BRIEFING NOTE ON LEGAL PRACTICE BILL, 2012, FOR PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON 6 JUNE 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, most notably the Admission of Advocates Act, 1964 (Act No. 74 of 1964), and the Attorneys Act, 1979 (Act No. 53 of 1979), of the former Republic of South Africa and similar Acts in the former homelands. Besides the undesirable fragmented legislative framework and different regulatory bodies with different codes of conduct, which do not promote a legal profession that the Constitution envisages, some of the Acts give rise to anomalies, for instance in the case of practical vocational training in the form of articles of clerkship. In addition, in the case of advocates there are no statutory regulatory bodies at all but various non-statutory formations, for instance the General Council of the Bar and its constituent Bar Councils and bodies such as Advocates for Transformation. There are no statutory requirements in place for practical vocational training in the case of advocates. A person who wishes to practise as an advocate merely applies to court for admission as such if he or she, among others, qualifies in terms of qualifications, namely an LLB degree, and is a fit and proper person. Persons wishing to practise as an attorney must, on the other hand, before they can apply to court for admission as such, do articles of clerkship, generally for a two year period, and undergo a gruelling attorneys' admission examination. These requirements are set out in the law.

1.2 The legal profession is also not representative of the demographics of South Africa and entry into the profession is, in some instances, determined by outdated, unnecessary, and overly restrictive prescripts.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 by uniting the legal profession and regulating it by means of a single statute under a single umbrella regulatory body, the South African Legal Practice Council.

1.3 It has taken approximately 15 years to get to this point of having a Bill before Parliament for consideration. What also needs to be said at the outset is that the 15 years of negotiations, deliberations and discussions by the various structures that have been set in place for purposes of coming forward with a consensus Bill have not achieved this goal. While in the recent past

there has been more of a convergence of opinions and some degree of consensus, the Bill is still not a consensus Bill in some respects. Hence the incremental approach provided for by means of the Transitional Council. Both Government and the legal profession recognise this and have undertaken to continue during the parliamentary process with engagement on issues, particularly the issues which form the mandate of the Transitional Council.

1.4 While the Bill has taken time to get to here for consideration, longer than usually is the case after Cabinet approval, it needs to be said that the time taken has been used fruitfully and was done with a purpose. The finalisation of the Bill has been unusual in the sense that changes made to it during the certification process by the State Law Advisers are the result of, among others –

(a) continuing engagement with the legal profession in an attempt to try and reach consensus on aspects in respect of which there was no agreement at the time the Bill was considered by Cabinet;

(b) issues identified by the State Law Advisers which, in their opinion, required clarity and revisiting; and

(c) issues highlighted during discussions between the Department and the Competition Commission (the Commission) which the Commission considered to be anti-competitive and discriminatory.

1.5 While seeking to address the challenges highlighted above, the Bill recognises the independence of the legal profession and seeks to strengthen this independence. The Bill is, among others, a measure to "democratize" the structures governing the profession which, in turn, will lead to greater transformation. The legal profession, after all, serves as the feeder to the judiciary.

1.6 The transformative nature of this Bill will also manifest itself in its application. Several provisions intend to promote and facilitate transformation and accountability:

- One umbrella body will regulate both the advocates' and attorneys' professions but will, where necessary, recognise the differences between the two categories of lawyers.
- Clause 6 requires the Council to report annually to the Minister on its activities, with the view to making recommendations to the Minister regarding legislative and other interventions to improve access to the profession and access to justice broadly.

- Clause 29 envisages the obligatory rendering of community service by candidate legal practitioners as well as by practising lawyers, advocates and attorneys, which will contribute enormously to access to justice.
- Clause 32 allows a legal practitioner to apply to the Council to convert his or her registration as an attorney to that of an advocate and vice versa, facilitating mobility between these two categories of lawyers.
- Clause 35 provides for the establishment of a fee structure which is to determine affordable legal fees.
- The establishment of an Office of Legal Services Ombud (the Ombud), which is intended to protect and promote the interests of consumers of legal services.
- The emphasis on the creation of mechanisms to provide proper, appropriate and transformational legal education.
- The move away from the current system of "provincialism", in terms of which independent statutory law societies "each do their own thing", which is certainly not in the interests of a unified legal profession, required to promote uniform minimum norms and standards.
- It eliminates artificial and outdated discrepancies or distinctions between advocates and attorneys, for instance it gives attorneys the right of appearance in all courts, as is the case with advocates, and it give attorneys the right to practise throughout the Republic, as is the case with advocates.
- It will eliminate the undesirable and artificial situation where there are statutory and non-statutory members of the various law societies.

Clause 3, setting out the purpose of the Bill, and clause 5, setting out the objects of the Council, confirm, in broad terms, the transformatory intent, as does the Preamble.

1.7 As already indicated, the Bill proposes an incremental approach for its implementation. A Transitional South African Legal Practice Council (the Transitional Council) 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 and putting systems and procedures in place for the subsequent phases of the implementation process.

1.8 The Transitional Council's role, powers and functions 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.

1.9 The Bill still affords an opportunity for the profession to shape its future. That is why the Bill places an emphasis on the role of the Transitional Council, affording the various formations in the profession to come forward, within a specified timeframe, with legislative proposals on how the profession is to be regulated. The real transformation lies in the proposals to be made by the representatives of the professions who will serve on the Transitional Council.

1.10 While the profession is being given an opportunity to transform and rationalise itself in the deliberations of the Transitional Council, Government has a legitimate interest and expectation in overseeing that the profession is transformed in line with Constitutional imperatives and that it enhances access to justice, not only for entry into the profession but also in relation to access to legal services. Government is duty bound to bring this about. The Constitution, our supreme law, envisages as much. Section 22 of the Constitution, dealing with freedom of trade, occupation and profession, gives every citizen the right to choose their trade, occupation or profession freely. But section 22 also provides that the practice of a trade, occupation or profession may be regulated by law, and that is what the Bill does.

1.11 The Memorandum on the Objects of the Bill sets out the provisions of the Bill in considerable detail. Therefore only the clauses which are particularly noteworthy or which are bound to give rise to some debate are discussed below, rather than operational issues which will be dealt with during the detailed deliberations of the Committee.

2. CLAUSE 1: DEFINITIONS

The definitions are self-explanatory.

- The Bill gives continued recognition to the two main categories of legal practitioners, namely "advocates" and "attorneys".
- The definitions of "conveyancer" and "notary" indicate that these functionaries must be admitted attorneys. The conveyancing and notary qualifications are specialist qualifications that can be acquired by an attorney.

3. CLAUSES 4 AND 5: ESTABLISHMENT AND OBJECTS OF COUNCIL

3.1 Clause 4 of the Bill establishes the Council which is to regulate all legal practitioners. (This is confirmed by clause 2 which provides that the Bill is applicable to all legal practitioners).

3.2 Clause 5 sets out the objects of the Council. These are, among others, to facilitate the realisation of the goal of a transformed and restructured legal profession that is unified, accountable, efficient and independent; 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 reflects the demographics of the Republic. The Council is also responsible for implementing the Legal Services Sector Charter which has the same transformational goals as the Bill.

4. CLAUSE 6: POWERS AND FUNCTIONS OF COUNCIL

4.1 The form and structure of the regulatory and governance arrangements for the profession have dominated the debate on the transformation of the legal profession for the past 15 years. The need for a single regulatory structure is motivated by the following:

- It will facilitate uniformity in the regulation of legal practitioners;
- there will be more certainty and transparency in respect of the norms and standards governing legal practitioners;
- it will promote the protection of the public interest;
- it will advance constitutional democracy by providing legal practitioners with a single unified body through which to raise and address concerns;
- it will facilitate consumer protection;
- it will advance public confidence in the rule of law, given the fact that lawyers have a fundamental role to play in the administration of justice;
- attorneys and advocates, joining forces within a single structure, will be able to work more efficiently and inexpensively, thereby ensuring greater access to legal services;
- a single structure which ensures uniform, transparent and representative regulation will contribute towards improving the image of the profession as an accessible profession, thus broadening access to the profession; and
- it will address the concern or perception that a self regulating profession serves itself and looks after its own, at the expense of clients and the greater public interest.

4.2 The Department's position is that it is necessary for a single regulatory structure in the form of a Council to be established in order to set the norms and standards for the profession, with a view to enhancing access to justice, not only for consumers of legal services but also for entry into the profession by previously disadvantaged individuals.

4.3 The view is held that to allow existing structures to continue operating will perpetuate the current position and transformation of the legal profession will not become a reality. The Legal Services Sector Charter, of December 2007, in Chapter 3, paragraph 3.2(i) and paragraph 3.3(i) also refers to one national regulatory body.

4.4 Clause 6 sets out at length the powers and functions of the Council, the following of which are highlighted:

4.4.1 In terms of clause 6(1)*(j)*, the Council may delegate any of its powers and functions to a committee established in terms of the Bill or the Regional Councils. However, such delegation does not divest the Council of any power or function so delegated. The Regional Councils will therefore not have any original powers as the current provincial law societies do in terms of the Attorneys Act, 1979. It is, however, recognised that regional structures are necessary for operational reasons but there must be uniformity in their approach.

4.4.2 Another provision that promotes uniformity is clause 6(1)*(k)* that provides that the Council must develop norms and standards to guide the conduct of legal practitioners and the legal profession. Currently only an advocate that belongs to one of the voluntary associations is subject to that association's norms and standards. There is no uniformity and little recourse for a dissatisfied client, other than an application to the High Court.

4.4.3 Clause 6(1)(*m*) to (*p*) deals with the provision of financial support by the Council to persons or organisations in deserving cases. These provisions are intended to enhance access to the profession. Government acknowledges, and is grateful for, the numerous initiatives undertaken by the profession to date in this regard.

4.4.4 Clause 6(2) sets out matters relating to the administration of the Council. Clause 6(2)(*g*) provides that the Council may publish periodicals, pamphlets and other printed material for the benefit of practitioners and the public.

4.4.5 Training is recognised in the Bill as a key transformational imperative, as legal practitioners are one of the main sources of candidates for the judiciary, the transformation of which is of paramount importance. 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 establish a mechanism to provide proper and appropriate transformational 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.

4.4.6 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 law graduates registered 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. 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. It also indicates Government's commitment in this regard.

4.4.7 In terms of clause 22 the funds of the Council consist, among others, of annual subscription fees paid by legal practitioners and an annual appropriation made by the Attorneys Fidelity Fund.

5. CLAUSES 7 AND 14: COMPOSITION OF COUNCIL AND ITS DISSOLUTION

5.1 Clause 7, dealing with the composition of the Council, is bound to give rise to considerable and robust debate in the Committee. The representation of attorneys and advocates is a key issue. Clause 7(1) provides for the composition of the Council which, it is suggested, should consist of a majority of legal practitioners, 16 in all, namely 10 practising attorneys and six practising advocates, a legal academic nominated by the academia, three persons appointed by the Minister and a representative of Legal Aid South Africa. There will

probably be criticism about the Minister's power to appoint three members and the fact that Legal Aid South Africa has representation on the Council.

5.2 The first Council will be elected in accordance with the procedure to be approved by the Minister by regulation on the advice of the Traditional Council. After that the Council will be elected by a procedure to be determined by the Council in its rules.

5.3 Clause 14 provides for a situation where the Minister loses confidence in the ability of the Council to perform its functions. The Minister may, should such a situation arise, dissolve the Council. This provision has already been criticised on the grounds that it infringes on the independence of the legal profession. While on the face of it seems to be the case, the Minister may only dissolve the Council on good cause shown and after he or she has afforded the Council an opportunity to respond to his or her intention to dissolve the Council. Moreover the Minister must, before dissolving the Council, appoint a judge to conduct an investigation and to make recommendations to him or her. It should be borne in mind that one of the objects of the Bill is to protect and promote the public interest.

6. CLAUSE 23: REGIONAL COUNCILS

Clause 23 provides for the establishment of Regional Councils by the Council. The areas of jurisdiction will be prescribed in regulations by the Minister. As already indicated, the Regional Councils will only have delegated powers of the Council to promote a uniform approach to operational matters. Previous versions of the Bill provided for the recognition of voluntary associations of legal practitioners. The Bill does not provide for voluntary associations since section 18 of the Constitution gives everyone the right to freedom of association.

7. CLAUSES 24 AND 26: ADMISSION AND ENROLMENT OF LEGAL PRACTITIONERS

Enrolment is centralised in terms of the Bill. Clause 24, read with clause 26, provides that only a legal practitioner admitted by the High Court and enrolled with the Council in terms of the Bill may practise law, either as an attorney or as an advocate. Currently attorneys are enrolled by the provincial law societies and advocates by the Director-General: Justice and Constitutional Development. A High Court may only admit a person as a legal practitioner if the person is –

(a) duly qualified, that is he or she has an LLB degree or a law degree obtained in a foreign country which is equivalent to a South African LLB degree and which is recognised by the SA Qualifications Authority; he or she has undergone practical vocational training in

the form of articles or pupilage as prescribed by the Minister in regulations; and he or she has passed the admission exam determined by the Council;

(b) is a South African citizen or a resident;

(c) is a fit and proper person; and

(d) has served a copy of the application for admission to court, with accompanying documentation, on the Council.

Clause 24 also requires the Minister to make regulations, after consultation with the Council, on the right of appearance of foreign legal practitioners in South African courts and the right to practise here pursuant to the Republic's international obligations, for instance South Africa's international obligations under the General Agreement on Trade Services (the GATS) adopted by the Republic in 1994.

8. CLAUSE 25: RIGHT OF APPEARANCE

8.1 Clause 25(1) provides that legal practitioners may practise throughout the Republic. As already indicated, this represents a further progressive or transformative measure. At present advocates may practise throughout the Republic but attorneys may only practise in the jurisdiction of the High Court in which they were admitted and enrolled. If an attorney wishes to practise or appear in the area of jurisdiction of another High Court, he or she must first apply to the Registrar of the High Court in question to be enrolled there. The Bill, in other words, gets rid of an unfair and unjustifiable discriminatory measure. All legal practitioners must have the same LLB degree for purposes of admission and attorneys at present must also undergo a period of articles a requirement that does not apply in the case of advocates. There is simply no justification for the continued distinction in this regard.

8.2 Clause 25(2) provides that all legal practitioners have a right to appear on behalf of any person anywhere in the Republic. This provision unconditionally abolishes the current discrimination on the right of appearance in the higher courts between advocates and attorneys. Currently attorneys may only appear in the lower courts, and in the High Court, but only after application in terms of the Right of Appearance in Courts Act, 1995. Again, there is simply no justification for the continued distinction in this regard.

9. CLAUSE 26: VOCATIONAL TRAINING

Clause 26 provides for the minimum qualifications and practical vocational training that a person needs to undergo in order to be admitted and enrolled as a legal practitioner. Currently articles of clerkship are compulsory for all prospective attorneys and are regulated by statute. Advocates need not undergo any training. Pupilage has no statutory basis, being applicable only to advocates who choose to practise with the constituent Bars of the General Council of the Bar. The discrepancy in this respect is untenable. This aspect is one of the terms of reference of the Transitional Council, which will have an opportunity, within 24 months, to investigate and make recommendations to the Minister on the best form of vocational training that advances the transformation of the profession and facilitates entry into the profession. This clause also retains the Council's authority to make rules on the assessment of persons who wish to become conveyancers or notaries.

10. CLAUSE 29: PRESCRIPTION OF COMMUNITY SERVICE

10.1 Clause 29(1) provides that the Minister may, after consultation with the Council, prescribe the requirements for community service by regulation. Community service may be a component of practical vocational training or a minimum period of recurring service by practising legal practitioners upon which continued registration as a legal practitioner is dependent.

10.2 In terms of clause 29(2), "community service", may, among others, include the delivery of free legal services to the public, the provision of training on behalf of the Council, service as a judicial officer and service in the small claims courts, and service to the State. This measure is intended to enhance the public's access to legal services.

11. CLAUSES 30 AND 31: REGISTRATION AND CANCELLATION AND SUSPENSION OF REGISTRATION

11.1 Clause 30 deals with the registration of legal practitioners with the Council. All legal practitioners who are admitted by the court must be registered with the Council. The Council must keep a Roll of Legal Practitioners (Roll) that reflects the particulars of practising and non-practising legal practitioners.

11.2 In terms of clause 30(5), the Regional Councils will play a role in the enrolment of legal practitioners, as the registrar of the High Court where a legal practitioner was admitted, must forward the details of the admission to the Council, through the Regional Council in question.

11.3 Clause 31 provides that a legal practitioner may be suspended or have his or her registration 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. The High Court remains the ultimate arbiter for the striking off of a person's name from the Roll.

12. CLAUSE 33: AUTHORITY TO RENDER LEGAL SERVICES

12.1 Clause 33 deals with work reservation and 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. Non-compliance with this is subject to a criminal sanction.

12.2 The Competition Commission has indicated that this aspect will require further attention going forward.

13. CLAUSE 34: FORMS OF LEGAL PRACTICE

13.1 Clause 34 retains the referral system, namely that an advocate may only render legal services upon receipt of a brief from an attorney. An advocate may therefore not receive funds directly from a client. T

13.2 However, the possibility has been created for the Minister to make regulations on advice from the Council, regarding the acceptance of briefs by advocates directly from members of the public.

13.3 While multi-disciplinary practices are not included as a form of legal practice, clause 6(5)*(i)* provides that the Council must advise the Minister on this. The South African Law Reform Commission is currently investigating this. The Competition Commission also indicates that the development of this form of practice should be encouraged.

14. CLAUSE 35: FEE STRUCTURE OF LEGAL PRACTITIONERS, JURISTIC ENTITIES AND JUSTICE CENTRES

14.1 The high cost of legal fees is the main stumbling block to access to legal services by the members of the public. This issue is one of the Council's functions (see clause 6(4)), and clause 35 provides that fees for legal services may only be charged in accordance with the fee structure as determined in the Bill or as may be determined in law. Criteria are put in place for

the determination of fees, among others, the importance, significance, complexity and expertise of the legal services required, the volume of work and the time spent on the work, as well as the financial implications of the matter at hand.

14.2 The Council and Transitional Council have no option but to address this issue and determine a fees structure in pursuance of one of the main objects of the Bill, namely to ensure that legal services are affordable and within the reach of the general population. The fee structure and determination of fees for the different services rendered by attorneys and advocates is fundamental for access to justice.

14.3 Although the Competition Commission has indicated that the provisions dealing with fees are appropriate, it has indicated that this aspect will require further attention going forward. This is to avoid discounting and overreaching that sometimes happens. The Commission proposes that —

- maximum tariffs should be prescribed and not minimum tariffs as is currently the position; and
- the fee structure should be composed of persons, the majority of whom are not stakeholders/competitors.

15. CLAUSE 36: CODE OF CONDUCT

15.1 Clause 36 requires the Council to draw up a code of conduct for all practitioners. In terms of clause 36(4) and (5) the code must be published in the *Gazette* and comments must be invited before the finalisation or amendment thereof. Failure to comply with the code by any legal practitioner constitutes misconduct.

15.2 The clauses of the Bill relating to the code of conduct and fees chargeable by legal practitioners for legal services are possibly the most significant in the quest to enhance the accountability of the profession and access to justice.

16. CLAUSE 37: ESTABLISHMENT OF DISCIPLINARY BODIES

16.1 Clause 37 will also enhance the accountability of the profession. In terms of clause 37(1), the Council must establish investigating committees to conduct investigations into complaints against legal practitioners, and if appropriate, refer the matter to a disciplinary

committee for a full hearing. These bodies must be accessible to the public, must promote the efficient resolution of complaints, must be representative and include members of the public.

16.2 Clause 37(8) provides that where a complainant is aggrieved by the outcome of a complaint, he or she may lodge an application for a review with the Ombud. A legal practitioner has a right of appeal to an appeal tribunal appointed by the Council, which implies that the legal practitioner may challenge the facts presented at a hearing, whereas a complainant has a right of review with the Ombud, where only procedural matters relating to the hearing of a complaint and the outcome thereof may be challenged.

16.3 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 consumer.

16.4 Sanctions that may be imposed by a disciplinary body include, among others, an order to pay compensation to the complainant, a fine, suspension from practice, an endorsement on the enrolment of the practitioner, an order that an attorney's Fidelity Fund certificate be withdrawn and a recommendation to the Council that it applies to court to have the name of the practitioner struck from the roll.

17. CHAPTER 5: LEGAL SERVICES OMBUD

17.1 Clause 46 establishes the Office of Legal Services Ombud. This new office will enhance accountability and transparency. The objects of the Ombud, which are set out in clause 47, 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. The Ombud is appointed by the President. The person appointed must have at least 10 years' experience as a legal practitioner or in the law. The Ombud's remuneration is determined by the President after consultation with the Minister and the Minister of Finance but it may not be less than the remuneration of a judge of a High Court.

17.2 Clause 49 sets out the powers and functions of the Ombud. Apart from the matters relating to discipline, the Ombud may make recommendations to the Council on any matter

which he or she considers may affect the integrity of the legal profession. The Ombud may also report and make recommendations to the Minister on the failure on the part of the Council or Regional Council.

17.3 Clause 52(6) provides that the expenditure of the Ombud will be defrayed from money appropriated by Parliament. It will form part of the Department's vote.

17.4 Clause 53 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.

18. CHAPTER 6: ATTORNEYS FIDELITY FUND

18.1 Chapter 6 of the Bill deals with the Attorneys Fidelity Fund (the Fund). The provisions of this Chapter largely replicate the current dispensation in the Attorneys Act, 1979. Clause 54 provides for the continued existence of the Attorneys Fidelity Fund established by the Attorneys Act, 1979.

18.2 Clause 55 deals with the revenue of the Fund, which is essentially from interest earned in trust accounts of attorneys, investments and money received from insurers.

18.3 Clause 56 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. At the request of the Law Society of South Africa subclause (1) expressly provides that the Fund is liable only if the entrustment occurs in the course of a practice of an attorney as such. If the limitation is not imposed it would have the effect of extending greatly the exposure of the Fund to theft of money not entrusted to an attorney but paid to him in another capacity.

18.4 Clauses 62 to 83 deal with the establishment of a Board to manage and administer the Fund, and claims against the Fund.

18.5 In terms of clause 63, the Board is composed of five legal practitioners nominated by the Council, two persons nominated by the Council who have expertise in the field of finance and two fit and proper persons nominated by the Minister. At the Fund's request clause 65 was amended to provide that Fund Board members may not be members of the Council or its

committees. This strengthens the independence of the Fund and prevents any conflict of interest.

19. CHAPTER 7: HANDLING OF TRUST MONIES

19.1 These clauses deal with the handling of trust monies and are only applicable to attorneys. In terms of clause 84, every attorney who receives or holds money or property belonging to any person must be in possession of a Fidelity Fund certificate. That attorney must, in terms of clause 86, open and operate a 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.

19.2 Clauses 87 to 91 deal with technical provisions relating to trust accounts and are virtually the same as the current provisions relating to the keeping of trust accounts in the Attorneys Act, 1979. These provisions have been retained as they protect the interests of the public.

19.3 Clause 89 gives both the Council and the Fund the right to bring an application to the High Court to freeze a trust account and to appoint a curator bonis to control and administer the trust account in question should this be necessary. Currently only the provincial Law Societies may bring such applications but the Fund motivated the necessity for them to be allowed to approach the High Court for damage control purposes.

20. CLAUSES 94 AND 95: REGULATIONS AND RULES

20.1 Clause 94 sets out the matters in respect of which the Minister may, or must, make regulations, after consultation with the Council. These are mainly issues relating to policy and include, among others, the following: the areas of jurisdiction of Regional Councils, the requirements for practical vocational training for both aspirant attorneys and advocates, the establishment of a mechanism to provide transformational legal education and training, the right of appearance of candidate legal practitioners in the courts, the fee structure and rendering of community service. Because of the importance of these issues, the regulations must be approved by Parliament.

20.2 Clause 95 sets out the matters in respect of which rules may, or must, be made by Council. These are regulatory aspects relating to the administration of the Council and include, among others, the following: the annual fees payable by legal practitioners to the Council, the procedure for the election of Council members, competency-based examinations or

assessments for candidate legal practitioners, conveyancers and notaries and the procedures to be followed by disciplinary bodies

21. CLAUSES 96 TO 119: TRANSITIONAL PROVISIONS

21.1 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.

21.2 Clause 96 provides for the establishment of the Transitional Council which has a lifespan of 3 years. By conferring statutory powers upon the Transitional Council, to investigate and submit regular reports on the matters assigned to it to the Minister and Parliament, not only will the discourse on the transformation of this vital sector, namely the justice system, be subjected to public scrutiny, but it will also strengthen the strategic relationship and partnership between the legal profession and the Department, which is vital for realising the transformative goals envisaged by the Bill. Accordingly, its main purpose would be to make recommendations on the rationalisation and transformation of the legal profession. The legal profession is assigned the responsibility of finalising aspects in respect of which there is currently contestation and which, in reality, can only be resolved by the profession itself if meaningful progress is to be made. Failure to move forward with a more consensus-based Bill could have disastrous results for the profession and for our entire constitutional democracy, in which the legal profession plays a cardinal role. As in the case of the constitution of the permanent Council, this clause dealing with the composition of the Transitional Council is bound to give rise to considerable and robust debate in the Committee. The representation of attorneys and advocates is a key issue. In clause 96(1) it is suggested that the Transitional Council consists of a majority of legal practitioners, 16 in all, namely eight attorneys nominated by the Law Society of South Africa (two of which represent the BLA, two of which represent NADEL, and one from each of the four statutory provincial law societies), a legal academic nominated by the academia, two persons appointed by the Minister, a representative of Legal Aid South Africa and a representative of the Fidelity Fund Board.

21.3 Clause 97(1) sets out the terms of reference of the Transitional Council, which are, among others-

(a) to make recommendations to the Minister for purposes of making regulations on an election procedure for constituting the first Council; the establishment of the first

Regional Councils and their areas of jurisdiction; the powers and functions of the first Regional Councils; all the practical vocational training requirements for aspirant attorneys and advocates; a fee structure and a mechanism to wind up the affairs of the Transitional Council;

(b) to prepare and publish a code of conduct;

(c) to make rules referred to in clause 108(2).

Clause 97(2) provides for negotiations between the Transitional Council and the attorneys' and advocates' professions in respect of the transfer of any assets, rights, liabilities obligations and staff to the new regulatory bodies. Some critics allege that these provisions amount to expropriation. This is incorrect as the assets will not go to the State but will go back to the legal profession, as it is reconfigured.

21.4 Section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995), is made applicable 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. Section 197, inter alia, provides that if a transfer of a business takes place, the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer.

21.5 Clauses 98 to 107 provide for the organisational and operational matters of the Transitional Council. These are similar to the provisions relating to the Council.

21.6 Clause 107 provides that the funds of the Transitional Council consist of—

(a) money appropriated by Parliament; and

(b) any other monies received by the Transitional Council or accruing to the Transitional Council from any other source, including disbursements made by existing law societies as may be agreed upon.

The Department's Director-General will be the accounting officer.

21.7 Clause 107(3) provides that out-of-pocket expenses incurred by members of the Transitional Council are borne by the body which he or she represents. This will ease Government's financial burden.

21.8 Clause 108(1) provides that the Minister must, within 6 months after receiving recommendations from the Transitional Council as provided for in section 97, make regulations, in consultation with the Transitional Council, in order to give effect to the recommendations of the Transitional Council as contemplated in section 97. Should the Transitional Council fail to make recommendations within the timeframe set, the Minister is empowered to make regulations as required, after consultation with the Transitional Council.

21.9 In addition, the Transitional Council must make a number of rules, as set out in clause 108(2), also within the 24 month period referred to above.

21.10 Clauses 109 and 110 deal with the abolition of the Fidelity Funds of the former TBVC States and their Boards of Control in so far as they still exist. 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.

21.11 Clauses 111 to 115 provide for transitional arrangements in relation to qualifications and current practitioners.

21.12 Clause 116 provides that existing law societies and any voluntary association of advocates must continue to perform their powers and functions until the commencement of Chapter 2, which provides for the establishment of the permanent Council. Thereafter practitioners may associate in terms of their Constitutional right to association, but only the structures envisaged in the Bill will have statutory rights.

21.13 The Bill does not provide for the conferring of senior status on legal practitioners. The North Gauteng High Court held in the application of Adv Mansingh that the President of South Africa does not have the power in terms of the Constitution to confer the status of senior counsel on practising advocates.

21.14 Clause 119 contains the commencement dates. The Bill will be put into operation incrementally, as follows:

- Chapter 10, which contains the provisions regarding the Transitional Council, comes into operation first, on a date fixed by the President.

- Chapter 2, which contains the provisions regarding the Council, comes into operation three years after the date of commencement of Chapter 10.
- The remaining provisions of this Act come into operation on a date after the commencement of Chapter 2, fixed by the President.