

**SUBMISSIONS BY THE LEGAL RESOURCES CENTRE****LEGAL PRACTICE BILL 2012****ADDRESS TO THE PARLIAMENTARY PORTFOLIO COMMITTEE**

1. Thank you for the opportunity to address issues raised by the Legal Practice Bill.
2. Section 3 of the Bill states that the purpose of the Act will be "*to provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution*". We identify ourselves strongly with that and believe that the Act when passed must ensure that it itself and not only the profession embraces the values underpinning the Constitution. In Section 3(b) it reaffirms that amongst its purposes is to "*broaden access to justice*".
3. I come to speak on behalf of the Legal Resources Centre, a law clinic started in the early 80's by amongst others the late Chief Justice Arthur Chaskalson who recognised that far too many South Africans are unable to access justice, to afford lawyers and to get to court. Accordingly the Legal Resources Centre was set up and in association with dozens of other clinics and universities, other non-profit organisations, has provided access to justice for poor people.
4. The Rule of Law is undeniably one of the key values underpinning the Constitution. Arthur Chaskalson in his very key role of participating in drafting and interpreting rights in the Constitution continually emphasised it. It is clearly stated in Section 1(c) of the Constitution that we are "*one sovereign democratic state founded on supremacy of the Constitution and the Rule of Law*".
5. Arthur Chaskalson believed very firmly in the Rule of Law. He was a fiercely independent advocate, he headed the Bar Council at a time it was necessary time and time again to remind the apartheid state of the Rule of Law, he set up the Legal Resources Centre to ensure that there was access to justice so that people could enjoy the principle of the Rule of Law, he served on the Legal Aid Board to ensure that there was greater access to justice, and after service as the Chief Justice, he continued to speak his mind on these issues inter alia at the International Commission of Jurists and also in the last speech he gave before his death at the end of last year.

6. Our submission from the LRC today will be in two parts:
  - 6.1 First we will address you the Constitutional principles raised by the late Chief Justice and we wish simply to remind you what he said in his last speech.
  - 6.2 Once we have dealt with those aspects, my other colleagues will deal with the issues of detail that we wish to discuss. In that regard we are aware that you have received mounds of submissions from others. Our submission is different in that we have curtailed our submission to ensuring that the law clinics of which we are part are not obstructed in any manner by provisions in the Bill that may restrict their ability in fulfilling the task of providing access to justice for all.
7. In the last weeks before his death, Arthur Chaskalson again spoke this time to the Cape Law Society on the importance of the Rule of Law. Because his speech was so significant and because it directly discussed this Bill, the LRC has taken the liberty of attaching it to its submission before your committee today. We do so to encourage all of those who would participate in the debate to ensure that as Arthur Chaskalson reminded us, this Bill is about matters "*best dealt with by consensus and not dictating*".
8. Chaskalson clearly emphasises that the "*independence of the judiciary and the legal profession are central pillars of our constitutional democracy and that we should be astute to ensure that there is no erosion of these fundamental principles*". As a consequence of this, our Constitution, he reminds us, reflects the struggle against authoritarian regimes, commits us to transformation and enshrines the rights that will enable all citizens, equal before the law, to ensure that there is "*Supremacy of the Constitution and the Rule of Law*". He reminds us that President Zuma recently commented that: "*perhaps nothing reflects adherence to the Rule of Law like the judicial settlement of disputes*".
9. Chaskalson continues and says that this is only possible if "*the judiciary should be, and should be seen to be, independent*" (page 9). He then continues to state that it is clear that "*the judiciary depends on an independent legal profession to enable it to perform its constitutional duty. This is an incident of the Rule of Law which is entrenched in our Constitution*" (page 10). Then he canvasses international sources (pages 10, 11 and 12) which are the basis for this assertion and points out that the independent profession is "*essential to give substance to the right to have access to courts, the right to a fair trial, the right to just administrative action, and generally to the right of the public to enforce the obligation on the State to respect, promote and fulfil all the rights in the Bill of Rights*". (page 12 ) Put simply without independent lawyers our Constitution cannot operate in the manner intended.

10. That very independence also allows members of the profession to act in the public interest. Accordingly in the very dark days of the most authoritarian aspects of South Africa's history, there were always lawyers who were because of their independence able to act in the public interest. If those affected by injustice are not able to find people who are, in their view, sufficiently independent, then the profession would not be able to be seen as a "*institution that will uphold and protect the rights of everyone*" (page 13).
11. Chaskalson then points out that maintaining this standard is an obligation not only of the profession but that it must be done in co-operation with Government and civil society and as such "*the focus of the profession's rules should be the public interest, not self-interest*".
12. He then points out that it is intended that the Legal Practice Council should become "*the controlling body for both the attorneys and advocates professions, and the assets and liabilities of existing Law Societies and Bar Councils.....*". In that body the ethical and professional standards will be determined. "*The Council will consist of 21 members of whom 10 will be elected by attorneys and 6 by advocates. The remaining 5 will be made up of 3 nominees of the Minister, one professor of law and one nominee of the Legal Aid Board*". Thus the advocates will then become a "*junior partner of the combined profession ..... potentially a weakened profession which may have serious consequences not only for the legal profession but also for the public as well*" which the profession is required to serve.
13. Chaskalson argues that the Bill does not respect the freedom of lawyers to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. He concludes that this would be contrary to the United Nations Basic Principles on the Role of Lawyers.
14. To avoid this, the drafters need to return to the Bill so as to ensure that it achieves what its preamble says it should do i.e. to ensure that the values underpinning the Constitution are embraced, that the Rule of Law is upheld and that the independence of the profession is strengthened.
15. The Bill as currently framed unfortunately does little to ensure the retention of those ethics, the commitment to the values underpinning the Constitution because it allows the profession to become subject to a Council which can be dissolved by the Minister "*If on good cause shown he loses confidence in the ability of the Council to perform its functions effectively and efficiently, or on any reasonable grounds*".(page 20 )
16. Further we are disturbed by the fact that the Bill empowers the Minister to prescribe access to the profession by determining the training for lawyers,

the fees to be charged by lawyers – while all of this must be done after consultation with the Council, nonetheless it means that the independence of lawyers to regulate their own rules is removed from the current participants in the profession and will vest with the Minister.

17. Further Chaskalson correctly points out that the Ombud while required by the Bill to be independent, she/he is in fact required to report annually to the Minister and is financially dependent on the Department of Justice and Constitutional Development.
18. In Chaskalson's conclusion he recalls "*on other occasions I have warned against the erosions of rights and checks and balances. The first steps to that end, even they may seem at the time not to pose immediate threats, are particularly dangerous, for if allowed to pass without objection, they open the way for a political culture in which this is treated as acceptable. There are signs that this is happening in our country..... The legal profession has a duty to itself and to the people of our country to do all that it can to protect its independence. That involves ensuring that its rules and practices are in the public interest and facilitate access to courts by the public and in particular by those whose need is the greatest, by promoting the culture of independence and professionalism in practitioners, by explaining to the general public the role of the independent legal profession in protecting democracy and by raising its voice against measures calculated to erode that independence.....*"
19. We in the LRC while not opposed to the State legislating a governance structure for the profession (as it does in the medical, engineering, accountant and other professions) are to opposed to a situation where the end product will be a Legal Practice Bill which vests members of the Executive with far reaching powers to control important aspects of the functioning of the legal profession. We would therefore encourage a serious reassessment of those aspects of the Bill relating to the Minister's regulatory powers and the role of the Council.
20. We do not at this stage intend to enumerate each of the aspects of the Bill which conflict with the independence of the legal profession. They are apparent from the speech of the late Chief Justice and in different ways are discussed by many of the participants in these public hearings.
21. The challenge to our parliament and all participants in the process is as stated by the late Chief Justice is to reach consensus so that the new law will not undermine or even threaten the achievements of a lengthy and brave struggle which saw these principles enshrined in the Constitution .
22. We now turn to consider how the bill as presently framed will inhibit and restrict those who practice law in the public interest primarily through the

institution of the law clinic – an institution which has its origins in the passion of those lawyers most fiercely committed to the rule of law.

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