**SUBMISSIONS BY THE NATIONAL BAR COUNCIL OF SOUTH AFRICA (NBCSA) ON THE LEGAL PRACTICE AMENDMENT BILL B11-2017 AND OTHER PROVISIONS ON THE LEGAL PRACTICE ACT 28 OF 2014**

1. **Introduction**

The purpose of this submission to the Portfolio Committee on Justice and Correctional Services is to present and make proposals on legislation which has far reaching implications for the future of legal practitioners in South Africa. Our first submission is on the Legal Practice Amendment Bill B 11-2017 which is currently being considered by the Committee and seeks to amend specific provisions in the Legal Practice Act 28 of 2014. Our second submission is to present motivations for the consideration of proposals for further amendments to the Legal Practice Act notwithstanding the fact that such amendments are not part of the proposed amendments of the Bill before the Committee.

1. **Background**

When the Legal Practice Bill (now the Legal Practice Act 28 of 2014) was introduced in Parliament, its memorandum on the objects of the Bill highlighted that the legal profession is not representative of the demographics of South Africa and also that entry into the profession is in many instances determined by outdated, unnecessary and overly restrictive prescripts. Further, that access to legal services especially by the poor is limited. The National Bar Council of South Africa subscribes to the principle of access to justice and also ensuring healthy professional competition between legal practitioners, in this instance between advocates and attorneys.

Further, in the preamble of the Act, the following are apparent:

1. That section 22 of the Bill of Rights of the Constitution established the right to freedom of trade, occupation and profession.
2. That the practice of a trade, occupation or profession may be regulated by law.

It is critical that to realise these objectives, various provisions in the Act be aligned with the Constitution.

1. **The National Bar Council of South Africa and its role in the National Forum established in terms of the Legal Practice Act 28 of 2014**

Section 96 of the Legal Practice Act, 2014 established the National Forum on the Legal Profession (“the National Forum”). The National Bar Council of South Africa is represented in the National Forum and has one seat. The National Bar Council of South Africa is presenting these submissions to the Portfolio Committee on Justice and Correctional Services as an institution that represents its members who are in excess of 800. All these submissions are made on behalf of the National Bar Council of South Africa.

1. **A reflection on the Legal Practice Amendment Bill B11-2017**

The memorandum on the objects of the Legal Practice Amendment Bill B11-2017 provides that the ‘ primary aim of the Bill is to address practical and technical issues of a non-contentious nature, including the transitional provisions of the Act in respect of the implementation of the Act (own emphasis). The proposed amendments on the bill are as follows:

1. Clause 1 amends section 6 of the Act. Section 6 of the Act provides for the powers and functions of the South African Legal Practice Council (“the Council). The bill seeks to add as functions of the Council the establishment, promotion, administration or assistance in the establishment, promotion or administration of insurance schemes, medical aid schemes, medical benefit schemes, pension funds, provident funds, pension schemes or benevolent schemes for legal practitioners, for employees of legal practitioners and for officials and employees of the Council.
2. Clause 2 amends section 23 (2)(b) of the Act. Section 23 of the Act provides for the establishment of Provincial Councils. The proposed amendment will allow the Minister to prescribe the areas of jurisdiction of Provincial Councils in consultation with the Council.
3. Clause 3 amends section 33 of the Act. Section 33 of the Act provides for authority to render legal services. Clause 3 amends section 33 (1) and (3) to provide that only practising legal practitioners may perform certain acts or render certain services by inserting the word “practising”
4. Clause 4 amends section 91 of the Act. Section 91 of the Act provides for the right of banks in respect of trust accounts. Clause 4 amends section 91(4) of the Act to provide that the Legal Practitioners’ Fidelity Fund Board may also determine the period for which a bank statement must be issued and also replaces the word ‘ statement’ with the words ‘ transaction history’
5. Clause 5 amends section 96 of the Act. Section 96 of the Act provides for the establishment of the National Forum on the Legal Profession, Clause 5 proposes an amendment to section 96 of the Act to provide that the National Forum 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.
6. Clause 6 amends section 97 of the Act which sets out the terms of reference of the National Forum. Clause 6 proposes that the mandate of the National Forum should be broadened to include the mandate to advise the Minister on the first set of regulations that must be made in terms of section 94 of the Act and to make the first set of rules in terms of section 95 of the Act.
7. Clause 7 deals with consequential amendments to section 109 of the Act which confirm and give effect to the extension of the mandate of the National Forum as contemplated in clause 6
8. Clause 8 amends section 117 of the Act which deals with transitional provisions relating to the existing statutory law societies. The amendment proposes that the existing law societies must continue to perform their powers and functions

until the date of transfer of assets, rights, liabilities, obligations and staff, from the current law societies to the Council or Provincial Councils as contemplated in section 97 (2) (a), as amended by clause 6.

Clause 9 deals with the short title.

In the memorandum it is also stated that the Bill was submitted to the National Forum for comment and that comments were received from the National Forum. Although the Bill was submitted to the National Forum on the Legal Profession which the National Bar Council of South Africa is a member of, it is our submission that NBCSA is making these submissions as an institution that represents its members.

1. **Concerns of the National Bar Council of South Africa on the Legal Practice Amendment Bill B11-2017**

As already stated above, there is a proposed amendment to section 33 of the Act. Clause 3 of the Bill amends section 33 (1) and (3) of the Act to provide that only practising legal practitioners may perform certain acts or render certain services by inserting the word ‘practising.’ ( own emphasis)

Our concerns are as follows:

1. there is no definition for the term ‘practising legal practitioner’
2. does the term ‘practising legal practitioner’ suggest that this term will apply only to those legal practitioners who attend or appear in court? Does this definition exclude consultants who though render or offer various legal services do not appear in court? Will such consultants not be entitled to receive rewards or commission for rendering legal services?

Section 33 of the Act provides:

*Authority to render legal services*

*33.*

*(1) Subject to any other law no person other than a legal practitioner who has been admitted or enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward –*

1. *appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear; or*
2. *draw up or execute any instruments or documents relating to or required or intended to use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic.*

*(2) No person other than a legal practitioner may hold himself or herself out as a legal practitioner or make any representation or use any type or description indicating or implying that he or she is a legal practitioner.*

*(3) No person may in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary, unless that person is an advocate, attorney, conveyancer or notary , as the case may be.*

*(4) A legal practitioner who is struck off the Roll or suspended from practice may not –*

1. *render services as a legal practitioner or indirectly for his or her own account, or in partnership, or association with any other person, or as a member of a legal practice; or*
2. *be employed by, or otherwise be engaged, in a legal practice without the prior written consent of the Council, which consent may not be unreasonably withheld, and such consent may be granted on such terms and conditions as the Council may determine.*

Clause 3 of the Bill which amends the Act provides:

*Amendment of section 33 of Act 28 of 2014*

*3. Section 33 of the principal Act is hereby amended –*

1. *by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:*

*“Subject to any other law, no person other than a practising legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward –“; and*

1. *by the substitution for subsection (3) of the following subsection:*

*“(3) No person may in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary, unless that person is* ***[an]*** *a practising advocate, attorney, conveyancer* or *notary, as the case may be.”*

We submit that the current reading of section 33 (1) and (3) in the Act should be retained as the proposed amendment in the Bill will adversely other legal practitioners.

1. **A reflection on the provisions which are not part of the proposed amendments in the Bill**

Rule 249 (1) of the Assembly Rules provides that ‘if a bill has been published for public comment in terms of Rule 241 or 248, the Assembly committee to which the bill is referred must arrange its business in such a manner that interested persons and institutions have an opportunity to comment on the bill. In the same vein Rule 249 (3) of the Assembly Rules provides:

*(3) The committee-*

*(a) must inquire into the subject of the bill and report on it to the Assembly;*

*(b) if it is a bill amending the provisions of legislation, may seek the permission of the Assembly to inquire into amending other provisions of that legislation ( own emphasis)*

*(c) may, or if ordered by the Speaker must, consult any other committee that has a direct interest in the substance of the bill;*

*(d) may consult the member in charge of the bill;*

*(e) may consult the JTM on whether any amendments to the bill proposed in the committee-*

*(i) may affect the classification of the bill; or*

*(ii) may render the bill constitutionally or procedurally out of order;*

*(f) may not propose an amendment that-*

*(i) affects the classification of the bill, except as provided in subrule (4) and Joint Rule 163; or*

*(ii) renders the bill constitutionally or procedurally out of order within the meaning of Joint Rule 161;*

*(g) may recommend approval or rejection of the bill or present with its report an amended bill or a redraft of the bill;*

*(h)………………*

*(i)…………………*

In support of our submission as well as our motivation for consideration of amendments on some provisions of the Legal Practice Act which are not part of the amendment Bill before the Committee, we have identified section 34(2)(b) of the Act as requiring an amendment. There is a need to clarify the provisions of section 34(2)(b) of the Act.

*Section 34(2)(b) reads as follows:*

1. *An advocate contemplated in paragraph (a)(ii) may only render those legal services rendered by advocates before the commencement of this Act as determined by the Council in the Rules, if he or she –*
2. *is in possession of a Fidelity Fund certificate and conducts his or her practice in accordance with the relevant provisions of Chapter 7 with particular reference to section 84, 85, 86 and 87;*
3. *has notified the Council thereof in terms of section 30(1)(b)(ii).*

The question is will advocates who possess a Fidelity Certificate be permitted to perform those functions which are performed by attorneys? Is the construction of section 34 aligned to what the Act seeks to achieve? In our view, it is not. Our reading of section 34 is premised on the following:

1. An advocate who will possess a Fidelity Fund Certificate will render those services which were traditionally rendered by advocates before the commencement of the Act. Simply put, these advocates referred to hereinbefore will not perform functions of an attorney even though they are both in possess a Fidelity Fund Certificate.
2. Before the commencement of the Act, advocates did not sign notices and or pleadings etc. The question is: is this what the Act intends to achieve, where litigants who approach Fidelity Fund Advocates will still be required or expected to have notices and or pleadings drafted and settled by the Fidelity Fund Advocate to be signed by an attorney notwithstanding the fact that both they possess a Fidelity Fund Certificate. Is that access to justice on the part of litigants. It is our submission that it is not as we believe that the client (litigant) will remunerate both the advocate with a Fidelity Fund Certificate and an attorney. Why are advocates with a Fidelity Fund Certificate not recognised by the Act in the same manner with attorneys who possess the same Fidelity Fund Certificate.

We therefore propose that Section 34(2)(b) should be amended to read as follows:

*34(2)(b) An advocate contemplated in paragraph (a)(ii) may render legal services as determined by the Council in the Rules, if he or she –*

1. *is in possession of a Fidelity Fund certificate and conducts his or her practice in accordance with the relevant provisions of Chapter 7 with particular reference to section 84, 85, 86 and 87;*

*(ii)has notified the Council thereof in terms of section 30(1)(b)(ii).*

Having read the provisions of Rule 249 of the national Assembly rules, we submit:

1. it is in the interest of members of the NBCSA , the legal profession and members of the public that permission be sought to amend other provisions of the Legal Practice Act which are not part of the Legal Practice Amendment Bill before \the Committee;
2. that the proposed amendments to the bill proposed in the Committee will not affect the classification of the Bill; and
3. that the proposed amendments will not render the bill constitutionally or procedurally out of order.
4. **Conclusion**

It is our submission that in order to realise the spirit and purport of the Constitution and more particularly the underlying principles enshrined in the Bill of Rights, the Committee considers the proposed amendments.