What should the post-LPA Bar look like?

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In the August 2015 edition of the *Advocate* I wrote about the value of an independent Bar: its role in buttressing and nourishing an independent bench, its importance to the Rule of Law in our nascent and still vulnerable democracy. I wrote also about the introspection and differing, sometimes divergent, views within our own ranks which the passing and partial implementation of the Legal Practice Act ("LPA") has provoked. I trust I will be forgiven if I touch on these themes again. The LPA is, after all, the single most significant development in the regulation of the advocates' profession of recent times. It may be of some interest to some practitioners how things are progressing here. The Rule of Law is the keystone of our constitutional project. It should be of abiding concern to all lawyers.

A brief synopsis of where we are now on the LPA: Chapter 10 of the LPA established the National Forum ("Forum") and brought into being certain transitional arrangements. It came into effect just over a year ago, on 1 February 2015. Chapter 2 of the LPA will come into operation in less than two years from now. On that date the Forum will cease to exist. The remaining provisions of the LPA are to become operative on a date after the commencement of Chapter 2, to be fixed by the President. Chapter 2 of the LPA will establish the South African Legal Practice Council ("Council"). This is the statutory body which will in the future regulate both the advocates' and the attorneys' professions. It will consist of 23 members. Ten of them must be practising attorneys and six must be practising advocates. These practitioners are to be elected in accordance with a procedure prescribed by the Minister of Justice & Constitutional Development, on the recommendations of the Forum.

Provincial Councils in each of the provinces will later be established. These will have the powers and perform the functions determined for them by the Council. Provincial Councils are to be constituted in a manner reflecting the proportion of attorneys and advocates in the area of jurisdiction of the Provincial Council concerned. Provincial Councils may establish committees, which may consist of only attorneys or only advocates to deal with matters relating exclusively to the attorneys' or the advocates' professions, respectively.

We are represented on the 21-member Forum by six representatives – three nominated by Advocates for Transformation and three by the general membership of the GCB, in accordance with our co-governance protocols. The Forum has established a number of sub-committees ("Working Committees") to deal with the various functions with which it is tasked. The Working Committees are comprised of members of the Forum. After a slow start, the Working Committees have started meeting regularly and have produced a number of discussion documents on a variety of topics. The *modus operandi* is to attempt to reach consensus amongst those represented on the Working Committees but, if agreement cannot be achieved, matters go to a vote. The positions adopted in the Working Committees are taken to the Forum in plenary sessions. The Forum discusses and later votes to accept, reject or modify the recommendations of its Working Committees.

The "Rules and Code of Conduct" Working Committee is tasked with, *inter alia*, proposing a code of conduct for all legal practitioners. Some time ago, a process of reviewing and revising our existing Uniform Rules of Professional Ethics was commenced under the chairmanship of Sutherland J. The process involved all the Bars. The resultant product has been adapted slightly and tabled as the Bar's proposal for the conduct rules to be applicable to counsel who will under the LPA practise as referral advocates.

A formal submission has also been made on behalf of the Bars to the "Governance" Working Committee on, amongst other things, the proposed election procedure for constituting the Council and its Provincial Councils. Our proposal has been controversial. Unsurprisingly, it has not been met with acclaim from within the ranks of certain of the attorneys on the Forum. More surprisingly, perhaps, one of our own representatives voted with the attorneys and against the Bar when our proposals were considered by the Working Committee. The Bar's position is that the six practising advocates on the Council are to be elected by practising advocates only. The attorneys' position is that the six practising advocates on the Council must be

elected both by practising advocates and by all attorneys. Their numerical superiority means that the attorneys' proposal would result in the advocate-representatives on the Council being, in effect, elected by attorneys. The fate of the conflicting proposals remains in the balance. The Forum holds a plenary session on 23 April 2016 at which this issue will be considered. The GCB will consider its options in the light of developments which occur there.

Most nettlesome of the issues with which the Working Committees are to grapple are the proposed rules to regulate the practical vocational training which all legal practitioners will be required to undergo, and the competency-based examinations or assessments which all legal practitioners will have to pass, before they can be admitted to practice as either an advocate or an attorney under the LPA.

Currently, the Bars have the capacity to accept no more than 40% of all who apply at our Bars to do pupillage. In the past few years we have received steadily increasing numbers of applicants for pupillage. Part of the reason for this is that many recently-graduated LLB students are unable to obtain a position with an attorneys' firm or as a corporate advisor in the business world.

Most will agree that in the post-LPA era we cannot continue to turn away large numbers of those who wish to join our ranks, many of whom are more than competent to do so. The constituent Bars of the GCB are the dominant part of the advocates' profession and the standard bearers for high competence and ethics. Quite apart from running the unnecessary risk of being criticised, and undermined, as exclusivist, it is in the interests of the administration of justice, no less than in the Bars' own interest, that as many as feasible of those advocates who wish to practise as referral advocates join and are part of our ranks. On the other hand, it is unrealistic to believe that all those who have achieved their four-year LLB would currently be able to go through our one-year pupillage programme and successfully pass the Bar examinations at the end of it.

After months of deliberation, a sub-committee of the GCB produced a draft proposal on the vocational training and assessments contemplated in the LPA, as it would apply to advocates, and as it could link in with such additional requirements as might be required by the Bars as a pre-requisite for membership. It differentiated between the form of vocational training and assessment which would qualify candidates to practise as an advocate under the LPA, and an additional period of mentorship and assessment which would be necessary for anyone wishing to join a Bar.

The proposal was debated at length at the recent March Exco meeting of the GCB. Views diverged significantly on the merits of the proposal. They were informed largely by differing concepts of what the Bars should look like in the post-LPA environment; must the Bars be a broad church, seeking to accommodate virtually all who have an LLB and want to practise as referral advocates; or should the Bars be something a little less egalitarian? As a result, now with additional members deployed to it, the sub-committee has been asked to reconsider its proposals. The outcome of its deliberations will be considered by the GCB in due course, probably at the AGM in July. The final product will have a significant bearing on the kind of Bar we envisage for the future, perhaps, even, for the future of the Bars.

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Not entirely unrelated was the holding of a special meeting of the National Bar Examination Board ("NBEB") in January, following failures of the examination in legal writing by an unusual number of pupils. The NBEB was asked to reconsider the results of these pupils, most of whom had passed all other subjects and had been given a pass mark by the examiners on the legal writing paper, but had been failed on moderation by the Judge Moderator. After hearing representations made from several Bars and individually on pupils' behalf, the NBEB passed all these candidates. Arising from these developments, a symposium, similar to that held some ten years ago, has been arranged for the end of June. It is intended as an opportunity to re-look at and debate a number of aspects of our pupillage programme and the Bar examinations which determine its outcome for our pupils, including the curriculum, subject content, the manner in which pupils are assessed at the end of pupillage, and the role of judge moderators in the process. On these, and other issues relating to pupillage, there are also differing viewpoints.

Happily, there are some things on which unanimity prevails. Recently, a letter was received from the acting CEO of the Forum, inviting the GCB to enter into negotiations with a view to agreeing to the transfer of all our assets, rights, liabilities, obligations and staff to the Council, in terms of section 97(2)(b) of the LPA. At the request of all the Bars and Exco, I have written to the acting CEO, politely declining the invitation.

Bars perform a variety of functions and play a number of roles. We comment on proposed legislation. We interact with sectors of society on behalf of our members when necessary. We speak publicly when we feel it appropriate to comment on issues of national, and sometimes international, importance, which bear on matters of law or human rights. We set and regulate the application of a basic threshold of competence for, and strive towards excellence in the practice of advocacy by, our members. We monitor and, with varying degrees of success, impose and maintain ethical conduct amongst practising advocates, both those who are our members and those who are not. Most importantly, perhaps, we channel and amplify the influence and stature of practising advocates to promote and sustain a legal system which upholds the Rule of Law.

Absent agreement within the Forum and, in due course, the Council, the Bars' role in setting and maintaining standards of excellence and ethical conduct amongst advocates is at risk of diminishing and, possibly, disappearing altogether. The Bars' future as a champion of the Rule of Law will depend entirely on whether a significant majority of practising advocates hold the view that the Bars have retained a *raison d'être* once the LPA is fully implemented. None of us should be under any illusions about that. All of us need to keep an eye on the real question – what kind of Bar do we foresee 20 years from now and how best do we facilitate that objective today. A