



26 May 2011

Via e-mail [L.Bassett@justice.gov.za](mailto:L.Bassett@justice.gov.za)

Mr L Bassett  
Department of Justice and Constitutional Development  
Pretoria

Dear Mr Bassett

#### **REPRESENTATIONS: LEGAL PRACTICE BILL**

We attach hereto the submissions by the Law Society of South Africa (LSSA) on the most recent version of the Legal Practice Bill (version headed "5: Copy of Legal Practice Bill as changed by Wilma and Lawrence"). These submissions are made as a matter of urgency, the LSSA having been given very limited time to furnish its submissions. The LSSA does not consider that there has been proper consultation with regard to what is proposed to be put before Parliament and reserves the right at an appropriate time to make further submissions and representations in relation to the Bill.

Yours faithfully

A handwritten signature in cursive script, appearing to read "Lizette Burger".

**Lizette Burger**  
**Professional Affairs Manager**

Tel: +27 (0)12 366 8800

Fax: +27 (0) 86 674 6533

E-mail: [lizette@lssa.org.za](mailto:lizette@lssa.org.za)

The Law Society of South Africa brings together the Black Lawyers Association, the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the National Association of Democratic Lawyers in representing the attorneys' profession in South Africa.

# LEGAL PRACTICE BILL

## SUBMISSIONS BY LAW SOCIETY OF SOUTH AFRICA (LSSA)

### 1. CONVEYANCER

Amend the definition of "conveyancer" in **Section 1** as follows:

**"conveyancer"** means a **practising attorney** who is registered and enrolled to practise as a conveyancer in terms of this Act;

Motivation: The conveyancing qualification is a specialist qualification acquired by an attorney, and it does not stand alone. A person wishing to practise as a conveyancer must first qualify as an attorney, hence the proposed amendment of the definition to refer to a practising attorney - compare the definitions of "*patent attorney*" and "*trademark attorney*", which are properly defined.

### 2. LEGAL SERVICES

Insert a definition of "legal services" in **Section 1**:

**"legal services"** in relation to legal practitioners means the provision of advice or assistance to the public relating to the enforcement, protection or interpretation of legal rights or obligations and which is not provided purely incidentally to the provision of other advice or assistance, and includes the appearance in court on behalf of members of the public.

Motivation: There is no definition of "*legal services*". This omission has far-reaching consequences in relation to work reserved for legal practitioners (see section 35).

### 3. NOTARY

Amend the definition of "notary" in **Section 1** as follows:

“notary” means a practising attorney who is registered and enrolled to practise as a notary in terms of this Act;

Motivation: The same comments apply here as relate to the definition of “conveyancer”.

#### 4. OBJECTS, POWERS, DUTIES AND FUNCTIONS OF COUNCIL IN TERMS OF EDUCATION

- i. The Council must have the power to determine that certain forms of education and training will be mandatory.
- ii. The Council must have the power to determine the provision, accreditation and monitoring of legal education and training of the profession.
- iii. Although the Bill includes an enabling clause, the LSSA has resolved that Mandatory Continuing Professional Development (MCPD) should be implemented as expeditiously as possible and that the Bill must specifically provide for MCPD in order to avoid any delays in implementation.

4.1 Amend **Section 5** (objects of Council) to read as follows:

(h) promote high standards of legal education and training and post-qualification continuing professional development;

Motivation: The LSSA wishes to ensure that the Council has the power to require practitioners to undergo mandatory post-qualification continuing professional development.

4.2 Amend **Section 6(1)** (powers, duties and functions of Council) to read as follows:

(n) provide financial support to organisations or institutions providing legal education and training, including legal education and training for purposes of post-qualification continuing professional development, with the object of enhancing the standards of legal services and increasing access to justice;

Motivation: It is proposed that the subsection be expanded to incorporate the funding of legal education and training for purposes of post-qualification continuing professional development.

4.3 Amend **Section 6(5)** (powers, duties and functions of Council) to read as follows:

(e) may determine, after consultation with relevant roleplayers and legal practitioners in general, conditions relating to the nature and extent of continuing education and training, including mandatory post-qualification continuing professional development;

Motivation: The amendment is intended to empower the Council to determine the conditions for mandatory post-qualification continuing professional development. The power of the Council should include determining conditions for vocational and practice management training.

4.4 Insert the following **Section 6(5)(ga)**:

(ga) may accredit persons, organisations and institutions which provide legal education and training for purposes of post-qualification continuing professional development of practitioners;

Motivation: The proposed amendment empowers the Council to accredit persons, organisations and institutions which provide legal education and training for purposes of post-qualification continuing professional development.

## 5. REGULATION IN TERMS OF FEES

Guidance in terms of fees must be a regulatory function of the Legal Practice Council. Amend **Section 6** accordingly.

## 6. COMPOSITION OF COUNCIL

6.1 Amend **Section 7(1)(a)** as follows:

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

(a) 16 legal practitioners, comprising of **twelve** practising attorneys and **four** practising advocates, elected in accordance with a procedure as may, on the advice of –

(i) the Transitional Council for purposes of the election of the first Council; or

(ii) the Council after the date referred to in section 121(4), as may be required from time to time, be prescribed by the Minister;

Motivation: The LSSA proposes that of the 16 legal practitioners elected to the Council, twelve should be practising attorneys and four should be practising advocates. This is representative of the corresponding numbers of attorneys and advocates in practice.

6.2 Amend **Section 7(1)(c)** as follows:

(c) **one** fit and proper **person** appointed 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;

Motivation: The LSSA proposes that there should be only one fit and proper person appointed by the Minister to assist the Council.

- 6.3 The position of Legal Aid South Africa should not be entrenched - Delete **Section 7(1)(e)**

Motivation: Legal Aid practitioners are legal practitioners like all others and should not be treated differently.

## 7. REGIONAL LEVEL OF GOVERNANCE

- 7.1 The LSSA is of the view that the Regional Councils should have the following functions, and that these should be listed in the Act. It is suggested that **Section 26(3)** be amended accordingly:

- Administration and monitoring of articles of clerkship
- Training, examinations and admissions
- Monitoring of trust accounts, audits, Fidelity Fund certificates
- Discipline
- Suspensions and strikings from the roll of legal practitioners
- *Pro bono* / community service
- Assessment of attorneys' fees.

- 7.2 Add the following proviso to **Section 26(3)(b)**:

**provided that a Regional Council shall have no powers or authorities other than those which may be delegated to it from time to time by the Transitional Council or the Council, as the case may be.**

Motivation: The proviso has been added to emphasise that a regional council will have no original powers, but only those powers delegated to it by the Transitional Council or the Council.

7.3 Regarding the regional level of governance, see Annexure "A".

## 8. VOLUNTARY ASSOCIATIONS

No powers must be delegated to Voluntary Associations - Delete Section 27(3).

Motivation: The LSSA proposes that section 27(3) be deleted. While the Council can request the voluntary associations to assist it in the performance of its duties, it should not have the right to delegate any of its powers to voluntary associations.

## 9. AUTHORITY TO RENDER LEGAL SERVICES

Replace Section 35 with the following:

- (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 the expectation of any fee, commission, gain or reward, direct or indirect -
  - (a) appear in any court of law or tribunal in which only practitioners are entitled to appear; or
  - (b) draw up or execute any instrument or document 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, direct or indirect, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer, notary, patent attorney or trade mark attorney unless that

person is an advocate, attorney, conveyancer, notary, patent attorney or trade mark attorney, as the case may be.

- (4) A legal practitioner who is struck off the Roll or suspended from practice may not—
- (a) render legal 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 may be given in exceptional circumstances and on such terms and conditions as the Council may determine.
- (3) 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.

Motivation: The provisions of the section dealing with the reservation of work for legal practitioners have been clarified.

In section 35(4)(b) it must be clear that a legal practitioner who has been struck off the roll or suspended from practice may not be employed or engaged in a legal practice.

## 10. FUNDING

10.1 The governing structures should be funded directly from collection commission earned on interest paid over to the Fidelity Fund.

10.2 Amend the Section 58 to read as follows:

**58.** The Fund is liable to reimburse persons who suffer pecuniary loss 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 an attorney as such whenever the theft is committed by an attorney in that practice, or any person employed by that practice or supervised by that attorney, including where that attorney or person is acting as executor or



administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity, 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).

Motivation: It must be made clear that the Fund is liable to reimburse persons who suffer pecuniary loss as a result of theft of money or other property given in trust to a trust account practice only if the entrustment occurs in the course of a practice of an attorney as such. This concept has been interpreted by the courts on many occasions and is well understood. If the limitation is not imposed it would have the effect of extending greatly the exposure of the Fund to theft of money not entrusted to an attorney but paid to him in another capacity.

10.3 Amend **Section 59(7)** as follows:

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

Motivation: The cross reference to subsection 4 should be a cross-reference to subsection 5.

10.4 Amend **Section 60(g)** as follows:

(g) paying premiums in respect of contracts of insurance entered into in terms of sections 78 and 79;

Motivation: In subsection 60(g) the authority to pay premiums should refer to contracts of insurance entered into in terms of section 78 as well as section 79.

10.5 Substitute **Section 60(j)** by the following:

*(j)* making an annual appropriation to the Council in terms of subsection 24(1)(b);

Motivation: The subsection has been amended to refer to the annual appropriation of funds by the Fund to the Council in terms of subsection 24(1)(b).

10.6 The cross-reference in **Section 60(m)** should presumably be to Section 58.

## 11. INVESTMENT OF TRUST MONIES

Replace **Section 88(5)** with the following:

- (5) Interest accrued on money deposited in terms of this section must, in the case of money deposited in terms of -
- (a) subsections (2) and (3)(b) be paid over to the Fund;
  - (b) subsection (4)(a), be paid over to the person referred to in that subsection.

Motivation: In terms of this section interest earned on all trust accounts by attorneys will be payable to the Attorneys Fidelity Fund. This will include accounts opened by an attorney on the instructions of a person who is involved in a transaction.

This provision would have serious and far-reaching implications for the clients of attorneys, and other members of the public particularly in relation to conveyancing transactions. It is a very common practice for purchasers of properties to be required to pay deposits, and amounts in respect of costs and transfer duty, to an attorney, to be held in a trust account pending the finalisation of the transaction. These amounts frequently run to several hundred thousand rand,

and may be held for lengthy periods before the transfer has been completed. Section 88(5) of the Bill in its current form would make serious inroads into the right of a member of the public to earn interest on his money pending the finalisation of the transaction and would materially disrupt a convention relating to the transfer of immovable property which has existed for decades.

Furthermore, if all interest on the client's investment were to accrue to the Fund, the client would be discouraged and would probably refuse to pay the amount to the attorney and would prefer to leave it with the bank in an interest bearing account and have a bank guarantee issued. The effect of this would be that the Fund would be deprived of the "general" interest on the amount paid to the attorney's trust account for purposes of investment – it may only be for one day, but cumulatively it would amount to a huge loss.

## 12. TRANSITIONAL SOUTH AFRICAN LEGAL PRACTICE COUNCIL

### 12.1 Composition

Amend Section 99(1)(a)(i) as follows:

- (a) 16 legal practitioners, namely —
  - (i) **twelve** attorneys nominated by the Law Society of South Africa, **(details of representation to be provided)**
  - (ii) **[Details of representation to be provided: the ratio between attorneys and advocates should be 75: 25].**

Motivation: The LSSA proposes, as it has proposed for the composition of the Council itself, the representation of legal practitioners on the Transitional Council should be in the ratio of 75:25 as between attorneys and advocates. The LSSA proposes, as it has proposed for the composition of the Council itself, the representation of legal practitioners on the Transitional Council should be in the ratio of 75:25 as between attorneys and advocates. The make-up of each component's representation will have to be determined.

## 12.2 Transitional period

Replace **Section 100** with:

**100.** The Transitional Council must, within 18 months after the commencement of this Chapter **or within such further period, not exceeding 18 months, as the Minister upon the recommendation of the Transitional Council may determine –**

Motivation: The LSSA proposes that the Minister may extend the life of the Transitional Council for a further 18 months on the recommendation of the Transitional Council.

## 12.3 Terms of reference of Transitional Council

Insert a **Section 100(a)(ix)**:

**(ix) all the requirements for the implementation of mandatory post-qualification continuing professional development of practitioners;**

Motivation: The LSSA is anxious that it be granted the power as soon as possible to implement mandatory post qualification continuing professional development. It is proposed that the Transitional Council be given the authority to implement compulsory continuing professional development at an early date.

## 13. LEGAL PRACTICE SOCIETY

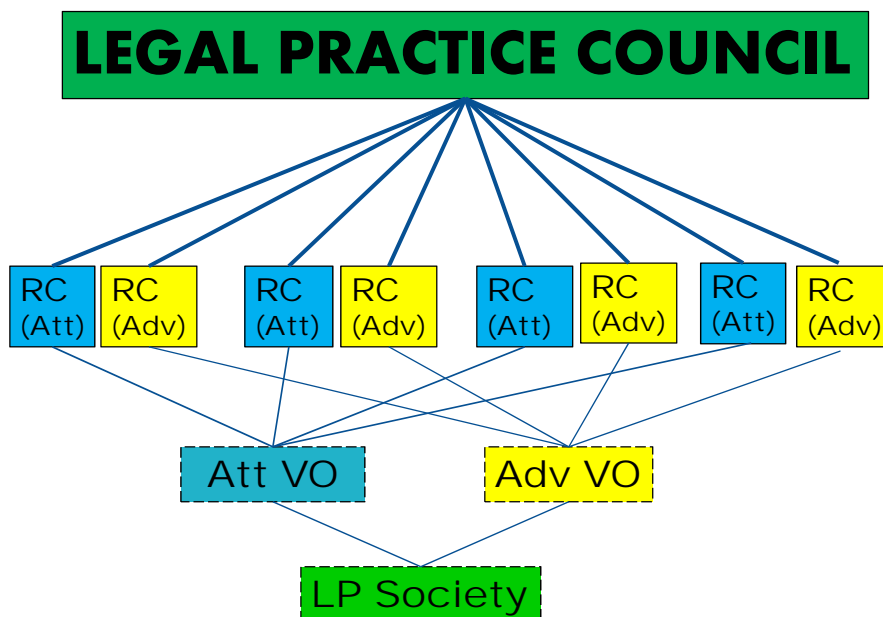
In the LSSA draft Bill submitted during November 2011, provision was made for a **Legal Practice Society**. The LSSA is of the view that the Act should make provision for such society, with the functions as set out in the November 2011 submissions.

## ANNEXURE "A"

The LSSA proposes two alternative approaches to governance at the regional level. The first (Model A) is that regional councils must represent attorneys and advocates, and this is what the existing draft provides for. The effect of the draft Bill is that the Council, through regional councils, will regulate both attorneys and advocates in a unified structure.

An alternative form of governance (Model B) may be considered whereby the structure of the legal profession be split at regional level, leading to attorneys and advocates being separately regulated. This structure would enable the interests of the respective branches of the profession, to the extent that they differ, to be represented separately. Each branch would, however, be answerable to, and be subject to the overall regulatory authority of the Council.

### PROPOSED GOVERNING STRUCTURE – MODEL B:



1. Attorneys and Advocates should be granted delegated authority from the National Legal Practice Council (NLPC) to regulate themselves separately at regional level.

2. In each region, there should be an Attorneys Chamber and an Advocates Chamber, which should be statutory bodies serving the same geographical area, linked and accountable to the NLPC.
3. Provision should be made for interaction and co-operation of the 2 Chambers in a region, to deal with issues of mutual concern. For example, the Rules can provide for representation of Advocates on the disciplinary committees of the Attorneys and *vice versa*.
4. The functions to be delegated from the NLPC to the Regional Chambers, should be specified in the Act and should include all administrative functions that can be dealt with more effectively at regional level, including:
  - 4.1 Registration and monitoring of articles of clerkship
  - 4.2 Training, examinations and admissions
  - 4.3 Discipline in terms of a Code of Conduct and Rules applicable on a national basis, as determined by the Transitional Council (TC) and the NLPC.
  - 4.4 Monitoring of trust accounts, audits, Fidelity Fund certificates
  - 4.5 Suspensions and strikings from the roll of LPs
  - 4.6 The administration of Pro Bono work.
5. The NLPC should have the right to add or withdraw functions delegated to a Regional Chamber.
6. Voluntary associations should not be accredited to perform any administrative functions.
7. Policy issues, Codes of Conduct, Rules and issues of national concern should remain the prerogative of the NLPC.
8. All Legal Practitioners (LPs) should register and pay subscriptions to the NLPC, who should maintain the roll of LPs, including Notaries, Conveyancers, non-practising LPs, as well as Candidate Attorneys and Pupils.
9. All Attorneys practicing within the jurisdictional area of an Attorneys Regional Chamber, should be subject to the delegated authority of that Chamber. All Advocates practicing within the jurisdictional area of an Advocates Regional Chamber, should be subject to the delegated authority of that Chamber.

10. The number of regions, their geographical areas of jurisdiction, the composition of the Chamber's Council and the election of the Councillors of the Regional Chambers, should be determined by the TC and be subject to amendment by the NLPC.
11. All the Regional Chambers can combine to form a voluntary association (Society?) without regulatory powers, which can promote the interests of the Attorneys (the so-called trade union function). The same should apply to the Advocates. **This concept needs to be developed further** and need not be dealt with in the Act, but the Regional Chambers of the Attorneys and the Advocates could form 2 voluntary associations that can appoint or elect their representatives on the NLPC. The 2 voluntary associations can combine to form a Legal Practice Society.
12. Each Regional Chamber should be funded from funds provided by the NLPC, as well as fines imposed by its disciplinary committees and administrative fees charged to LP's.