



THE LEGAL PRACTICE BILL, 2012

PRESENTATION TO THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT

**DEPARTMENT OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

June 2012

OVERVIEW OF THE PRESENTATION

1. The nature of the Legal Profession
 - who constitute the profession in South Africa and those who have a stake in it
2. The transformation of the Legal Profession as:
 - a constitutional imperative
 - part of the transformation trajectory of the entire judicial sector
3. Consultation with the Legal Profession in the policy discourse and drafting
4. Opportunity for the participation of the customers of legal services in the profession that affect their livelihoods



5. The main topical themes of the Bill
 - 5.1 The rule of law
 - 5.2 The independence of the profession and the judiciary

6. Taking the process forward
 - 6.1 Transitional phase
 - 6.2 End state



The nature of the Legal Profession

- ❑ The Legal Profession has always been a tightly regulated profession – because it operates in an overly regulated space. What to do, how to do it and when to do it, is regulated by different forms of legislation/prescripts, including Admission of Advocates Act, Attorneys Act, rules of court made by the Rules Board and approved by the Minister, Practice Directives by JP's, rules made by the Bars and Law Societies. Therefore different role players, including Government will always have a say on how people who ply their trade at the courts – including advocates and attorneys conduct their trade in a public space which must guarantee access to justice for all. The independence of the profession explained later on must be seen against this background. The legal profession does not operate in its own space, but operates in a space where all people, rich and poor, converge in pursuit of justice. The Minister and Government role must be seen in this context



The nature of the Legal Profession

- ❑ Advocates and attorneys are different in many respects and are similar in some:
 - they belong to different regulatory bodies, some statutorily entrenched some voluntary
 - They undergo different vocational training programmes, compulsory to some, voluntary to others – yet important to all
 - they prefer different names, title and status, (some entitling the bearers thereof to higher fees for the same service)
 - they charge different fees and use different methods to recover the fees, attorneys directly from clients, some advocates through attorneys, some advocates through direct charges

yet:

- they have similar academic qualifications
- they appear in the same courts
- they represent the same people before same judges and magistrates
- contribute to the same jurisprudence



The nature of the Legal Profession

- they draw their fees from the same customers, who in the case of service of both attorney and advocate pay twice for the service of one – contrary to a known marketing ploy of buying two for the price of one
- From the perspective of the customer, whether individual or the state, the most onerous and burdensome obligation is the price they pay for a service apportioned to many practitioners in circumstances where service of one would suffice. The Bill seeks to ameliorate this burden by providing for regulations where a brief may be taken by an advocate directly from a client (clause 34) which regulations must be made on the advice of the profession
- The Minister's or Government's interest in the governance scheme of the profession is to safeguard public interest



Who constitute the legal profession in South Africa

- ❑ The profession is constituted by
- ❑ From our records there are approximately 4 762 advocates are enrolled of just over 2000 are affiliated to the GCB through its constituent Bars, just below a 1000 practice through the Independent Bars and the others practice in the public and private sector (as prosecutors or legal advisers)
- ❑ The gender and racial demographics are as follows:
 - 3220 are males
 - 1465 are females
 - 2470 are White
 - Just less than 2000 are Black



Who constitute the legal profession in South Africa

- An estimated 20 000 attorneys who practise through the law societies which, unlike the Bars, are creatures of statutes. 13 000 are White, African 4006, Coloured 270 Indians 2424. Attorneys are allowed to practise as joint business adventures, commonly through partnerships. The big law firms are in the cities and affluent towns while one-man practices are in the outskirts and rural areas. About 7000 of attorneys are Black and women constitute a lesser number (The LSSA will have accurate statistics, unlike advocates, the department is not required by law to keep a roll of attorneys).
- The Law Societies, like the High Courts, still mirror the defunct Self Governing States and RSA territory, there are still some Law Societies of the defunct Homelands, operating under the laws passed by the old Bantustans. Those who still argue for the retention of the current structures are arguing for the perpetuation of the old structures founded on the segregation policy which is against the grain of the Constitution



Who have a stake in the transformation and will be affected by the Bill

- The GCB and its constituent Bars
- The Independent Association of Advocates
- The Forum of South African Advocates
- The Law Society of South Africa and Law Societies
- Law Clinics at universities
- Legal Aid South Africa
- NPA
- State Attorneys
- Judiciary – which is sustained by the pool in the legal profession for judicial appointment
- Legal Advisers in the public and private sector
- Public Interest Institutions and legal companies
- Communities as customers of the legal services

Therefore a wide spectrum of interest groups are affected by the Bill
– and the dominant or loud voice or sentiments of one sector does not represent the views of all



Transformation of the Legal Profession as a constitutional imperative

- ❑ The Legal Profession constitutes part of the judicial machinery that provides services aimed at promoting access to justice.
- ❑ The constitutional imperative that requires the rationalisation of all legislation relevant to courts with a view to establishing a judicial system suited to the requirement of the Constitution contemplated in in the Constitution (Item 16(6) of Schedule 6) also applies to the legal profession. The Legal Profession's character and structure is premised on the courts and the rationalisation of the courts will inevitably impact on the profession
- ❑ Access to justice is one of the fundamental constitutional values, that the proposed legislation seeks to achieve



Transformation of the Profession as part of a broad constitutional discourse

- ❑ The reform of the Legal Profession constitutes part of a holistic transformation trajectory which constitutes a package of the transformation of the judicial system. Therefore the following transformative initiatives would impact on the initiatives envisaged by the Bill:
 - pursuit of a single judicial system including rationalisation of the courts envisaged by the Constitution Seventeenth Amendment Bill and the Superior Courts Bill
 - reform of the state legal services
 - the review of the civil justice system, including the rationalisation of the rules of courts regime
- ❑ **Consultation:** the 15 years odd gestation of the Bill was mainly due to the protracted consultation, started by the first Minister of Justice immediately after the advent of democracy by hosting an indaba which involved all formations of the legal profession. This is one missed opportunity in the Vision 2000



Consultation processes

- ❑ Different task teams worked on different Bills, some task teams led by the profession itself (the House may hear more about the Geoff Budlender Bill and the LSSA Bill). Subsequent task teams were formed, and at all times with participation and involvement of the profession
- ❑ Debates on the Bill took place in different fora (AGM's of the LSSA and GCB), some at which Minister Radebe played a leading role in the debate on the policy imperatives followed by panel discussions on different aspects of the Bill
- ❑ Several consultative workshops were held with all formations in the profession eg in April 2010 at the Emperor's Palace which was followed by several engagements with the management structures of the GCB and LSSA. Much has been said and written about in the long walk to Parliament. There is no theme that we may not have discussed along the way. Several trade-offs and concessions were made in the process



Consultation processes

- ❑ Concessions made include:
 - dropping the uniform name of legal practitioner and the retention of the names of attorney and advocate to retain the dual legal practice
 - a complete U-turn regarding the composition of the Council – moved from Minister’s appointees and adopted a mechanism that allows for the profession to nominate 16 legal practitioners of the 21-member Council, with the Minister appointing only three to represent public interest, and departure from a Minister’s nominee in the Council was a significant compromise
 - Abandoned the devolving assets to new regulatory structures to address perceptions of expropriation
- ❑ The Transitional Council is the biggest concession and ground breaking aspect by Minister Radebe – who had to re-seek Cabinet’s approval for a different Bill giving effect to this.



Opportunity for wider consultation

- ❑ The tabling of the Bill is a momentous occasion for us who have been involved in the negotiations – and that is it provide opportunity for customers of legal services to participate in the process that affect s their life in so many ways
- ❑ Already the Competition Commission has ruled that the determination of fees by practitioners (who are defined as competitors) to the exclusion of customers who pay for their services, was inconsistent with the competition laws and policies. The Transitional phase in the Bill has given the profession a life wire to proactively revise the fee determination mechanism.



Topical themes that will dominate the debate

- ❑ The introduction of the Bill was met with headlines that suggest that the Bill offends against the rule of law and compromises the independence of the profession by providing state control and interfering with the current fees structure which is working well. Nothing is said about the value in entrenching legal community service which has had resounding success in the medical fraternity and the Institution of an Ombud which is an established feature in the insurance and banking industries, for example. Thousands of cases that would otherwise further clog the courts are resolved by these institutions and the legal profession has welcomed this arrangement which will strengthen accountability in a profession where this aspect has not always been visible
- ❑ We do not find anything opposed to law, on the contrary we believe the Bill will strengthen the rule of law



The Independence of the Profession

- ❑ Not only is the independence of the profession, which is not synonymous with the constitutionally entrenched independence of the judiciary, but seeks to guard it, said in so many words in the Bill, but it permeates the Bill
- ❑ The Bill gives effect to the IBA General Principles for the Legal Profession which not only promote the independence of the profession – but place the interest of the clients above all other interests
- ❑ The non state participation in the Council enhances independence - we could have insisted on the precedent in similar institutions (Allied Health Professions Council of South Africa has a DoH designate, and all members are appointed by the Minister); In South Australia the Attorney-General, who has executive responsibility, is part of the Legal Society)



- We believe that the transitional phase under Parliamentary oversight, is the best approach to advance the transformation of the complex legal profession. It leaves the destiny of the noble profession largely in the hands of the profession itself



THANK YOU

Questions/Comments



the doj & cd

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