



National Alliance for the Development of Community Advice Offices:
NPC 2012/060283/08

PO Box 12957, Mowbray, Cape Town, 7705 • Tel: (021) 447 6599 | Fax: (021) 447 6560 •
Cell: 071 918 1927 • Fax to email: 086 651 8416 • Email: nomboniso@nadcao.org.za
• Web: www.nadcao.org.za



JOINT SUBMISSION TO THE SOUTH AFRICAN PARLIAMENTARY PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON THE LEGAL PRACTICE BILL [B20-2012]

An Oral Submission shall be made by Nomboniso Maqubela, Nadcao Interim National Coordinator and Seth Mnguni, Spokesperson for the National Task Team on Community-Based Paralegals

1. Introduction

- 1.1 The National Alliance for the Development of Community Advice Offices (Nadcao) and the National Task Team on Community-Based Paralegals makes this submission jointly.
- 1.2 Nadcao came into being in 2005, as an intervention by an alliance of civil society partners, supported by key donors, who were concerned about the fragmented and weakened state of the sector, and began to initialise processes that would ensure the securing of long-term support to community advice offices (CAOs) as a sustainable way of ensuring access to justice within poor and marginalised communities.
- 1.3 The National Task Team on Community-Based Paralegals represents the following nine provincial structures:
 - Eastern Cape Advice Offices Forum;
 - Free State Advice Centre Association;
 - Gauteng Paralegal and Advice Office Association;
 - Kwazulu Natal Community Based Advice Office Association;
 - Limpopo Paralegal and Advice Office Forum;
 - Mpumalanga Paralegal Advice Office Consortium;

- Northern Cape Coalition of Community Development Agencies;
- North West Advice Offices Cluster;
- Western Cape Paralegal Association.

The National Task Team on Community-Based Paralegals is mandated by these structures to ensure the inclusion of CBPs in the Legal Practice Bill [B20-2012], hereinafter referred to as the “Bill”, as well as to establish a national interim governance structure in anticipation of its Constitution and National Representative Body. This national interim governance structure will come into force during the course of 2013. This will ensure that in the absence of statutory regulation of the Community-Based Paralegal (CBP) sector, the sector will self-regulate.

1.4 The rationale for the Nadcao initiative was based on the following:

- CAOs and CBPs are important and effective vehicles for local community empowerment, development and access to justice;
- To be effective, CAOs require sustained institutional and financial support;
- CAOs also have important provincial and national contributions to building democracy, promoting justice and advancing constitutional rights and should therefore have a representative, collective voice.

1.5 Despite all the positive attributes of the CAO sector, there were a number of serious challenges to be overcome when Nadcao started out:

- CAOs were fragmented and conflicted about their role and future in the wider justice system;
- The sector was unregulated and lacked coherent governance standards, which fuelled negative perceptions;
- The lack of formal state recognition and the inability of the sector to coherently articulate its added value;
- Strained organisational capacity and absence of a long-term strategy for the sustainability of the sector;
- Intermittent funding to the sector, largely from foreign donors, was not sufficient to support the CAOs and related support organisations.

- 1.6 CAOs are small, non-profit organisations that offer free basic legal and human rights information, advice and services to people who are marginalised through poverty, social circumstances and geographical location. They are located mainly in poor and rural communities throughout South Africa and are staffed by poorly salaried or volunteer CBPs. CAOs have oversight from elected members from the communities serving on their management structures. They are non-partisan and non-political in their operation.
- 1.7 Nadcao's vision is to ensure that in every community in South Africa, a local resident will have, within walking distance, access to a fully functional and well-resourced CAO. Nadcao has developed an inclusive strategy for the sector, through which it seeks to achieve its vision.
- 1.8 Nadcao has played a supportive role in the quest for CBPs to be included in the Bill, given the inextricable nexus between CAOs and CBPs.
- 1.9 We would like to thank the Portfolio Committee for this opportunity to make this submission. Our submission is structured in the following way.
- 1.9.1 The first part of this submission deals with CBPs vis-à-vis the historical context of the Legal Practice Bills and the subsequent exclusion of CBPs in the Bill.
- 1.9.2 The second part of this submission briefly considers regional and international best practice in regard to CBPs and their regulation.
- 1.9.3 The third part of this submission deals with minimum provisions required to be inserted into the Bill in regard to CBPs.
- 1.9.4 The last part of this submission presents conclusionary remarks.

2. Historical Context and Exclusion of CAOs and CBPs from the Bill

- 2.1 In his budget vote speech to the National Assembly on 19 May 1998, the former Minister of Justice, the late Dullah Omar entitled his speech "Report on Transformation of Justice System". In his report he identified seven Key Result Areas. Under the Access to Justice

Key Result Area, he further identified an output as “Formal Structuring of Paralegals”. Minister Dullah Omar had made many overtures to the CBP sector with the intention of ensuring that they were included in a Legal Practice Bill.

- 2.2 Minister Dullah Omar, in his discussions and request to the Swedish Government and the Swedish International Development Agency (Sida), made specific reference for the need to support these advice offices and to build on their past work and existing direct relationships with and access to communities. Support to the paralegal movement thus became one of the objectives and focal areas of the Swedish government’s access to justice programme in South Africa.¹
- 2.3 In 2001, the former Minister of Justice, Dr Penuell Maduna, set up a task team Chaired by Geoff Budlender to draft the Legal Practice Bill.
- 2.4 Given the significant differences of opinion by both the attorneys’ and the advocates’ profession, two Bills were drafted, one by the Law Society of South Africa and the other by the remainder of the task team stakeholders.
- 2.5 In the Chairman’s report of April 2002, to the Minister, Geoff Budlender states that there was consensus between the two professions that:

“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.”²

- 2.6 In December 2007 the Legal Services Sector Charter (hereinafter referred to as the “Charter”) was adopted. One of the pillars of the Charter is access to justice and CBPs are recognised as core to this. The Charter defines what a CBP is and makes provision for the appointment of a paralegal to the Charter Council by a recognised paralegal regulatory body. One of the objectives of the Charter is:

¹ Stanley Khan and Safoora Sadek, Sida Evaluation of Swedish Support to the Access to Justice in South Africa, 04/28, p. 16

² Geoff Budlender, Task Team on the Draft Legal Practice Bill, Report by the Chairperson to the Minister for Justice and Constitutional Development, April 2002

“devising and implementing measures to address the provision and availability of pro bono services and community-based paralegal services thus ensuring access to affordable legal services for all people in South Africa particularly marginalised, poor and rural communities.”

2.7 In addition the Charter states:

“The Charter seeks to ensure the provision of legal services in an environment that is conducive to effective access to justice by ensuring access to affordable legal services to all; particularly in poor, rural and marginalised communities by providing adequate and proper legal services such as pro bono services, community-based paralegal services, justice centers, advice offices, university law clinics, the provision of community services and by investigating legal insurance.”

2.8 The Charter also commits that government will undertake to:

“provide for the regulation of non-commercial community-based paralegal practitioners so as to provide access to primary legal services in rural, poor and marginalised communities.”

2.9 In August 2009, the Department of Justice and Constitutional Development (the “Department”) published a first working draft of the new Legal Practice Bill. The Bill appeared to be very progressive and showed a clear intent to integrate paralegals into the formal justice sector and regulate them accordingly. Chapter 2 of the working draft provided for inclusion of paralegals to be represented on the Legal Practice Council. Chapter 3 of the working draft provided for the regulation of paralegal practitioners and Chapter 4 of the working draft provided for:

- Rendering of services by paralegal practitioners;
- Establishment and objects of Paralegal Committee;
- Constitution and functioning of Paralegal Committee; and
- Powers and functions of Paralegal Committee.

2.10 Chapter 4 also states that:

“The Council must, in consultation with Minister and the Paralegal Committee, within a period of 12 months after its establishment, submit to the Minister legislative proposals to regulate the rendering of legal services by paralegal practitioners” and “the Minister must within three months after receipt of the proposals referred to in subsection (1), introduce legislation into Parliament to regulate the rendering of legal services by paralegal practitioners”.

- 2.11 In 2009, discussions were held between Mr. Greg Erasmus, the previous National Co-ordinator of Nadcao, and Ms. Ooshara Sewpaul and Mr. Sello Chiloane in the Directorate: Constitutional Development of the Department, on the promotion and recognition of the work of CAOs and CBPs, and the long-term investment by the Department in the work of the sector with a view to improve the long-term viability of the sector, including structured investment into the CAO Development Fund.
- 2.12 The CAO related objectives outlined in the Department’s Policy Framework provide a watershed opportunity to harness the inherent value of the sector. The CAOs, as their core mission, provide access to justice and constitutional awareness to impoverished and marginalised communities. It is questionable whether government on its own will be able to provide consistent and permanent access to legal free services across the whole of South Africa, especially to isolated communities in deep rural areas.
- 2.13 The Nadcao network of over 230 CAOs is spread all over South Africa and if it receives the requisite level of sustained support and investment, it will add a significant delivery component in the promotion of access to justice as spelt out in the Department’s Policy Framework. There are approximately 500 CBPs working in these 230 CAOs.
- 2.14 As examples of just two organisations in the Access to Justice network, in 2011, Black Sash advice offices, working in eight cities handled 6,762 cases, 42% of which involved social insurance, 23% involved work and livelihood and 13% social assistance. In the same year, the Community Law and Rural Development Centre’s CBPs working in rural KwaZulu Natal and the Eastern Cape recovered approximately R4,5 million for its clients. Both organisations accomplished this through negotiation, rather than action through the courts, saving the state’s precious resources and ensuring that clients receive benefits expeditiously. These benefits are often the only source of household income.

- 2.15 Contrary to public perception, most CBPs affiliated to the National Task Team on CBPs are well-trained and experienced. The Community Law and Rural Development Centre CBPs for example all have University of KwaZulu Natal Diplomas in Paralegal Studies.
- 2.16 In truth, without a sustainable CAO sector, the recognition of CBPs as “practitioners who operate in a non-profit, community environment”, as envisaged by the Charter, becomes an almost futile exercise. It is our view that any discussions about the recognition of CBPs within the wider justice system must include the issue of the long-term sustainability of CAOs.
- 2.17 Unless CAOs continue to operate, there will be very few CBPs available to provide the envisaged free services to the poor and marginalised as there will be no “non-profit, community organisations” left to employ their services.
- 2.18 The integration of CAOs into the wider justice system therefore necessitates the inclusion of sustained financial support to the CAO sector from government and the private sector in South Africa.
- 2.19 On 15 April 2010, discussions were held between Mr. Greg Erasmus, the previous National Coordinator of Nadcao, Seth Mnguni as Chairperson of the Gauteng Paralegal and Advice Offices Association, Mr. John Moerane, Coordinator of the North West Advice Offices Cluster, and Ms. Lucille February, Treasurer of the Western Cape Paralegal Association, and the Department, wherein the Department explained its option to exclude paralegals (including commercial, state, academic and community-based paralegals) from the Legal Practice Bill. Instead, the Department had committed itself to the establishment of a separate regulatory framework for paralegals, in particular the work of CBPs working in CAOs, and to set in place language and intention to this effect in the Bill.
- 2.20 Given this commitment, Nadaco agreed to engage the Department, together with other stakeholders, to develop an appropriate but separate regulatory framework for paralegals, in particular, community-based paralegals. Nadcao also committed itself to ensure that CAOs would have the chance to comment on the revised Legal Practice Bill once published. Nadcao’s belief at the time was that given the furore between the advocates and lawyers over the Legal Practice Bill, the Legal Practice Bill would not proceed to be enacted in the near future. It accordingly took the view that CBP regulation may well have been expedited through a separate regulatory framework.

2.21 In April 2010, the Department published a second draft removing all references to paralegals. The Department also published a document entitled “Key Principles Underpinning the Transformation of the Legal Profession” and meant as a “basis for consultation with principal stakeholders in the legal profession”. It further states that “it builds on the past discussion and engagement initiated under the previous administrations...”. More importantly the document under Principle XV states:

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

2.22 It is noted with regret though, that despite the commitment by the Department to establish a separate regulatory framework for paralegals, in particular the work of CBPs working in CAOs, and to set in place language and intention to this effect in the Bill, both commitments have been ignored.

2.23 The Bill makes no reference whatsoever to CAOs nor CBPs but does state that among the organisations consulted was the “National Alliance of Advice Offices” (sic). Of course this is incorrect and it ought to be the “National Alliance for the Development of Community Advice Offices”. The Department is requested to amend the name accordingly. The effect or decisions of such consultation referred to are not borne out in the Bill.

2.24 This omission is seen as a significant setback for the CAO and CBP sectors and has thus required both sectors to re-think their future strategy for fear of being further sidelined.

2.25 Given the exclusion of CBPs in the Bill and the absence of a separate regulatory framework, this appears to frustrate the progressive intentions of the Charter vis-à-vis CBPs, as already referred to above.

3. Regional and International Best Practices Regarding CBPs

3.1 As with the rest of Southern Africa, there is a significant number of CBPs in South Africa, as illustrated in the table below. The figure in the table for South Africa includes CBPs,

commercial, state and academic paralegals.

Table 6. Paralegals working in Southern African countries

Country	Number of paralegals
Lesotho	32
Malawi	75
Mozambique	75
Namibia	200
South Africa	3 500
United Republic of Tanzania	2 500
Zambia	1 000
Zimbabwe	100

Source: Mary Ndlovu, *Survey of Paralegal Development in Anglophone Southern Africa* (Zimbabwe, Legal Resources Foundation, 2009).

- 3.2 There is a growing recognition in Africa of the important role CBPs play in the justice system. For example, the legal aid law in Sierra Leone adopted in May 2012 specifically provides for CBPs to complement the provision of legal aid. In Malawi, the Law Commission has recommended formal recognition of CBPs in the new legal aid bill. In Zimbabwe, the Labour Court allows paralegals right of appearance and the Council of Legal Education has agreed to a paralegal training certificate.
- 3.3 In May 2012, the United Nations Commission on Crime Prevention and Criminal Justice adopted the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. The United Nations General Assembly will debate the matter in December 2012 for possible adoption. The Principles and Guidelines encourage states to “develop, where appropriate, a nationwide scheme of paralegal services with standardised training curricula and accreditation schemes”; and to:
- “ensure that quality standards for paralegal services are set and that paralegals receive adequate training and operate under the supervision of qualified lawyers;
 - ensure the availability of monitoring and evaluation mechanisms to guarantee the quality of the services provided by paralegals;
 - promote the development of a code of conduct that is binding for all paralegals working in the criminal justice system;
 - specify the types of legal services that can be provided by paralegals and the types of services that must be provided exclusively by lawyers, unless such determination is within the competence of the courts or bar associations;

- ensure access for accredited paralegals who are assigned to provide legal aid to police stations and prisons, facilities of detention or pretrial detention centres and so on; and to
- allow, in accordance with national law and regulations, court-accredited and duly trained paralegals to participate in court proceedings and advise accused when there are no lawyers available to do so.”

3.4 On 12 July 2012, fifty organisations working to advance justice in twenty African countries drafted the Kampala Declaration which *inter alia*, calls on governments to recognise the role CBPs play, following the lead of legal aid legislation in Sierra Leone, Nigeria, Malawi and ongoing initiatives in Uganda, Tanzania, Kenya and elsewhere; and also calls on governments to invest directly in the scale-up of CBP efforts.

4. Provisions Which CAOs and CBPs Require for Inclusion into the Bill

- 4.1 Given the central role CBPs have in enhancing access to justice for the poor and vulnerable, it must be of great concern to all citizens that they have yet to be recognised as legal practitioners.
- 4.2 In this regard, it would be prudent to add that far from being in competition with attorneys, CBPs in reality, work closely with many attorneys, referring carefully screened and potentially successful litigious matters to them on a contingency basis. The screening by CBPs also reduces the time needed to be spent by an attorney. In addition, the clients that frequent CAOs are the most poor and vulnerable and they would in any event not be able to afford the fees of attorneys. CAOs who employ the CBPs also provide their services free of charge.
- 4.3 Given that CAOs are dependant on donor funding, their sustainability is questionable. However, the Charter together with the Bill could provide a substantive opportunity for the state to wholly pay for or subsidise the costs of CAOs. As access to justice is a state obligation, so too then should be the costs associated with it.
- 4.4 In regard to law graduates having to undertake community service or practical vocational training, a debate has ensued around whether the state will pay subsistence costs. It is of course ironical, that despite CAOs and CBPs being at the vanguard of access to justice for

decades, the issue of sustaining these services has never been firmly canvassed nor debated by policy makers.

- 4.5 If one of the intentions of the Bill is to ensure that black advocates receive more opportunities for state briefs, then there is an undeniable logic that the work of CBPs must be sustained by the state.
- 4.6 Having a separate regulatory framework for CBPs will irreparably and irrevocably detach and disconnect CBPs from other legal practitioners and from the mainstream justice sector. This divisiveness goes against the intended spirit of the Bill to bring the legal professions together and this will not augur well for sustained access to justice.
- 4.7 The Minister of Justice has described the Bill as a landmark in improving access to justice for poor communities, but it is difficult to comprehend how this might be possible without the continued services of CAOs and the CBPs who work for them.
- 4.8 Indeed when the Minister announced the Bill at a breakfast meeting on 21 May 2012, he was publicly questioned by a member of the National Task Team for CBPs, why CBPs had been left out of the Bill. The Minister replied that CBPs were inferred in the Bill, which of course is not the case at all.
- 4.9 It is respectfully submitted that in order to ensure better complementarity between CBPs, attorneys and advocates, the Bill must provide a legislative framework for the transformation and restructuring of CBPs in line with government's policy imperatives and best international practice; to regulate the affairs of CBPs, and to set norms and standards; to provide for the admission, enrolment and registration of CBPs; and to regulate the professional conduct of CBPs, so as to ensure accountability.
- 4.10 Specifically, the Bill must recognise and accord roles/responsibilities and duties to CBPs within the formal legal system, in line with the policy intention to promote access to justice and to unify the legal profession.
- 4.11 Representation of paralegals within the proposed structures must be set out in the Bill and must be adequate and justifiable.

- 4.12 The Bill must directly provide for the regulation of CBPs and not defer this to a separate legislation as this would effectively extract the discussion on CBPs from the context of the Bill.
- 4.13 The Bill also needs to articulate the value of CAOs and the interconnection between CAOs and CBPs.
- 4.14 The relationship of CAOs and CBPs to the various institutional mechanisms such as the Fidelity Fund and legal training bodies must be adequately defined. For accredited CAOs employing CBPs, the Department must make the necessary contribution towards the Fidelity Fund.
- 4.15 The Bill ought to provide for the appointment of not less than two CBP representatives appointed by the Minister to the Council or other representative body, after he or she has received nominations from CBP practitioners or organisations representing the interests of CBPs.
- 4.16 The Bill must provide for the rendering of services by those CBPs employed by accredited CAOs.

5. Conclusion

- 5.1 Nadcao and the National Task Team on CBPs encourages the Department, attorneys, advocates and other stakeholders and beneficiaries to constructively engage them in their efforts to ensure that CBPs are equitably and justifiably included in the Bill or that sufficient minimum thresholds are contained in the Bill for their regulation and sustainability.
- 5.2 The CAO and CBP sectors have waited for nearly two decades for statutory regulation, recognition and formal integration into the justice sector. Accordingly, the Department is respectfully requested to establish draft provisions for the inclusion of CBPs in the Bill within three months of this submission, that is by 26 October 2012, after thorough consultation with stakeholders and beneficiaries, particularly in the CAO and CBP sectors.
- 5.3 We alert the Portfolio Committee to the official letters of support and a petition in support of this submission, duly attached hereto.

5.4 We respectfully thank the Portfolio Committee for their time.

Contact Persons:

Nadcao: Nomboniso Nangu Maqubela:
Cell: 071 918 1927; nomboniso@nadcao.org.za

National Task Team: Seth Mnguni
Cell: 073 243 0758; nwc@nadcao.org.za