LEGAL PRACTICE BILL

SUBMISSION

BY

THE LEGAL RESOURCES CENTRE

1 This Legal Practice Bill has been very long in the making. The debate relating to the Bill and the transformation of the legal profession commenced before 1994 and was given impetus immediately after 1994 with the promulgation of the interim Constitution, the final Constitution, the establishment of the Constitutional Court and through the workings of the legal forum initiated by the Minister of Justice. Many attempts have been made to reach agreement in regard to the Bill and the manner in which it will realize constitutional rights and values in the legal arena. At the very least, there was general consensus that a profession that remained divided into strict compartments without recognizing the need to make legal services available on a larger scale would inhibit rather than ensure the integrity of the profession.

2 The Bill currently before us was issued in May 2012. Many of the issues relating to transformation, such as greater representation and diversity in the judiciary, the profession, in ownership of firms, as well as black leadership in law societies and bar councils, have all seen some progress notwithstanding the absence of the enactment of this legislation. Many of these welcome developments have taken place after lengthy deliberation in multiparty discussions and have already contributed significantly to the transformation of our legal processes and

profession. The Bill should facilitate the continuation of these changes rather than obstruct them in any way.

3 The Legal Resources Centre was constituted in 1979. It came into being as a public interest law group committed to using law as an instrument of justice in accessing rights for those disenfranchised and marginalized under the apartheid state. It persuaded the then legal authorities, bar councils and law societies to provide exceptions and amend rules to allow attorneys and advocates to practice together in what became known as a "law clinic" in various parts of the country.

4 We were not the first to try and assist the poor to gain access to the law. Many brave, often Black practitioners acting on their own, had tried to and often with significant success. Others had set up voluntary legal advice clinics, particularly in Johannesburg, where for example the Black Sash set up clinics to assist people prosecuted under the Pass Laws. After the enactment of the 1979 Labour Relations Act, which created greater space in which unions could organize, various trade unions set up worker advice offices throughout the country. Many others have since followed the LRC's lead and have established clinics where attorneys, advocates and paralegals work together representing poor people, their communities and organizations who would otherwise be unable to access legal services.

5 These clinics each have their own purposes. Since the advent of democracy. The LRC itself has framed its purpose as an independent, non-profit, public-interest

law clinic which uses the law as an instrument of justice. It works for the development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services in support of the vulnerable and marginalized, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social economic or historical circumstances. The LRC, both for itself and in its work, among other objectives, is committed to:

5.1 Ensuring that the principles, rights and responsibilities enshrined in the Constitution are respected, promoted, protected, and fulfilled;

5.2 Building respect for the rule of law and constitutional democracy;

5.3 Enabling the vulnerable and marginalized to assert and develop their rights;

5.4 Promoting gender and racial equality and opposing all forms of unfair discrimination;

5.5 Contributing to the development of a human rights jurisprudence; and

5.6 Contributing to the social, cultural and economic transformation of society.

6 We welcome this opportunity to comment on the Legal Practice Bill. We are indebted to the chairperson and the committee for enabling this extended time for the submission of comments.

7 The law clinics referred to in paragraphs 3,4 and 5 above extended access to legal services and emphasized throughout the commitment to the rule of law. They asserted the need for clinics to be independent from political and other interference – thus throughout emphasizing the need for the judiciary and the legal profession to retain an independence so that citizens and clients could have faith in the judicial system. The same criteria applies to the future Legal Practice Bill and needs to be emphasized and acknowledged in the Bill. Insofar as the current Bill fails to do so, this has been pointed out in his last public address before his death by the former Chief Justice and Founder of the Legal Resources Centre, Arthur Chaskalson. A copy of that final address is attached to this submission and expressly incorporated as part of our submission. It is marked LRC 1.

8 We turn now to the manner in which the Bill will regulate the public interest law sector. We submit that it is important that in regulating the public interest law sector the Bill facilitates, rather than restrains access to justice and the delivery of free and low cost legal services to the poor. Insofar as the Bill regulates the public interest law sector, it is important that it facilitates, rather than restrain access to justice and the delivery of free and low-cost legal services to the poor. It must afford sufficient agency and flexibility to public interest clinics in order to enable them to deliver legal services efficiently, effectively, and without undue statutory interference.

9 We welcome in particular that the Bill has included among its key purposes the broadening of access to justice[1] and recognition of the need to protect the public interest.[2] This would include recognition of the law clinics, the origins of which are briefly mentioned above, and which the LRC and others have caused to be multiplied across the land. At present, we believe that these clinics are practicing properly, are generally well regulated, and are be able to ensure that their clients may celebrate and enjoy the transformative rights and values enshrined in the Constitution. In this regard, we recall that Constitutional Court Judge Ismail Mohamed described the Constitution as follows:

> "The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of that part of the past which is disgracefully racist, authoritarian, insular and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."[3]

10 It is particularly important that all in South Africa have access to lawyers to assist them to realise the rights essential to the "democratic, universalistic, caring and

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[1] §3(b)
[2] §3(d)
[3] S v. Makwanyane 1995 (3) SA 391 (CC) at [262]

aspirationally egalitarian ethos expressly articulated in the Constitution" described by the late Chief Justice .

11 While we welcome the statutory recognition of law clinics in the definitions section of the Bill and their establishment in §34, we wish to make submissions with respect to whom they may employ and how they should be organized, in order to ensure that law clinics are best able to facilitate access to courts and legal services rather than be caught up in statutory confusion which could potentially stifle the delivery of legal services to the poor.

12 The Bill provides for a number of institutions at which legal practitioners may practice. At times the institutions are defined, as is the case for law clinic and justice centre. However, the Bill references a number of undefined institutions: commercial juristic entities,[4] non-profit juristic entities,[5] public interest legal centres,[6] community-based organisations,[7] non-governmental organisations,[8] and practices. This confusion needs to be avoided: the terms used should be defined and be used more consistently.

13 Our submissions will attempt to do this in respect of the entities which will be permitted in the non- profit, non fee-charging sector. The Bill allows for two non-commercial legal practices in §s 34(7) and 34(8). This changes the previous law society practice of recognizing a "clinic" and allowing for different forms of

[4] §34(6)
[5] §34(7)
[6] §35(5)(b)
[7] §29(2)(a)
[8] §29(2)(a)

governance. While it is arguable that allowing for the two statutory categories may encourage a greater variety of institutions providing legal services more accessible to the poor, we submit that as presently framed in the Bill the categories are more likely to result in confusion. The Bill attempts to set up two different entities in §s 34(7) and 34(8) but then unfortunately confuses them by including a definition of "law clinic" in the definitions which again collapses both into a single type of "law clinic" encompassing either type of the governance structures separated into the different §s 34(7) and 34(8). We would suggest that the confusion could be avoided by simply providing for one structure being a law clinic which can retain the currently proposed definition and then in § 34 provide for a law clinic which:

(a) **is governed by Legal Aid of South Africa, a university or by a board incorporated not for gain;**

(b) **is constituted primarily to serve the public interest and/or enable poor people to obtain legal services free of charge;**

(c) **where both attorneys and advocates can practice on a full or part-time basis; and**

(d) **which is registered with the Legal Practice Council and operating subject to regulations issued by the Council.**

14 If that is acceptable then we would suggest that different aspects of the current proposals for §s 34(7) and 34(8) need to be considered and the best of those incorporated into the merged provision for a "law clinic" as the statutory institution

to deliver legal services in a noncommercial practice. We propose the Bill could therefore be simplified to provide:

> **"A law clinic may be established by a non -profit organization registered in terms of the Nonprofit Organizations Act[9] or any university in the Republic provided that -**
>
> **(a) In the case of an university it is constituted and governed as part of the faculty of law at that university;**
>
> **(b) In the case of a non- profit organization its chairperson and the majority of its governing body are comprised of legal practitioners;**
>
> **(c) All legal services at the law clinic are rendered by a legal practitioner or under the supervision of an admitted legal practitioner;**
>
> **(d) The legal services rendered by it must be rendered by it free of charge subject to the provisions of § 92 of this Act;**

We make the above proposals in light of the following experience:

- The law societies have been able to provide a sufficient a regulatory framework for the operating of the clinics – which regulations have been amended from time to time. The law societies have been and their successor, the Legal Practice Council would be, best positioned to regulate

[9] Act 71 of 1997

what types of work can be done in the clinics. To legislate on these issues could stultify the growth of the clinics.

- Most of the non-profit provisions in the draft Bill are provided for in the legislation governing non-profit organizations – there is no need to repeat them here.

- Almost all the non-profit based clinics started with a governing body "comprised exclusively of legal practitioners."[10] We submit that this is no longer necessary or even advisable. We have learnt that these governing bodies are able to add greater value to the operation of the clinics by being able to have other professional persons and persons with experience outside the legal profession – e.g. managers, accountants, human resources practitioners, and community representatives on the governing body.

- The provisions relating to the recovery of costs could be adequately governed by the proposed § 92 (see below) which was enshrined by this parliament in the Attorneys Act[11] taking into account the Hameva judgment[12] and experience. The suggested provision for university based clinics in § 34(8)(d) will negate those advances , generally confuse and could reduce clients represented by clinics into a weaker party before courts due to the pressure of costs .

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[10] § 34 (7)(a) of the Bill
[11] See § 79A of Attorneys Act 53 of 1979
[12] Hameva and Another v Minister of Home Affairs 1997(2) SA756 (Nm) ;

We accordingly submit that §s 34(7) and 34(8) be reconsidered and preferably reframed as one "law clinic" institution. If this submission is not accepted, we nonetheless submit that the amendments suggested above in respect of the different provisions of §s 34(7) and (8) should still be made in those respective sub-sections. In other words, the provisions regarding governing bodies, costs, nonprofits and so on still require amendment.

15 We turn now to the earlier subsections of § 34 which deal with the where attorneys and advocates may practice as legal practitioners and submit that the following amendments are required: that § 34(4)(c) and in respect of 34(5) subsections (b) and (d) (something entirely new) be deleted and replaced with a simple provision that permits advocates and attorneys to practice at a "law clinic." If the suggestion that 34(7) and (8) be merged is not accepted these aspects of subsections (4) and (5) still will require attention as the current draft creates a new undefined entity in 34(5) (d) being a "public interest legal centre."

16 Finally in respect of the people and places involved in the practice of law we wish to revert to the definitions proposed for advocates and attorneys. We are aware that the professional bodies of the profession will be commenting on the adequacy of the proposed definitions and we accordingly to limit our comments to some consequences of the proposed definitions which raise serious concern:

16.1 In regard to the distinction between attorneys and advocates, the definition § relies upon the holding of a Fidelity Fund Certificate to distinguish between the two.

16.2 We submit that these definitions need to be reconsidered as the distinction is particularly problematic if we take into account that attorneys working for Legal Aid of South Africa and the State Attorney are to be excluded from having to hold Fidelity Fund Certificates.[13]

16.3 Further the practice to date has been that attorneys working at all law clinics too have been exempted from holding certificates[14] – a practice we suggest should be continued. The Bill appears to change the practice but only in respect of the director of a clinic administered by a nonprofit entity when in § §84(1) (b) it provides that only the directors of juristic entities are required to hold certificates, which unless otherwise exempt would require only LRC directors (and not the other attorneys in the office) to hold certificates. In these rather confusing circumstances we submit that § 84(8) of the Bill amended to add the following words in bold ".....do not apply to an attorney who practices in the employ of Legal Aid of South Africa **or any other registered law clinic.**"

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[13] §84(1); §84(8)

[14] The Bill continues to provide for such exemptions to be granted in § 85(5)

16.4 With or without that addition the proposed definitions will remain problematic as the distinction will be based on the holding of a certificate which at least 50% of the attorneys in practice will not require by law (or due to an exemption). We fear that the law will give rise to uncertainty if it defines legal practitioners as attorneys and advocates by reference to the requirements of holding a fidelity fund certificate but permits nearly half (maybe more) of the attorneys to fall outside the ambit of the definition .

16.5 As there are many other submissions dealing with the attorney – advocate distinction we do not believe it appropriate to suggest new definitions here – but will be willing to supplement these submissions on the proposed definitions when the matter is before parliament, if appropriate.

17 Certificate of appearance

Current practice is to allow candidate attorneys to appear in district courts. Those courts and the civil courts rely extensively on their services. Advocates too – once enrolled under current legislation – appear in many courts. This has in fact at times proved problematic as lawyers without sufficient training, including members of the 'independent' bar. have proven to be unaccountable to any one for their conduct. The Bill attempts to remedy this latter problem in § 25 – but unfortunately may in doing so curtail the current practice which affords what will be candidate legal practitioners a right of appearance. We would submit that this be remedied by granting the Legal Practice Council the power to, notwithstanding the provisions of § 25, grant certificates of appearance to candidate legal practitioners

to appear in courts designated by the council once the candidate legal practitioner has been registered as such for 6 months. The certificate of appearance should only be valid for as long as the candidate legal practitioner remains registered.

18 Miscellaneous: We note the following further aspects briefly, without going into detail. We will if requested to do so be willing to expand on any of these aspects:

18.1 Though the preamble refers to section 22 of the Constitution establishing a right to freedom of trade, occupation and profession, there are a number of other constitutional provisions and issues at stake. These include the rule of law,[15] access to courts,[16] the independence of the judiciary, and provisions dealing with legal representation.[17]

18.2 The definitional provision defines 'charter' as the Legal Services Sector Charter as adopted by the legal profession of the Republic and the Minister in December 2007. §5(l) identifies implementing the charter as one of the objects of the council. The charter is a relatively old document and the precursor to the draft Bill. Because the Bill should incorporate the realisation of the charter, we believe it - erroneous to require in the Bill that the charter still be implemented but rather to ensure that the Bill itself covers all the important elements that are needed to govern the profession.

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[15] §5(k)
[16] §3(b); §5(b)
[17] Preamble

18.3 There should be a provision to assure that the interests of the law clinic sector (as broadly defined in our proposal) are adequately represented on the council:

18.3.1 §7, which governs the composition of the council, ought to contain a provision allowing the law clinics doing public interest work to nominate a representative to the council.

18.3.2 Alternatively, there should be a provision that one or two of the 16 legal practitioners contemplated in §7(1)(a) come from the " law clinic" sector.

18.4 To the extent that the council has a role in determining fees for Fidelity Fund certificates, as stated in §6(4)(b), there seems to be confusion between the roles of the council, which in the current draft relates to all legal practitioners, and the fund, which relates to attorneys only.

18.5 Many clauses in relation to the operation of the council, particularly §15-§23 should be contained in the council's regulations and not in this statute.

18.6 Community service must be defined and used consistently in both §29 and §85. The Attorneys Act defines community service as full time service related to the application of the law and performed at a law clinic or legal

aid.[18] However, reading §29(1)(a)-(b), it appears the Bill contemplates part-time service, more akin to pro bono work, when it refers to community service.

18.7 §29(2), discussing the prescription of community service, further introduces community-based organizations, trade unions, and non-governmental organizations into the mix of institutions. The definitions of law clinic, non-profit-juristic entity, community-based organization, and non-governmental organizations need to be properly defined, aligned, and distinguished.

18.8 §37(1) mandates the council to investigate complaints of misconduct against legal practitioners, candidate legal practitioners, or juristic entities. We submit that the "law clinics" should be added to this list because, if they fall under a university or nonprofit organization, may not be juristic entities for purpose of professional discipline.

18.9 §37(2) and §37(3), which focus on findings against individual practitioners, do not consistently make provisions for findings against juristic entities or "law clinics."

18.10 §42, which makes provisions for an appeal against the decision of the disciplinary committee to an appeal tribunal, fails to set out any

[18] Attorneys Act No. 53 of 1979

requirements of seniority or expertise for the members of the appeal tribunal.

19 Costs: The Attorneys Act[19] was amended so as to enable law clinics to recover costs where they acted on behalf of indigent persons . This amendment was in part motivated by the fact that in respect of costs too, law clinic clients should appear equal before the law. §92 of the Bill largely adopts the current approach but has replaced the wording in the previous § 79A of the Attorneys Act with a provision which now enables the individual attorney rendering the service to recover the costs personally or behalf of a "practice." The word "practice" is not defined in the Bill. It doesn't necessarily include a "law clinic" which was intended as the beneficiary of the introduction of § 79A. As the major provider of free legal services to the poor we submit that this Bill should not place the law clinics and their clients at risk of losing this potential benefit –We submit that the tried and tested § 79 A should be retained in preference to the proposed draft § 92. This recommended change is a crucial one, in our view. We will want to elaborate particularly on this aspect in oral submissions to the Committee as, if passed in its current proposed form, much of the work currently done by law clinics may have to be curtailed.

20 The LRC notes with concern that the drafters have not considered the position of paralegals within the legal profession. We are aware of other submissions to the

[19] See §79A Act 53 of 1979

committee on the issue of paralegals and, if necessary, we to deal with the issue further at a subsequent stage.

21 In conclusion we submit that the Act long in creation has become over complicated. Parliament is encouraged to heed the following words of Judge Binns Ward:

> "It (the current Attorneys Act) seems to me to be the product of outdated formalism in the regulation of the attorney's profession in the modern unitary state. The issue is perhaps one which might be addressed constructively in the reforms contemplated by the Legal Practice Bill that has been under discussion now for some years.[20]"

22 We look forward to addressing the committee on these and other aspects should the opportunity arise.

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[20] Absa Bank v Barinor New Business Venture 2011 (6) SA 225 at 231