualification professional development of legal practitioners;
 - (d) a framework for the creation and recognition of limited liability legal practices and the terms and condition applicable to such practices;
 - (e) Government and other securities into which the Board can invest surplus funds; and
 - (f) matters which must be included in the annual report of the Board;
 - (g) the establishment of a mechanism to provide **[transformational]** legal education and training;
 - (h) the right of appearance of candidate legal practitioners in court or other institution;
 - [(i) fee structure of legal practitioners;**
 - (j) the manner in which a notice of application for review must be lodged with the Ombud;**
 - (k) the form of a summons issued by the Ombud;**

²³² The PC has requested the Department to do an audit of all aspects which require regulations to be made by the Minister and to indicate which of those should be done in consultation with the Council and of those which should be done after consultation with the Council. This exercise would best be done once most of the issues in the Bill have been settled by the PC. During the drafting process to date, we are finding additional aspects in respect of which rules and regulations are required and these need to be considered and approved by the PC. The final decision of the PC on what the regulatory framework of the profession will be, will also have an impact on the rules and regulations. The index to the Bill, the long title of the Bill, the purpose and objects clauses, the provisions dealing with rules and regulations, renumbering and cross-referencing are technical matters which ideally should be left to the end of the drafting process. For the PC's consideration and guidance.

²³³ As suggested by the PC; see however, also clause 6(1)(n) and clause 27.

- (l) **the manner of service of a summons issued by the Ombud;]**
- (m) the form of the annual report of the Ombud;
- (n) the rendering of community service;
- [(o) the establishment of a mechanism to monitor and evaluate the implementation of the Charter;]**
- (o) the procedure and criteria relating to the ranking or status of legal practitioners (after consultation with the Council); ²³⁴
- (p) the instruction of advocates by a member of the public; or
- (q) any other ancillary or administrative matter that it is necessary to prescribe for the proper implementation or administration of this Act.

(2) Any regulation made under subsection (1) must, before publication thereof in the *Gazette*, be approved by Parliament.

Rules

- 95.** (1) The Council may, and where required in the circumstances, must, by publication in the *Gazette*, make rules relating to—
- (a) the fees and charges which are payable to the Council;
 - (b) the fee to be paid by a person applying to the Council to be **[registered and]** enrolled;
 - (c) the manner in which an application for **[registration and]** enrolment must be submitted to the Council through the Regional Council in question;
 - (d) the fee payable by a legal practitioner to the Council when applying to convert his or her **[registration] enrolment**;
 - (e) the manner in which an application must be made by a legal practitioner for the conversion of his or her **[registration] enrolment**;
 - (f) the procedure for the election of Council members, for the convening meetings of the Council and the procedure for the conduct of meetings;
 - (g) the procedure for the conduct of meetings of committees of the Council;
 - (h) the procedure for the appointment of the executive officer and other employees of the Council;
 - (i) the conditions of service of the executive officer and other employees of the Council;

²³⁴ An enabling provision for the Minister to possibly make regulations in respect of the conferment of honours by the President/Chief Justice (senior counsel/senior legal practitioner status) as requested by the PC, for consideration.

- (j) competency based examinations or assessments for candidate legal practitioners, conveyancers or notaries;
- (k) the minimum conditions and procedures for the registration and administration of practical vocational training;
- (l) procedures and directions pertaining to the assessment of persons undergoing practical vocational training;
- (m) the level of competence to be achieved for admission and enrolment as a legal practitioner;
- (n) the information which must be submitted to the Council when a person applies to court for admission as a legal practitioner and the time period within which that information must be submitted;
- (o) the criteria for a person, institution, organisation or association to qualify to conduct the assessment of practical vocational training;
- (p) service which qualifies as community service;
- (q) the instruction of attorneys and the instruction of advocates by attorneys;
- (r) the procedures to be followed by disciplinary bodies;
- (s) the manner and form in which complaints of misconduct relating to legal practitioners, candidate legal practitioners or juristic entities must be lodged with the Regional Council and dealt with;
- (t) an application for a Fidelity Fund certificate;
- (u) the form of the Fidelity Fund certificate issued by the Council;
- (v) the contribution to be paid to the Council when applying for a Fidelity Fund certificate.
- (w) the manner in which the Council must **[register and]** enrol a duly admitted legal practitioner;
- (x) the manner in which the Council must keep the Roll of **[registered]** legal practitioners;
- (y) the manner in which an admitted legal practitioner must apply to the Council for **[registration and]** enrolment;
- (z) the manner in which a legal practitioner must apply to the Council to convert his or her **[registration] enrolment** as an attorney to that of an advocate and *vice versa*;
- (zA) the certificate issued by a registrar of **[a] the** High Court to an attorney who has acquired the right to appear in **[a] the** High Court, the Supreme Court of Appeal and the Constitutional Court and the information to be submitted by the registrar to the Council;

- (zB) the form of a subpoena issued by the Council;
- (zC) the manner of service of a subpoena;
- (zD) the manner in which a legal practitioner, candidate legal practitioner or juristic entity may lodge an appeal to an appeal tribunal;
- (zE) the inspection of the accounts of an attorney: Provided that rules made in terms of this paragraph must be made in consultation with the Board;²³⁵
- (zF) the powers and functions of the executive committee of the Council established in terms of section 20; **[or]**
- (zG) the manner of investment of any monies of the Council which are not required for immediate use; **[and]**
- (zH) the procedures to be followed before a member of the Council is removed from office as provided for in section 12(4); and.²³⁶
- (zI) any other matter in respect of which rules must be made in terms of this Act.

(2) (a) Before the Council makes any rule under this section, the Council must publish a draft of the proposed rule in the *Gazette* together with a notice, calling on interested persons to comment in writing within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice.

(b) If the Council alters the draft rules as a result of any comments, it need not publish those alterations before making the rule.

(3) The Council may, if circumstances necessitate the publication of a rule without giving notice provided for in subsection (2)(a), publish that rule without prior publication of a draft as provided for in subsection (2), provided that the notice of publication states—

- (a) the reason why circumstances necessitated that publication without prior publication of a draft as provided for in subsection (2); and
- (b) that any person who is aggrieved by the rule may make representations to the Council within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice.

CHAPTER 10

TRANSITIONAL PROVISIONS

Part 1

²³⁵ As requested by the AFF in respect of clause 64(1)(e) above.

²³⁶ See clause 12(4).

Transitional South African Legal Practice Council²³⁷

96. (1) A Transitional South African Legal Practice Council is hereby established as a body corporate with full legal capacity and comprising of the following members:

- (a) 16 legal practitioners, namely—
 - (i) eight attorneys **[nominated]** designated/elected? by the Law Society of South Africa, two of which represent the Black Lawyers Association, two of which represent the National Association of Democratic Lawyers, one of which represents the Law Society of the Cape of Good Hope, one of which represents the Law Society of the Orange Free State, one of which represents the Law Society of the Transvaal and one of which represents the Natal Law Society;
 - (ii) five advocates **[nominated]** designated by the General Council of the Bar of South Africa;
 - (iii) one advocate **[nominated]** designated by the Independent Advocates Association of South Africa;
 - (iv) one advocate **[nominated]** designated by the National Forum of Advocates; and
 - (v) one advocate **[nominated]** designated by Advocates for Transformation;
- (b) one²³⁸ teacher of law **[or legal academic nominated]** designated by **[law teachers, legal academics or organisations representing law teachers or legal academics]** the South African Law Deans Association;
- (c) subject to subsection (2A), two persons who, in the opinion of the Minister, are fit and proper persons who have knowledge of the legal profession, designated by the Minister;
- (d) one person **[nominated]** designated by Legal Aid South Africa; and
- (e) one person **[nominated]** designated by the Board, who may not be a legal practitioner.

(2) In constituting the Transitional Council as provided for in subsection (1), regard must be given to—

- (a) the terms of reference of the Transitional Council;

²³⁷ The proposed amendments in this clause mirror, to a large extent, the proposed amendments in clause 7, dealing with the composition of the Council. For the PC's consideration. The final composition of the TC, like the final composition of the Council, is still subject debate and decision by the PC.

²³⁸ The PC raised the question whether there should not be two teachers of law.

- (b) achieving representivity with regard to—
 - (i) race;
 - (ii) gender; and
 - (iii) disability; and
- (c) ensuring adequate regional representation when making a nomination in respect of subsection (1)(a).

ALTERNATIVE OPTION FOR SUBCLAUSE (2):

(2) The need for the Transitional Council to reflect broadly –

- (a) the racial and gender composition of South Africa;
- (b) representation of persons with disabilities; and
- (c) regional representation.

must be considered when the Transitional Council is established in terms of this section, in addition to the terms of reference of the Transitional Council.

(2A) A person referred to in subsection (1)(c) may not be designated as a member of the Transitional Council if he or she –

- (a) is a public servant;
- (b) is a member of Parliament, any provincial legislature or any municipal council; or
- (c) is an office-bearer or employee of any party, movement or organization of a party-political nature.

(3) The duration of the Transitional Council is three years and it ceases to exist on the date of commencement of Chapter 2.

(4) Subject to sections 99, 101 and 102, members of the Transitional Council hold office for the three year duration of the Transitional Council.

Terms of reference of Transitional Council²³⁹

97. (1) The Transitional Council must, within 24 months after the commencement of this Chapter—

- (a) make recommendations to the Minister on the following:
 - (i) An election procedure for purposes of constituting the first Council;

²³⁹ The question is raised whether the regulations made by the TC, for instance the election procedure for the purposes of constituting the first Council, the establishment of the first Regional Councils, the powers and functions of the first Regional Councils and the manner in which the first Regional Councils must be elected, should not continue to apply after the commencement of Chapter 2 if there is no need to change them. The Bill, in clauses 7 and 23, require the Council to make rules on these aspects, which may not be necessary. The transition phase requires regulations for these aspects while the Bill, after the commencement of Chapter 2, requires these aspects to be regulated by rules made by the Council. The PC's guidance would be appreciated. The current arrangements might give rise to unnecessary new rules and regulations after the commencement of Chapter 2. This is pointed out in the interests of a smooth transition from the TC to the Council phase.

- (ii) the establishment of the first Regional Councils and their areas of jurisdiction, taking into account the factors referred to in section 23(2)(a);
- (iii) the powers and functions of the first Regional Councils;
- (iv) the manner in which the first Regional Councils must be elected;
- (v) all the practical vocational training requirements that candidate attorneys or pupils must comply with before they can be admitted by the court as a legal practitioners;
- [(vi) fee structure of legal practitioners;]²⁴⁰**
- (vii) the right of appearance of a candidate legal practitioner in court or any other institution;²⁴¹
- (viii) a mechanism to wind up the affairs of the Transitional Council; and
- [(ix) all the requirements necessary for the implementation of compulsory post-qualification professional development;]²⁴²**

(b) prepare and publish a code of conduct for legal practitioners, candidate legal practitioners and juristic entities; and

(c) make rules, as provided for in section 108(2).

(2) (a) The Transitional Council must, within 24 months of the commencement of this Chapter, negotiate with and reach an agreement with the **[attorneys' and advocates' professions]** law societies referred to in section 56 of the Attorneys Act, 1979, and any other similar statutory bodies regulating the legal profession established in the former homelands²⁴³, in respect of the transfer of their assets, rights, liabilities, obligations and staff, to the Council or Regional Councils.

(b) The provisions of paragraph (a) do not preclude any non-statutory bodies or voluntary associations which are involved in the regulation of legal practitioners or matters dealt with in this Act, from negotiating and reaching an agreement with the Transitional Council in respect of the transfer of their assets, rights, liabilities, obligations and staff, to the Council or Regional Councils.²⁴⁴

²⁴⁰ The PC requested the Department to consider reducing the areas of responsibility (terms of reference) of the TC . For PC's consideration, esp in light of alternative proposal in respect of clause 35 dealing with fees.

²⁴¹ The PC requested the Department to consider reducing the areas of responsibility (terms of reference) of the TC. However, see clause 25 which has been revised in light of comments of PC relating to right of appearance in courts by candidate legal practitioners.

²⁴² The PC requested the Department to consider reducing the areas of responsibility (terms of reference) of the TC.

²⁴³ The PC requested that the application of this provision be restricted to statutory bodies. The proposed amendment is also in line with the comments of the LSSA in respect of clause 97(2).

²⁴⁴ The PC requested a provision to allow non-statutory bodies to dissolve and participate in the negotiations referred to in clause 97(2) regarding the transfer of assets, etc.

(3) Section 197 of the Labour Relations Act, 1995 (Act No.66 of 1995), applies in respect of the transfer of the staff contemplated in subsection (2).²⁴⁵

(4) If the agreement contemplated in subsection (2) cannot be reached by the parties concerned, any party may refer the matter to arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(5) The Minister may extend the period of 24 months contemplated in subsections (1) and (2) if he or she deems it necessary.

Powers and functions of Transitional Council

98. (1) The Transitional Council may do all that is necessary or expedient to carry out its terms of reference referred to in section 97, including the following, having due regard to the Constitution and applicable legislation where appropriate and relevant:

- (a) Establish one or more committees, including an executive committee, consisting of members of the Transitional Council only, or members of the Transitional Council and staff members or other persons, to assist the Transitional Council in—
 - (i) the performance or exercise of its powers and functions;
 - (ii) determining the powers and functions of a committee;
 - (iii) appointing a chairperson and deputy chairperson of a committee; and
 - (iv) determining procedures for the functioning of committees; and
- (b) delegate any of its powers and functions to its committees, subject to any conditions it may impose, which delegation does not—
 - (i) divest the Transitional Council of the power or function so delegated; and
 - (ii) preclude the Transitional Council from varying or setting aside any decision made under a delegation.

(2) The Transitional Council must, in consultation with the Director-

General —

- (a) appoint an executive officer to perform or exercise the powers and functions determined by the Transitional Council and supervise the staff of the Transitional Council;
- (b) employ or second from existing governance structures in the legal profession so many staff members as may be necessary to enable it to carry out its functions;

²⁴⁵ The PC requested the insertion of a provision in terms of which the staff of the disbanding bodies get preference to posts in the new regulatory structures. This is already provided for in section 197 of the LRA.

- (c) conclude agreements with any person or organisation for the performance of any particular act or any particular work or the rendering of services for the purposes of furthering the objects of the Transitional Council;
- (d) enter into contracts in connection with the performance of its functions or the exercise of its powers;
- (e) determine the remuneration and other conditions of service of staff members; and
- (f) pay an honorarium or an allowance to any person to cover expenses reasonably incurred by him or her in connection with any act performed at the request of the Transitional Council or in terms of its directions on behalf of the Transitional Council and the furtherance of its objects.

(3) The Transitional Council must, after its establishment report to the Minister every six months on its activities and the Minister must, immediately on receipt thereof, submit the report to Parliament.

Membership of Transitional Council²⁴⁶

99. (1) A member of the Transitional Council must—

- (a) be a South African citizen; and
- (b) be a fit and proper person.

(2) The following persons are disqualified from becoming or remaining members of the Transitional Council:

- (a) An unrehabilitated insolvent[s];
- (b) a person declared to be of unsound mind by a court of the Republic;
- (c) a person who has been convicted of an offence and sentenced to more than 12 months' imprisonment without the option of a fine, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, other than a conviction for an offence committed prior to 27 April 1994 associated with political objectives; or
- (d) a person who has **[vacated his or her]** been removed from office in terms of section 102.

Chairperson and deputy chairperson of Transitional Council²⁴⁷

²⁴⁶ The technical amendments are intended to promote uniformity: See clauses 8 and 65.

²⁴⁷ The technical amendments in this clause are intended to promote uniformity: see clause 9 dealing with the chairperson and deputy chairperson of the Council.

100. (1) At the first meeting of the Transitional Council, the members of the Transitional Council must, in consultation with the Minister, elect and appoint a chairperson and deputy chairperson of the Transitional Council from among themselves.

ALTERNATIVE OPTION:

(1) The Minister must, in/after consultation with the members of the Transitional Council, at its first meeting, designate one of the members as chairperson and another as deputy chairperson.

(2) The chairperson and the deputy chairperson hold office for the duration of the Transitional Council.

(3) The deputy chairperson may/must²⁴⁸, if the chairperson is absent or is for any reason unable to act as chairperson, perform all the functions and exercise all the powers of the chairperson.

(4) If both the chairperson and deputy chairperson are absent from any meeting, the members present must elect **[one of their number]** a person from among themselves²⁴⁹ to preside at that meeting and the person so presiding may/must²⁵⁰, during that meeting and until the chairperson and deputy chairperson resumes duty, perform all the functions and exercise all the powers of the chairperson.

(5) If both the chairperson and deputy chairperson have been given leave of absence, the members of the Transitional Council must elect one person from among themselves to act as chairperson until the chairperson and deputy chairperson resumes duty or **[vacates]** is removed from office in terms of section 102.

(6) If the office of the chairperson **[and]** or deputy chairperson becomes vacant, the members of the Transitional Council must, at the first meeting **[after such vacancy occurs]** thereafter or as soon as possible thereafter, elect from among themselves a new chairperson **[and]** or deputy chairperson, as the case may be.

(7) A chairperson and deputy chairperson may vacate office as such, without relinquishing his or her membership of the Transitional Council, unless his or her membership has been terminated in accordance with section 101.²⁵¹

Term of office

²⁴⁸ See clause 9(3).

²⁴⁹ See clause 9(4).

²⁵⁰ See clause 9(4).

²⁵¹ Aligned with clause 9(7) for the PC's consideration.

100A. A member of the Transitional Council holds office for the duration of the Transitional Council.²⁵²

Termination of office²⁵³

101. (1) A person ceases to be a member of the Transitional Council when that person—

- (a) is no longer eligible in terms of section 99 to be a member;
- (b) resigns; **[or]**
- (c) **[vacates his or her]** is removed from office in terms of section 102;
- (d) in the case of a legal practitioner referred to in section 96(1)(a), ceases to be a practising legal practitioner, for whatever reason; or²⁵⁴
- (e) is appointed as a judicial officer.

(2) A member may resign after giving at least three months' written notice to the Transitional Council, but the Transitional Council may, on good cause shown, accept a shorter period.

[Vacation of] Removal from office²⁵⁵

102. (1) **[A member of the]** The Transitional Council **[must vacate]** may remove a member from **[his or her]** office on account of—

- (a) a conviction of any misconduct/offence under this Act or a conviction for any offence, which, in the opinion of the Transitional Council, debars him or her from serving as a member of the Transitional Council;
- (b) incapacity or incompetency which, in the opinion of the Transitional Council, debars him or her from serving as a member of the Transitional Council;
- (c) absence from three consecutive meetings of the Transitional Council without the permission of the Chairperson, except on good cause shown;
- (d) a request by the body which or person who **[nominated]** designated/elected that member in terms of section 96, on good cause shown by the body or person in question;

ALTERNATIVE OPTION TO PARAGRAPH (d):

²⁵² For the PC's consideration to align it with provisions of the Council: see clause 10.

²⁵³ Aligned with clause 11 dealing with the termination of the Council, for the PC's consideration.

²⁵⁴ Pursuant to the comments of UNISA in respect of clause 12.

²⁵⁵ Aligned with clause 12, dealing with the removal from office of members of the Council, for the PC's consideration.

- (d) a request by the body which or person who **[nominated]** designated/elected that member in terms of section 96, on good cause shown by the body or person in question, upon confirmation thereof by the High Court;
- (e) engaging in any activity that may, in the opinion of the Transitional Council, undermines the integrity of the Transitional Council; or
- (f) the sequestration of his or her estate.

(2) If the Transitional Council has commenced proceedings for the removal of a member it may suspend that member from office.

(3) A member who is suspended from office may not perform or exercise any of the powers or functions of that office or receive any allowances.

(4) The Transitional Council must follow due process of law if it intends to remove a member for office, as determined by the Transitional Council in the rules.

[Filling of v] Vacancies in Transitional Council and filling thereof²⁵⁶

103. (1) A vacancy in the Transitional Council occurs when—

- (a) a member dies;
- (b) a member terminates office in terms of section 101;
- (c) a member **[vacates his or her]** is removed from office in terms of section 102; or
- (d) a member's resignation takes effect.

(2) A vacancy must be filled as soon as practicably possible in accordance with the **[procedure referred to in]** provisions of section 96.

(3) Any person appointed to fill a vacancy holds office for the unexpired portion of the term of the vacating member.

Meetings of Transitional Council

104. (1) The Transitional Council must hold at least four meetings in each year at venues to be determined by the Transitional Council and may, in addition, hold any further meetings as the Transitional Council may, from time to time, determine.

(2) The Transitional Council must, as soon as practicable after the appointment of its members, meet for the first time at the time and place determined by the Minister.

²⁵⁶ Aligned with clause 13, dealing with vacancies in the Council, for the PC;s consideration.

(3) The Transitional Council must, before its dissolution, meet with the Council contemplated in section 7 for the purposes of handing over.

Quorum and procedure at meetings of Transitional Council

105. (1) The majority of the members of the Transitional Council constitutes a quorum at any meeting of the Transitional Council.

(2) The Transitional Council must determine a procedure in the rules²⁵⁷ for convening meetings and the procedure for the conduct of meetings.

(3) The Transitional Council must keep a record of its proceedings.

Decisions of Transitional Council²⁵⁸

106. (1) The decision of the majority of the members present at the meeting constitutes the decision of the Transitional Council[: **Provided that the Chairperson has a casting vote, in addition to a deliberative vote**].

(2) In the event of a deadlock in the voting the chairperson has a casting vote in addition to a deliberative vote.²⁵⁹

Finances, expenditure and accountability of Transitional Council

107. (1) Expenditure incidental to the exercise of the powers or the performance of the powers and functions of the Transitional Council must be defrayed from the funds of the Transitional Council.

(2) The funds of the Transitional Council consist of—

(a) monies defrayed from the budget vote of the Department for the purposes contemplated in subsection (1); and

(b) any other monies received by the Transitional Council or accruing to the Transitional Council from any other source, including disbursements made by existing law societies as may be agreed upon.

(3) Out-of-pocket expenses incurred by members of the Transitional Council in exercising their powers or carrying out their powers and functions under this

²⁵⁷ Aligned with clause 16, dealing with meetings of the Council, for the PC's consideration.

²⁵⁸ Aligned with clause 17, dealing with decisions of the Council for the PC's consideration.

²⁵⁹ Technical amendment for consideration by the PC.

Chapter are borne by the body which or person who, **[nominated]** designated or elected **[or appointed]** that member.

(4) The Director-General, as the accounting officer of the Department, is responsible for the funds referred to in subsection (2)(a).

Part 2

Rules and regulations

108. (1) (a) The Minister must, within six months after receiving recommendations from the Transitional Council as provided for in section 97(1)(a), make regulations by publication in the *Gazette*, in consultation with the Transitional Council, in order to give effect to the recommendations of the Transitional Council as contemplated in section 97(1)(a).

(b) If the Transitional Council fails to make recommendations as provided for in paragraph (a), within the timeframe provided for in section 97, the Minister must, within six months, make the regulations in question, after consultation with the Transitional Council.

(c) Any regulation made under this subsection must, before publication thereof in the *Gazette*, be approved by Parliament.

(2) (a) The Transitional Council must, within 24 months after the commencement of this Chapter, make rules by publication in the *Gazette* in respect of the following:

- (i) A competency based examination or assessment for candidate legal practitioners, conveyancers and notaries;
- (ii) the minimum conditions and procedures for the registration and administration of practical vocational training;
- (iii) the procedure and directions pertaining to the assessment of persons undergoing practical vocational training;
- (iv) the criteria for a person, institution, organisation or association to qualify to conduct an assessment;
- (v) the procedures to be followed by disciplinary bodies; **[and]**
- (vi) the manner and form in which complaints of misconduct relating to legal practitioners, candidate legal practitioners or juristic entities must be lodged with the Regional Council; and

(vii) any other matter in respect of which rules must be made in terms of this Chapter.

(b) Before the Transitional Council makes any rule under this subsection, it must publish a draft of the proposed rule in the *Gazette* together with a notice, calling on interested persons to comment in writing within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice.

(c) If the Transitional Council alters the draft rules as a result of any comments, it need not publish those alterations before making the rule.

(d) The Transitional Council may, if circumstances necessitate the publication of a rule without giving notice, as provided for in paragraph (b), publish that rule without prior publication of a draft as provided for in paragraph (b), provided that the notice of publication states—

- (i) the reason why circumstances necessitated that publication without prior publication of a draft as provided for in paragraph (b); and
- (ii) that any person who is aggrieved by the rule may make representations to the Transitional Council within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice.

Part 3

Abolition of Fidelity Funds of former TBVC States and transfer of assets, rights, liabilities and obligations to [Attorneys] Legal Practitioners Fidelity Fund

109. (1) For the purposes of this Part, “**law society**” means a law society referred to in section 56 of the Attorneys Act, 1979 (Act No. 53 of 1979).

(2) The—

- (a) Attorneys Fidelity Fund referred to in section 26(1) of the Attorneys, Notaries and Conveyancers Act, 1984 (Act No. 29 of 1984), of the former Republic of Bophuthatswana; and
- (b) Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund referred to in section 25 of the Attorneys Act, 1987 (Act No. 42 of 1987), of the former Republic of Venda,

cease to exist on the date referred to in section 119(4) and all assets, rights, liabilities and obligations which, on that date, vested in any of the said Funds, vest from that date in the Fund referred to in section 54(1).

Transitional provisions in relation to existing Attorneys Fidelity Fund Boards of Control

110. The—

- (a) Attorneys Fidelity Fund Board of Control referred to in section 27 of the Attorneys Act;
- (b) Attorneys Fidelity Fund Board of Control referred to in section 26(3) of the Attorneys, Notaries and Conveyancers Act, 1984 (Act No. 29 of 1984), of the former Republic of Bophuthatswana; and
- (c) Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control referred to in section 27 of the Attorneys Act, 1987 (Act No. 42 of 1987), of the former Republic of Venda,

and any committee of any such Board of Control appointed in terms of any such law and which existed immediately before the date referred to in section 119(4), cease to exist on that date and all assets, rights, liabilities and obligations which, on that date, vested in any of the Boards referred to in paragraphs(a), (b) and (c), vest in the Board referred to in section 62.

Transitional provisions in relation to qualifications

111. (1) Notwithstanding anything to the contrary in this Act—

- (a) (i) the training course presented at a Practical Legal Training School of the Law Society of South Africa, for purposes of the Attorneys Act²⁶⁰; or
- (ii) any other training course approved by any existing society or the General Council of the Bar,

before the date referred to in section 119(4) for the purposes of training persons to qualify as legal practitioners must be regarded as having been presented or approved pursuant to the regulations pertaining to practical vocational training; and

- (b) any period of practical vocational training undergone with an attorney or advocate before the date referred to in section 119(4) must be regarded, as having been a period of practical vocational training under supervision of a legal practitioner.

(2) Any person upon whom the degree *baccalaureus procurationis* was conferred by a university of the Republic, is regarded as being qualified to be enrolled as an attorney by the Council as if he or she held the degree *baccalaureus legum*, if all the

²⁶⁰ Adapted in line with the comments of the LSSA in respect of clause 111(1)(a)(i).

other requirements in the Attorneys Act are complied with²⁶¹: Provided that such person has not later than 1 January 1999 registered for the first-mentioned degree.

Transitional provisions relating to Fidelity Fund certificates

112. Any attorney who is in terms of section 85(1) required to be in possession of a Fidelity Fund certificate and who, at the date referred to in section 119(4), is not in possession of such a certificate issued in terms of any law repealed by this Act, must, within 60 days after the said date, apply for such a certificate.

Existing advocates, attorneys, conveyancers and notaries

113. (1) Any person **[whose name appears on the roll of advocates, roll of attorneys, roll of conveyancers or roll of notaries of any High Court]** who has been admitted by the High Court and authorised to be enrolled an advocate, attorney, conveyance or notary²⁶² **[at]** before²⁶³ the date referred to in section 119(4), must be regarded as having been admitted to practise and, where applicable, subject to any condition imposed by the High Court, and must be enrolled as a legal practitioner, conveyancer or notary in terms of this Act, subject to the terms of any order of court whereby any such person has been suspended from practice as an advocate, attorney, conveyancer or notary.

(2) Every person who, in terms of subsection (1), is regarded as having been admitted and authorised to practise and to be enrolled as a legal practitioner, conveyancer or notary, must be enrolled as a legal practitioner, conveyancer or notary on the Roll, and for that purpose—

(a) the registrar of every Division of the High Court must as soon as possible after the appointment of the Council's executive officer, furnish him or her with the name of every person whose name appears on the roll of attorneys, roll of conveyancers or roll of notaries of that **[High Court]** Division and with particulars of the order of court whereby every such person was admitted to practise as an attorney, conveyancer or notary and of any order of court, if any, in terms of which any such person has been suspended from practice as an attorney, conveyancer or notary;

²⁶¹ Adapted in line with the comments of the LSSA in respect of clause 111(2).

²⁶² Adapted in line with the comments of the GCB in respect of clause 113(1) and agreed to by the PC.

²⁶³ Technical amendment for consideration by the PC.

- (b) the Director-General: Justice and Constitutional Development must as soon as possible after the appointment of the Council's executive officer, furnish him or her with the name of every person whose name appears on the roll of advocates and with particulars of the order of court in terms of which every such person was admitted to practise as an advocate and of any order of court, if any, in terms of which any such person has been suspended from practice as an advocate; and
- (c) the law societies existing immediately prior to the date referred to in section 119(4) in terms of the Attorneys Act or any other law, must as soon as possible after the appointment of the Council's executive officer, furnish him or her with the name of every person whose name appears on the roll of attorneys, roll of conveyancers or roll of notaries of that society and with particulars of the order of court whereby every such person was admitted to practise as an attorney, conveyancer or notary and of any order of court, if any, in terms of which any such person has been suspended from practice as an attorney, conveyancer or notary.

(3) The Council must compile and consolidate the rolls of the existing practising and non-practising advocates, attorneys, conveyancers and notaries contemplated in subsection (2)(a), (b) or (c) into the Roll referred to in section 30(3).

(4) Every person who, on the date referred to in section 119(4), has the status of senior counsel retains that status after the commencement of this Act.

Persons entitled to be admitted and enrolled as advocates, attorneys, conveyancers or notaries

114. Any person who, immediately before the date referred to in section 119(4), was entitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of this Act.²⁶⁴

Pending proceedings

115. (1) Any enquiry in terms of any law repealed by this Act into the alleged unprofessional or dishonourable or unworthy conduct of a legal practitioner which has not been concluded at the date referred to in section 119(4), must be referred to the Council which must treat the matter as it deems appropriate.

²⁶⁴ The GCB's comments in respect of clause 114 are not clear.

(2) Any proceedings in respect of the suspension of any person from practice as an advocate, attorney, conveyancer or notary or **[for]** in respect of the removal of the name of any person from the roll of advocates, attorneys, conveyancers or notaries which have been instituted in terms of any law repealed by this Act, and which have not been concluded at the date referred to in section 119(4), must be continued and concluded as if that law had not been repealed and for that purpose a reference in the provisions relating to such suspension or removal to the General Council of the Bar of South Africa, any Bar Council, any Society of Advocates, any society or the State Attorney must be construed as a reference to the Council.

Transitional provisions relating to existing law societies and voluntary associations of advocates

116. The existing law societies and any voluntary association of advocates must continue to perform their powers and functions until the commencement of Chapter 2.

Interpretation of certain references in laws

- 117.** Subject to the provisions of this Act, a reference in any other law to—
- (a) an advocate, a counsel or an attorney, must be construed as a reference to a legal practitioner in this Act;
 - (b) a conveyancer admitted in terms of any law repealed by this Act, must be construed as a reference to a conveyancer **[registered]** enrolled in terms of section 30;
 - (c) a notary admitted in terms of any law repealed by this Act, must be construed as a reference to a notary **[registered]** enrolled in terms of section 30;
 - (d) senior counsel, must be construed as a reference to the status of senior counsel as it existed prior to the commencement of this Act; and
 - (e) the General Council of the Bar of South Africa, the Association of Law Societies of the Republic of South Africa, the Law Society of South Africa, a law society or similar reference made in any law repealed by this Act, must be construed as a reference to the Council.

Part 4

Repeal and amendment of laws and savings

118. (1) (a) Subject to paragraph (b) and subsection (2), the laws specified in the Schedule are hereby repealed or amended to the extent indicated in the third column thereof.

(b) Paragraph (a) takes effect on the date referred to in section 119(4).

(2) Any—

(a) regulation made under any law referred to in subsection (1) and in force immediately before the date referred to in section 119(4); and

(b) rule, code, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document promulgated, issued, given or granted and any other steps taken in terms of any such law immediately before the date referred to in section 119(4) and having the force of law,

remains in force, except in so far as it is inconsistent with any of the provisions of this Act, until amended or revoked by the competent authority under the provisions of this Act.

(3) Anything done in terms of a law repealed or amended by this Act—

(a) remains valid if it is consistent with this Act, until repealed or overridden; and

(b) is deemed to have been done in terms of the corresponding provision of this Act.

(4) A Regional Council contemplated in section 97(1)(a)(ii) continues to exist and is deemed to have been established by the Council in terms of this Act.

Short title and commencement

119. (1) This Act is called the Legal Practice Act, **[2012]** 2013.

(2) Chapter 10 comes into operation on a date fixed by the President by proclamation in the *Gazette*.

(3) Chapter 2 comes into operation three years after the date of commencement of Chapter 10 or on any earlier date fixed by the President by proclamation in the *Gazette*.

(4) The remaining provisions of this Act come into operation on a date, after the commencement of Chapter 2, fixed by the President by proclamation in the *Gazette*.

SCHEDULE**(Laws repealed by section 118)**

No. and year of law	Short title	Extent of repeal
Act No. 24 of 1926	Natal Conveyancers Act, 1926	The whole
<u>Act No. 47 of 1937</u>	<u>Deeds Registries Act, 1937</u>	
Act No. 27 of 1939	Natal Advocates and Attorneys Preservation of Rights Act, 1939	The whole
Act No. 19 of 1941	Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act, 1941	The whole
Act No. 93 of 1962	General Law Further Amendment Act, 1962	Sections 35, 36, 37 and 38
Act No. 74 of 1964	Admission of Advocates Act, 1964	The whole
Act No. 74 of 1964 (Transkei)	Admission of Advocates Act, 1964	The whole
Act No. 74 of 1964 (Bophuthatswana)	Admission of Advocates Act, 1964	The whole
Act No. 74 of 1964 (Venda)	Admission of Advocates Act, 1964	The whole
Act No. 29 of 1974	General Law Amendment Act, 1974	Section 16
Act No. 39 of 1977	Admission of Advocates Amendment Act, 1977	The whole
Act No. 25 of 1979	Admission of Advocates Amendment Act, 1979	The whole
Act No. 41 of 1979 (Bophuthatswana)	Admission of Advocates Amendment Act, 1979	The whole
Act No. 53 of 1979	Attorneys Act, 1979	The whole
Act No. 29 of 1984	Bophuthatswana Attorneys Act	The whole
Act No. 107 of 1985	Rules Board for Courts of Law Act	
Act No. 114 of 1993	Recognition of Foreign Legal Qualifications and Practice Act	The whole
Act No. 62 of 1995	Right of Appearance in Courts Act	The whole

MEMORANDUM ON THE OBJECTS OF THE LEGAL PRACTICE BILL, 2011

1. BACKGROUND

1.1 Current legislation pertaining to advocates and attorneys is fragmented as it is regulated by different laws which apply in different parts of the country. The legal profession is also not representative of the demographics of South Africa and entry into the profession is, in many instances, determined by outdated, unnecessary, and overly restrictive prescripts. Access to legal services, especially by the poor, is limited. The Bill seeks to correct these shortcomings by uniting the legal profession and regulating it by means of a single statute. While seeking to attain these objectives, the Bill recognises the independence of the legal profession and seeks to strengthen this independence.

1.2 The Bill proposes an incremental approach as far as its implementation is concerned. A Transitional South African Legal Practice Council (the Transitional Council) will fulfil a key role in the first phase of implementation, paving the way for the establishment of the permanent South African Legal Practice Council and putting systems and procedures in place for the second and subsequent phases of the implementation process. Its role, powers and functions relate largely to aspects in respect of which there are still differing views between the various categories of legal practitioners among themselves, on the one hand, and between the Government and the legal profession, on the other. The responsibilities of the Transitional Council will become apparent as the Bill is discussed in greater detail below.

2. PURPOSE OF BILL

Some of the main goals of the Bill, as set out in the purpose clause, are to—

- (a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution;
- (b) broaden access to justice—
 - (i) by putting in place a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are affordable and within the reach of the citizenry;
 - (ii) by putting in place measures to provide for the rendering of community service by candidate legal practitioners and practising legal practitioners;
 - (iii) by putting in place measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that reflects the demographics of the Republic;
- (c) create a single unified statutory body, the South African Legal Practice Council (the Council) to regulate the affairs of all legal practitioners in pursuit of the goal of a unified, accountable, efficient and independent legal profession;
- (d) protect and promote the public interest; and
- (e) protect and promote the interests of consumers of legal services by the establishment of an Office of Legal Services Ombud.

3. CLAUSE BY CLAUSE ANALYSIS

3.1 Clause 1: Definitions

3.1.1 While most of the definitions are self-explanatory, the following definitions are highlighted:

3.1.2 An "**advocate**" is defined as a legal practitioner practising without a Fidelity Fund certificate and an "**attorney**" is defined as a legal practitioner practicing with a Fidelity Fund certificate. A "**legal practitioner**" is defined as an advocate or attorney registered as such in terms of section 30. These definitions are noteworthy in the sense that the Bill gives continued recognition to the two main categories of legal practitioners.

3.1.3 "**Charter**" is defined as the Legal Services Sector Charter as adopted by the legal profession and the Minister in December 2007. One of the functions of the Council established in terms of clause 4 is to monitor and evaluate the implementation of the Legal Services Sector Charter.

3.1.4 The "**code of conduct**" is defined as a written code, setting out rules and standards relating to ethics, conduct and practice for legal practitioners and its enforcement through the Council and its structures.

3.2 Clause 2: Application of Act

The Bill is applicable to all legal practitioners.

3.3 Clause 3: Purpose of Act

Clause 3 sets out the purpose of the Bill, as discussed in paragraph 2 above.

3.4 Clauses 4 and 5: Establishment of Council and Objects of Council

3.4.1 Clause 4 of the Bill establishes the Council, as a body corporate with full legal capacity, to regulate all legal practitioners.

3.4.2 Clause 5 sets out the objects of the Council. The objects are, among others, to facilitate the realisation of the goal of a transformed and restructured legal profession, to ensure that fees chargeable by legal practitioners for legal services are reasonable and promote access to legal services, to promote and protect the public interest, to preserve and uphold the independence of the legal profession, to enhance and maintain the integrity and status of the legal profession, and to promote access to the legal profession in pursuit of a profession that reflects the demographics of the Republic.

3.5 Clause 6: Powers and functions of Council

3.5.1 Clause 6 extensively sets out the powers and functions of Council. Clause 6(1) sets out the powers and functions which are necessary for the operation of the Council, such as acquiring property and insuring against risks, among others.

3.5.2 In terms of clause 6(1)(j), the Council may delegate any of its powers and functions to its committees or Regional Councils. However, such delegation does not divest the Council of any power or function so delegated.

3.5.3 Clause 6(1)(k) states that the Council may develop norms and standards that must guide the conduct of legal practitioners and the legal profession.

3.5.4 Clauses 6(1)(o) to (s) deals with the provision of financial support by the Council to organisations providing legal education and training, to non-profit organisations and institutions promoting access to justice for poor people, considering and granting bursaries and loans to students and candidate legal practitioners.

3.5.5 Clause 6(2) sets out matters relating to the administration of the Council. In clause 6(2)(a), the Council, in order to perform its functions properly, must employ an executive officer and officials and staff in order to carry out its functions. In terms of clause 6(2)(g) the Council may publish periodicals, pamphlets and other printed material for the benefit of practitioners and the public.

3.5.6 In terms of clause 6(3) the Council must register and enroll all legal practitioners after their admission by the court. Current legislation provides for the keeping of a roll by provincial law societies in respect of attorneys and by the Director-General: Justice and Constitutional Development in respect of advocates.

3.5.7 Clause 6(4) empowers the Council to determine certain categories of fees.

3.5.8 Clause 6(5) deals with the powers and functions of the Council vis-à-vis education in law and legal practice generally. Clause 6(5)(f), for instance states that the Council, must, in the prescribed manner, establish a mechanism to provide proper and appropriate transformational legal education and training having due regard to our inherited legacy and new constitutional dispensation. Legal education must extend to aspiring as well as experienced legal practitioners. Training is recognised in the Bill as a key transformational imperative, as legal practitioners are the main source of candidates for the judiciary, the transformation of which is of paramount importance.

3.5.9 Clause 6(5)(h) provides that the Council must report to the Minister on its activities, with particular reference to measures to enhance access to justice, for instance on the fee structure for legal services, the number of new graduates registered with the Council, the effectiveness of the training requirements for entry into the profession and

measures adopted to enhance entry into the profession, including the remuneration of legal practitioners and continuing education to enhance skills of legal practitioners. The purpose of this report is to make recommendations to the Minister regarding legislative and other interventions to improve access to the profession and access to justice generally. Barriers to entry into the profession in light of current entry requirements have prevented historically disadvantaged individuals from entering the profession. This clause is therefore in support of the broader transformative goal of improving access to the profession and justice, generally.

3.5.10 Clause 6(5)(i) provides that the Council must advise the Minister on the right of appearance of attorneys in the High Courts, the Supreme Court of Appeal and the Constitutional Court, on the right of foreign legal practitioners to appear in courts in the Republic and to practise as legal practitioners in the Republic, on multi-disciplinary legal practices, also with the view to promoting legislative and other interventions on multi-disciplinary legal practices.

3.6 Clause 7: Composition of Council

3.6.1 Clause 7(1) provides for the composition of the Council which consists of a total of 16 legal practitioners, namely 10 attorneys and six advocates. They are to be elected in accordance with the procedure to be approved by the Minister by regulation on the advice of the Traditional Council within 24 months of the promulgation of Chapter 10 of the Act, dealing with the Transitional Council.

3.6.2 The ratio of attorneys to advocates is larger, as the legal profession is comprised of more attorneys than advocates.

3.6.3 In terms of non-legal practitioners, the Council will consist of one legal academic, three fit and proper persons appointed by the Minister who, by virtue of their knowledge and experience, are able to assist the Council in achieving its objects, one fit and proper person who will represent the interests of government and a person nominated by Legal Aid South Africa.

3.7 Clauses 8 to 14: Qualification for membership of Council, chairperson and deputy chairperson of Council, term of office, termination of office, vacation of office, filling of vacancies and dissolution of Council.

3.7.1 Clause 8 sets out the criteria for persons who qualify to be members of the Council. Clause 9 provides for the appointment of the chairperson and deputy chairperson of the Council, who in terms of clause 9(1), are elected by members of the Council, from among its members.

3.7.2 Clauses 10 to 13 deal with the term of office of members of the Council, the termination of office of members of the Council, vacation of office and the filling of vacancies on the Council.

3.7.3 Clause 12 provides that a member must vacate his or her office on account of misconduct, inability to perform the powers and functions of office, absence from three consecutive meetings of the Council, a request by the body which or person who nominated, elected or appointed that member, engaging in any activity that may undermine the integrity of the Council and the sequestration of his or her estate.

3.7.4 Clause 14 provides for the dissolution of the Council and the appointment of an interim Council by the Minister.

3.8 Clauses 15 to 22: Operation of Council

Clauses 15 to 22 deal with operational matters relating to the Council, such as meetings, the quorum for meetings of the Council, decisions at meetings, procedures, the establishment of committees, the appointment of an executive office and staff members, the delegation of powers and assignment of powers and functions and the finances, expenditure and accountability of the Council.

3.9 Clause 23: Regional Councils

3.9.1 Clause 23 provides for the establishment of Regional Councils by the Council.

3.9.2 The areas of jurisdiction will be prescribed by the Minister.

3.9.3 The Regional Councils carry out the powers and functions as determined by the Council or in terms of the Act.

3.9.4 The first Regional Councils are to be elected in accordance with a procedure to be prescribed by the Minister on the advice of the Transitional Council.

3.9.5 In constituting the Regional Councils the composition of the Council, the efficient attainment of the objects of the Council, cost effectiveness, resources and the interests of the public, among others, must be taken into account. The Minister must, for the first Regional Councils, on the advice of the Transitional Council, prescribe several matters regarding their operation.

3.10 Clauses 24 and 25: Regulation of legal practitioners, admission and right of appearance

3.10.1 Clause 24 provides that only a legal practitioner admitted and enrolled to practise as such is entitled to practise in terms of the Bill. The Minister may make regulations in respect of admission and enrolment.

3.10.2 Clause 25 provides that legal practitioners may practise throughout the Republic and that all legal practitioners have a right to appear on behalf of any person in the Republic. This provision unconditionally abolishes the current discrimination on the right of appearance in the High Court, between advocates and attorneys.

3.10.3 Clause 26 provides for the minimum qualifications and practical vocational training that a person needs, in order to be admitted and enrolled as a legal practitioners.

3.10.4 In terms of clause 27 the Council makes rules in respect of conditions and procedures for the registration of practical vocational training requirements and in terms of clause 28 the Council makes rules for the procedure pertaining to assessment of practical vocational training.

3.11 Clause 29: Prescription of community service

3.11.1 Clause 29(1) provides that the Minister may, after consultation with the Council, prescribe the requirements for community service. Community service may be a component of practical vocational training or a minimum period of recurring service by

practising legal practitioners upon which continued registration as a legal practitioner is required.

3.11.2 In terms of clause 29(2), "community service", may, among others, include the delivery of free legal services to the public, the provision of training on behalf of the Council, service as a judicial officer and service in the small claims courts, and service to the State.

3.12 Clauses 30 to 32: Registration, cancellation and suspension of registration and conversion of registration of legal practitioners

3.12.1 Clause 30 deals with the registration of legal practitioners with the Council. All legal practitioners who are admitted by the court must be registered with the Council. The Council must keep a Roll of Legal Practitioners (Roll). The purpose of the Roll is to reflect the particulars of practising and non-practising legal practitioners.

3.12.2 In terms of clause 30(5), the Regional Councils play a role in the enrolment of legal practitioners, as the registrar of the High Court, where a legal practitioner has been admitted, must forward the details of the admission to the Council, through the Regional Council in question.

3.12.3 Clause 31 deals with the cancellation or suspension of registration of a legal practitioner. A legal practitioner may be suspended or have his registration cancelled if a High Court orders that the legal practitioner's name be struck off the Roll or that he or she be suspended from practice, or if the Council erroneously registered the legal practitioner.

3.12.4 Clause 32 deals with conversion of registration. A legal practitioner who has been registered as an attorney or advocate may convert his or her registration from that of an attorney to advocate and *vice versa*. The Council must make rules setting out the circumstances and criteria to be complied with when applying for a conversion of registration. The aim of this provision is to provide for an easier mechanism for legal practitioners to change direction in their careers, either as attorneys or advocates.

3.13 Clause 33: Authority to render legal services

Clause 33 provides that no person other than a legal practitioner may render legal services for reward, unless he or she is admitted and enrolled as a legal practitioner in terms of this Bill. A person contravening this provision is guilty of an offence.

3.14 Clause 34: Forms of legal practice

3.14.1 Clause 34(1) provides that an attorney may render legal services in expectation of a fee, commission, gain or reward directly from the public.

3.14.2 Clause 34(2) provides that an advocate may only render legal services in expectation of a fee upon receipt of a brief from an attorney. The current referral rule of practice, as applicable to advocates, is retained. The retention of this rule is considered to be in the public interest, as advocates do not hold Fidelity Fund certificates, which protects the public against the theft of money paid to a legal practitioner with a Fidelity Fund certificate.

3.14.3 A further provision has been included that an advocate may also render legal services in expectation of a fee, commission, gain or reward determined in accordance

with this Act or any other applicable law upon receipt of a request directly from a member of the public for that service: Provided that such request complies with the regulations.

3.14.4 Clause 34(4) provides that attorneys may either practise for their own account, in a commercial juristic entity with other attorneys, in a non-profit juristic entity, at Legal Aid South Africa, in a public interest legal centre, or as part of the State Attorney.

3.14.5 In terms of clause 34(5), advocates are precluded from practising in a partnership and may only practise—

- (a) for their own account and as such may not make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance or otherwise;
- (b) as part of a non-profit juristic entity established in terms of subsection (7);
- (c) as part of Legal Aid South Africa;
- (d) at a public interest legal centre; or
- (e) as a State Advocate.

3.15 Clause 35: Fee structure of legal practitioners, juristic entities and justice centres

Clause 35 provides that fees for legal services may be charged by legal practitioners (including juristic entities and Legal Aid South Africa) in accordance with the fee structure as determined in the rules by the Transitional Council and later by the Council or as may be determined in law. The importance, significance and complexity of the service rendered, the volume of work done, the financial implications of the matter and

professional expertise of the legal practitioner can be taken into account when the fee structure is put in place.

3.16 Clauses 36 to 45: Code of conduct and establishment of disciplinary bodies

3.16.1 Clause 36 requires the Council to draw up a code of conduct. In terms of clause 36(4) the code must be published in the *Gazette*. This provision supports the principle of transparency. Clause 36(3) states that the Council must publish the code to inform members of the public of the existence of the code. The Council must also publish the draft code of conduct for public comments before issuing it to legal practitioners.

3.16.2 Clause 37 deals with the establishment of disciplinary bodies. In terms of clause 37(1), each Regional Council must establish investigating committees to conduct investigations into complaints against legal practitioners. If this committee finds that the legal practitioner may be guilty of misconduct, then the matter is referred to a disciplinary committee for a full hearing. The purpose of the investigating committee is to obtain and consider evidence of alleged misconduct and to decide whether a full enquiry is warranted. In terms of clause 37(3), each Regional Council must, from time to time, establish disciplinary committees to adjudicate on matters referred to them.

3.16.3 Clause 37(4) provides for the composition of disciplinary bodies (in relation to both investigating committees and disciplinary committees). These bodies must be accessible to the public, must promote the efficient resolution of complaints and must be representative in respect of race, gender, national and regional demographics and include members of the public.

3.16.4 Clauses 37(5) and (6) provides for an appeal mechanism for legal practitioners aggrieved by an outcome of a disciplinary hearing, an appeal tribunal. In this regard such appeal tribunal must be prescribed.

3.16.5 Clause 37(7) provides that the Council may in the rules determine procedures to be followed by disciplinary bodies.

3.16.6 Clause 37(8) provides that where a complainant is aggrieved by the outcome of a complaint, he or she may lodge an application for a review with the Ombud. A legal practitioner has a right of appeal, which implies that the legal practitioner may challenge the facts presented at a hearing, whereas a complainant has a right of review with the Ombud, where only procedural matters relating to the hearing of a complaint and the outcome thereof may be challenged.

3.16.7 Clause 38 provides that complaints against legal practitioners, candidate legal practitioners and juristic entities (meaning the legal practice itself) must be lodged with the Regional Council having jurisdiction and must be dealt with in the manner and form determined in the rules by the Council.

3.16.8 Clause 39 sets out the provisions for the requirements of a disciplinary hearing, such as subpoenas, representation of the legal practitioner charged and the examination and cross examination of witnesses, among others.

3.16.9 In terms of clause 40, a disciplinary committee must, within 30 days after the conclusion of a disciplinary hearing, decide whether the legal practitioner is guilty of misconduct. The legal practitioner, candidate legal practitioner or representative of the

juristic entity must be informed of the outcome, if found guilty. Clause 40(3)(a) sets out the sanctions which a disciplinary committee may impose. These range from the payment of compensation to a complainant, the imposition of a fine, temporary suspension or advising the Council to apply for the striking off of a legal practitioner or other appropriate relief. It is important to note that the Council applies to court for the striking off of a legal practitioner.

3.16.10 Clause 41 sets out the powers of the Ombud when he or she reviews a matter at the request of a complainant. A hearing on review must be done in accordance with the procedure determined by the Ombud. A late filing of a review may be condoned. The Ombud may confirm the findings of a disciplinary committee, set aside the findings if the procedure was substantially unfair, or, if there has been an unreasonable delay on the part of the disciplinary body, substitute the decision of the disciplinary body for his or her own decision. Where the outcome of a disciplinary hearing is taken on review, the Ombud may confirm the outcome or substitute the decision of a disciplinary body if there was a substantial miscarriage of justice.

3.16.11 Clause 42 deals with appeals, which must be done in the manner prescribed in regulations.

3.16.12 Clause 43 sets out the further role of the Ombud which is to monitor the investigation of a complaint and the conduct of a disciplinary body during a hearing.

3.16.13- Clause 44 provides that the Council may apply to court for the suspension of a legal practitioner where there is evidence that he or she misappropriated trust money or is guilty of other serious misconduct.

3.16.14 In terms of clause 45, the High Court retains the ultimate power to adjudicate upon matters relating to the conduct of legal practitioners.

3.16.15 The clauses regarding disciplinary matters relating to legal practitioners are transformational in that the current regime does not provide for the oversight of disciplinary matters relating to legal practitioners, by an independent body, except through a court process. The clauses relating to the oversight role of the Ombud provide for greater accountability on the part of the legal profession to the public.

3.17 Clauses 46 to 53: Legal Services Ombud

3.17.1 Clause 46 establishes the Office of Legal Services Ombud.

3.17.2 The objects of the Ombud, which are set out in clause 47, are, among others, to protect and promote the public interest, ensure the fair, efficient and effective investigation of complaints and promote the independence of the legal profession.

3.17.3 In terms of clause 48 the Ombud must be a South African citizen, a fit and proper person, with an accumulative period of at 10 years in the administration of justice, the law and legal profession. The Ombud is independent and subject only to the Constitution and the law. No person may interfere with the functioning of the Ombud.

3.17.4 Clause 49 sets out the powers and functions of the Ombud. Apart from the matters relating to discipline, the Ombud may make recommendations to the Council on any matter which he or she considers may affect the integrity of the legal profession. In terms of clause 49(1)(b), the Ombud may of his or her own accord or on receipt of a

complaint, investigate the alleged failure of the Council or Regional Council to effectively deal with a complaint. The Ombud may, in such an instance, report and make recommendations to the Minister on the failure on the part of the Council or Regional Council. The Ombud may also review a decision of the Attorneys Fidelity Fund Board in respect of a rejection of a claim arising out of theft of trust money.

3.17.5 The other clauses relating to the Ombud deal with operational matters, such as staff and remuneration, among others. Clause 52(6) provides that the expenditure of the Ombud will be defrayed from money appropriated by Parliament. In terms of clause 52(14) the Office commences to function as from a date fixed by the Minister by notice in the *Gazette*. Before this date the necessary arrangements must be made for the Office to be accommodated, equipped and staffed.

3.17.6 Clause 53 provides that the office of the Ombud must prepare and submit to the Minister, an annual report containing the audited financial statements, the auditor's report and a statement on its activities during the year. The Minister must table the report in Parliament.

3.18 Clauses 54 to 83: Attorneys Fidelity Fund

3.18.1 Chapter 6 of the Bill deals with the Attorneys Fidelity Fund (the Fund). The provisions of this Chapter largely replicate the current dispensation in the Attorneys Act, 1979 (Act No.53 of 1979).

3.18.2 Clause 54 provides for the continued existence of the Attorneys Fidelity Fund established by the Attorneys Act. All rights, liabilities and obligations which vest in the current Attorneys Fidelity Fund will vest in the Fund created in the Bill.

3.18.3 Clause 55 deals with the revenue of the Fund, which is essentially from interest earned in trust accounts of attorneys, investments and money received from insurers.

3.18.4 Clause 56 sets out the liability of the Fund. The Fund is liable to reimburse persons who suffer loss as a result of theft of any money or other property given in trust to an attorney. Clause 57 sets out the circumstances under which the liability of the Fund is limited. For instance, clause 57(1)(a) provides that a family member or member of the household of an attorney found guilty of theft, cannot claim reimbursement from the Fund. Also, in terms of clause 57(1)(d), a person who received notice from the Council or the Board against the continued use of the services of a practice found guilty of theft, may not claim against the Fund when that person becomes a victim of theft by that practice.

3.18.5 Clause 58 regulates the purpose and application of the Fund. The Fund may be utilised for meeting its liabilities, paying the operating costs of the Board and the Fund and paying the costs incurred in investigating and establishing the validity of claims referred to in clause 56, among others. It is also to be noted that the Fund contributes toward the expenses of the Council.

3.18.6 Clauses 62 to 83 deal with the establishment of a Board to manage and administer the Fund, and claims against the Fund. These clauses relate to operational matters. In terms of clause 63, the Board is composed of five legal practitioners nominated by the Council, two persons nominated by the Council who have expertise in the field of finance and two fit and proper persons nominated by the Minister.

3.18.7 Clause 74 to 77 provides that every attorney must pay to the Fund annually an amount required for professional indemnity insurance, re-insurance, insurance cover and suretyship.

3.18.8 Clause 78 provides that no person may claim against the Fund unless notice of the claim is given to the Board and the Council within three months after the claimant became aware of the theft or within six months of the Board having sent a written demand to him or her. The Board may, in its discretion extend these periods.

3.19 Clauses 84 to 91: Handling of trust monies and trust accounts

3.19.1 These clauses deal with handling of trust monies and are only applicable to attorneys. In terms of clause 84, every attorney who practises for his or her own account or as a director and who receives or holds money or property belonging to any person must be in possession of a Fidelity Fund certificate. Any person who contravenes this clause is guilty of an offence and is liable on conviction to a fine, or striking off, among others. This clause does not apply to attorneys who practice in the full time employ of the State.

3.19.2 Clause 85 provides for the application by an attorney of a Fidelity Fund certificate, which is determined in the rules by Council. In terms of clause 85(5), the Council may exempt categories of attorneys from paying the annual fee for a certificate.

3.19.3 Clause 86 requires attorneys to open and operate trust accounts. Money held on account of anybody must be deposited in the bank as soon as possible after receipt

thereof. Money may, on the instruction of any person, be held in a separate trust account. In instances where money is held in a trust account, the interest earned in those accounts must be paid over to the Fidelity Fund.

3.19.4 Clauses 87 to 91 deal with technical provisions relating to trust accounts and are virtually the same as the current regime relating to the keeping of trust accounts in the Attorneys Act. These provisions have been retained as they protect the interests of the public.

3.20 Clauses 92 and 93: General provisions

3.20.1 Clause 92 provides for the recovery of costs by attorneys rendering free legal services.

3.20.2 Clause 93 provides for offences and penalties. A practice may not employ a person who has been suspended or struck off the Roll, while that person remains suspended or struck off, without the consent of the Council. A contravention of this provision renders a person guilty of an offence and liable to a fine or imprisonment not exceeding one year.

3.21 Clauses 94 and 95: Regulations and Rules

3.21.1 Clause 94 sets out the matters in respect of which the Minister may make regulations.

3.21.2 Clause 95 sets out the matters in respect of which rules may, or where required in the circumstances, must, be made by Council.

3.22 Clauses 96 to 119: Transitional provisions

3.22.1 As already indicated the transitional provisions are extensive and seek to cater for all matters that may arise in regard to the regulation of legal practitioners under the new dispensation during the transition from the current regime to the new one. Clause 96 provides for the establishment of the Transitional South African Legal Practice Council (Transitional Council) as a body corporate with full legal capacity.

3.22.2 The Transitional Council comprises all the current statutory bodies and voluntary associations in the legal profession and the Minister, law teachers at universities and Legal Aid South Africa should designate other councillors.

3.22.3 The Transitional Council is made up of a majority of legal practitioners, namely 16 in total. In constituting the Transitional Council regard must be had to the terms of reference of the Transitional Council and representivity. The duration of the Transitional Council is three years.

3.22.4 Clause 97 provides extensively for the terms of reference of the Transitional Council. It must, within 24 months after the commencement of this Chapter, make recommendations to the Minister on the following:

- (i) an election procedure for purposes of constituting the first Council;
- (ii) the establishment of the first Regional Councils and their areas of jurisdiction;
- (iii) the powers and functions of the first Regional Councils;
- (iv) the manner in which the first Regional Councils must be elected;

- (v) all the practical vocational training requirements candidate attorneys or pupils must comply with before they can be admitted by the court as a legal practitioner;
- (vi) fees chargeable by legal practitioners;
- (vii) the right of appearance of a candidate legal practitioner in court or any other institution;
- (viii) a mechanism to wind up the affairs of the Transitional Council; and
- (ix) all the requirements necessary for the implementation of compulsory post-qualification professional development.

3.22.5 Clause 97(2) provides for negotiations between the Transitional Council and the legal profession in respect of the transfer of assets, rights, liabilities obligations and staff of existing law societies to the Council or Regional Councils. Section 197 of the Labour Relations Act, 1995 (Act No.66 of 1995), has also been brought in to ensure the protection of the existing labour law rights of any staff that may be affected by the transfer. These negotiations and agreement on the transfer must occur within 24 months of the commencement of the chapter. The Minister may extend this period, if necessary.

3.22.6 Clauses 98 to 107 provide for the powers and functions of the Transitional Council and other organisational and operational matters in similar fashion to the same provisions relating to the Council.

3.22.7 Clause 107 provides that the funds of the Transitional Council consist of—

- (a) money appropriated by Parliament; and
- (b) any other monies received by the Transitional Council or accruing to the Transitional Council from any other source, including disbursements made by existing law societies as may be agreed upon.

3.22.8 Clause 107(3) provides that out-of-pocket expenses incurred by members of the Transitional Council in exercising their powers or carrying out their powers and functions under this Chapter are borne by the body which or person who, nominated, elected or appointed that member.

3.22.9 Clause 108(1) provides that the Minister must, within 6 months after receiving recommendations from the Transitional Council as provided for in section 97, make regulations, in consultation with the Transitional Council, in order to give effect to the recommendations of the Transitional Council as contemplated in section 97. Should the Transitional Council fail to make recommendations within the timeframe set, the Minister is empowered to make regulations as required, after consultation with the Transitional Council.

3.22.10 In addition, the Transitional Council must prepare and publish a code of conduct, and make a number of rules, as set out in clause 108(2), also within the 24 month period referred to above. On receipt of the recommendations of the Transitional Council, the Minister must make regulations on the issues in question.

3.22.11 Clause 109 deals with the abolition of Fidelity Funds of the former TBVC States, to the extent to which they still exist, and the transfer of their assets, rights, liabilities and obligations to the Attorneys Fidelity Fund.

3.22.12 Clause 110 contains transitional provisions in relation to the Board of Control of the Attorneys Fidelity Fund established by the Attorneys Act, and the corresponding Acts of the former Bophuthatswana and Venda referred to above. When the Board of the Fund

is created in terms of the Bill, all assets, rights and liabilities of the existing Boards of Control will vest in the Board created in terms of the Bill.

3.22.13 Clause 111 deals with transitional provisions in relation to qualifications. This clause recognises degrees and training courses in existence.

3.22.14 Clause 112 provides that attorneys, who are not in possession of a Fidelity Fund certificate at the date of commencement of the Bill, must apply for one within 60 days in terms of the Bill.

3.22.15 Clause 113 provides that the names of all existing attorneys and advocates whose names appears on the relevant existing rolls, must be regarded as having been unconditionally admitted to practise and authorised to be enrolled as legal practitioners under the Bill, subject to any court order suspending them from practice.

3.22.16 Clause 115 regulates pending proceedings, the interpretation of certain references and the repeal of existing provisions as required by this Bill. On the repeal of the existing laws, it is important to note that clause 118(1) keeps these laws intact and operational until virtually all the transitional arrangements have been implemented.

3.22.17 Clause 119 contains the commencement dates. The Bill will be put into operation incrementally. Clause 119(2) provides that Chapter 10, which contains the provisions regarding the Transitional Council, comes into operation on a date fixed by the President by proclamation in the *Gazette*. Clause 119(3) provides that Chapter 2 comes into operation three years after the date of commencement of Chapter 10 or on any earlier date fixed by the President by proclamation in the *Gazette*. Clause 119(4) provides that

the remaining provisions of this Act come into operation on a date, after the commencement of Chapter 2, fixed by the President by proclamation in the *Gazette*.

4. PARTIES CONSULTED

4.1 The process of consultation on the Bill was extensive and lengthy. The legal profession represented by the Law Society of South Africa, the General Council of the Bar, the Independent Advocates Association of South Africa and the National Forum of Advocates were consulted. Organisations representing paralegals were also consulted, namely the National Alliance of Advice Offices.

5. FINANCIAL IMPLICATIONS FOR STATE

5.1 The legal profession will be responsible for the costs arising out of the implementation of the Bill, with the exception of the implementation of Chapter 5 dealing with the establishment of an Office of Legal Services Ombud. The implementation of this Chapter will have financial implications for the State. However, clause 52(14) provides that this Office will only commence with its operations as from a date fixed by the Minister in the *Gazette*, before which the necessary arrangements will be made for it to be accommodated, equipped and staffed. This will allow the Office to be established when funds become available.

5.2 The Transitional Council will be funded mainly from monies defrayed from the budget vote of the Department of Justice and Constitutional Development.

6. IMPLEMENTATION PLAN

Implementation of the envisaged changes will be done incrementally. With regard to the establishment of a single regulatory framework under a national Legal Practice Council the approach is to establish a Transitional Council that will manage the transition. Other

operational aspects will be provided for by way of regulations, rules or other subordinate legislative measures. The detailed transitional provisions of the Bill seek to ensure a smooth transition to the new dispensation. The Transitional Council, in terms of clause 96(3), will be in existence for a period of three years from the date of commencement of Chapter 10 of the Bill.

7. PARLIAMENTARY PROCEDURE

7.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.