The Legal Practice Bill and the Bar

Professor Cheryl Loots, Legal Adviser of the Policy Unit of the Department of Justice and Constitutional Development, comments as follows:

It has been alleged that the enactment of the Legal Practice Bill will mean the end of the Bar. This is not true. From the first draft the Bill has made provision for the continued existence of Bars as voluntary professional associations, which is the status that the Bars have always had.

In terms of the proposed legislation all legal practitioners, including advocates, will be required to be registered with a statutory Legal Practice Council. For attorneys, this replaces the requirement that every attorney must be a member of a statutory law society. For advocates it is a new requirement because advocates have not been obliged by statute to belong to any regulating body. In recent years this has given rise to a problematic situation in which large numbers of admitted as advocates are practicing without being subject to any regulation. Some of them take instructions directly from clients and there is the danger that they may handle funds on behalf of clients or take deposits on account of fees. Such monies are, of course, trust monies. The solution proposed by the legislation is to require every legal practitioner who receives, holds or handles trust funds to operate a trust account or pay the money into a Fidelity Fund account.

With regard to the question of the continued existence of the Bars, the Bill specifically provides that legal practitioners may be members of voluntary professional associations and practise according to the rules of such organizations, provided that such rules are not inconsistent with the provisions of the Act or any other law, or contrary to the public interest. The Bill does not prohibit advocates from practicing only on referral by choice. This has been so since the first draft. This was the policy suggested in the Discussion Paper on Transformation of the Legal Profession, published during 1999.

This was also the policy expressed in a letter written by the minister to the Competition Commission when he was asked to comment on a memorandum submitted by the GCB which argued that certain Bar rules were not contrary to the public interest. The minister stated: "The policy of my Ministry and Department is that legal practitioners should be free to join voluntary associations and practice according to the rules of those associations, provided that they are not contrary to the public interest, but that those rules should not apply to legal practitioners who are not members of those associations." He further said: "We do not object to members of Bars practising as a referral profession by choice, but this rule should not be enforced against non-member legal practitioners ...." It is difficult to understand how this policy statement can be interpreted as the expression of "a commitment to terminating the referral principle" (see page 2 of the Chairman's Circular to all Members of the Bar, dated 30 January 2001).

The statement on page 4 of the circular of 30 January, that "the latest text appears to yield on the question of the continuation of the Bar" in that "Clause 11(5) and (6) provide ... for a right to legal practitioners to make an election in this regard, and to form voluntary associations" to be an attempt to claim undeserved credit for saving the Bar. Clause 11(5) provides that no legal practitioner is barred from taking instructions directly from the public, provided that the legal practitioner complies with the provisions of the Act. This provision was introduced in the second draft to underscore the provision, which was in the first draft and is still in the third draft, prohibiting a professional voluntary organisation from enforcing its rules against persons who are not members of the organization. The object was to ensure that *De Freitas* type applications can not be brought against non-members of the Bar purely because they take instructions directly from the public. In the third draft a new sub-section (6) was introduced to make it clear that the provisions of sub-section (5) do not prevent a legal practitioner from electing to take instructions only on referral. It does not reflect a change of policy, but an attempt to clarify.

Mr Gauntlett suggests in his circular of 30 January the legislation should oblige every legal practitioner to be a member of a professional association and the council should police the professional associations. He suggests that this would guarantee fundamental independence. Surely it would do the opposite and compromise the independence of professional associations such as the Bars. It is a solution which also takes no account of the Constitution's guarantee of freedom of association. Where is the freedom if one is obliged to belong to a professional association? The Bar may have suggested this solution in its submission made to the Legal Practice Forum, but it is certainly not the solution upon which consensus was reached.

Much has been written about the composition of the council. It has been alleged that the profession will lose its independence because the minister will be 'selecting' almost all the members of the council. This is very misleading. The draft provides that the minister appoints on nomination from the various sectors of the profession. If more nominations are received than the number of places to be filled then the minister would have to exercise some discretion in deciding which nominees to appoint, but would have to do so according to guidelines which require account to be taken of the extent to which the nominating body is representative of the sector. This is generally the kind of formula followed in statutes which regulate professions. Some give the relevant minister much wider discretion. Mr Gauntlett pours scorn on the fact that the drafters considered the legislation regulating estate agents, quantity surveyors and engineers, clearly implying, in a rather insulting way, that these are lesser professions, not to be compared with lawyers. It is interesting to note that quantity surveyors require a four-year BSc and three years of practical experience to qualify for registration with their statutory council. The regulation of estate agents is obviously relevant because they too handle trust money.

Suggestions as to the composition of the council and mechanisms for its

appointment will be welcomed by the drafters, and will be seriously considered as long as they do not undermine the basic principle that statutory councils of this nature are intended to promote and protect the public interest. A council elected by lawyers, in the way that the statutory law societies were, is out of the question. The provincial statutory law societies were ill conceived for they purported to promote the interests of their members, while, at the same time, promoting the public interest. This obviously involves an inherent conflict of interest.

At the time of writing this article (25 February), the draft continues to be a draft in progress and the door for comment remains open. The website address for access to the draft Bill and its accompanying explanatory memorandum is http:/www.doj.gov.za/legislation/bills. It is in PDF format because this condenses the file and facilitates quick downloading. The Acrobat Reader can be downloaded free of charge from the Adobe website. It is not complicated. Once you have downloaded the Acrobat Reader you will be able to automatically access any document which is in PDF format. It is now standard Internet practice to store large files in PDF format. 🕮

The GCB replies:

The Policy Unit – these matters need not be personalised – suggests that members are being misled. It does so as we go to print, and at great length. There is neither time nor space (nor, one fears, credulity) to deal with everything, but some matters stand out.

It is perhaps necessary first to state what the Policy Unit does **not** say. Members can then draw their own conclusions.

It does **not** acknowledge

- that the first and second drafts of the Bill made no reference to advocates, let alone their continued existence;
- that this was expressly raised, at a special meeting for that purpose, by Sutherland SC and me on 17 July 2000;
- that we pressed for confirmation that the Bar would receive statutory recognition, in letters on 18 July, 10 August and 11 August 2000;
- that the reaction was that there would be no express statutory recognition of the continued existence of the Bar;
- that indeed the Unit's letter to the Competition Commission (opposing the Bar's application for the exemption of some of its rules) also contains this passage, not quoted above: "[t]he Bill does not perpetuate the statutory recognition of the distinction between advocates and attorneys";
- that the third draft, with the minister's support, now expressly recognises **for the first time** that lawyers may continue to practise on a referral basis.

Members can see all this for themselves. They have not been misled.

The other issues the Unit seeks to argue are dealt with elsewhere in this issue. The attempt to defend a council overwhelmingly appointed by the minister, because he appoints "on nomination", and wants to avoid "a trade association of lawyers", will either impress members or it will not. It did not impress the LSSA/GCB/BLA/Nadel/AFT meeting on 24 February 2001, as members will read elsewhere. We do not choose to "insult" quantity surveyors; we thought it a truism that their legislation is no model for us because their social function is different. We are sorry the Policy Unit sees the world differently.

What really remains is the inaccurate account of the "consultative process" here offered. We have really tried to be part of it: in our August 1999 submissions, our November 1999 Forum attendance, the letters and the meetings which followed.

What has again **not** been explained is how – in the middle of the ostensible operation of the "consultative process" – the Policy Unit, without so much as notice to the GCB, prepared a letter to the Competition Commission

- attacking the Bar's application, in 2000, in terms of the law then in force;
- calling in aid its then draft of the Bill "*which will [sic] regulate the practice of law*";
- attacking the *De Freitas* decision just weeks before the appeal was to be heard by the SCA.

The Unit does not disclose that the Commission has formally admitted in an affidavit that it itself acted unfairly in receiving this letter in these circumstances, and that in acting upon it, the Commission's ruling is vitiated. It also does not disclose that after the Minister very properly elected to abide the application, just last month it actively sought his intervention against the GCB. Fortunately good judgment prevailed.

It is not surprising that the wider profession – not just the GCB – has turned to itself to seek a solution.

Jeremy Gauntlett SC
Chairman
General Council of the Bar of South Africa 🕮

The independent Bar

"The lawyer's role in every country goes to the heart of delivering justice. Like the independent judge, the independent lawyer is vital. Lawyers must use their skills fearlessly to expose the truth; to serve the needs of their clients; and to ensure that the court can see the case from their client's perspective. They must be independent of the State and committed to the highest ethical standards. I agree with Sir Sydney Kentridge that 'it is the independent Bar inseparably from the independent bench which is the protection of the citizen against the State' . . . . where people look to the courts to advance or protect their rights generally they rely on an independent voice to speak for (them). Advocacy, at which the Bar excels, is a practical manifestation of freedom of speech". Lord Irvine of Lairg, Lord Chancellor of Britain (quoted in *CBA: the Criminal Bar Association Newsletter*, December 2000).