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Portfolio Committee on Justice and Correctional Services  
Attention: Mr V Ramaano  
By email: [vramaano@parliament.gov.za](mailto:vramaano@parliament.gov.za)

28 July 2017

Dear Sirs

#### **SUBMISSION ON THE PROPOSED AMENDMENTS TO THE LEGAL PRACTICE ACT, 2014**

ClearlawSA Pty Ltd (ClearlawSA) is a South African company that is committed to continuing legal education. Our company is empowered, and our team is experienced, committed and enthusiastic about our offering. We believe that the programmes offered to date have not met the standards that the sector should seek to uphold, either as to number of offerings, quality, or relevance.

ClearlawSA is:

1. working with local and international IT providers to create a platform; and
2. producing and collating dense, relevant, high quality education

for admitted attorneys in the public and private sector.

ClearlawSA recognises that the implementation of the Legal Practice Act is necessarily going to take some time. Having thoroughly examined the Act and the Amendment Bill, ClearlawSA believes that in order to ensure that the Act stands the best chance of achieving the objects it has set particularly in relation to continuing legal education, additional amendments could be made to it at this time.

In this submission we comment first on the Amendment Bill as it stands, and then we propose additional amendments for consideration. We are interested in making verbal submissions.

## The Legal Practice Act Amendment Bill, 2017

### 1. Section 23(b) in the Amendment Bill:

- a. We recommend that in addition to the current proposal, the section should include the words “provided that if the Minister does not define the jurisdiction of the Provincial Councils within 12 months of the commencement of this Act, then the National Council must do so.” This is because it is unclear whether the Provincial Councils then have jurisdiction absent the Minister’s definition, or if they can define their own jurisdiction, which is unlikely to be the intention of the legislature.
- b. The section should read, “(b) The Minister **[must] may, from time to time,** prescribe the areas of jurisdiction of the Provincial Councils in consultation with the Council, *provided that if the Minister does not define the jurisdiction of the Provincial Councils within 12 months of the commencement of this Act, then the National Council must do so.*” The proposed amendments are in italics and underlined.

### 2. Section 96(4) in the Amendment Bill:

- a. The proposed amendment renders the date on which the National Forum will need to hand over to the Council and the date on which that Forum will cease to exist (and its members will be disbanded) vague, and this could lead to dispute. We propose that the section read, ““(4) The **[duration of the] National Forum [is for a period not exceeding three years and it]** ceases to exist on the date of the meeting with the Council as envisaged in section 105(3), or such other date as the Minister may determine after consultation with the National Forum, which should not be later than 1 February 2018 [commencement of Chapter 2].”. The proposed insertion appears in italics and is underlined.
- b. Alternatively, there should be a mechanism by which the Minister can require the Forum to complete its work and to hand over to the Council.
- c. Furthermore, the proposed amendment does not go far enough because it fails to indicate that membership of the Forum should also terminate on the date that the Forum terminates. Subsection (5) should be amended accordingly to also refer to section 96(4). The subsection should read, “(5) Subject to sections 96(4), 99, 102 and 103, members of the National Forum hold office for the three year duration of the National Forum.”

### 3. Section 97(2)(a) in the Amendment Bill:

- a. It is foreseeable that the Forum may not be able to reach agreement with the Law Societies. To oblige the Forum to do so may result in an untenable position where the necessary transition cannot take place, and the progress of the Act is stymied. Since the law societies are not currently regulated, there should be no requirement to obtain

their consent as the Act clearly contemplates an entirely new regime in which they will have no place.

- b. We therefore recommend that the section be amended by the additional wording reflected below in italics and underlined, “(2)(a) The National Forum must, within 24 months of the commencement of this Chapter, negotiate with, and reach an agreement with, the law societies referred to in section 56 of the Attorneys Act **[and any other similar statutory bodies still regulating the legal profession established in the former homelands]**, in respect of the transfer of their assets, rights, liabilities, obligations and staff, to the Council or Provincial Councils as well as a date on which the law societies shall be dissolved and such transfer effected: Provided that such date may not be later than six months after the date of commencement of Chapter 2, and provided further that in the absence of an agreement, the law societies shall transfer their assets, rights, liabilities, obligations and staff to the Council with effect from 1 February 2018.” Proposed changes are underlined and in italics.

#### **Additional amendments to the Act recommended by ClearlawSA**

##### **4. Section 25:**

- a. In order to implement the requirement that legal practitioners continue their education, as anticipated in section 6(5)(f) of the Act, some incentive is required. In our experience without a substantial incentive, it is likely that legal practitioners will argue the programme is unnecessary, unsuitable, time-consuming, reducing their revenue, or any other reason that will allow them to escape the obligation. In other countries, the concept of an annual practising certificate has been developed and applied. A practising certificate confirms that the practitioner has attained his or her required target in each year.
- b. The target for continuing legal education is usually set with reference to a number of hours of training, or certain mandatory courses, or a combination of both such things. Only when the required hours are completed will the practising certificate be renewed, and without a valid certificate, the practitioner may not practise.
- c. Whilst the target for hours is being developed by the Council, the notion of the practising certificate can nonetheless be introduced. This could be introduced in regulations, but it can also be introduced in the Act. Our suggestion is that the Act could be amended in section 25(1) as follows in italics and underlined text, “25. (1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practising, or he or she has not completed the requirements for a practising certificate”.
- d. A definition of “practising certificate” must be inserted in section 1 of the Act. This could be the following, “practising certificate” is the document issued by the National Council

to a practising legal practitioner annually to authorise that legal practitioner to continue to provide legal services, that confirms that the legal practitioner has completed the prescribed number of courses or hours of continuing legal education, as the case may be".

**5. Section 30:**

- a. This section refers to the "non-practising Roll" which term is not defined, but which term has been used for decades to refer to the Roll of admitted attorneys who have the relevant qualifications, but are not practising as attorneys i.e. they do not operate a trust account, nor do they operate within a law firm. For example, they may be in-house attorneys or state legal advisors and prosecutors.
- b. Since the Amendment Act proposes to amend section 33 by the addition of the word "practising" in relation to "legal practitioner" it is necessary to define both "practising" and "non-practising" in section 1 as regards the definition of "the Roll". "practising Roll" could be defined as "the register of legal practitioners that have qualified, that wish to or that are operating a trust account, providing legal services as anticipated in section 34, and have achieved the prescribed requirements for a practising certificate which Roll is maintained by the Council". The "non-practising Roll" would then be defined as "the register of legal practitioners that have qualified, but that do not wish to or do not operate a trust account, and may provide legal services that are not defined in section 34, which Roll is maintained by the Council". Registration on either Roll could be subject to an annual fee.
- c. Section 30 could then be amended as follows, "30. (1) (a) A person duly admitted by the High Court and authorised to be enrolled to practise as a legal practitioner must apply to the Council in the manner determined in the rules, for the enrolment of his or her name on the practising Roll or non-practising Roll as the case may be."
- d. This is not only important to recognise the important role that non-practising attorneys play, but also to potentially exempt or exclude non-practising legal practitioners from the *compulsory* attainment of continuing legal education targets. Whilst all legal practitioners would be welcome to attend all courses and participate in all training offered, the usual practise internationally is that only legal practitioners on the practising Roll are required to comply with the obligation.

**6. Section 31:**

Subsection (b) should be amended to refer to the practising certificate, as follows, "(b) The Council may cancel or suspend the enrolment of a legal practitioner if he or she has erroneously been enrolled, or has been enrolled on information that is subsequently proved to be false or is not eligible for a practising certificate".

**7. Section 34(9):**

- a. It is unclear what the term “legal practise” is intended to mean. Attorneys that do not practise as attorneys but are nonetheless fully qualified, may offer consultancy services, or may act as in-house legal advisors, or state legal advisors, or even prosecutors – all of whom may be providing “access to justice”. What is the purpose of section 34(9) in this context? Would these types of activity be unlawful?
- b. We recommend that a new subsection (10) be included that provides as follows, “(10) The provisions of subsection (9) shall not prevent or exclude the activities of non-practising legal practitioners provided they do not contravene the provisions of section 33.”

**8. Section 94(1):**

In order to give more weight to the requirement for practising certificates we recommend that section 94(1) be amended in relation to the making of regulations as follows, “94. (1) The Minister may, and where required in the circumstances, must, subject to

- a. subsection (2), make regulations relating to—
  - (a) the establishment of a mechanism to provide appropriate legal education and training as contemplated in section 6(5)(f) and the requirements for and issue of a practising certificate”;

**9. Section 94(2):**

- a. This provision requires the Minister to wait until the Council is established before making any regulations. Although the regulations that the Minister is empowered to make should not apply until such time as the Council has been established and is in place, there is no reason why regulations could not be drafted and consulted upon earlier, and come into force after the Council is established.
- b. We recommend this section be amended as follows, “(2) The regulations contemplated in subsection (1) must—
  - (a) in the case of subsection (1)(a) to (l) and (o) and (p), be made after consultation with the Council or the Forum as the case may be where the Forum is still operating, unless otherwise indicated; and
  - (b) in the case of subsection (1)(m) and (n), be made after consultation with the Council, or the Forum as the case may be, and the Board; and
  - (c) in the case where regulations are made in consultation with the Forum, the regulations shall not come into force until the Council has been established.”

**10. Section 94(3):**

- a. Although the making of regulations is a critical function, it is not usually the case that regulations are placed before Parliament. Laws are appropriately placed before the legislators for debate and approval, but secondary legislation such as regulations tends more frequently to be dealt with by the Minister concerned, or a quango – such as a sector regulator.
- b. Requiring regulations to be placed before Parliament suggests that Parliament has some function in relation to those regulations, and may require changes or refuse to approve them. As a result, this could cause significant delays whilst numerous regulations (the Act anticipates that at least 16 regulations will be made by the Minister) come before Parliament – noting too that Parliament's time is taken up by numerous other matters of national importance.
- c. We recommend that subsection (3) be deleted.

**11. Section 95(1):**

We recommend that subsection (v) be amended to refer to the practising certificate to tie into section 30(3), as follows, “(v) the manner in which the Council must keep the Roll of legal practitioners as contemplated in section 30(3) *and the grant of and eligibility for a practising certificate;*”

Please do not hesitate to contact the writer if you would like to discuss these proposals further.

Yours faithfully

**Kerron Calenborne (a signed copy will be sent later today)**