

TASK TEAM ON THE DRAFT LEGAL PRACTICE BILL

REPORT BY THE CHAIRPERSON TO THE MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT

- 1 On 20 April 2002 you appointed a Task Team to prepare a draft Legal Practice Bill for your consideration. The organisations represented, and their representatives, were as follows (I need to add that the representatives of various organisations changed from time to time - I have listed the principal representatives):

Chairperson

Geoff Budlender

Representatives of the Profession

Advocates for Transformation B Adv Justice Poswa

Black Lawyers Association B Mr Jake Moloï

Corporate Lawyers Association B Mr Graeme Fraser (CLASA largely withdrew from participation once the Task Team had taken its decision with regard to corporate lawyers)

Criminal Law Bar B Adv JJS Prinsloo

Deans of the SA University Law Faculties B Prof Derek van der Merwe

General Council of the Bar B Adv Chris Loxton

Adv Jeremy Gauntlett (alternate)

Independent Association of Advocates of SA B Adv Mathew Klein

Law Society of South Africa - Mr Jan Maree

Ms Susan Abro

National Association of Democratic Lawyers B Mr Vincent Saldana

National Paralegal Institute and National Community-Based Paralegal Association B Mr Martin Monyela
Prof Shadrack Gutto (alternate)

Representatives of the Justice Department

Mr Johan Labuschagne B Directorate Legislation

Prof Cheryl Loots B Policy Unit

Ms Poovindree Naidoo B Directorate Legislation

Adv Gerhard Nel B National Prosecuting Authority

THE PROCESS

- 2 The Task Team met regularly on a monthly basis. Between the meetings of the Task Team, a smaller Drafting Team met regularly to deal in more detail with the matters of principle discussed by the Task Team. In addition, representatives of the Department, the General Council of the Bar (GCB) and the Law Society of South Africa (LSSA) held further drafting meetings in December 2001.
- 3 At its first meeting, the Task Team agreed that it was desirable to prepare a new draft Bill from scratch. The two existing drafts, prepared by the Policy Unit and by the GCB, were used as resources in this process.
- 4 The Task Team and the Drafting Team worked through the various issues which had to be addressed. The Department was given the task of preparing a draft to reflect the views of the majority of the Task Team. That draft was incrementally amended as the discussions proceeded.
- 5 At a relatively early stage, it became clear that there were significant differences of opinion amongst some members of the Task Team. We hoped that these differences could be accommodated within one draft Bill, possibly with alternate versions of particular chapters.

- 6 However, it became clear it not practically possible to incorporate the differences of opinion as options within the draft which was being prepared by the Department. The LSSA therefore prepared an alternative draft, which it made available to members of the Task Team. By this stage, the drafting process was fairly well advanced.

- 7 The Task Team made changes to the draft prepared by the Department, as each of the various issues was discussed. The Task Team and the Drafting Team did not have meetings specifically devoted to the draft prepared by the LSSA. However, all of the major issues in contention were fully debated during the course of the work of the Task Team. The LSSA made some changes to its draft in the light of those discussions. The LSSA >pre-final= draft was discussed at the last meeting of the Task Team, on 25 January 2002.

- 8 Annexure >A= is a draft Bill which represents the views of a majority of the Task Team. Some members have attached footnotes reflecting their reservations on some matters. The LSSA has not provided comments on this draft, but has submitted its own draft.

- 9 Subject to the reservations which have been noted, Annexure >A= is the recommendation of the majority of the Task Team.

- 10 The LSSA (which included in its team the Black Lawyers Association and the National Association of Democratic Lawyers) in due course produced a final version of its proposal for a draft Bill. That proposal (annexure B) represents the recommendation of the representatives of those organisations.

MAJOR POINTS OF AGREEMENT

- 11 The Task Team reached agreement on a number of fundamental points of principle. I believe that this agreement provides the basis for a major step forward in the provision and regulation of legal services in the public interest. This section of my report lists major points of agreement, on which there is actual or virtual unanimity amongst the members of the Task Team. The points of agreement are as follows (in some instances there are differences of opinion on how these principles should be operationalised.).
- 12 All legal practitioners should be regulated within a single statutory framework, which makes provision for specialisation of functions.
- 13 The purpose of regulation should be to serve the public interest, and regulation should be limited to that purpose.
- 14 The ultimate regulatory body should be an independent Legal Practice Council operating at a national level.
- 15 The Legal Practice Council should have a mixed membership of practitioners and non-practitioners. The practitioners should be in the majority, and their representatives should be selected by them. There should be a significant presence of non-practitioners to represent various other interests and the public interest.
- 16 At an operational level, the Council should function on a regional basis.

- 17 The office of Legal Services Protector should be created. This should be an independent person of high standing, appointed on the recommendation of the Judicial Service Commission. He/she should have the power to review disciplinary processes conducted by the Council and other legally recognized disciplinary structures, at the request of complainants who allege that there has been serious procedural irregularity, or a substantial miscarriage of justice. The Protector should also have the power to investigate allegations of systemic abuse within the legal profession. The office of the Protector should be funded from the vote of the Department of Justice and from the Fidelity Fund.
- 18 The Fidelity Fund should continue to exist under the control of a newly constituted board, on which practitioners have a majority membership but not exclusive membership, again to promote representation of the public interest.
- 19 The four year LLB should continue to be the principal requirement for legal practice, but in addition there should be a requirement of practical legal training. The practical training requirements should be determined or approved by the Council. The aim should be to ensure that graduates receive adequate practical training to enable them to carry out their professional tasks effectively, while at the same time ensuring that the requirements do not result in a denial of access to the profession. It is essential that all qualified graduates who wish to obtain this training, should be able to do so.
- 20 Legal practitioners should be officers of the court, and accountable to the court. They are liable to be struck off the roll of practitioners by the court if circumstances warrant it.
- 21 Lawyers who do not render services to the public at large (eg lawyers who are employed by corporations to provide legal services to those corporations) should

- not be registered legal practitioners, and not have the right of audience in the courts.
- 22 Registered legal practitioners should be able to practise for their own account, or through the following forms of juristic person:
- 22.1 As part of a commercial juristic entity (for example a company) of which all of the partners, members and shareholders are legal practitioners.
 - 22.2 As part of a non-profit juristic entity in which the governing body is composed exclusively of legal practitioners.
 - 22.3 As part of a justice centre under the control of the Legal Aid Board
 - 22.4 As part of a multi-disciplinary practice approved by the Council
 - 22.5 As part of a legal advice office accredited by the Council.
- 23 Multi-disciplinary practice presents a number of practical problems, in particular related to issues of client confidentiality, privilege, and the over-riding duty of legal practitioners to the courts. This form of practice has been considered and investigated in other parts of the world. The Task Team proposes that provision be made in the Bill for this form of practice, subject to regulations to be made by the Minister on the recommendation of the Council. There is a need for further study of this issue before this form of practice can be introduced. The Task Team suggests that the South African Law Commission be requested urgently to investigate and make recommendations on this matter.

- 24 It should continue to be a requirement for practice as a conveyancer, that the person concerned is a registered legal practitioner who has attained a specialist qualification under the control of the Council. This recommendation does not address the question of what transactions or activities should only be undertaken by a conveyancer. That should be dealt with in the relevant legislation - in particular, the Deeds Registries Act - and not in the Legal Practice Bill.
- 25 Similarly the qualification of notary should be retained, on the basis that a notary is a registered legal practitioner who has acquired a specialised qualification under the control of the Council. The question of what activities require the services of a notary should be dealt with in the relevant legislation (eg the Marriage Act), and is not a matter for the Legal Practice Bill.
- 26 The Council should be under a legal obligation to promote and support the development of paralegal work, in order to promote access to justice. There should be a special committee of the Council to promote the development and empowerment of paralegals.
- 27 An accredited legal advice office, which is a non-profit organisation, should be permitted to charge a fee for the services rendered by paralegals employed by it.
- 28 Prosecutors should be officers of the court, subject to clear ethical rules and the discipline of the court. This should be addressed in the legislation dealing with the National Prosecuting Authority.
- 29 It is essential that a costing exercise be undertaken before new legislation is adopted. The major sources of funding for the existing structures of the legal profession are contributions by members, and the Attorneys Fidelity Fund. The structures which we propose will involve some additional expenditure,

particularly (but not only) with regard to the Legal Services Protector and the Paralegal Committee, which are proposed new structures. It would be futile and in fact counter-productive to create structures with insufficient funds to carry out their functions effectively. While the members of the legal profession should contribute substantially towards the regulation of their profession, the required contributions should not become a bar to access to the profession. The state and the public also have an interest in the establishment and functioning of these structures, and should contribute appropriately.

- 30 I believe that this list of major points of agreement provides a broad foundation for real progress in the provision and regulation of legal services.

MAJOR POINTS OF DISAGREEMENT

- 31 The most important point of disagreement was on the structure of the profession. In essence, there are two different views on the structure of the new, united legal profession.
- 32 The view of the majority of the Task Team is represented by annexure A. This proposes that all legal practitioners fall under the Council. It seeks to recognise and encourage voluntary association by providing that the Council may accredit professional organisations. An accredited professional organisation performs the statutory regulatory and disciplinary functions in respect of its members, subject to oversight by the Council. If a legal practitioner is not a member of an accredited organisation, these functions are performed by the Council and its structures.

- 33 The alternative view (proposed by the LSSA/BLA/NADEL) is represented by annexure B. This proposes that statutory power to govern all legal practitioners should vest in the South African Legal Practice Society, of which all legal practitioners must be members. Governance of the Society is through the National Council. The National Council establishes Regional Chapters, and delegates certain of its powers to the Regional Chapters, which may have specialised chambers. While voluntary associations of practitioners may be formed, they may not exercise any statutory functions.
- 34 A number of consequential differences flow from these different structures.
- 35 I will refer briefly to some other significant differences of approach.
- 36 There is agreement that the public interest requires that the public be protected against people who exploit them by taking money for services which they are not competent to provide. The majority of the Task Team propose that it should be an offence for any person other than a registered legal practitioner to render >legal services= to the public for reward. >Legal services= are defined in general terms, to mean the provision of advice or assistance relating to the enforcement, protection or interpretation of legal rights or obligations, which is not provided incidentally to the provision of other advice or assistance. The LSSA/BLA/NADEL view is that the prohibition should be defined in relation to a specific list of >reserved work=, rather than in general terms. There is however agreement that the guiding principle should be the protection of the public interest.
- 37 The majority of the Task Team propose that the Minister should be empowered to issue regulations with the consent of the Council, authorising registered paralegals to appear in specified courts, in specified areas, and in respect of

- specified matters. The purpose would be to enable poor people to obtain some representation where they would otherwise be unrepresented, in circumstances where the Minister and the Council are satisfied that a registered paralegal can provide adequate and competent representation. The LSSA/BLA/NADEL representatives oppose this proposal.
- 38 The LSSA/BLA/NADEL propose that the Legal Services Protector=s power to investigate allegations of systemic abuse within the legal profession may only be exercised in consultation with the Chief Justice or his or her nominee. The majority of members of the Task Team do not support this limitation on the powers of the Legal Services Protector.
- 39 The majority of members of the Task Team propose that it should be possible for a company to carry on legal practice even though shares in the company are held by people other than legal practitioner. They propose that this should be permitted only with the consent of the Council, and provided that only legal practitioners may be directors of the entity, and that the Council is satisfied as to the steps which will be taken to ensure the professional independence of the practitioners, and the maintenance of client confidentiality. The LSSA/BLA/NADEL oppose this proposed form of practice.

SOME PERSONAL OBSERVATIONS

- 40 The meetings of the Task Team were characterised by forthright but constructive debate. Often the areas of disagreement dominated the discussion. However, the above analysis demonstrates that there was a great deal of common ground amongst the participants, on fundamental questions.
- 41 I believe that the most fundamental principles can be stated as follows:
- 41.1 An independent and vigorous legal profession is an essential foundation of independent courts and the rule of law, which is in turn a founding value of our Constitution.
- 41.2 The regulation of the legal profession should seek to protect and strengthen that foundation. This includes the principle that the practitioners should select their representatives on governing bodies.
- 41.3 The public has a legitimate interest in seeing that the profession does this properly, and does not abuse the monopoly which it is granted in the public interest.
- 41.4 The profession should be structured and organised in such a way as to promote access to justice, and access to membership of the legal profession.
- 41.5 There is a need for external accountability in respect of the manner in which the profession regulates itself and exercises its disciplinary powers.

- 42 In this report, I have not attempted to set out the reasons for the points of view taken by various participants. To do this would require a voluminous report. I am sure that the participants will have adequate opportunities to present and justify their views as this matter moves forward.
- 43 The structures and processes which will be necessary in the transitional period before the new Legal Practice Council is appointed, will depend in part on which of the proposed new structures is adopted. I would suggest that once the government has taken a view on this matter, the relevant professional bodies should be invited to make proposals with regard to transitional structures if that approach is adopted by Parliament.
- 44 A very important body of opinion and expertise within the legal system has not been involved in our process. I refer here to the judiciary, which has a great interest in ensuring a skilled and independent legal profession, and effective access to justice. I would respectfully suggest that it is essential that this proposal be submitted to the judiciary for its comment before any final decisions are taken.
- 45 In my opinion, the Task Team was structurally limited in two respects. First, the time available to it was limited. This meant that some fairly complex matters (such as multi-disciplinary practice) could not be fully investigated. In some other countries, the reform of the legal profession has been the subject of lengthy formal enquiries, for example through commissions or law reform agencies. Secondly, the membership of the Task Team was such that it was not an appropriate body for examining the desirability of more radical changes to the profession, such as (for example) large-scale deregulation. A more broadly-based body, with additional expertise in areas outside the law and with more time at its disposal, would be necessary for such a task.

46 I am grateful to members of the Task Team for their willingness to give up a great deal of their time to enable us to achieve the real progress which has been made. And I am sure that I speak for all of the members of the Task Team when I say that we are grateful to you for the opportunity to make a really substantial input into the legislative process on this very important matter. I hope that what we have produced will assist you in the way forward.

GEOFF BUDLENDER

Chairperson: Task Team on the Legal Practice Bill

April 2002