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## MEMORANDUM ON THE OBJECTS OF THE LEGAL PRACTICE BILL, 2012

### 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representative of the demographics of South Africa and entry into the profession is, in many instances, determined by outdated, unnecessary, and overly restrictive prescripts.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 through a legal profession that is regulated by means of a single national regulatory body in terms of one 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 National Forum on the Legal Profession (the National Forum) 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 (the Council) and putting systems and procedures in place for the second and subsequent phases of the implementation process. The powers and functions of the National Forum 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 National Forum 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 and ensures that the rule of law is upheld;
- (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 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 broadly reflects the demographics of the Republic;
- (c) create a single unified statutory body, the Council, in order to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an 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 the Legal Services Ombud.

### 3. CLAUSE BY CLAUSE ANALYSIS

#### 3.1 Clause 1: Definitions

While most of the definitions are self-explanatory, the following definitions are highlighted:

3.1.1 An "**advocate**" is defined as a legal practitioner who is admitted and enrolled as such and an "**attorney**" is defined as a legal practitioner who is admitted and enrolled as

such. A **"legal practitioner"** is defined as an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30, respectively. These definitions are noteworthy in the sense that the Bill gives continued recognition to the two main categories of legal practitioners.

3.1.2 **"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 Act will be applicable to all legal practitioners and candidate legal practitioners.

### 3.3 **Clause 3: Purpose of Act**

Clause 3 sets out the purpose of the proposed Act, 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 and all candidate 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 broadly 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.

3.5.2 In terms of clause 6(1)(a)(x), the Council may delegate any of its powers and functions to its committees or Provincial Councils. However, such delegation does not divest the Council of any power or function so delegated.

3.5.3 Clause 6(1)(a)(xi) to (xiii) deals with the provision of financial support by the Council to organisations providing legal education and training, to non-profit organisations and to institutions promoting access to justice for poor people.

3.5.4 Clause 6(1)(b) states that the Council may develop norms and standards that must guide the conduct of legal practitioners, candidate legal practitioners and the legal profession, advise the Minister with regard to matters concerning the legal profession and develop programmes to empower historically disadvantaged legal practitioners 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)(f) 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 enrol 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 appropriate legal education and training having due regard to our inherited legacy and the 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 number of new graduates enrolled 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 candidate legal practitioners and continuing education to enhance the 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 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 prescribed by the Minister.

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 two legal academics, three fit and proper persons designated by the Minister who, by virtue of their knowledge and experience, are able to assist the Council in achieving its objects, a person designated by Legal Aid South Africa and one person designated by the Legal Practitioners' Fidelity Fund Board.

### **3.7 Clauses 8 to 14: Membership of Council, chairperson and deputy chairperson of Council, term of office of members of Council, termination of office, removal from 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, removal from office and vacancies in the Council and the filling thereof.

3.7.3 Clause 12 provides that the Council may remove a member 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 elected or designated that member, or his or her becoming disqualified to remain as a member.

3.7.4 Clause 14 provides for the dissolution of the Council but only on the authority of a High Court order, 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 officer 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: Provincial Councils**

3.9.1 Clause 23 provides for the establishment of Provincial Councils by the Council.

3.9.2 The Council must establish a Provincial Council in every province. The areas of jurisdiction will be prescribed by the Minister.

3.9.3 The Provincial Councils carry out the powers and functions as determined by the Council or in terms of the Act.

3.9.4 The Provincial Councils are to be elected in accordance with a procedure to be prescribed by the Minister on the advice of the National Forum.

3.9.5 In constituting the Provincial Councils the proportion of attorneys and advocates practising in the area of jurisdiction of that Provincial Council must be taken into account. The Minister must, for the first Provincial Councils, on the advice of the National Forum, prescribe several matters regarding their operation.

### **3.10 Clauses 24 to 28: Admission, enrolment, right of appearance, legal qualifications, practical vocational training and assessment of practical vocational training**

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, in consultation with the Minister of Trade and Industry and after consultation with the Council, and having regard to any relevant international commitments of the Government of Republic of South Africa, make regulations in respect of admission and enrolment of foreign legal practitioners.

3.10.2 Clause 25 provides that legal practitioners may practise throughout the Republic in any court and that all legal practitioners have a right to appear in any court on behalf of any person in the Republic. Attorneys who wish to appear in the High Court, Supreme

Court of Appeal or the Constitutional Court must, however, comply with certain requirements.

3.10.3 Clause 26 provides for the minimum qualifications, namely the LLB degree, and practical vocational training, which includes doing community service and a legal practice management course, that must be complied with before a person can be admitted and enrolled as a legal practitioner.

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, including the payment of remuneration, allowances or stipends to all candidate legal practitioners, and in terms of clause 28 the Council makes rules for the procedure pertaining to the assessment of persons undergoing practical vocational training.

### **3.11 Clause 29: Community service**

3.11.1 Clause 29(1) provides that the Minister must, 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 legal practitioners upon which continued enrolment as a legal practitioner is dependent.

3.11.2 In terms of clause 29(2), "community service", may, among others, include the provision of training on behalf of the Council, service, without any remuneration, as a judicial officer in the case of legal practitioners, service at the South African Human Rights Commission and service to the State, approved by the Minister in consultation with the Council.

3.11.3 In terms of clause 29(3), the Council may exempt a candidate legal practitioner or legal practitioner from performing community service, on good cause shown.

### **3.12 Clauses 30 to 32: Enrolment, cancellation and suspension of enrolment and conversion of enrolment of legal practitioners**

3.12.1 Clause 30 deals with the enrolment of legal practitioners with the Council. All legal practitioners who are admitted by the court must be enrolled with the Council. The Council must keep a Roll of Legal Practitioners (the Roll). The purpose of the Roll is to reflect the particulars of practising and non-practising legal practitioners. Regarding advocates, the Roll must reflect whether they practise with or without a Fidelity Fund certificate.

3.12.2 In terms of clause 30(5), the Provincial Councils play a role in the enrolment of legal practitioners, as the registrars of the various Divisions of the High Court, where a legal practitioner has been admitted, must forward the details of the admission to the Council, through the Provincial Council in question.

3.12.3 Clause 31 deals with the cancellation or suspension of enrolment of a legal practitioner. A legal practitioner may be suspended or have his or her enrolment 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 enrolment. A legal practitioner who has been enrolled as an attorney or advocate may convert his or her enrolment 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. A similar conversion of enrolment is provided for in the case of advocates who practise with Fidelity Fund certificates and who wish to practise without a Fidelity Fund certificate and *vice versa*.

### **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.

### **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.

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, if that advocate is in possession of a Fidelity Fund certificate.

3.14.4 Clause 34(5) provides that attorneys may either practise for their own account, in a commercial juristic entity with other attorneys, at a law clinic, at Legal Aid South Africa or in the full time employment of the State or the South African Human Rights Commission.

3.14.5 In terms of clause 34(6), 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 law clinic;
- (c) as part of Legal Aid South Africa;
- (d) as a State Advocate or at the South African Human Rights Commission.

### **3.15 Clause 35: Fees in respect of legal services**

3.15.1 Clause 35 provides that, until the investigation by the South African Law Reform Commission referred to in clause 35(4) has been completed, fees for legal services (litigious and non-litigious legal services) charged by legal practitioners (including juristic entities, law clinics and Legal Aid South Africa) must be in accordance with the tariffs determined by the Rules Board for Courts of Law. The importance, significance and complexity of the service rendered, the seniority and experience of the legal practitioner concerned, the volume of work done and the financial implications of the matter must be taken into account when the fees are determined by the Rules Board.

3.15.2 In terms of clause 35(4) the South African Law Reform Commission must, within two years after the commencement of Chapter 2 of the Act, investigate and report back to the Minister with recommendations on how to address the current challenges relating to legal fees.

3.15.3 In terms of clause 35(6) the Minister may, by notice in the *Gazette*, determine maximum tariffs payable to legal practitioners who are instructed by any State Department or Provincial or Local Government in any matter.

3.15.4 In terms of clause 35(7) a legal practitioner must, when first receiving instructions from a client, provide the client with information regarding the envisaged costs of the legal services in question and the processes involved.

### **3.16 Clauses 36 to 44: 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), the Council must establish investigating committees to conduct investigations into complaints against legal practitioners. If such a 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.

3.16.3 Clause 37(4) and (5) provides for the composition of disciplinary committees. These committees must, as far as is practicable, be accessible to persons necessary for the finalisation of the matters in question, must promote the efficient resolution of complaints and must be representative in respect of race, gender, national and provincial demographics and include an advocate, an attorney and lay persons.

3.16.4 Clause 38 provides that complaints against legal practitioners, candidate legal practitioners and juristic entities (meaning the legal practice itself) must be lodged with the Council and must be dealt with in the manner and form determined in the rules by the Council. In the interests of transparency, the particulars of all disciplinary hearings must be published on the website of the Council, and the proceedings of disciplinary committees are open to the public.

3.16.5 Clause 39 sets out the operational requirements relating to a disciplinary hearing, such as subpoenas, representation of the legal practitioner charged and the examination and cross examination of witnesses.

3.16.6 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.

3.16.7 Clause 41 deals with appeals, which must be done in the manner prescribed in the rules. Both aggrieved complainants and legal practitioners can appeal. The transparency provisions set out in clause 38(3) are also made applicable in respect of appeal tribunals which are established by the Council.

3.16.8 Clause 42 sets out the further role of the Ombud which is to monitor the investigation of complaints and the conduct of disciplinary committees and appeal tribunals.

3.16.9 Clause 43 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.

3.16.10 In terms of clause 44, the High Court retains the ultimate power to adjudicate upon matters relating to the conduct of legal practitioners.

3.16.11 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 45 to 52: Legal Services Ombud**

3.17.1 Clause 45 establishes the Office of the Legal Services Ombud.

3.17.2 The objects of the Ombud, which are set out in clause 46, 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 47 the Ombud must be a judge discharged from active service. 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 48 sets out the powers and functions of the Ombud. The Ombud may, among others, investigate any alleged maladministration in the profession or abuse of power, which the Ombud considers may affect the integrity of the profession and the independence thereof. The Ombud is entitled to resolve disputes by means of mediation, conciliation or negotiation or by making recommendations to the relevant authorities on how to address the issues in question. The Ombud may also do anything necessary to enable proceedings to be taken to a competent court or forum.

3.17.5 The other clauses relating to the Ombud deal with operational matters, such as staff and term of office, among others. Clause 51(6) provides that the expenditure of the Ombud will be defrayed from money appropriated by Parliament. In terms of clause 51(13) 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 52 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 53 to 83: Legal Practitioners' Fidelity Fund and Legal Practitioners' Fidelity Fund Board**



3.18.1 Chapter 6 of the Bill deals with the Legal Practitioners' Fidelity Fund (the Fund) and the Legal Practitioners' Fidelity Fund Board (the Board). The provisions of this Chapter largely replicate the current dispensation in the Attorneys Act, 1979 (Act No. 53 of 1979).

3.18.2 Clause 53 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 54 deals with the revenue of the Fund, which is essentially from interest earned in trust accounts of legal practitioners, investments and money received from insurers.

3.18.4 Clause 55 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 or advocate practising with a Fidelity Fund certificate, not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*. Clause 56 sets out the circumstances under which the liability of the Fund is limited. For instance, clause 56(1)(a) provides that a family member or member of the household of an attorney or advocate who committed the theft, cannot claim reimbursement from the Fund. Also, in terms of clause 56(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 57 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 55, among others. It is also to be noted that the Fund contributes toward the expenses of the Council.

3.18.6 Clauses 61 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 62, the Board is composed of five legal practitioners elected by the Council, two persons designated by the Council who have expertise in the field of finance and two fit and proper persons designated by the Minister.

3.18.7 Clauses 74 to 77 provide that every attorney and an advocate who practises with a Fidelity Fund certificate must pay to the Fund annually an amount required for professional indemnity insurance, re-insurance, insurance cover and suretyship, and an annual non-refundable amount determined by the Board.

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 or advocates referred to in section 34(2)(b). In terms of clause 84, every attorney or advocate referred to in section 34(2)(b) who practises for his or her own account or as a director must be in possession of a Fidelity Fund certificate. Any person who contravenes this clause is, in terms of clause 93, guilty of an offence and is liable on

conviction to a fine, or striking off, among others. This clause does not apply to attorneys or advocates, who practise in the full time employ of the State or the South African Human Rights Commission.

3.19.2 Clause 85 provides for the application by an attorney or advocate referred to in section 34(2)(b) 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 or advocates referred to in section 34(2)(b) from paying the annual fee for a certificate.

3.19.3 Clause 86 requires attorneys or advocates referred to in section 34(2)(b) 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 legal practitioners 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. This clause also contains offences and penalties in respect of other acts or omissions, for instance in the case of advocates who take briefs directly from members of the public without being in possession of a Fidelity Fund and persons who masquerade as legal practitioners.

### **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, or where required in the circumstances, must, 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 the Council, the Board or the Legal Services Ombud.

### **3.22 Clauses 96 to 120: 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 National Forum on the Legal Profession as a body corporate with full legal capacity.

3.22.2 The National Forum comprises of representatives of all the current statutory bodies and voluntary associations in the legal profession, as well as two persons designated by the Minister, one law teacher and Legal Aid South Africa, and the Board must also designate one person.

3.22.3 The National Forum is made up of a majority of legal practitioners, namely 16 in total. In constituting the National Forum regard must be had to the terms of reference of the National Forum and representivity. The duration of the National Forum is three years.

3.22.4 Clause 97 provides extensively for the terms of reference of the National Forum. 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 Council;
- (ii) the establishment of the Provincial Councils and their areas of jurisdiction;
- (iii) the composition, powers and functions of the Provincial Councils;
- (iv) the manner in which the Provincial 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 practitioner;
- (vi) the right of appearance of a candidate legal practitioner in court or any other institution;
- (vii) a mechanism to wind up the affairs of the National Forum; and
- (viii) prepare and publish a code of conduct.

3.22.5 Clause 97(2) provides for negotiations between the National Forum and the existing statutory law societies in respect of the transfer of assets, rights, liabilities, obligations and staff of these law societies to the Council or Provincial 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 108 provide for the powers and functions of the National Forum and other organisational and operational matters in similar fashion to the same provisions relating to the Council.

3.22.7 Clause 108 provides that the funds of the National Forum consist of—

- (a) money appropriated by Parliament; and
- (b) any other monies received by the National Forum or accruing to the National Forum from any other source, including disbursements made by existing law societies as may be agreed upon.

3.22.8 Clause 108(3) provides that out-of-pocket expenses incurred by members of the National Forum in exercising their powers or carrying out their functions under this Chapter, are borne by the body which or person who designated or elected that member.

3.22.9 Clause 109(1) provides that the Minister must, within six months after receiving recommendations from the National Forum as provided for in section 97, make regulations, in consultation with the National Forum, in order to give effect to the recommendations of the National Forum as contemplated in section 97. Should the National Forum fail to make recommendations within the timeframe set, the Minister is empowered to make regulations as required, after consultation with the National Forum.

3.22.10 In addition, the National Forum must make and publish rules as set out in clause 109(2), also within the 24 month period referred to above.

3.22.11 Clause 110 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 Legal Practitioners' Fidelity Fund.

3.22.12 Clause 111 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 112 deals with transitional provisions in relation to qualifications. This clause recognises degrees and training courses in existence.

3.22.14 Clause 113 provides that attorneys, who are not in possession of a Fidelity Fund certificate at the date of commencement of the Act, must apply for one within 60 days.

3.22.15 Clause 114 provides that any person who has been admitted by the High Court and authorised to be enrolled as an advocate, attorney, conveyancer or notary in terms of any Act in the former Republic of South Africa and former homelands which is still applicable, must be regarded as having been unconditionally admitted to practice and authorised to be enrolled as legal practitioners under the Bill, subject to any court order suspending them from practice.

3.22.16 Clause 116 regulates pending proceedings, clause 118 deals with the interpretation of certain references, and clause 119 provides for the repeal and amendment of existing laws and savings. On the repeal of the existing laws, it is important to note that clause 119(1) keeps these laws intact and operational until virtually all the transitional arrangements have been implemented.

3.22.17 Clause 120 contains the short title and commencement dates. The Bill will come into operation incrementally. Clause 120 provides that Chapter 10, which contains the provisions regarding the National Forum, comes into operation on a date fixed by the President by proclamation in the *Gazette*. Clause 120(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 120(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**

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. The Competition Commission was also 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 Act, 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 National Forum will be funded mainly from monies defrayed from the budget vote of the Department.

## **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 National Forum 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 National Forum, 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 Joint Tagging Mechanism of Parliament was of the view that the Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution since some of its provisions deal with functional areas of concurrent national and provincial legislative competence as set out in Schedule 4 to the Constitution.

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.

