

REPUBLIC OF SOUTH AFRICA

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# LEGAL PRACTICE BILL

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*(As presented by the Portfolio Committee on Justice and Constitutional Development  
(National Assembly))  
(The English text is the official text of the Bill)*

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(MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

**[B 20B—2012]**

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# BILL

**To provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic; to provide for the establishment, powers and functions of a single South African Legal Practice Council and Provincial Councils in order to regulate the affairs of legal practitioners and to set norms and standards; to provide for the admission and enrolment of legal practitioners; to regulate the professional conduct of legal practitioners so as to ensure accountable conduct; to provide for the establishment of an Office of a Legal Services Ombud and for the appointment, powers and functions of a Legal Services Ombud; to provide for a Legal Practitioners' Fidelity Fund and a Board of Control for the Fidelity Fund; to provide for the establishment, powers and functions of a National Forum on the Legal Profession; and to provide for matters connected therewith.**

## **Preamble**

**WHEREAS** section 22 of the Bill of Rights of the Constitution establishes the right to freedom of trade, occupation and profession, and provides that the practice of a trade, occupation or profession may be regulated by law;

### **AND BEARING IN MIND THAT—**

- the legal profession is regulated by different laws which apply in different parts of the national territory and, as a result thereof, is fragmented and divided;
- access to legal services is not a reality for most South Africans;
- the legal profession is not broadly representative of the demographics of South Africa;
- opportunities for entry into the legal profession are restricted in terms of the current legislative framework;

### **AND IN ORDER TO—**

- provide a legislative framework for the transformation and restructuring of the legal profession into a profession which is broadly representative of the Republic's demographics under a single regulatory body;
- ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld;
- ensure that legal services are accessible;
- regulate the legal profession, in the public interest, by means of a single statute;
- remove any unnecessary or artificial barriers for entry into the legal profession;
- strengthen the independence of the legal profession; and
- ensure the accountability of the legal profession to the public.

**P**arliament of the Republic of South Africa enacts as follows:—

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#### **DEFINITIONS, APPLICATION AND PURPOSE OF ACT**

##### **Definitions**

1. In this Act, unless the context otherwise indicates—
- “**Admission of Advocates Act**” means the Admission of Advocates Act, 1964 (Act No. 74 of 1964); 30
- “**advocate**” means a legal practitioner who is admitted and enrolled as such under this Act;
- “**appeal tribunal**” means an appeal tribunal established in terms of section 41;
- “**assessment**” means the process under which it is determined whether a candidate legal practitioner has successfully attained the level of competence referred to in section 28; 35
- “**attorney**” means a legal practitioner who is admitted and enrolled as such under this Act;
- “**Attorneys Act**” means the Attorneys Act, 1979 (Act No. 53 of 1979);
- “**Auditor-General**” means the person appointed as the Auditor-General in terms of section 193 of the Constitution; 40
- “**bank**” means a bank as defined in section 1 of the Banks Act, 1990 (Act No. 94 of 1990), and registered, otherwise than provisionally, or regarded as having been registered as a bank in terms of Chapter III of that Act;
- “**Board**” means the Legal Practitioners' Fidelity Fund Board established in terms of section 61; 45
- “**candidate attorney**” means a person undergoing practical vocational training with a view to being admitted and enrolled as an attorney;
- “**candidate legal practitioner**” means a person undergoing practical vocational training, either as a candidate attorney or as a pupil; 50

- “**code of conduct**” means a written code setting out rules and standards relating to ethics, conduct and practice for legal practitioners and its enforcement through the Council and its structures, which may contain different provisions for advocates and attorneys and different provisions for different categories of legal practitioners; 5
- “**Constitution**” means the Constitution of the Republic of South Africa, 1996; 5
- “**conveyancer**” means any practising attorney who is admitted and enrolled to practise as a conveyancer in terms of this Act;
- “**Council**” means the South African Legal Practice Council established in terms of section 4;
- “**court**” means any court in the Republic as defined in section 166 of the Constitution; 10
- “**Department**” means the Department of Justice and Constitutional Development;
- “**disciplinary body**” means—
- (a) an investigating committee;
  - (b) a disciplinary committee; or 15
  - (c) an appeal tribunal, as the case may be;
- “**Director-General**” means the Director-General of the Department;
- “**Fidelity Fund certificate**” means the certificate referred to in section 85;
- “**financial year**” means the financial year of the Fund referred to in section 59;
- “**Fund**” means the Legal Practitioners’ Fidelity Fund referred to in section 53; 20
- “**High Court**” means the High Court of South Africa established by section 6 of the Superior Courts Act, (Act No. 10 of 2013), or, if the context indicates otherwise, the Division thereof having jurisdiction;
- “**justice centre**” means an office of Legal Aid South Africa and includes a satellite office; 25
- “**law clinic**” means a law clinic referred to in section 34(8);
- “**Legal Aid South Africa**” means the Legal Aid Board established in terms of section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969);
- “**legal practitioner**” means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30, respectively; 30
- “**LLB degree**” means a Bachelor of Laws, also referred to as a degree of *baccalaureus legum*, referred to in section 26;
- “**magistrates’ court**” means a regional court or a district court established in terms of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);
- “**Minister**” means the Minister of Justice and Constitutional Development; 35
- “**notary**” means any practising attorney who is admitted and enrolled to practise as a notary in terms of this Act;
- “**Ombud**” means the person appointed by the President as a Legal Services Ombud in terms of section 47;
- “**practical vocational training**” means training required in terms of this Act to qualify as a candidate attorney or pupil in order to be admitted and enrolled as an attorney or advocate; 40
- “**prescribed**” means prescribed by regulation and “**prescribe**” has a corresponding meaning;
- “**Provincial Council**” means a Provincial Council established in terms of section 23; 45
- “**pupil**” means a person undergoing practical vocational training with a view to being admitted and enrolled as an advocate;
- “**Roll**” means the Roll of Legal Practitioners referred to in section 30(3);
- “**rules**”— 50
- (a) means the rules of the Council;
  - (b) for the purposes of sections 48(3)(a) and (d) and 52(1), means the rules of the Legal Services Ombud; and
  - (c) for the purposes of sections 63(1)(e) and (f), means the rules of the Board;
- “**South African Human Rights Commission**” means the South African Human Rights Commission referred to in Chapter 9 of the Constitution; 55
- “**this Act**” includes any regulation, rule or notice made or issued in terms of this Act; and
- “**trust account practice**” means a practice conducted by— 60
- (a) one or more attorneys who are; or
  - (b) an advocate referred to in section 34(2)(b) who is, in terms of this Act, required to hold a Fidelity Fund certificate.

## Application of Act

2. This Act is applicable to all legal practitioners and all candidate legal practitioners.

## Purpose of Act

3. The purpose of this Act is to—
- (a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld; 5
  - (b) broaden access to justice by putting in place—
    - (i) a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry; 10
    - (ii) measures to provide for the rendering of community service by candidate legal practitioners and practising legal practitioners; and
    - (iii) measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic; 15
  - (c) create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession;
  - (d) protect and promote the public interest;
  - (e) provide for the establishment of an Office of Legal Services Ombud; 20
  - (f) provide a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners and candidate legal practitioners; and
  - (g) create a framework for the—
    - (i) development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners; 25
    - (ii) regulation of the admission and enrolment of legal practitioners; and
    - (iii) development of adequate training programmes for legal practitioners and candidate legal practitioners.

## CHAPTER 2 30

### SOUTH AFRICAN LEGAL PRACTICE COUNCIL

#### *Part 1*

#### *Establishment, powers and functions of South African Legal Practice Council*

### Establishment of Council

4. The South African Legal Practice Council is hereby established as a body corporate with full legal capacity, and exercises jurisdiction over all legal practitioners and candidate legal practitioners as contemplated in this Act. 35

### Objects of Council

5. The objects of the Council are to—
- (a) facilitate the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent; 40
  - (b) ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice;
  - (c) promote and protect the public interest; 45
  - (d) regulate all legal practitioners and all candidate legal practitioners;
  - (e) preserve and uphold the independence of the legal profession;
  - (f) enhance and maintain the integrity and status of the legal profession;
  - (g) determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners; 50



- (h) promote high standards of legal education and training, and compulsory post-qualification professional development;
- (i) promote access to the legal profession, in pursuit of a legal profession that broadly reflects the demographics of the Republic;
- (j) ensure accessible and sustainable training of law graduates aspiring to be admitted and enrolled as legal practitioners; 5
- (k) uphold and advance the rule of law, the administration of justice, and the Constitution of the Republic; and
- (l) give effect to the provisions of this Act in order to achieve the purpose of this Act, as set out in section 3. 10

### **Powers and functions of Council**

6. (1) (a) In order to achieve its objects referred to in section 5, and, having due regard to the Constitution, applicable legislation and the inputs of the Ombud and Parliament, the Council may—
- (i) acquire or hire movable or immovable property; 15
  - (ii) develop, hypothecate, let, sell or otherwise dispose of its movable or immovable property;
  - (iii) make donations and grants in support of projects related to its objects;
  - (iv) perform any act relating to its financial affairs as may be necessary;
  - (v) institute or defend legal proceedings on behalf of the Council; 20
  - (vi) impose monetary penalties;
  - (vii) invest Council funds;
  - (viii) borrow or raise money;
  - (ix) insure against any risk;
  - (x) delegate any of its powers and functions to its committees or Provincial Councils, subject to any conditions it may impose, which delegation does not—
    - (aa) divest the Council of the power or function so delegated; and
    - (bb) preclude the Council from varying or setting aside any decision made under a delegation; 30
  - (xi) provide financial support to organisations or institutions providing legal education and training, including legal education and training for purposes of compulsory post-qualification professional development, with the object of enhancing the standards of legal services and increasing access to justice; 35
  - (xii) provide financial support to legal practitioners, organisations or institutions for the purposes of providing work-place training opportunities for candidate legal practitioners; 35
  - (xiii) provide financial support to non-profit organisations and institutions promoting access to justice for poor people; and
  - (xiv) pay for services rendered at the request of the Council with the object of enhancing the professional standards of legal practitioners. 40
- (b) In order to achieve its objects referred to in section 5, and having due regard to the Constitution, applicable legislation and the inputs of the Ombud and Parliament, the Council must—
- (i) develop norms and standards to guide the conduct of legal practitioners, candidate legal practitioners and the legal profession; 45
  - (ii) advise the Minister with regard to matters concerning the legal profession and legal practice;
  - (iii) do all things necessary for the proper and effective performance of its functions or the exercise of its powers; 50
  - (iv) pay out of pocket expenses to Council members; and
  - (v) develop programmes in order to empower historically disadvantaged legal practitioners, as well as candidate legal practitioners.
- (2) The Council, in order to perform its functions properly—
- (a) must employ an executive officer and such officials or staff as may be necessary to enable it to carry out its functions and determine the remuneration and other conditions of service of its officials and staff; 55
  - (b) may establish, promote, arrange, administer or assist in the establishment, promotion, arrangement or administration of insurance, medical-aid, pension, provident or benevolent schemes for the benefit of its officials and staff and the dependants of such officials and staff; 60

- (c) may conclude agreements with any person or organisation for the performance of any particular act or particular work or the rendering of particular services for the purposes of furthering the objects of the Council;
  - (d) may enter into contracts in connection with the performance of its functions or the exercise of its powers; 5
  - (e) may pay an honorarium or an allowance to any person to cover expenses reasonably incurred by him or her in connection with any act performed at the request of the Council or in terms of its directions on behalf of or for the benefit of the Council and the furtherance of its objects; and
  - (f) may publish or cause to be published periodicals, pamphlets and other printed material for the benefit of legal practitioners or the public. 10
- (3) The Council must, subject to this Act—
- (a) enrol a duly admitted legal practitioner as such; and
  - (b) keep a Roll of legal practitioners and decide on— 15
    - (i) the form of the certificates and the Roll to be kept;
    - (ii) the maintenance of the Roll or issuing of certificates; and
    - (iii) the reviewing of the Roll and the manner in which alterations may be made to the Roll.
- (4) The Council must, in the rules, with regard to fees and charges which are payable to the Council, determine— 20
- (a) application fees as provided for in this Act;
  - (b) annual fees, or portion thereof, in respect of a part of a year, payable to the Council by legal practitioners for Fidelity Fund certificates: Provided that any determination made in terms of this paragraph must be made in consultation with the Board; 25
  - (c) annual fees payable by all legal practitioners who are admitted and enrolled in terms of section 24(1) as practising legal practitioners;
  - (d) the date on which any fee is payable;
  - (e) the fees, or portion thereof, payable in respect of any examination conducted by the Council or on behalf of the Council; and 30
  - (f) any other fee or charge it considers necessary, as contemplated in this Act.
- (5) The Council, with regard to education in law and legal practice generally—
- (a) may, subject to sections 5 and 7 of the Higher Education Act, 1997 (Act No. 101 of 1997), conduct visits to any educational institution which has a department, school or faculty of law; 35
  - (b) may advise the Council on Higher Education established in terms of the Higher Education Act, 1997, regarding matters relevant to education in law, including the desirability of including in the LLB curriculum a form of community service to be undertaken by all law students;
  - (c) may consult with the South African Qualifications Authority established by the National Qualifications Framework Act, 2008 (Act No. 67 of 2008), or any structure established by it, to determine competency standards for the purposes of registration; 40
  - (d) may conduct any examination for the purposes of practical vocational training; 45
  - (e) may determine, after consultation with relevant role-players and legal practitioners in general, conditions relating to the nature and extent of continuing education and training, including compulsory post-qualification professional development;
  - (f) must, in the prescribed manner, create a mechanism to— 50
    - (i) provide appropriate legal education and training, having due regard to our inherited legacy and new constitutional dispensation; and
    - (ii) offer legal education and training to aspiring and newly appointed legal practitioners, as well as continued training for experienced legal practitioners; 55
  - (g) may accredit training institutions that offer—
    - (i) practical vocational training courses which contribute towards the qualification of legal practitioners and candidate legal practitioners; and
    - (ii) compulsory post-qualification professional development;
  - (h) must report annually to the Minister on— 60
    - (i) the number of new candidate legal practitioners registered as such in terms of section 27 and the number of new legal practitioners enrolled with the Council in terms of section 30;

- (ii) the effectiveness of the training requirements for entry into the profession;
- (iii) measures adopted to enhance entry into the profession, including the remuneration of candidate legal practitioners and continuing legal education to develop skills of legal practitioners; and 5
- (iv) progress made on the implementation of the programmes contemplated in subsection (1)(b)(v) to empower historically disadvantaged legal practitioners and candidate legal practitioners, and the Council may make recommendations to the Minister regarding legislative and other interventions to improve access to the profession and access to justice broadly and the Minister must thereupon table that report in Parliament; and 10
- (i) must, at the request of the Minister, advise the Minister on multi-disciplinary legal practices which the Minister may consider for the purposes of developing policies and legislative and other interventions in respect of multi-disciplinary legal practices. 15

### Composition of Council

7. (1) The Council consists of the following members:
- (a) 16 legal practitioners, comprising of 10 practising attorneys and six practising advocates, elected in accordance with the procedure prescribed by the Minister— 20
    - (i) in terms of section 97(1)(a)(i); or
    - (ii) in terms of this section, in consultation with the Council, if the procedure referred to in subparagraph (i) requires revision after the commencement of Chapter 2; 25
  - (b) two teachers of law, one being a dean of a faculty of law at a university in the Republic and the other being a teacher of law, designated in the prescribed manner;
  - (c) subject to subsection (3), three fit and proper persons designated by the Minister, who, in the opinion of the Minister and by virtue of their knowledge and experience, are able to assist the Council in achieving its objects; 30
  - (d) one person designated by Legal Aid South Africa; and
  - (e) one person designated by the Board, who need not necessarily be a legal practitioner.
- (2) When constituting the Council the following factors must, as far as is practicable, be taken into account: 35
- (a) the racial and gender composition of South Africa;
  - (b) the objects of the Council;
  - (c) representation of persons with disabilities;
  - (d) provincial representation; and 40
  - (e) experience and knowledge of—
    - (i) the provision of legal services;
    - (ii) the principles of promoting access to justice;
    - (iii) legal education and training;
    - (iv) consumer affairs; 45
    - (v) civil and criminal proceedings and the functioning of the courts and tribunals in general;
    - (vi) the maintenance of professional standards of persons who provide legal services;
    - (vii) the handling of complaints; and 50
    - (viii) competition law.
- (3) A person referred to subsection (1)(c) may not be designated as a member of the Council if he or she—
- (a) is a public servant;
  - (b) is a member of Parliament, any provincial legislature or any municipal council; or 55
  - (c) is an office-bearer or employee of any party, movement or organisation of a party-political nature.

**Membership of Council**

- 8.** (1) A member of the Council must—
- (a) be a South African citizen;
  - (b) be a fit and proper person; and
  - (c) subscribe to the objects of the Council. 5
- (2) The following persons are disqualified from becoming or remaining members of the Council:
- (a) An unrehabilitated insolvent;
  - (b) a person declared to be of unsound mind by a court of the Republic;
  - (c) a person who has been convicted in a court of first instance— 10
    - (i) of an offence and sentenced to more than 12 months' imprisonment without the option of a fine; or
    - (ii) of an offence, which involves any element of dishonesty, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, other than a conviction for an offence committed prior to 27 April 1994 associated with political objectives: Provided that if the person in question lodges an appeal against the conviction or sentence, he or she must be suspended from office by the Council as contemplated in section 12, pending the outcome of the appeal: Provided further that he or she may be replaced by the designating body, or in the case of a member referred to in section 7(1)(a), elected in terms of the procedure referred to in that section; 15
  - (d) a person who has been removed from office in terms of section 12; or
  - (e) a member of the Board or any of its committees. 20

**Chairperson and deputy chairperson of Council** 25

- 9.** (1) At the first meeting of the Council, the members of the Council must elect and appoint a chairperson and deputy chairperson from among themselves.
- (2) The chairperson and the deputy chairperson hold office for a period of three years from the date of their election and may be re-elected and re-appointed for one further term, unless such chairperson or deputy chairperson resigns or ceases to be a member of the Council. 30
- (3) The deputy chairperson must, if the chairperson is absent or is for any reason unable to act as chairperson, perform all the functions and exercise all the powers of the chairperson.
- (4) If both the chairperson and deputy chairperson are absent from any meeting, the members present must elect a person from among themselves to preside at that meeting and the person so presiding must, during that meeting and until the chairperson or deputy chairperson resumes duty, perform all the functions and exercise all the powers of the chairperson. 35
- (5) If both the chairperson and deputy chairperson have been given leave of absence, the members of the Council must elect a person from among themselves to act as chairperson until the chairperson or deputy chairperson resumes duty or is removed from office in terms of section 12. 40
- (6) If the office of chairperson or deputy chairperson becomes vacant, the members of the Council must, at the first meeting thereafter or as soon as possible thereafter, elect from among themselves a new chairperson or deputy chairperson, as the case may be. 45
- (7) A chairperson and deputy chairperson may vacate office as such, without relinquishing his or her membership of the Council, unless his or her membership has been terminated in accordance with section 11.

**Term of office of members of Council** 50

- 10.** A member of the Council holds office for a term of three years, but may serve as a member for one further term if he or she is again so elected or designated, as the case may be.

**Termination of office**

- 11.** (1) A person ceases to be a member of the Council when that person— 55
- (a) is no longer eligible in terms of section 8 to be a member;

- (b) resigns;
- (c) is removed from office in terms of section 12;
- (d) in the case of a legal practitioner referred to in section 7(1)(a), ceases to be a practising legal practitioner, for whatever reason; or
- (e) is appointed as a judicial officer. 5

(2) A member may resign after giving at least three months' written notice to the Council, but the Council may, on good cause shown, accept a shorter period.

### Removal from office

12. (1) The Council may remove a member of the Council from office on account of—
- (a) a finding by a disciplinary committee in terms of section 40 of any serious misconduct as set out in the code of conduct contemplated in section 36 on the part of a legal practitioner; 10
  - (b) incapacity or incompetency which, in the opinion of the Council, debars him or her from serving as a member of the Council;
  - (c) absence from three consecutive meetings of the Council without the permission of the chairperson, except on good cause shown; 15
  - (d) a request by the body which or person who elected or designated that member in terms of section 7, on good cause shown by the body or person in question; or
  - (e) his or her becoming disqualified to remain as a member of the Council as contemplated in section 8(2). 20

(2) If the Council has commenced proceedings for the removal of a member, it may suspend that member from office.

(3) A member who is suspended from office may not perform or exercise any of the powers or functions of that office or receive any allowances. 25

(4) The Council must follow due process of law if it intends to remove or suspend a member from office, as determined by the Council in the rules.

### Vacancies in Council and filling thereof

13. (1) A vacancy in the Council occurs when—
- (a) the term of office of a member expires or terminates as contemplated in section 11; 30
  - (b) a member dies;
  - (c) a member is removed from office as contemplated in section 12; or
  - (d) the resignation of a member takes effect.

(2) A vacancy must be filled as soon as practicably possible in accordance with the provisions of section 7. 35

(3) Any person appointed to fill a vacancy holds office for the unexpired portion of the term of the vacating member.

(4) No decision taken by the Council or act performed under the authority of the Council is invalid merely by reason of a vacancy on the Council, if the decision was taken or the act was authorised, subject to sections 16 and 17. 40

### Dissolution of Council

14. (1) If the Minister loses confidence in the ability of the Council to perform its functions effectively and efficiently, the Minister must—
- (a) provide the Council with his or her reasons; 45
  - (b) give the Council a reasonable opportunity to respond to those reasons; and
  - (c) afford the Council a hearing on any submissions received.

(2) If, after taking the steps provided for in subsection (1), the Minister still does not have confidence in the ability of the Council to perform its functions effectively and efficiently, he or she must request the Ombud to conduct an investigation and make recommendations to him or her. 50

(3) If, after receiving the recommendations from the Ombud as contemplated in subsection (2), the Minister still has concerns in the ability of the Council to perform its functions effectively and efficiently, and the Minister is of the view that it is in the best interests of the administration of justice that the Council be dissolved, he or she must, in order to do so, approach the High Court with an application for an order dissolving the Council, together with any terms or conditions that the court deems appropriate. 55

- (4) (a) If the Minister dissolves the Council pursuant to a court order contemplated in subsection (3), the Minister must, having regard to the provisions of section 7, appoint an interim Council, consisting of at least seven persons and give effect to any conditions or terms contained in the court order.
- (b) The interim Council must be appointed within 21 days after the dissolution of the Council and must be appointed for a period determined by the Minister or the court, which period may not exceed six months. 5
- (5) (a) The Minister must from among the members of the interim Council designate a chairperson of the interim Council.
- (b) The interim Council must elect a deputy chairperson from among its members and the deputy chairperson holds office for such period as the interim Council may determine at the time of his or her election. 10
- (6) The chairperson of the interim Council may, at any time of his or her own accord, or must, at the written request of not fewer than five members, convene a special meeting of the interim Council. 15
- (7) Five members of the interim Council form a quorum for a meeting of the interim Council.
- (8) Sections 15, 16, 17, 18, and 21 apply with the necessary changes required by the context in respect of the interim Council.

## *Part 2* 20

### *Operation of Council*

#### **Meetings of Council**

- 15.** (1) The Council must hold at least four meetings in each year at venues to be determined by the Council and may, in addition, hold any further meetings as the Council may determine. 25
- (2) The Council must meet as soon as practicable after the appointment of its members.

#### **Quorum and procedure at meetings of Council**

- 16.** (1) The majority of the members of the Council constitutes a quorum at any meeting of the Council. 30
- (2) The Council must in the rules determine a procedure for convening meetings and the procedure for the conduct of meetings.
- (3) The Council must keep a record of its proceedings.

#### **Decisions of Council**

- 17.** (1) A decision of the majority of the members of the Council constitutes a decision of the Council. 35
- (2) In the event of a deadlock in the voting the chairperson has a casting vote in addition to a deliberative vote.

#### **Committees of Council**

- 18.** (1) The Council may— 40
- (a) establish one or more committees, consisting of—
- (i) members of the Council only; or
- (ii) members of the Council and any other suitable persons except employees of the Council, to assist the Council in the exercise of its powers and performance of its functions; and 45
- (b) dissolve a committee at any time.
- (2) The Council—
- (a) must determine the powers and functions of a committee;
- (b) must appoint a member of a committee as chairperson of such committee;
- (c) may, after complying with due process of law, remove a member of a committee at any time; and 50

(d) may determine a committee's procedure.

(3) The Council must, in the rules, determine the procedure for the conduct of meetings of a committee.

### **Executive officer and employees of Council**

**19.** (1) The Council must appoint an executive officer for the Council, who is the accounting officer of the Council. 5

(2) The executive officer must, in addition to such function as may be assigned to him or her in terms of this Act—

(a) perform or exercise any powers and functions assigned to him or her by the Council; 10

(b) supervise the employees of the Council; and

(c) account for the assets and liabilities of the Council.

(3) The Council may appoint any other employees it deems necessary to assist the executive officer in the performance of his or her functions.

(4) The procedure for the appointment of the executive officer and other employees of the Council must be determined by the Council in terms of the rules. 15

(5) The need for the staff of the Council to reflect the racial and gender composition of South Africa must, as far as is practicable, be considered when the executive officer and other employees of the Council are appointed in terms of this section.

(6) The Council must, in the rules, determine the conditions of service of the executive officer and the other employees of the Council. 20

### **Executive committee of Council**

**20.** (1) The Council must establish an executive committee and determine its powers and functions in the rules.

(2) The executive committee consists of— 25

(a) the chairperson and deputy chairperson of the Council; and

(b) five other members appointed by the Council.

(3) The need for the executive committee to reflect—

(a) the racial and gender composition of South Africa; and

(b) representation of attorneys and advocates, as well as provincial representation, 30

must, as far as is practicable, be considered when the executive committee is established in terms of subsection (1).

(4) The executive committee is responsible for the day to day functioning and administration of the Council in between meetings of the Council. 35

(5) The Council may direct the executive committee to perform such tasks as executive committee considers appropriate.

(6) A member of the executive committee holds office for so long as he or she is a member of the Council, unless he or she is removed as a member of the executive committee by the Council, or until his or her membership of the Council terminates in terms of this Act. 40

(7) (a) The chairperson of the Council is *ex officio* chairperson of the executive committee.

(b) The deputy chairperson of the Council is *ex officio* deputy chairperson of the executive committee. 45

(8) The executive committee may meet as often as it deems necessary and dispose of its business in the manner it considers appropriate.

(9) (a) The majority of the members of the executive committee constitutes a quorum at any of its meetings.

(b) The executive committee must determine a procedure in the rules for convening meetings and the procedure for the conduct of meetings. 50

(c) The executive committee must keep a record of its proceedings.

(d) A decision of the majority of the members present at a meeting constitutes the decision of the executive committee.

(e) In the event of a deadlock in the voting the chairperson has a casting vote in addition to a deliberative vote. 55

### Delegation of powers and assignment of functions of Council

21. (1) The Council may resolve to delegate any of its powers or assign any of its functions to—
- (a) a member of the Council;
  - (b) a committee of the Council; 5
  - (c) the executive committee;
  - (d) a Provincial Council; or
  - (e) the executive officer or an employee of the Council.
- (2) A delegation or assignment in terms of subsection (1)—
- (a) is subject to any conditions and directions as the Council may impose; and 10
  - (b) does not divest the Council of the responsibility for the exercise of the power or the performance of the duty or function.
- (3) The Council may confirm, vary or revoke any decision taken in consequence of a delegation or assignment, but no variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision. 15

### Finances, expenditure and accountability of Council

22. (1) The funds of the Council consist of—
- (a) fees, including subscription fees payable in terms of this Act;
  - (b) an annual appropriation made by the Fund, the amount of which is determined by the Board after consultation with the Council; and 20
  - (c) any other monies received by the Council in terms of this Act or accruing to the Council from any other source.
- (2) Expenditure incidental to the exercise of the powers or the performance of the functions of the Council in terms of this Act or any other law must be defrayed from the funds of the Council. 25
- (3) The executive officer—
- (a) must deposit all monies received by the Council with a bank approved by the Council;
  - (b) may invest any monies of the Council which are not required for immediate use with a bank approved by the Council or in such other manner as the Council may determine in the rules; 30
  - (c) is charged with the responsibility of accounting for money received or paid out for or on account of the Council; and
  - (d) must cause the necessary accounting and other related records to be kept, including proper records of all the assets and liabilities of the Council. 35
- (4) The records referred to in subsection (3)(d) must be audited by a registered accountant and auditor appointed by the Council.

### Establishment of Provincial Councils

23. (1) The Council must, subject to subsection (2) and progressively, establish a Provincial Council in every province of the Republic and may delegate to the Provincial Councils such powers and functions which, in the interests of the legal profession are better performed at provincial level. 40
- (2) (a) The Council must, at the commencement of Chapter 2, establish at least four Provincial Councils and the following factors must be taken into account: 45
- (i) There may not be more than one Provincial Council per province;
  - (ii) the location of the seats of the Divisions of the High Court;
  - (iii) the efficient attainment of the Council's objects;
  - (iv) availability of resources, cost-effectiveness and feasibility;
  - (v) the interests of legal practitioners and candidate legal practitioners;
  - (vi) provincial needs, interests and sensitivities; and 50
  - (vii) the interests of the public.
- (b) The Minister must prescribe the areas of jurisdiction of the Provincial Councils in consultation with the Council.
- (c) If a Provincial Council has not been established in a specific province the Council must determine under which Provincial Council that province falls. 55
- (3) The Provincial Councils must carry out any powers and perform any functions as may be determined by the Council or set out in this Act.



(4) Provincial Councils must be elected in accordance with a procedure determined by the Council in the rules.

(5) Provincial Councils must be constituted in such a manner so as to reflect the proportion of attorneys and advocates in the area of jurisdiction of the Provincial Council concerned. 5

(6) A Provincial Council may establish one or more committees to assist it in the exercise of its powers and the performance of its functions.

(7) A committee contemplated in subsection (6) may consist of only attorneys or only advocates to deal with matters relating exclusively to the attorneys' or advocates' professions, respectively. 10

### CHAPTER 3

#### REGULATION OF LEGAL PRACTITIONERS AND CANDIDATE LEGAL PRACTITIONERS

##### Admission and enrolment

**24.** (1) A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act. 15

(2) The High Court must admit to practise and authorise to be enrolled as a legal practitioner, conveyancer or notary or any person who, upon application, satisfies the court that he or she—

(a) is duly qualified as set out in section 26; 20

(b) is a—

(i) South African citizen; or

(ii) permanent resident in the Republic;

(c) is a fit and proper person to be so admitted; and

(d) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules. 25

(3) Subject to subsection (1), the Minister may, in consultation with the Minister of Trade and Industry and after consultation with the Council, and having regard to any relevant international commitments of the Government of the Republic, make regulations in respect of admission and enrolment to— 30

(a) determine the right of foreign legal practitioners to appear in courts in the Republic and to practise as legal practitioners in the Republic; or

(b) give effect to any mutual recognition agreement to which the Republic is a party, regulating— 35

(i) the provision of legal services by foreign legal practitioners; or

(ii) the admission and enrolment of foreign legal practitioners.

##### Right of appearance of legal practitioners and candidate legal practitioners

**25.** (1) Any person who has been admitted and enrolled to practise as a legal practitioner in terms of this Act, is entitled to practise throughout the Republic, unless his or her name has been ordered to be struck off the Roll or he or she is subject to an order suspending him or her from practising. 40

(2) A legal practitioner, whether practising as an advocate or an attorney, has the right to appear on behalf of any person in any court in the Republic or before any board, tribunal or similar institution, subject to subsections (3) and (4) or any other law. 45

(3) An attorney who wishes to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court must apply to the registrar of the Division of the High Court in which he or she was admitted and enrolled as an attorney for a prescribed certificate to the effect that the applicant has the right to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court and which the registrar must issue if he or she is satisfied that the attorney— 50

(a) (i) has been practising as an attorney for a continuous period of not less than three years: Provided that this period may be reduced in accordance with rules made by the Council if the attorney has undergone a trial advocacy training programme approved by the Council as set out in the Rules; 55

(ii) is in possession of an LLB degree; and

- (iii) has not had his or her name struck off the Roll or has not been suspended from practice or that there are no proceedings pending to strike the applicant's name from the Roll or to suspend him or her; or
  - (b) has gained appropriate relevant experience, as may be prescribed by the Minister in consultation with the Council, if the attorney complies with paragraph (a)(iii). 5
- (4) (a) An attorney wishing to apply for a certificate contemplated in subsection (3) must serve a copy of the application on the Council, containing the information as determined in the rules within the time period determined in the rules.
- (b) A registrar of a Division of the High Court who issues a certificate referred to in subsection (3) must immediately submit a certified copy thereof to the Council. 10
- (5) (a) A candidate attorney is, subject to paragraph (b), entitled to appear—
- (i) in any court, other than the High Court, the Supreme Court of Appeal or the Constitutional Court; and
  - (ii) before any board, tribunal or similar institution on behalf of any person, instead of and on behalf of the person under whose supervision he or she is undergoing his or her practical vocational training. 15
- (b) A candidate attorney may only appear in a regional division established under section 2 of the Magistrates' Courts Act, 1944 (Act No.32 of 1944), as contemplated in paragraph (a) if he or she has previously practised as an advocate for at least one year or has undergone at least one year of practical vocational training. 20

### **Minimum qualifications and practical vocational training**

- 26.** (1) A person qualifies to be admitted and enrolled as a legal practitioner, if that person has—
- (a) satisfied all the requirements for the LLB degree obtained at any university registered in the Republic, after pursuing for that degree— 25
    - (i) a course of study of not less than four years; or
    - (ii) a course of study of not less than five years if the LLB degree is preceded by a bachelor's degree other than the LLB degree, as determined in the rules of the university in question and approved by the Council; or 30
  - (b) subject to section 24(2)(b), satisfied all the requirements for a law degree obtained in a foreign country, which is equivalent to the LLB degree and recognised by the South African Qualifications Authority established by the National Qualifications Framework Act, 2008 (Act No. 67 of 2008); and
  - (c) undergone all the practical vocational training requirements as a candidate legal practitioner prescribed by the Minister, including— 35
    - (i) community service as contemplated in section 29, and
    - (ii) a legal practice management course for candidate legal practitioners who intend to practise as attorneys or as advocates referred to in section 34(2)(b); and 40
  - (d) passed a competency-based examination or assessment for candidate legal practitioners as may be determined in the rules.
- (2) An attorney qualifies to be enrolled as a conveyancer, if he or she has passed a competency-based examination or assessment of conveyancers as determined in the rules by the Council. 45
- (3) An attorney qualifies to be enrolled as a notary, if he or she has passed a competency-based examination or assessment for notaries as determined in the rules by the Council.

### **Practical vocational training**

- 27.** (1) The Council must in the rules, determine the minimum conditions and procedures for the registration and administration of practical vocational training. 50
- (2) The rules contemplated in subsection (1) must regulate the payment of remuneration, allowances or stipends to all candidate legal practitioners, including the minimum amount payable.

### **Assessment of practical vocational training**

- 28.** (1) The Council must, in the rules, determine a procedure and issue directions pertaining to the assessment of persons undergoing practical vocational training. 55

(2) The purpose of assessment in terms of subsection (1) is to establish whether, in the opinion of the Council, the person has attained an adequate level of competence as determined in the rules, for admission and enrolment as a legal practitioner.

(3) The assessment referred to in subsection (1) must be carried out by the Council or an appropriate institution or organisation engaged by the Council to conduct the assessment on its behalf. 5

(4) The Council must, in the rules, determine the criteria for a person, institution, organisation or association to qualify to conduct an assessment in terms of this section.

### Community service

**29.**(1) The Minister must, after consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister, and such requirements may include— 10

- (a) community service as a component of practical vocational training by candidate legal practitioners; or
- (b) a minimum period of recurring community service by legal practitioners upon which continued enrolment as a legal practitioner is dependent. 15

(2) Community service for the purposes of this section may include, but is not limited, to the following:

- (a) Service in the State, approved by the Minister, in consultation with the Council; 20
- (b) service at the South African Human Rights Commission;
- (c) service, without any remuneration, as a judicial officer in the case of legal practitioners, including as a commissioner in the small claims courts;
- (e) the provision of legal education and training on behalf of the Council, or on behalf of an academic institution or non-governmental organisation; or 25
- (f) any other service which the candidate legal practitioner or the legal practitioner may want to perform, with the approval of the Minister.

(3) The Council may, on application and on good cause shown, exempt any candidate legal practitioner or legal practitioner from performing community service, as set out in the rules. 30

### Enrolment with Council

**30.** (1) (a) A person duly admitted by the High Court and authorised to be enrolled to practise as a legal practitioner must apply to the Council in the manner determined in the rules, for the enrolment of his or her name on the Roll. 35

- (b) The application referred to in paragraph (a) must—
  - (i) be accompanied by the fee determined in the rules;
  - (ii) indicate whether the applicant intends to practise as an attorney or an advocate and, in the case of an advocate, whether he or she intends practising with or without a Fidelity Fund certificate; and
  - (iii) be submitted to the Council in the manner determined in the rules through the Provincial Council where the legal practitioner intends to practise. 40

(2) The Council must enrol the applicant as an attorney, advocate, notary or conveyancer, as the case may be, if he or she complies with the provisions of this Act.

(3) The Council must keep a Roll of Legal Practitioners, as determined in the rules, which must reflect— 45

- (a) the particulars of practising and non-practising legal practitioners and, in the case of advocates, whether they practise with or without a Fidelity Fund certificate;
- (b) the name of every person admitted as a legal practitioner in terms of this Act and the particulars of the order of court in terms of which he or she was admitted; 50
- (c) the name of every person readmitted as a legal practitioner and the particulars of the order of court in terms of which he or she was readmitted;
- (d) the names of all persons who were admitted and enrolled as legal practitioners before the commencement of this Act, and the particulars of the orders of court admitting them; 55

- (e) the particulars of any order of court in terms of which any legal practitioner has been suspended, whether the order was made before or after the commencement of this Act, or particulars of any court order in terms of which the name of any such person has been ordered to be struck off the Roll;
  - (f) any conversion of enrolment as contemplated in section 32; 5
  - (g) any amendment or endorsement against the enrolment of a legal practitioner as contemplated in section 40(3)(a)(v);
  - (h) the particulars of every attorney who has been issued with a certificate relating to right of appearance in the High Court, the Supreme Court of Appeal and the Constitutional Court referred to in section 25(3); and 10
  - (i) the particulars of every advocate who practises with a Fidelity Fund certificate as contemplated in section 34(2)(b).
- (4) Any document issued by the Council in terms of which it is certified that—
- (a) a person has been admitted and enrolled to practise as a legal practitioner;
  - (b) a person has been readmitted to practise as a legal practitioner; 15
  - (c) a person has been suspended from practice as a legal practitioner; or
  - (d) the name of a person has been struck off the Roll,
- is, on its mere production, *prima facie* proof of the facts stated therein.
- (5) The registrar of the Division of the High Court which makes an order—
- (a) admitting and authorising a person to practise and be enrolled as a legal practitioner; 20
  - (b) readmitting and authorising a person to practise and be enrolled as a legal practitioner; or
  - (c) that the name of a person be struck off the Roll or that suspends a person from practice as a legal practitioner under this Act or any other law, 25
- must immediately, after the making of that order, forward a certified copy thereof to the Council through the Provincial Council having jurisdiction.
- (6) The Roll referred to in subsection (3) must be—
- (a) published on the website of the Council;
  - (b) updated every month by the Council; and 30
  - (c) available for inspection by members of the public during business hours of the Council and Provincial Councils.

### **Cancellation and suspension of enrolment**

- 31.** (1) (a) The Council must cancel or suspend the enrolment of a legal practitioner if the High Court orders that his or her name be struck off the Roll or that he or she be suspended from practice. 35
- (b) The Council may cancel or suspend the enrolment of a legal practitioner if he or she has erroneously been enrolled, or has been enrolled on information that is subsequently proved to be false.
- (2) The Council must, before cancellation or suspension of enrolment of a legal practitioner in the case of subsection (1)(b), notify such legal practitioner and give him or her an opportunity to be heard. 40
- (3) The Council must, as determined in the rules, notify the person referred to in subsection (1) of the cancellation or suspension of enrolment.
- (4) The Council must, at the written request of any enrolled legal practitioner, cancel his or her enrolment and remove his or her name from the Roll or from the Roll of practising legal practitioners, as indicated by the legal practitioner in question, but where an investigation into any alleged improper conduct by that person is in progress or is to be held, the enrolment may not be cancelled until the investigation has been concluded. 50
- (5) Despite the cancellation or suspension of the enrolment of a person in terms of this section, that person remains liable for any fee, arrears or penalty imposed by the Council for the period that he or she was enrolled.

### **Conversion of enrolment**

- 32.** (1) (a) A legal practitioner may, at any time, as determined in the rules and upon payment of the fee determined by the Council in the rules, apply to the Council to convert his or her enrolment as an attorney to that of an advocate and *vice versa*. 55
- (b) An advocate practising as such referred to in section 34(2)(a)(i) may, at any time, as determined in the rules and upon payment of the fee determined by the Council in the

rules, apply to the Council for the conversion of his or her enrolment to that of an advocate practising as such referred to in section 34(2)(a)(ii) and *vice versa*.

(2) The Council may impose any conditions as it considers appropriate to give effect to the conversion and the provisions of this Act relating to enrolment.

(3) The Council may make rules setting out the circumstances under which a legal practitioner can apply for the conversion of his or her enrolment and any requirements such legal practitioner must comply with. 5

### Authority to render legal services

**33.** (1) Subject to any other law no person other than a legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward— 10

- (a) appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear; or
- (b) draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction within the Republic. 15

(2) No person other than a legal practitioner may hold himself or herself out as a legal practitioner or make any representation or use any type or description indicating or implying that he or she is a legal practitioner.

(3) No person may in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary, unless that person is an advocate, attorney, conveyancer or notary, as the case may be. 20

(4) A legal practitioner who is struck off the Roll or suspended from practice may not— 25

- (a) render services as a legal practitioner directly or indirectly for his or her own account, or in partnership, or association with any other person, or as a member of a legal practice; or
- (b) be employed by, or otherwise be engaged, in a legal practice without the prior written consent of the Council, which consent may not be unreasonably withheld, and such consent may be granted on such terms and conditions as the Council may determine. 30

### Forms of legal practice

**34.** (1) An attorney may render legal services in expectation of any fee, commission, gain, or reward as contemplated in this Act or any other applicable law, upon receipt of a request directly from the public for that service. 35

(2) (a) An advocate may render legal services in expectation of a fee, commission, gain or reward as contemplated in this Act or any other applicable law—

- (i) upon receipt of a brief from an attorney; or
- (ii) upon receipt of a request directly from a member of the public or from a justice centre for that service, subject to paragraph (b). 40

(b) An advocate contemplated in paragraph (a)(ii) may only render those legal services rendered by advocates before the commencement of this Act as determined by the Council in the rules, if he or she—

- (i) is in possession of a Fidelity Fund certificate and conducts his or her practice in accordance with the relevant provisions of Chapter 7, with particular reference to sections 84, 85, 86 and 87; 45
- (ii) has notified the Council thereof in terms of section 30(1)(b)(ii).

(c) An advocate may render legal services in criminal or civil matters in expectation of a fee, commission, gain or reward as contemplated in this Act or any other applicable law upon receipt of a request directly from a justice centre for that service, in which event the provisions of paragraph (b) do not apply. 50

(3) The Council must make rules relating to the briefing of advocates—

- (a) by attorneys; and
- (b) directly by members of the public. 55

- (4) The Council must make rules relating to the instruction of attorneys.
- (5) Attorneys may only practise—
- (a) for their own account;
  - (b) as part of a commercial juristic entity referred to in subsection (7) and as such, may only make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance, or otherwise with an attorney; 5
  - (c) as part of a law clinic established in terms of subsection (8);
  - (d) as part of Legal Aid South Africa; or
  - (e) as an attorney in the full-time employment of the State as a state attorney or the South African Human Rights Commission. 10
- (6) Advocates may only practise—
- (a) for their own account and as such may not make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance or otherwise; 15
  - (b) as part of a law clinic established in terms of subsection (8);
  - (c) as part of Legal Aid South Africa; or
  - (d) as an advocate in the full-time employment of the State as a state advocate or the South African Human Rights Commission.
- (7) A commercial juristic entity may be established to conduct a legal practice provided that, in terms of its founding documents— 20
- (a) its shareholding, partnership or membership as the case may be, is comprised exclusively of attorneys;
  - (b) provision is made for legal services to be rendered only by or under the supervision of admitted and enrolled attorneys; and 25
  - (c) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for—
    - (i) the debts and liabilities of the commercial juristic entity as are or were contracted during their period of office; and
    - (ii) in respect of any theft committed during their period of office. 30
- (8) (a) Subject to the approval of the Council in terms of the rules, a law clinic may be established by—
- (i) a non-profit juristic entity registered in terms of the Non-profit Organisations Act, 1997 (Act No. 71 of 1997), to conduct a legal practice if, in terms of its founding documents— 35
    - (aa) the majority of its members of its governing body is comprised of legal practitioners; and
    - (bb) upon its winding-up, dissolution or voluntary deregistration, any asset remaining after all liabilities have been met, are transferred to another non-profit organisation having similar objectives to it; or 40
  - (ii) any university in the Republic if it is constituted and governed as part of the faculty of law at that university,
- and is subject to the provisions of paragraphs (b) and (c).
- (b) A law clinic referred to in paragraph (a)—
- (i) may only render legal services if those services are rendered by or under the supervision of attorneys; 45
  - (ii) may not make over to, share or divide any portion of its professional fee whether by way of partnership, commission, allowance or otherwise;
  - (iii) may not distribute any of its income or property to its members, governors or employees, except as reasonable compensation for services rendered; 50
  - (iv) may only engage candidate legal practitioners if it complies with the requirements determined by the Council in the rules; and
  - (v) may not render those legal services determined by the Council in the rules.
- (c) Legal services rendered by a law clinic referred to in paragraph (a)—
- (i) must be accessible to the public; and 55
  - (ii) must, subject to section 92, be rendered to the recipient of those services free of charge, except that the law clinic may recover any amounts actually disbursed on behalf of the recipient of the services.
- (9) The Council must, within two years after the commencement of Chapter 2 of this Act, investigate and make recommendations to the Minister on— 60
- (a) the creation of other forms of legal practice, including—
    - (i) limited liability legal practices;
    - (ii) multi-disciplinary practices; and

(b) the statutory recognition of paralegals, taking into account best international practices, the public interest and the interests of the legal profession, with the view to legislative and other interventions in order to improve access to the legal profession and access to justice generally.

## **Fees in respect legal services** 5

**35.** (1) Until the investigation contemplated in subsection (4) has been completed and the recommendations contained therein have been implemented by the Minister, fees in respect of litigious and non-litigious legal services rendered by legal practitioners, juristic entities, law clinics or Legal Aid South Africa referred to in section 34 must be in accordance with the tariffs made by the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985). 10

(2) The Rules Board for Courts of Law must, when determining the tariffs as contemplated in subsection (1), take into account—

(a) the importance, significance, complexity and expertise of the legal services required; 15

(b) the seniority and experience of the legal practitioner concerned, as determined in this Act;

(c) the volume of work required and time spent in respect of the legal services rendered; and

(d) the financial implications of the matter at hand. 20

(3) Despite any other law to the contrary, nothing in this section precludes any user of litigious or non-litigious legal services, on his or her own initiative, from agreeing with a legal practitioner in writing, to pay fees for the services in question in excess of or below any tariffs determined as contemplated in this section.

(4) The South African Law Reform Commission must, within two years after the commencement of Chapter 2 of this Act, investigate and report back to the Minister with recommendations on the following: 25

(a) The manner in which to address the circumstances giving rise to legal fees that are unattainable for most people;

(b) legislative and other interventions in order to improve access to justice by the members of the public; 30

(c) the desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners;

(d) the composition of the mechanism contemplated in paragraph (c) and the processes it should follow in determining fees or tariffs; 35

(e) the desirability of giving users of legal services the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism contemplated in paragraph (c); and

(f) the obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services. 40

(5) In conducting the investigation referred to in subsection (4), the South African Law Reform Commission must take the following into consideration:

(a) Best international practices;

(b) the public interest;

(c) the interests of the legal profession; and 45

(d) the use of contingency fee agreements as provided for in the Contingency Fees Act, 1997 (Act No. 66 of 1997).

(6) The Minister may by notice in the *Gazette* determine maximum tariffs payable to legal practitioners who are instructed by any State Department or Provincial or Local Government in any matter. 50

(7) When any attorney or an advocate referred to in section 34(2)(b) first receives instructions from a client for the rendering of litigious or non-litigious legal services, or as soon as practically possible thereafter, that attorney or advocate must provide the client with a cost estimate notice, in writing, specifying all particulars relating to the envisaged costs of the legal services, including the following: 55

(a) The likely financial implications including fees, charges, disbursements and other costs;

(b) the attorney's or advocate's hourly fee rate and an explanation to the client of his or her right to negotiate the fees payable to the attorney or advocate;

(c) an outline of the work to be done in respect of each stage of the litigation process, where applicable; 60

- (d) the likelihood of engaging an advocate, as well as an explanation of the different fees that can be charged by different advocates, depending on aspects such as seniority or expertise; and
- (e) if the matter involves litigation, the legal and financial consequences of the client's withdrawal from the litigation as well as the costs recovery regime. 5
- (8) Any attorney or an advocate referred to in section 34(2)(b) must, in addition to providing the client with a written cost estimate notice as contemplated in subsection (7), also verbally explain to the client every aspect contained in that notice, as well as any other relevant aspect relating to the costs of the legal services to be rendered.
- (9) A client must, in writing, agree to the envisaged legal services by that attorney or advocate referred to in section 34(2)(b) and the incurring of the estimated costs as set out in the notice contemplated in subsection (7). 10
- (10) Non-compliance by any attorney or an advocate referred to in section 34(2)(b) with the provisions of this section constitutes misconduct.
- (11) If any attorney or an advocate referred to in section 34(2)(b) does not comply with the provisions of this section, the client is not required to pay any legal costs to that attorney or advocate until the Council has reviewed the matter and made a determination regarding amounts to be paid. 15
- (12) The provisions of this section do not preclude the use of contingency fee agreements as provided for in the Contingency Fees Act, 1997 (Act No. 66 of 1997). 20

## CHAPTER 4

### PROFESSIONAL CONDUCT AND ESTABLISHMENT OF DISCIPLINARY BODIES

#### Code of conduct

- 36.** (1) The Council must develop a code of conduct that applies to all legal practitioners and all candidate legal practitioners and may review and amend such code of conduct. 25
- (2) The code of conduct serves as the prevailing standard of conduct, which legal practitioners, candidate legal practitioners and juristic entities must adhere to, and failure to do so constitutes misconduct. 30
- (3) The Council must take all reasonable steps to—
- (a) publicise the existence of the code of conduct;
- (b) inform members of the public of the contents of the code of conduct, including its enforcement procedures; and
- (c) inform members of the public of how and where to obtain a copy thereof. 35
- (4) The code of conduct and every subsequent amendment must be published in the *Gazette* and the rules.
- (5) Before the Council publishes a code of conduct or any amendment thereof under this section, the Council must publish a draft of the proposed code of conduct in the *Gazette* together with a notice, calling on interested persons to comment in writing within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice. 40

#### Establishment of disciplinary bodies

- 37.** (1) The Council must, when necessary, establish investigating committees, consisting of a person or persons appointed by the Council to conduct investigations of all complaints of misconduct against legal practitioners, candidate legal practitioners or juristic entities. 45
- (2) (a) An investigating committee may, for the purposes of conducting an investigation contemplated in subsection (1), direct any legal practitioner or an employee of that legal practitioner to produce for inspection any book, document or article which is in the possession, custody or under the control of that legal practitioner or employee which relates to the complaint in question: Provided that the investigating committee may make copies of such book, document or article and remove the copies from the premises of that legal practitioner. 50



(b) The legal practitioner referred to in paragraph (a) or employee in question may not, subject to the provisions of any other law, refuse to produce the book, document or article, even though he or she is of the opinion that it contains confidential information belonging to or concerning his or her client.

(c) Any person who performs any function under this subsection, may not disclose any information which he or she obtained in the performance of such a function, except—

- (i) for the purposes of the investigation or a hearing by a disciplinary body;
- (ii) to any person authorised thereto by the Council or the Board who, of necessity, requires it for the performance of his or her functions under this Act; 10
- (iii) if he or she is a person who, of necessity, supplies it in the performance of his or her functions under this Act;
- (iv) when required to do so by order of a court of law; or
- (v) at the written request of the Ombud.

(3) An investigating committee must, after investigating a complaint, if it is satisfied that— 15

- (a) the legal practitioner, or the candidate legal practitioner concerned may, on the basis of available *prima facie* evidence, be guilty of misconduct that, in terms of the code of conduct, warrants misconduct proceedings, refer the matter to the Council for adjudication by a disciplinary committee; or 20
- (b) the complaint should be dismissed on the grounds that the conduct in question does not necessarily warrant misconduct proceedings, as set out in the code of conduct, it must dismiss the complaint, inform the Council, the complainant and the legal practitioner, candidate legal practitioner or juristic entity of its finding and the reasons for it, whereafter the complainant may appeal in terms of section 41, if the complainant is aggrieved by— 25
  - (i) the manner in which the investigating committee conducted its investigation; or
  - (ii) the outcome of the investigating committee.

(4) The Council must, when necessary, establish disciplinary committees, consisting of at least three persons, to adjudicate complaints against legal practitioners and candidate legal practitioners referred to it in terms of subsection (3)(a), and must also designate one of those persons as chairperson thereof, who may not be a lay person referred to in subsection (5)(e)(ii). 30

(5) When establishing disciplinary committees the following factors must, as far as is practicable, be taken into account: 35

- (a) the racial and gender composition of South Africa;
- (b) the ease of access by persons necessary for the finalisation of the matters in question;
- (c) the need to promote the efficient resolution of complaints made in terms of this Act; 40
- (d) national and provincial demographics;
- (e) the need to include—
  - (i) an advocate and an attorney, or failing which, there must be at least—
    - (aa) one advocate, in the event of the legal practitioner being an advocate or in the event of the candidate legal practitioner being a pupil; and 45
    - (bb) one attorney, in the event of the legal practitioner being an attorney or in the event of the candidate legal practitioner being a candidate attorney; and 50
  - (ii) at least one lay person drawn by the Council from a list of persons established and maintained by the Office of the Ombud who has been approved by the Office of the Ombud, as being suitable to serve on disciplinary committees and who is paid an allowance for this purpose determined by the Council and published in the *Gazette*; 55
- (f) the need to provide a cost-effective disciplinary system; and
- (g) the requirements of administrative justice.

### **Procedure for dealing with complaints of misconduct and procedure to be followed in disciplinary hearing**

**38.** (1) The Council must make rules to determine the procedure to be followed by disciplinary bodies established in terms of section 37 for dealing with all complaints of misconduct relating to legal practitioners, whether practising as an advocate, an attorney, a candidate legal practitioner or a juristic entity, and such complaints must be lodged in writing with the Council. 5

(2) Before the Council makes any rule contemplated in subsection (1) or amends any rule, the Council must publish a draft of the proposed rule or proposed amendment in the *Gazette* together with a notice, calling on interested persons to comment in writing within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice. 10

(3) Particulars of all disciplinary hearings, including the particulars of—

- (a) the allegations of misconduct being dealt with; and
- (b) the members of the disciplinary committees in question; 15
- (c) the legal practitioners, candidate legal practitioners or juristic entities involved in the dispute; and
- (d) the outcome thereof and any sanction imposed in terms of section 40(3), if applicable, must, subject to subsection (4)(a), be—
  - (i) published on the website of the Council; 20
  - (ii) updated, at least, once every month by the Council; and
  - (iii) available for inspection by members of the public during business hours of the Council and relevant Provincial Councils.

(4) (a) The proceedings of all disciplinary hearings are open to the public, unless the chairperson of a disciplinary committee directs otherwise, on good cause shown, on application by a person having an interest in the matter, whereafter the provisions of section 154(1) to (5) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), apply with the necessary changes required by the context. 25

(b) The complainant in the matter is entitled to be present during all proceedings in a disciplinary hearing relating to his or her complaint in the same manner as a complainant in criminal proceedings. 30

(5) (a) A decision of the majority of the members present at a disciplinary hearing constitutes the decision of a disciplinary committee.

(b) In the event of a deadlock in the voting, the chairperson has a casting vote, in addition to a deliberative vote. 35

### **Disciplinary hearing**

**39.** (1) A disciplinary committee must conduct disciplinary hearings subject to the provisions of this section and the rules determined by the Council, as contemplated in section 38.

(2) A disciplinary committee may, for the purposes of this section, appoint a person to assist it in the performance of its functions. 40

(3) (a) A disciplinary committee may, for the purposes of a hearing, subpoena any person who—

- (i) in its opinion may be able to give material information concerning the subject of the hearing; or 45
- (ii) it suspects or believes has in his or her possession or custody or under his or her control any book, document or object which has any bearing on the subject of the hearing,

to appear before it at the time and place specified in the subpoena, to be questioned or to produce a book, document or object. 50

(b) A subpoena issued in terms of paragraph (a), must be—

- (i) in the form determined in the rules;
- (ii) signed by the chairperson of a disciplinary committee or, in his or her absence, any member of that committee; and
- (iii) served on the person concerned as determined in the rules. 55

(4) A disciplinary committee may retain a book, document or object produced in terms of subsection (3) for the duration of the hearing.

(5) The chairperson of a disciplinary committee may call upon and administer an oath to, or take an affirmation from, any witness at the hearing who was subpoenaed in terms of subsection (3). 60

- (6) At a hearing the person charged—
- (a) (i) may be present at the hearing of the proceedings;
  - (ii) may be assisted or represented by another person or a legal practitioner in conducting his or her defence proceedings;
  - (iii) has the right to be heard; 5
  - (iv) may call witnesses;
  - (v) may cross-examine any person called as a witness in support of the charge; and
  - (vi) may have access to any book, document or object produced in evidence; and 10
- (b) (i) may admit at any time before conviction that he or she is guilty of the charge; and
- (ii) may, in the case where he or she makes an admission in terms of subparagraph (i), be deemed to be guilty of misconduct as charged. 15
- (7) (a) A witness who has been subpoenaed may not—
- (i) without sufficient cause, fail to attend the hearing at the time and place specified in the subpoena;
  - (ii) refuse to be sworn in or to be affirmed as a witness;
  - (iii) without sufficient cause, fail to answer fully and satisfactorily to the best of his or her knowledge all questions lawfully put to him or her; or 20
  - (iv) fail to produce any book, document or object in his or her possession or custody or under his or her control which he or she has been required to produce.
- (b) A witness who has been subpoenaed must remain in attendance until excused by the chairperson of the disciplinary committee from further attendance. 25
- (c) A witness who has been subpoenaed may request that the names of the members of the disciplinary committee be made available to him or her.
- (d) The law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce a book, document or object in a civil trial before a court of law applies, with the necessary changes, in relation to the examination of, or the production of any book, document or object, to any person called in terms of this section as a witness. 30
- (e) A witness may not, after having been sworn in or having been affirmed as a witness, give a false statement on any matter, knowing that answer or statement to be false. 35
- (f) A person may not prevent another person from complying with a subpoena or from giving evidence or producing a book, document or object which he or she is in terms of this section required to give or produce.
- (8) The record of evidence which has a bearing on a charge before a disciplinary committee, and which was presented before any commission which investigated an event or conduct is admissible without further evidence being led if— 40
- (a) the record is accompanied by a certificate from the chairperson of the body or commission; and
  - (b) the certificate certifies that the investigation was lawful, reasonable and procedurally fair. 45
- (9) If the misconduct with which the legal practitioner, candidate legal practitioner or juristic entity is charged amounts to an offence of which he, she or it has been convicted by a court of law, a certified copy of the record of the trial and conviction by that court is, on the identification of the legal practitioner, candidate legal practitioner or juristic entity as the accused person referred to in the record, sufficient proof of the commission 50 by him or her or it of that offence, unless the conviction has been set aside by a superior court.

### **Proceedings after disciplinary hearing and sanctions**

- 40.** (1) (a) After the conclusion of a hearing a disciplinary committee must, within 30 days, decide whether or not the legal practitioner, candidate legal practitioner or juristic entity is guilty of misconduct. 55
- (b) If a disciplinary committee finds that the legal practitioner, candidate legal practitioner or juristic entity is guilty of misconduct it must—
- (i) inform the legal practitioner, candidate legal practitioner or representative of the juristic entity and the Council and Provincial Council of the finding; and 60

- (ii) inform the legal practitioner, candidate legal practitioner or representative of the juristic entity of the right of appeal as provided for in terms of section 41.
- (2) A legal practitioner, candidate legal practitioner or representative of a juristic entity found guilty of misconduct in terms of this section may—
- (a) address a disciplinary committee in mitigation of sentence; and 5
- (b) call witnesses to give evidence on his or her behalf in mitigation of sentence.
- (3) If found guilty of misconduct, the disciplinary committee concerned may call witnesses to give evidence in aggravation of sentence and may—
- (a) in the case of a legal practitioner—
- (i) order him or her to pay compensation, with or without interest to the complainant, which order is subject to confirmation by an order of any court having jurisdiction in the circumstances in the prescribed manner, on application by the Council; 10
- (ii) impose upon him or her a fine, payable to the Council, not exceeding the amount determined from time to time by the Minister by notice in the *Gazette*, on the advice of the Council; 15
- (iii) temporarily suspend him or her from practising or from engaging in any particular aspect of the practice of law, pending the finalisation of an application referred to in subparagraph (iv)(bb);
- (iv) advise the Council to apply to the High Court for— 20
- (aa) an order striking his or her name from the Roll;
- (bb) an order suspending him or her from practice;
- (cc) an interdict prohibiting him or her from dealing with trust monies; or
- (dd) any other appropriate relief; 25
- (v) advise the Council to amend or endorse his or her enrolment;
- (vi) order that his or her Fidelity Fund certificate be withdrawn, where applicable;
- (vii) warn him or her against certain conduct and order that such warning be endorsed against his or her enrolment; or 30
- (viii) caution or reprimand him or her;
- (b) in the case of a juristic entity—
- (i) order it to pay compensation, with or without interest, to the complainant, which order is subject to confirmation by an order of any court having jurisdiction in the circumstances in the prescribed manner on application by the Council; 35
- (ii) impose upon it a fine, payable to the Council, not exceeding the amount determined from time to time by the Minister by notice in the *Gazette*, on the advice of the Council;
- (iii) warn it against certain conduct; 40
- (iv) advise the Council to apply to the High Court for the winding up of the juristic entity; or
- (v) caution or reprimand it; or
- (c) in the case of a candidate legal practitioner—
- (i) cancel or suspend his or her practical vocational training; 45
- (ii) impose upon him or her a fine, payable to the Council, not exceeding the amount determined from time to time by the Minister by notice in the *Gazette*, on the advice of the Council; or
- (iii) caution or reprimand him or her.
- (4) (a) A disciplinary committee may— 50
- (i) impose any combination of the sanctions in either subsection (3)(a), (b) or (c); and
- (ii) postpone the taking of any steps or suspend the imposition of any sanction on conditions as it may determine.
- (b) In addition to the sanctions referred to in subsection (3), a disciplinary committee may order the legal practitioner, candidate legal practitioner or juristic entity to pay the cost of the investigation or the disciplinary hearing. 55
- (5) (a) If the taking of any steps or the imposition of any sanction has been postponed or suspended for a particular period, and if at the end of that period the disciplinary committee is satisfied that the legal practitioner, candidate legal practitioner or juristic entity concerned has substantially observed all the relevant conditions, the disciplinary committee must indicate in writing that no further steps will be taken or that the sanction will not be imposed. 60

(b) If a legal practitioner, candidate legal practitioner or juristic entity fails to comply with any conditions determined in terms of this section, the disciplinary committee may impose a sanction for non-compliance or execute the sanction originally imposed, unless the legal practitioner, candidate legal practitioner or juristic entity satisfies the disciplinary committee that the non-compliance was due to circumstances beyond his or her or its control, in which case the disciplinary committee may set further conditions as it deems fit. 5

(6) Any court with civil jurisdiction may, on the application of a disciplinary committee, grant an order for the recovery from the legal practitioner, candidate legal practitioner or juristic entity concerned of any amount such legal practitioner, candidate legal practitioner or juristic entity failed to pay in accordance with a sanction imposed in terms of this section, together with any interest thereon, after which the order so granted has the effect of a civil judgment of that court and must be executed in accordance with the law applicable in that court. 10

(7) (a) At the conclusion of a disciplinary hearing a disciplinary committee must notify the complainant, the Council and the Provincial Council in writing of the outcome of the hearing. 15

(b) If a disciplinary committee finds that the legal practitioner, candidate legal practitioner or juristic entity is not guilty of misconduct it must inform the complainant of the right of appeal as provided for in terms of section 41. 20

(8) The Council must give effect to the advice and decision of a disciplinary committee.

#### **Appeal against conduct or finding of disciplinary committee**

**41.** (1) (a) Subject to section 44, a legal practitioner, candidate legal practitioner or juristic entity may, as determined in the rules and within 30 days of being informed of the decision by a disciplinary committee, lodge an appeal with an appeal tribunal established in terms of subsection (2) against a finding of misconduct by the disciplinary committee or against the sanction imposed, or both. 25

(b) A complainant who is aggrieved by—

(i) the manner in which an investigating committee conducted its investigation or the outcome of the investigating committee as referred to in section 37(3)(b); or 30

(ii) the outcome of a disciplinary hearing referred to in section 40, may, as determined in the rules and within 30 days of being informed of the decision by the investigating committee or the disciplinary committee, as the case may be, lodge an appeal with an appeal tribunal established in terms of subsection (2) against any conduct or finding of the investigating committee or disciplinary committee, as the case may be. 35

(2) (a) An appeal tribunal must consist of not less than three and not more than five persons appointed by the Council, one of whom the Council must designate as chairperson officer thereof. 40

(b) The members of the appeal tribunal must include at least—

(i) one advocate and one attorney; and

(ii) one lay person drawn by the Council from a list of persons established and maintained by the Office of the Ombud who has been approved by the Office of the Ombud, as being suitable to serve on appeal tribunals and who is paid an allowance for this purpose determined by the Council and published in the *Gazette*. 45

(c) The members of the appeal tribunal must, subject to paragraph (b)(ii), be legally qualified with relevant expertise and may not be persons who were involved in any investigation or proceedings which gave rise to the appeal. 50

(d) A decision of the majority of the members present at any proceedings of an appeal tribunal constitutes the decision of the appeal tribunal.

(e) In the event of a deadlock in the voting, the chairperson of the appeal tribunal has a casting vote, in addition to a deliberative vote. 55

(3) An appeal tribunal may—

(a) dismiss the appeal against the finding of an investigating committee or a disciplinary committee and confirm the finding or sanction or both; or

(b) uphold the appeal against the decision of a disciplinary committee wholly or in part and set aside or vary the finding or sanction or both. 60

(4) If a legal practitioner, candidate legal practitioner or juristic entity who or which has been found guilty of misconduct lodges an appeal in terms of subsection (1), the decision of the disciplinary committee may not be enforced before the appeal tribunal has decided the appeal.

(5) The provisions of section 38(3) are applicable with the changes required by the context in respect of appeal tribunals. 5

### **Monitoring by Legal Services Ombud**

**42.** The Ombud may monitor—

- (a) the investigation of complaints by investigating committees;
- (b) the conduct of disciplinary committees during disciplinary hearings; and 10
- (c) the conduct of appeal tribunals during appeal proceedings.

### **Urgent legal proceedings**

**43.** Despite the provisions of this Chapter, if upon considering a complaint, a disciplinary body is satisfied that a legal practitioner has misappropriated trust monies or is guilty of other serious misconduct, it must inform the Council thereof with the view to the Council instituting urgent legal proceedings in the High Court to suspend the legal practitioner from practice and to obtain alternative interim relief. 15

### **Powers of High Court**

**44.** (1) The provisions of this Act do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity. 20

(2) Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity or in connection with any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge. 25

## **CHAPTER 5**

### **LEGAL SERVICES OMBUD**

#### **Establishment of Office of Legal Services Ombud 30**

**45.** (1) The Office of the Legal Services Ombud for the Republic is hereby established, as a juristic person.

(2) (a) The Ombud must, in consultation with the Minister, determine the seat of the Office of the Ombud.

(b) The Office of the Ombud may, with the approval of the Minister, also conduct its activities away from its seat. 35

#### **Objects of Ombud**

**46.** The objects of the Ombud are to—

- (a) protect and promote the public interest in relation to the rendering of legal services as contemplated in this Act; 40
- (b) ensure the fair, efficient and effective investigation of complaints of alleged misconduct against legal practitioners;
- (c) promote high standards of integrity in the legal profession; and
- (d) promote the independence of the legal profession.

#### **Appointment and independence of Legal Services Ombud 45**

**47.** (1) The President must, as soon as practicable after the commencement of this Act, appoint a judge discharged from active service in terms of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001) as Legal Services Ombud.

(2) The Ombud is independent and subject only to the Constitution and the law and he or she must be impartial and exercise his or her powers and perform his or her functions without fear, favour or prejudice.

(3) The Council must assist and protect the Ombud to ensure his or her independence, impartiality, dignity and effectiveness. 5

(4) No person may interfere with the functioning of the Ombud.

### **Powers and functions of Ombud**

**48.** (1) (a) In addition to the other powers and functions conferred on or assigned to him or her in this Act, and for the purposes of achieving the objects referred to in section 46, the Ombud is competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged— 10

(i) maladministration in the application of this Act;

(ii) abuse or unjustifiable exercise of power or unfair or other improper conduct or undue delay in performing a function in terms of this Act;

(iii) act or omission which results in unlawful or improper prejudice to any person, which the Ombud considers may affect the integrity and independence of the legal profession and public perceptions in respect thereof. 15

(b) The Ombud may, in carrying out the powers and functions contemplated in paragraph (a), in his or her sole discretion, endeavour to resolve any dispute or rectify any act or omission by— 20

(i) mediation, conciliation or negotiation;

(ii) advising, where necessary, any person regarding appropriate remedies; or

(iii) any other means that may be expedient in the circumstances.

(c) At any time prior to, during, or after an investigation referred to in paragraph (a), the Ombud may if he or she— 25

(i) is of the opinion that the facts disclose the commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions; or

(ii) deems it advisable, refer any matter which has a bearing on an investigation to the appropriate body or authority affected by it or make an appropriate recommendation regarding the redress of the prejudice in question or make any other appropriate recommendation that the Ombud deems expedient to the affected body or authority; or 30

(iii) is of the opinion that there is substance in any complaint made and that the prejudice to the complainant or any other person adversely affected by the act or omission in question is substantial and has the potential of affecting the integrity and independence of the legal profession and public perceptions in respect thereof, do anything necessary to enable proceedings to be taken to a competent court for the necessary relief or direct or assist in directing a complainant to an appropriate forum. 35 40

(2) For the purposes of an investigation the Ombud may—

(a) summon any person who may be able to furnish any information on the subject of the investigation or who has in his or her possession or under his or her control any book, document or other object relating to the investigation, to appear before the Ombud at a time and place specified in the summons, to be questioned or to produce that book, document or other object; and 45

(b) designate a person to question that person, under oath or affirmation administered by the Ombud, and examine or retain for further examination or for safe custody the book, document or other object in question.

(3) A summons referred to in subsection (2) must— 50

(a) be in the form determined in the rules;

(b) contain particulars of the matter in connection with which the person concerned is required to appear before the Ombud;

(c) be signed by the Ombud or a person authorised by him or her; and

(d) be served as determined in the rules. 55

(4) (a) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a magistrate's court applies in relation to the questioning of a person in terms of subsection (2), and that person is not entitled to refuse to answer any question on the ground that the answer might expose him or her to a criminal charge.

(b) No evidence regarding any questions and answers referred to in paragraph (a) are admissible in any criminal proceedings, except in criminal proceedings where the person concerned stands trial on a charge contemplated in section 319(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955).

(5) A person appearing before the Ombud by virtue of subsection (2)— 5

(a) may be assisted at his or her examination by a legal representative; and

(b) is entitled to any witness fees as he or she would be entitled if he or she were a witness for the State in criminal proceedings in a magistrates' court.

(6) (a) The Ombud may, subject to paragraph (b), in the manner he or she deems fit, make known to any person or body any report or finding, point of view or recommendation in respect of a matter investigated by him or her. 10

(b) The report or finding, point of view or recommendation in respect of an investigation by the Ombud must, when he or she deems it fit but as soon as possible, be made available to the complainant and to any person or body implicated thereby.

(c) Any report or finding, point of view or recommendation in respect of an investigation by the Ombud must be open to the public, unless the Ombud is of the opinion that exceptional circumstances require that the report, finding, point of view or recommendation be kept confidential. 15

### **Term of office of Ombud**

49. The Ombud holds office for a period of seven years but may serve for one further term of seven years. 20

### **Acting Ombud and filling of vacancies**

50. (1) If the office of Ombud becomes vacant, the President must, subject to this Chapter, appoint a judge discharged from active service in terms of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), to that office. 25

(2) Whenever the Ombud is for any reason unable to exercise or perform his or her powers or functions, or when the appointment of a judge referred to in subsection (1) to the office of Ombud is pending, the President may, subject to this Chapter, appoint a person as acting Ombud to exercise the powers and perform the powers and functions of the Ombud. 30

(3) The President must determine the remuneration, allowances and other terms and conditions of service and service benefits of the acting Legal Services Ombud, after consultation with the Minister and the Minister of Finance.

### **Staff, finances and accountability of Office of Ombud** 35

51. (1) In order to perform its functions the Ombud must—

(a) employ a director as the administrative head of the Office of the Ombud;

(b) employ such administrative staff as may be necessary; and

(c) enter into contracts with service providers and accept liability for the expenses incurred as a result of such services being rendered. 40

(2) The Ombud must appoint a director for an agreed term not exceeding five years which may be renewed for one additional term not exceeding five years and on the conditions as the Minister, in consultation with the Minister of Finance, may determine.

(3) The Director, as the administrative head and chief executive officer of the Office of the Ombud, is responsible for the general administration of the Office, and must— 45

(a) manage and direct the activities of the Office of the Ombud, subject to the direction of the Ombud;

(b) appoint and supervise the administrative staff of the Office of the Ombud; and

(c) provide quarterly management reports to the Director-General.

(4) (a) The Minister must, after consultation with the Minister of Finance, determine the Director's remuneration, allowances, benefits and other terms and conditions of employment. 50

(b) The Minister must, after consultation with the Minister of Finance, determine the staff establishment of the Office, the remuneration, allowances, benefits, and other terms and conditions of appointment of the members of staff. 55



- (5) Expenditure in connection with the administration and functioning of the Office of the Legal Services Ombud must be defrayed from money appropriated by Parliament for this purpose.
- (6) Monies appropriated by Parliament for this purpose—
- (a) constitute earmarked funds on the departmental vote; and 5
  - (b) may not be used by the Department for any other purpose unless the Ombud has been consulted and the National Treasury approves.
- (7) Subject to the Public Finance Management Act, 1999 (Act No. 1 of 1999), the Director-General—
- (a) is charged with the responsibility of accounting for money received or paid out for or on account of the administration and functioning of the Office of the Ombud in accordance with National Treasury regulations; and 10
  - (b) must cause the necessary accounting and other related records to be kept, which must be audited by the Auditor-General.
- (8) The financial year of the Office is the period of 1 April in any year to 31 March in the following year, except that the first financial year of the Office of the Ombud begins on the date on which this Chapter comes into operation, as contemplated subsection (13), and ends on 31 March of the following year. 15
- (9) The Office of the Ombud may invest or deposit money that is not immediately required for contingencies or current expenditure— 20
- (a) in a call account or short-term fixed deposit with any registered bank or financial institution in the Republic; or
  - (b) in an investment account with the Corporation for Public Deposits established by section 2 of the Corporation for Public Deposits Act, 1984 (Act No. 46 of 1984). 25
- (10) Within six months after the end of each financial year, the Director must prepare financial statements in accordance with established accounting practice, principles and procedures, comprising—
- (a) a statement, with suitable and sufficient particulars, reflecting the income and expenditure of the Office of the Ombud during the preceding financial year; and 30
  - (b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.
- (11) The Auditor-General must audit the financial statements of the Office each year.
- (12) The Office of the Ombud may, after consultation with the Minister and the Minister of Finance— 35
- (a) acquire and alienate movable and immovable property; and
  - (b) hire and let movable and immovable property.
- (13) (a) The Office of the Ombud must commence with its functions as from a date fixed by the Minister by notice in the *Gazette*. 40
- (b) Before the date so fixed, the necessary arrangements must be made for the Office of the Ombud to be accommodated, equipped and staffed in order to perform its functions properly.

### Annual report

- 52.** (1) The Office of the Ombud must prepare and submit to the Minister an annual report as determined in the rules within six months after the end of the financial year of the Office of the Ombud. 45
- (2) The annual report referred to in subsection (1) must include the following documents:
- (a) The audited financial statements prepared in terms of this Act; 50
  - (b) the report of the Auditor-General prepared in terms of this Act;
  - (c) a report of the activities undertaken in terms of the functions of the Ombud set out in this Chapter; and
  - (d) a statement of the progress made during the preceding year towards achieving the objects of this Chapter. 55
- (3) The Minister must table in Parliament each annual report submitted in terms of this Chapter.

## CHAPTER 6

## LEGAL PRACTITIONERS' FIDELITY FUND

*Part 1**Establishment of Fund and founding provisions***Continued existence of Attorneys Fidelity Fund** 5

**53.** (1) Despite the provisions of section 119, the Attorneys Fidelity Fund established by section 25 of the Attorneys Act continues to exist as a juristic person under the name Legal Practitioners' Fidelity Fund.

(2) The Fund acts through the Board.

**Revenue of Fund** 10

**54.** The Fund consists of—

- (a) each amount which, immediately prior to the date referred to in section 120(4), is or was payable to or held on account of the Fund, and which is paid on or after such date of commencement;
- (b) annual contributions paid by applicants for the issue of Fidelity Fund certificates and any interest on, or penalties in respect of, overdue contributions; 15
- (c) interest paid to the Fund in terms of this Act;
- (d) income obtained from investments of the Fund;
- (e) money recovered by or on behalf of the Fund in terms of this Act; 20
- (f) money received by or on behalf of the Fund from any insurer;
- (g) any other money lawfully paid into the Fund; and
- (h) any other money accruing to the Fund from any other source.

**Liability of Fund**

**55.** (1) The Fund is liable to reimburse persons who suffer pecuniary loss, not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, as a result of theft of any money or other property given in trust to a trust account practice in the course of the practice of the attorney or an advocate referred to in section 34(2)(b) as such, if the theft is committed— 25

- (a) by an attorney in that practice or advocate, or any person employed by that practice or supervised by that attorney or advocate; 30
- (b) by an attorney or person acting as executor or administrator in the estate of a deceased person; or
- (c) by an attorney or person employed by that attorney who is a trustee in an insolvent estate or in any other similar capacity, 35

excluding a curator to a financial institution in terms of the Banks Act, 1990 (Act No. 94 of 1990) or a liquidator of a mutual bank in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993).

**Limitation of liability of Fund**

**56.** (1) The Fund is not liable in respect of any loss suffered— 40

- (a) by a family member or a member of the household of any attorney or an advocate referred to in section 34(2)(b) who committed the theft;
- (b) by any partner or co-director in the trust account practice in which the theft occurs;
- (c) as a result of theft committed by an attorney or advocate whose fidelity has been otherwise guaranteed by a person, either in general or in respect of a particular transaction, to the extent to which it is covered by the guarantee; 45
- (d) by any person as a result of any theft committed after the victim of the theft received notice in writing from the Council or the Board warning against the use or continued use of the legal services of the trust account practice 50 concerned or the giving of any money or property in trust to that trust account

- practice and the person in question has failed to take reasonable steps after being so warned; or
- (e) by any person as a result of theft of money which any attorney or an advocate referred to in section 34(2)(b) has been instructed to invest on behalf of such person. 5
- (2) A claim for reimbursement as provided for in section 55 is limited—
- (a) in the case of money given in trust to a trust account practice, to the amount actually handed over, without interest, unless interest has been earned and given in trust to the practice, or unless the Board, in its discretion, decides to pay interest; and 10
- (b) in the case of securities or other property, to an amount equal to the average market value of such securities or property at the date when written demand is first made for their delivery, or if there is no average market value, the fair market value of such securities or other property as at that date, without interest. 15
- (3) Only the balance of any loss suffered by any person after deduction from the loss of the amount or value of all money or other benefits received or receivable by that person from any source other than the Fund, may be recovered from the Fund.
- (4) Subsection (1)(e) does not apply to money which an attorney is authorised to invest where the attorney acts in his or her capacity as executor, trustee or curator, or in any similar capacity, excluding a curator to a financial institution in terms of the Banks Act, 1990 (Act No. 94 of 1990), or liquidator of a mutual bank in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993). 20
- (5) Subject to subsection (6), an attorney or advocate must be regarded as having been instructed to invest money for the purposes of subsection (1)(e), where a person— 25
- (a) who entrusts money to the attorney or advocate; or
- (b) for whom the attorney or advocate holds money,
- instructs the attorney or advocate to invest all or some of that money in a specified investment or in an investment of the attorney's or advocate's choice.
- (6) For the purposes of subsection (1)(e) an attorney or advocate is regarded as not having been instructed to invest money if he or she is instructed by a person— 30
- (a) to pay the money into a trust account, if that payment is for the purpose of investing the money in that account on a temporary or interim basis only, pending the conclusion or implementation of any particular matter or transaction which is already in existence or about to come into existence at the time that the investment is made and in respect of which investment the attorney or advocate exercises exclusive control as trustee, agent or stakeholder, or in any fiduciary capacity; 35
- (b) to lend money on behalf of that person to give effect to a loan agreement where that person, being the lender— 40
- (i) specifies the borrower to whom the money is to be lent;
- (ii) has not been introduced to the borrower by the attorney for the purpose of making that loan; and
- (iii) is advised by the attorney in respect of the terms and conditions of the loan agreement; or 45
- (c) to utilise money to give effect to any term of a transaction to which that person is a party, other than a transaction which is a loan or which gives effect to a loan agreement that does not fall within the scope of paragraph (b).
- (7) An attorney or advocate who has been instructed to invest money as provided for in subsection (5) must, as soon as practicable after he or she has received that instruction, but prior to the receipt of the money to be invested, notify the person giving the instruction of the provisions of subsection (1)(e) in the form and manner determined by the Board in terms of subsection (8). 50
- (8) For the purposes of subsection (7), the Board must issue directives determining the form and manner in which a notice referred to in that subsection must be given, and it may from time to time review and, if necessary, revise such directives. 55
- (9) For purposes of subsection (1)(a), "family member", in relation to any person, means his or her parent, parent-in-law, sibling, child, including an adopted child or a step-child, or spouse (whether by statutory, customary or religious law), and including a life partner who is a person living with that person as if they were married to each other. 60

### **Purpose and application of Fund**

- 57.** (1) Subject to the provisions of this Act, the Fund must be utilised for the following purposes:
- (a) Meeting the liability of the Fund referred to in section 55;
  - (b) paying expenses incurred in operating the Board and the Fund, including the payment of remuneration or allowances and other service benefits to employees; 5
  - (c) paying expenses incurred by the Board in investigating and establishing the validity of claims contemplated in section 55;
  - (d) paying all expenses and legal costs incurred by the Board for the purpose of recovering money from the persons whose wrongful conduct gave rise to the claim; 10
  - (e) refunding the costs or any portion thereof incurred by a claimant in establishing a claim or attempting to recover the whole or a portion of the claim from the person whose wrongful conduct gave rise to the claim; 15
  - (f) paying legal expenses incurred in defending a claim made against the Fund, or otherwise incurred in relation to the Fund;
  - (g) paying premiums in respect of contracts of insurance entered into in terms of sections 76 and 77;
  - (h) paying allowances to members of the Board in relation to their services or their reasonable travelling and accommodation expenses incurred in relation to the affairs of the Board and the Fund to be determined in consultation with the Council; 20
  - (i) paying fees and expenses to the Council or its structures in respect of any function performed as agents for the Fund; 25
  - (j) making an annual appropriation to the Council in terms of section 22(1)(b);
  - (k) paying costs relating to the detection or prevention of theft of trust money; and
  - (l) paying interest in relation to section 55.
- (2) Subject to the provisions of this Act, the Fund may be utilised for the following purposes: 30
- (a) refunding the bank charges or any portion thereof paid by any attorney or an advocate referred to in section 34(2)(b) in relation to the keeping of a trust account referred to in section 86(2) and (3);
  - (b) paying expenses relating to any function performed in terms of this Act;
  - (c) paying the audit and inspection costs or a portion thereof incurred by an attorney or advocate in relation to the obtaining of a Fidelity Fund certificate; and 35
  - (d) paying bursaries and loans to students, candidate legal practitioners and legal practitioners for the purposes of legal education and research.

### **Legal Practitioners' Fidelity Fund Account** 40

**58.** (1) Money of the Fund must be deposited into a banking account held by the Fund at an institution registered as a bank, to the credit of an account to be known as the Legal Practitioners' Fidelity Fund Account.

(2) The Board may invest money which is deposited in terms of subsection (1) and which is not immediately required for the purposes mentioned in this Act. 45

### **Financial year of Fund**

**59.** The financial year of the Fund is determined by the Board.

### **Fund exempt from certain tax and insurance laws**

**60.** (1) The revenue of the Fund is exempt from the provisions of any law relating to the payment of income tax or any other tax or levy by the State. 50

(2) Any provision of any law relating to insurance (other than a law relating to the compulsory insurance of employees) or the provision of security in connection therewith, does not apply to the Fund.

**Part 2****Operation of Fund****Establishment of Board**

- 61.** (1) A Legal Practitioners' Fidelity Fund Board is hereby established to manage and administer the Fund. 5
- (2) The Fund must be held in trust by the Board for the purposes mentioned in this Act.

**Composition of Board**

- 62.** (1) The Board consists of the following persons:
- (a) Five legal practitioners, one of whom must be an advocate referred to in section 34(2)(b), elected in accordance with a procedure determined in the rules by the Council in consultation with the Board; 10
  - (b) two persons, designated by the Council, who, by virtue of their qualifications, expertise and experience in the field of finance, and whose names are submitted by the Independent Regulatory Board of Auditors or its successor; 15
  - and
  - (c) two fit and proper persons designated by the Minister.
- (2) The need for the Board to reflect—
- (a) the racial and gender composition of South Africa;
  - (b) representation of persons with disabilities; and 20
  - (c) provincial representation,
- must, as far as is practicable, be considered when the Board is constituted as contemplated in subsection (1).

**Powers and functions of Board**

- 63.** (1) In addition to the powers conferred upon it in this Act, and in the furtherance of the purpose of the Fund, the Board may— 25
- (a) invest any monies which are not required for immediate use in government and other securities as may be prescribed by regulation, as provided for in section 72(3);
  - (b) insure itself against risk; 30
  - (c) conclude agreements;
  - (d) institute or defend legal proceedings;
  - (e) as determined in the rules, inspect or cause to be inspected the accounts of any attorney or an advocate referred to in section 34(2)(b);
  - (f) make rules relating to— 35
    - (i) contributions to the Fund and the issuing and costs of Fidelity Fund certificates;
    - (ii) the procedure for the appointment of the executive officer and other employees; and
    - (iii) any other matter concerning the Fund; 40
  - (g) make an arrangement with any bank for the keeping of trust accounts opened in terms of section 86(2) and for the investment of money in separate trust savings or other interest bearing accounts opened in terms of section 86(3) and (4) to provide for one or more of the following:
    - (i) The payment of interest to the Fund on the whole or any part of the money deposited in terms of section 86(2) and the money invested in terms of section 86(3) and (4), as contemplated in section 86(5); 45
    - (ii) the manner in which the Fund is informed of amounts held in the accounts opened in terms of section 86(2), (3) and (4);
    - (iii) the auditing of interest calculations and account balances in the accounts opened in terms of section 86(2), (3) and (4) in the bank accounts; and 50
    - (iv) any other relevant matter;
  - (h) consider claims against the Fund;

- (i) through any person authorised thereto in writing by the chairperson of the Board, institute a prosecution for the misappropriation or theft of property or trust money, and the provisions of the laws relating to private prosecutions apply to such prosecution as if the Board is a public body;
- (j) delegate to any of its employees the duty, subject to conditions that may be imposed by the Board, to consider any claims against the Fund; and 5
- (k) generally take any other steps and perform any other acts as may be necessary for or conducive to the achievement of the objects of the Fund.
- (2) The Board must appoint an executive officer to— 10
  - (a) perform or exercise the powers and functions determined by the Board;
  - (b) supervise the employees of the Board; and
  - (c) account for the assets and liabilities of the Board.
- (3) The Board may appoint any other employees as it deems necessary to assist the executive officer.
- (4) The procedure for the appointment of the executive officer and other employees must be determined by the Board. 15
- (5) The need for the staff of the Board to reflect— 20
  - (a) the racial and gender composition of South Africa; and
  - (b) representation of persons with disabilities,
 must, as far as is practicable, be considered when the executive officer and other employees are appointed in terms of this section.
- (6) The Board must determine the conditions of service of the executive officer and the other employees of the Board.

### **Membership of Board**

- 64.** (1) A member of the Board must— 25
  - (a) be a South African citizen;
  - (b) be a fit and proper person; and
  - (c) subscribe to the objects of the Board.
- (2) The following persons are disqualified from becoming or remaining members of the Board: 30
  - (a) An unrehabilitated insolvent;
  - (b) a person declared to be of unsound mind by a court of the Republic;
  - (c) a person who has been convicted in a court of first instance— 35
    - (i) of an offence and sentenced to more than 12 months' imprisonment without the option of a fine; or
    - (ii) of an offence, which involves any element of dishonesty, either in the Republic or outside the Republic, if the conduct constituting the offence would have been an offence in the Republic, other than a conviction for an offence committed prior to 27 April 1994 associated with political objectives: Provided that if the person in question lodges an appeal 40 against the conviction or sentence, he or she may be suspended from office by the Board as contemplated in section 69, pending the outcome of the appeal: Provided further that he or she may be replaced by the designating body, or in the case of a member referred to in section 62(1)(a), elected in terms of the procedure referred to in that section; 45
  - (d) a person who has been removed from office in terms of section 69; and
  - (e) a member of the Council or any of its committees.

### **Chairperson and deputy chairperson of Board**

- 65.** (1) At the first meeting of the Board, the members of the Board must elect and appoint a chairperson and deputy chairperson from among themselves. 50
- (2) The chairperson and deputy chairperson hold office for a period of three years from the date of their election and may be re-elected and re-appointed for one further term, unless such chairperson or deputy chairperson resigns or ceases to be a member of the Board.
- (3) The deputy chairperson must, if the chairperson is absent or is for any reason 55 unable to act as chairperson, perform all the functions and exercise all the powers of the chairperson.

(4) If both the chairperson and deputy chairperson are absent from any meeting, the members present must elect a person from among themselves to preside at that meeting and the person so presiding must, during that meeting and until the chairperson or deputy chairperson resumes duty, perform all the functions and exercise all the powers of the chairperson. 5

(5) If both the chairperson and deputy chairperson have been given leave of absence, the members of the Board must elect a person from among themselves to act as chairperson until the chairperson or deputy chairperson resumes duty or is removed from office in terms of section 69.

(6) If the office of chairperson or deputy chairperson becomes vacant, the members of the Board must, at the first meeting thereafter or as soon as possible thereafter, elect from among themselves a new chairperson or deputy chairperson, as the case may be. 10

(7) A chairperson and deputy chairperson may vacate office as such, without relinquishing his or her membership of the Board, unless his or her membership has been terminated in accordance with section 68. 15

### **Vacancies in Board and filling thereof**

**66.** (1) A vacancy in the Board occurs when—

- (a) the term of office of a member expires or terminates as contemplated in section 68;
- (b) a member dies; 20
- (c) a member is removed from office as contemplated in section 69; or
- (d) the resignation of a member takes effect.

(2) A vacancy in the Board must be filled as soon as practicably possible in accordance with the provisions of section 62.

(3) Any person appointed to fill a vacancy holds office for the unexpired portion of the term of the vacating member. 25

(4) No decision taken by the Board or act performed under the authority of the Board is invalid merely by reason of a vacancy on the Board, if the decision was taken or the act was authorised, subject to section 70.

### **Term of office of members of Board** 30

**67.** (1) A member of the Board holds office for a term of three years, but may serve as a member for one further term if he or she is again so elected or designated, as the case may be.

(2) Despite subsection (1), a member remains in office after the expiry of his or her term of office until the commencement of the term of office of his or her successor. 35

### **Termination of office**

**68.** (1) A person ceases to be a member of the Board when that person—

- (a) is no longer eligible in terms of section 64 to be a member;
- (b) resigns;
- (c) is removed from office in terms of section 69; 40
- (d) in the case of a legal practitioner referred to in section 62(1)(a), ceases to be a practising legal practitioner, for whatever reason; or
- (e) is appointed as a judicial officer.

(2) A member may resign after giving at least three months' written notice to the Board, but the Board may, on good cause shown, accept a shorter period. 45

### **Removal from office**

**69.** (1) The Board may remove a member of the Board from office on account of—

- (a) a finding by a disciplinary committee in terms of section 40 of any serious misconduct as set out in the code of conduct contemplated in section 36 on the part of a legal practitioner; 50
- (b) incapacity and incompetence which, in the opinion of the Board, debars him or her from serving as a member of the Board;
- (c) absence from three consecutive meetings of the Board without the permission of the chairperson, except on good cause shown; or

- (d) a request by the body which or person who elected or designated that member in terms of section 62, on good cause shown by the body or person in question; or
- (e) his or her becoming disqualified to remain as a member of the Board as contemplated in section 64(2). 5

(2) If the Board has commenced proceedings for the removal of a member, it may suspend that member from office.

(3) A member who is suspended from office may not perform or exercise any of the powers or functions of that office or receive any allowances.

(4) The Board must follow due process of law if it intends to remove or suspend a member from office, as determined by the Board in the rules contemplated in section 63(1)(f). 10

### Meetings and resolutions of Board

**70.** (1) (a) The Board may meet at any place in the Republic.

(b) The Board must, as soon as practicable after the appointment of its members, meet for the first time at the time and place determined by the Minister and thereafter at such times and places determined by the Board. 15

(2) The majority of the members of the Board constitutes a quorum at any meeting of the Board.

(3) When the chairperson is absent or is not able to perform his or her functions, the deputy chairperson must act as chairperson, and if both the chairperson and deputy chairperson are absent or are not able to perform their functions, the members present must elect one from among themselves to preside at that meeting. 20

(4) A decision of the majority of the members constitutes a decision of the Board and in the event of an equality of votes the person presiding at the meeting has a casting vote in addition to a deliberative vote. 25

(5) A resolution in writing of the Board signed by all its members is regarded as if it had been passed at a meeting of the Board.

(6) The Board must determine the procedure for calling a meeting and the procedure to be followed at the meeting. 30

(7) In any advice or recommendation to the Minister, the minority views of any one or more members of the Board, as well as any report of a committee appointed in terms of section 71, must be included.

(8) The Board must keep a record of its proceedings.

### Committees of Board

35

**71.** (1) The Board—

- (a) must appoint an executive committee consisting of the chairperson, deputy chairperson and two other members of the Board, one of whom must be an advocate referred to in section 34(2)(b);
- (b) may appoint committees relating to matters falling within the scope of its powers and functions, the members of which may be members of the Board or other persons; 40
- (c) may in writing, delegate to the executive committee or other committee any powers and functions as it may determine; and
- (d) may direct the executive committee or other committee, either generally or in a specific case, to advise the Board. 45

(2) (a) The Board must elect and appoint a chairperson of a committee.

(b) The chairperson of the Board is *ex officio* chairperson of the executive committee referred to in subsection (1)(a) and the deputy chairperson of the Board is *ex officio* deputy chairperson of the executive committee referred to in subsection (1)(a). 50

(3) A committee exercises its powers and performs its functions in accordance with any policy directions of the Board.

(4) The Board may at any time dissolve any committee.

(5) The provisions of section 70 apply, with the necessary changes, to a meeting of a committee. 55

(6) The Board is not divested of any power or function delegated to a committee, and may amend or rescind a decision of a committee.



### **Certificate in respect of liabilities of Fund and investment of money in Fund**

**72.** (1) The Board must appoint an actuary to make recommendations to it on or before 31 March in any year regarding the amount which, in that actuary's opinion, will be required during the next ensuing year ending on 31 December, for the purposes of meeting the obligations of the Fund in terms of section 55, and the actuary must furnish the Board on or before the first-mentioned date with a certificate setting out the amount so recommended. 5

(2) The Board must, within 30 days after receipt of the certificate referred to in subsection (1), determine the amount required in the ensuing year for the purposes referred to in subsection (1). 10

(3) Any amount determined in terms of subsection (2) that is not immediately required for the purposes referred to in subsection (1) in any financial year must be invested in government and other securities as may be prescribed by regulation.

### **Annual review by actuary**

**73.** (1) Within three months after the end of each financial year, the actuary referred to in section 72(1) must review the financial soundness of the Fund and submit an actuarial valuation report to the Board and the Minister. 15

(2) The actuarial valuation report must contain—

(a) a statement— 20

- (i) reflecting the actuarial value of the assets and liabilities of the Fund;
- (ii) on the financial soundness of the Fund; and
- (iii) on whether in the financial year concerned, a surplus or deficit was present in the Fund and, if a deficit is present, specifying the amount required to enable the Fund to meet its obligations; and

(b) an indication of— 25

- (i) the basis and method used to value the assets and liabilities of the Fund;
- (ii) any changes to the basis and method used to value the Fund as compared with the actuarial report of the previous year;
- (iii) any special consideration or restriction that the Board brought to the attention or made applicable to the actuary in performing the function in terms of this section; and 30
- (iv) any explanatory note on any matter relevant to obtaining a true and meaningful reflection of the financial state of the Fund.

(3) The Board must submit a report to the Minister if, at any stage after having regard to the assets and liabilities of the Fund, the value of the assets of the Fund is insufficient or is not increasing at a sufficient rate to meet payments for benefits that may be reasonably anticipated, and the Minister must immediately submit that report to Parliament. 35

### **Contributions to Fund by legal practitioners**

**74.** (1) (a) Subject to the provisions of this section, every attorney, practising on his or her own account or in partnership, and every advocate referred to in section 34(2)(b), must, annually when he or she applies for a Fidelity Fund certificate, pay to the Council— 40

- (i) the amount as may be fixed by the Board from time to time in respect of the cost of group professional indemnity insurance arranged by the Board pursuant to the provisions of section 77(2); and 45
- (ii) any other non-refundable amount as may be fixed by the Board from time to time.

(b) Any legal practitioner referred to in paragraph (a) who commences to practise on or after 1 July in any year must, in respect of that year, pay half of the contribution which is payable in terms of that paragraph for that year. 50

(2) A legal practitioner referred to in subsection (1) (a) who applies under section 85(1) for the first time for a Fidelity Fund certificate must pay to the Fund, in addition to any contributions payable in terms of subsection (1), any single non-refundable contribution as the Board may determine. 55

(3) The Board may require a legal practitioner referred to in subsection (1)(a) in respect of whom the Fund has been applied as a result of any of the circumstances

referred to in section 57, to pay an additional annual contribution to the Fund of such amount and for any period as the Board may determine.

(4) (a) A legal practitioner referred to in subsection (1)(a) who is not in possession of a Fidelity Fund certificate and who intends to commence to practise on his or her own account, in partnership or in a juristic entity, must, before commencing to practise, give notice of his or her intention to the Council and thereafter becomes liable to pay to the Fund the amount of the contribution referred to in subsections (1) and (2). 5

(b) A legal practitioner referred to in subsection (1)(a) who is in possession of a Fidelity Fund certificate but who intends to commence to practise for his or her own account, in partnership or in a juristic entity in the area of jurisdiction of a Division of the High Court other than that in which he or she usually practises for his or her own account or in partnership, must give notice of his or her intention to the Council. 10

(5) All contributions payable under this section must be paid to the Council, and the Council must remit the contributions to the Board within seven days of receipt thereof.

## **Audit** 15

75. (1) The accounts of the Fund must be audited by a registered accountant and auditor appointed by the Board.

(2) A person appointed under subsection (1) must, in respect of each financial year of the Fund, draw up a balance sheet and income statement of the Fund and immediately submit certified copies thereof, together with his or her report thereon, to the chairperson of the Board and to the Council. 20

(3) Within one month of receiving the audited financial statements, the Board must submit an annual report to the Council and the Minister which must at least set out and contain—

- (a) the total number of persons who made claims in terms of this Act; 25
- (b) the total number of legal practitioners who paid contributions in terms of this Act;
- (c) the total number of persons who were paid claims and the monetary value of claims paid in terms of this Act; and
- (d) any other matters as may be prescribed by the Minister. 30

## **Re-insurance**

76. (1) The Board may, in its discretion, enter into a contract with any person or corporation carrying on fidelity insurance business in terms of which the Fund will be indemnified to the extent and in the manner provided in that contract against liability to pay claims under this Act. 35

(2) A contract referred to in subsection (1) must be entered into in respect of legal practitioners referred to in section 84(1).

(3) A claimant against the Board does not have any right—

- (a) of action against any person or corporation with whom a contract of indemnity has been entered into in terms of this section; or 40
- (b) to any money paid by the insurer in accordance with that contract.

(4) Any money paid by an insurer in accordance with a contract of indemnity must be paid into the Fund for appropriation by the Board.

## **Provision of insurance cover and suretyships**

77. (1) The Board may— 45

- (a) acquire or form and administer a public company; or
- (b) together with any other person or institution, establish a scheme, underwritten by a registered insurer,

in order to provide insurance cover, subject to the provisions of the Short Term Insurance Act, 1998 (Act No. 53 of 1998), to legal practitioners referred to in section 84(1) in respect of any claims which may arise from the professional conduct of those legal practitioners. 50

(2) The Board may enter into a contract with a company or scheme referred to in subsection (1), or any company carrying on professional indemnity insurance business, for the provision of group professional indemnity insurance to legal practitioners referred to in section 84(1) to the extent and in the manner provided in the contract. 55

- (3) The Board may enter into deeds of suretyship to the satisfaction of the Master of the High Court having jurisdiction in order to provide security on behalf of an attorney in respect of work done by that attorney as—
- (a) executor in the estate of a deceased person;
  - (b) a trustee in an insolvent estate; 5
  - (c) a curator to the person or property in the case of a person who is unable to manage his or her own affairs; or
  - (d) in case of any other similar capacity, by any other person in such capacity where an attorney acts as agent for the person concerned.
- (4) The Board may levy premiums and fees for the provision of any insurance or security through any scheme established or public company administered by it in terms of the provisions of this Act or legislation repealed by this Act. 10

### **Part 3**

#### ***Claims against Fund***

#### **Procedure for instituting claims against Fund** 15

- 78.** (1) No person has a claim against the Fund in respect of any theft contemplated in section 55, unless—
- (a) written notice of the claim is given to the Council and to the Board within three months after the claimant became aware of the theft or, by the exercise of reasonable care, should have become aware of the theft; and 20
  - (b) within six months after a written demand has been sent to him or her by the Board, the claimant furnishes the Board with proof as the Board may reasonably require.
- (2) If the Board is satisfied that, having regard to all the circumstances, a claim or the proof required by it has been lodged or furnished within a reasonable period, it may in its discretion extend any of the periods referred to in subsection (1). 25

#### **Actions against Fund**

- 79.** (1) The Fund is not obliged to pay any portion of a claim which could reasonably be recovered from any other person liable.
- (2) The Fund may pay all reasonable expenses and legal costs incurred by a claimant in exhausting his or her rights of action against another person. 30
- (3) The Fund may, in its discretion, before deciding whether to make full payment of a claim or any part of it, make an interim payment to the claimant of a portion of the amount for which his or her claim has been admitted.
- (4) Any action against the Fund in respect of loss suffered by any person as a result of theft committed by a legal practitioner referred to in section 84(1), candidate attorney or employee of any such legal practitioner or juristic entity, must be instituted within one year of the date of a notification directed to that person or his or her legal representative by the Fund, informing him or her that the Fund rejects the claim to which the action relates. 35 40
- (5) In any action against the Fund all defences which would have been available to the person against whom the claim arose, are available to the Fund.
- (6) Any action against the Fund may, subject to the provisions of this Act, be brought in any court having jurisdiction in respect of the claim.

#### **Subrogation** 45

- 80.** On payment out of the Fund of money in settlement in whole or in part of any claim under this Chapter, the Fund is subrogated, to the extent of the payment, to all rights and legal remedies of the claimant against any legal practitioner referred to in section 84(1) or person in relation to whom the claim arose, or in the event of his or her death or insolvency or other legal disability, against any person having authority to administer his or her estate. 50

### Claims against future revenue of Fund

- 81.** (1) If the Fund at any time has insufficient assets to settle all claims and judgments, the claims and judgments must, to the extent to which they are not settled, be charged against future revenue of the Fund. 5
- (2) The Board may determine the order in which claims and judgments referred to in terms of subsection (1) are settled, and may, if the revenue of the Fund is not sufficient to settle all claims in full, settle any claim or judgment in whole or in part.
- (3) Without limiting its discretion, the Board must, in applying the Fund towards the settlement of claims and judgments, consider the following:
- (a) The relative degrees of hardship suffered or likely to be suffered by the various claimants should their claims against the Fund not be settled in whole or in part; 10
  - (b) subject to paragraph (a), the full settlement of relatively small claims, except in exceptional circumstances, before relatively large claims are settled to a greater extent than the small claims; and 15
  - (c) in equal circumstances, the priority of claimants according to the dates of the judgments or the dates when the claims were admitted by the Board, as the case may be.

### Indemnification in respect of certain acts

- 82.** No action for damages may be instituted— 20
- (a) against the Fund, the Board or any member, official or employee of the Board in respect of anything done in the *bona fide* exercise or performance of its or his or her powers or functions in terms of the provisions of this Act; or
  - (b) against the Council, a member of the Council or official or employee thereof, in respect of any notification issued in good faith for the purposes of section 79(4). 25

### Preservation and disposal of records and documents in possession of Board

- 83.** (1) Any record or document in possession of the Board relating to any claim instituted against the Fund must, subject to the provisions of subsection (2), be preserved at the office of the Board. 30
- (2) The Board may, after the lapse of five years from the date which any claim to which any record or document relates is settled by the Board or adjudicated upon by the court or rendered unenforceable by lapse of time, direct that the record or document be removed to some other place of custody or be destroyed or otherwise disposed of.

## CHAPTER 7 35

### HANDLING OF TRUST MONIES

#### Obligations of legal practitioner relating to handling of trust monies

- 84.** (1) Every attorney or any advocate referred to in section 34(2)(b), other than a legal practitioner in the full-time employ of the South African Human Rights Commission or the State as a state attorney or state advocate and who practises or is deemed to practise— 40
- (a) for his or her own account either alone or in partnership; or
  - (b) as a director of a practice which is a juristic entity,
- must be in possession of a Fidelity Fund certificate.
- (2) No legal practitioner referred to in subsection (1) or person employed or supervised by that legal practitioner may receive or hold funds or property belonging to any person unless the legal practitioner concerned is in possession of a Fidelity Fund certificate. 45
- (3) The provisions of subsections (1) and (2) apply to a deposit taken on account of fees or disbursements in respect of legal services to be rendered. 50
- (4) A Fidelity Fund certificate must indicate that the legal practitioner concerned is obliged to practise subject to the provisions of this Act, and the fact that such a legal practitioner holds such a certificate must be endorsed against his or her enrolment by the Council.

(5) A legal practitioner referred to in subsection (1) who—

- (a) transfers from one practice to another; or
- (b) ceases to practise,

must give notice of this fact to the Council and comply with the Council's relevant requirements in relation to the closure of that legal practitioner's trust account and in the case of paragraph (b) return his or her certificate to the Council. 5

(6) The Council may withdraw a Fidelity Fund certificate and, where necessary, obtain an interdict against the legal practitioner concerned if he or she fails to comply with the provisions of this Act or in any way acts unlawfully or unethically.

(7) The provisions of this section do not apply to a legal practitioner who practises in the full time employ of Legal Aid South Africa on a permanent basis. 10

(8) An advocate, other than an advocate referred to in section 34(2)(b), may not receive or hold money or property belonging to any person in the course of that advocate's practice or in respect of any instruction issued to the advocate by an attorney or a member of the public. 15

(9) No legal practitioner in the full-time employ of the South African Human Rights Commission or the State as a state attorney, state advocate, state law adviser or in any other professional capacity may receive or keep money or property belonging to any person, except during the course of employment of such legal practitioner with the State or the South African Human Rights Commission and in such case only on behalf of the South African Human Rights Commission or the State and for no other purpose. 20

### **Application for and issue of Fidelity Fund certificates**

**85.** (1) (a) A legal practitioner who is obliged in terms of section 84(1) to be in possession of a Fidelity Fund certificate must apply to the Council for such a certificate as determined in the rules. 25

(b) Every legal practitioner referred to in paragraph (a) who, for the first time, practises as such, must, within the period and after payment of the fee determined by the Council in the rules, complete a legal practice management course approved by the Council determined in the rules.

(2) An application in terms of subsection (1)(a) must be accompanied by the contribution payable by applicants as determined in the rules. 30

(3) The Council must, in consultation with the Board, determine the amount of the contribution for the ensuing year, if any, and in the event of a contribution being charged, give notice thereof by publication in the *Gazette*.

(4) In determining the amount of the contribution, the Council and the Board must take into account— 35

- (a) the value of the Fund;
- (b) the extent of the expenses and liabilities which the Fund is likely to incur in the ensuing years; and
- (c) the actuarial valuation report referred to in section 73(2). 40

(5) The Council may, in consultation with the Board, and taking into account the performance of community service which promotes access to justice—

- (a) exempt a category of legal practitioners referred to in subsection (1) from paying the whole or part of the contribution; or
- (b) exempt a particular legal practitioner referred to in subsection (1) from paying the whole or part of the contribution after consideration of a written application from that legal practitioner, if the Council is satisfied that there is good reason to do so. 45

(6) Upon receipt of an application in terms of subsection (1) the Council must, if it is satisfied that the applicant has— 50

- (a) complied with the provisions of this Chapter;
- (b) paid the required contribution to the Fund;
- (c) discharged all liabilities in respect of enrolment fees; and
- (d) completed the application form as determined in the rules in every respect, immediately issue to the applicant a Fidelity Fund certificate that is determined in the rules. 55

(7) A Fidelity Fund certificate is valid until 31 December of the year in respect of which it was issued.

(8) A document purporting to be a Fidelity Fund certificate which has been issued contrary to the provisions of this Act is null and void and must be returned to the Council on demand. 60

### Trust accounts

**86.** (1) Every legal practitioner referred to in section 84(1) must operate a trust account.

(2) Every trust account practice must keep a trust account at a bank with which the Fund has made an arrangement as provided for in section 63(1)(g) and must deposit therein, as soon as possible after receipt thereof, money held by such practice on behalf of any person. 5

(3) A trust account practice may, of its own accord, invest in a separate trust savings account or other interest-bearing account any money which is not immediately required for any particular purpose. 10

(4) A trust account practice may, on the instructions of any person, open a separate trust savings account or other interest-bearing account for the purpose of investing therein any money deposited in the trust account of that practice, on behalf of such person over which the practice exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity. 15

(5) Interest accrued on money deposited in terms of this section must, in the case of money deposited in terms of—

- (a) subsections (2) and (3), be paid over to the Fund and vests in the Fund; and
- (b) subsection (4), be paid over to the person referred to in that subsection: Provided that 5% of the interest accrued on money in terms of this paragraph must be paid over to the Fund and vests in the Fund. 20

(6) A legal practitioner referred to in section 84(1) may not deposit money in terms of subsection (2), nor invest money in terms of subsections (3) and (4) in accounts held at a bank which is not a party to an arrangement as provided for in section 63(1)(g), unless prior written consent of the Fund has been obtained. 25

(7) A legal practitioner referred to in section 84(1) must comply with the terms of an arrangement concluded between a bank and the Fund as provided for in section 63(1)(g).

### Accounting

**87.** (1) A trust account practice must keep proper accounting records containing particulars and information in respect of— 30

- (a) money received and paid on its own account;
- (b) any money received, held or paid on account of any person;
- (c) money invested in a trust account or other interest-bearing account referred to in section 86; and
- (d) any interest on money so invested which is paid over or credited to it. 35

(2) (a) The Council or the Board may, itself or through its nominee, at the cost of the Council or the Board, inspect the accounting records of any trust account practice in order to satisfy itself that the provisions of section 86 and subsection (1) are being complied with.

(b) If on an inspection it is found that these provisions have not been complied with, the Council or the Board may write up the accounting records of the trust account practice and recover the costs of the inspection and the writing up of the accounting records from the trust account practice concerned. 40

(3) For the purposes of subsections (1) and (2), “accounting records” include any record or document kept by or in the custody or under the control of any trust account practice which relates to— 45

- (a) money held in trust;
- (b) money invested in terms of section 86(2), (3) or (4) and interest thereon;
- (c) any estate of a deceased person or any insolvent estate or any estate placed under curatorship, in respect of which an attorney in the trust account practice is the executor, trustee or curator or which he or she administers on behalf of the executor, trustee or curator; or
- (d) the affairs of the trust account practice. 50

(4) (a) Any money held in the trust account of a trust account practice in respect of which the identity of the owner is unknown or which is unclaimed after one year, must, after the second annual closing of the accounting records of the trust account practice following the date upon which those funds were deposited in the trust account of the trust account practice, be paid over to the Fund by the trust account practice. 55

(b) Nothing in this subsection deprives the owner of the money contemplated in paragraph (a) of the right to claim from the Fund any portion as he or she may prove an entitlement to.

(5) (a) Despite section 37(2)(a), any attorney or an advocate referred to in section 34(2)(b) or an employee of a trust account practice must, at the request of the Council or the Board, or the person authorised thereto by the Council or the Board, produce for inspection a book, document or article which is in the possession, custody or under the control of that legal practitioner or such employee, which book, document or article relates to the trust account practice or former trust account practice of such attorney or advocate: Provided that the Council or the Board or person authorised by the Council or the Board may make copies of such book, document or article and remove the copies from the premises of that attorney, advocate or trust account practice.

(b) The legal practitioner referred to in paragraph (a) or employee in question may not, subject to the provisions of any other law, refuse to produce the book, document or article, even though he or she is of the opinion that it contains confidential information belonging to or concerning his or her client.

(6) Any person who performs any function under this section, may not disclose any information which he or she obtained in the performance of such a function except—

- (a) for the purposes of an investigation or hearing by a disciplinary body;
- (b) to any person authorised thereto by the Council or the Board who of necessity requires it for the performance of his or her functions under this Act;
- (c) if he or she is a person who of necessity supplies it in the performance of his or her functions under this Act;
- (d) when required to do so by order of a court of law;
- (e) at the written request of the Ombud; or
- (f) at the written request of the National Prosecuting Authority or any competent authority which requires it for the institution of an investigation with a view to the institution of any criminal prosecution.

### **Trust money and trust property of trust account practice**

**88.** (1) (a) Subject to paragraph (b), an amount standing to the credit of any trust account of any trust account practice—

- (i) does not form part of the assets of the trust account practice or of any attorney, partner or member thereof or of any advocate referred to in section 34(2)(b); and
- (ii) may not be attached by the creditor of any such trust account practice, attorney, partner or member or advocate.

(b) Any excess remaining after all claims of persons whose money has, or should have been deposited or invested in a trust account referred to in paragraph (a), and all claims in respect of interest on money so invested, are deemed to form part of the assets of the trust account practice concerned.

(2) Trust property which is registered in the name of a trust account practice, or jointly in the name of an attorney or trust account practice and any other person in a capacity as administrator, trustee, curator or agent, does not form part of the assets of that attorney or trust account practice or other person.

### **Court may prohibit operation of trust account**

**89.** The High Court may, on application made by the Council or the Board, and on good cause shown, prohibit any legal practitioner referred to in section 84(1) from operating in any way on his or her trust account, and may appoint a *curator bonis* to control and administer that trust account, with any rights, powers and functions in relation thereto as the court may deem fit.

### **Appointment of *curator bonis* in respect of trust account**

**90.** (1) If any legal practitioner referred to in section 84(1)—

- (a) dies;
- (b) becomes insolvent;
- (c) is struck off the Roll or suspended from practice;
- (d) is declared by a competent court to be incapable of managing his or her own affairs; or

(e) abandons his or her practice or ceases to practise, the High Court may, on application made by the Council, Board or by any person having an interest in the trust account of that legal practitioner or trust account practice, appoint a *curator bonis* to control and administer that account, with any rights, powers and functions as the court may deem fit. 5

(2) Where the legal practitioner contemplated in subsection (1) is an attorney and was practising in partnership or as a member of a company with another attorney or attorneys, the court must allow the trust account to remain under the control of the remaining partners or members, unless there is good reason not to do so.

(3) If a trust account practice is sequestrated, liquidated or placed under business rescue procedures, whether provisionally or finally, the court may, on application made by the Council, Board or by any person having an interest in the trust account of that practice, appoint a *curator bonis* to control and administer that account, with any rights, powers and functions as the court may deem fit. 10

(4) The court may only grant an application provided for in subsection (1) or (2), on good cause shown by the Council, Board or any other person concerned, and after having given the trust account practice an opportunity to respond in writing to the application. 15

(5) Nothing in this section or section 89 may be construed as preventing any attorney who was practising in partnership with a legal practitioner referred to in subsection (1) who is an attorney, from operating on the trust account of the partnership. 20

### **Rights of banks in respect of trust accounts**

**91.** (1) (a) Any bank at which a trust account practice keeps its trust account, or any separate account forming part of a trust account, is not, by reason only of the name or style by which the account concerned is distinguished, deemed to have knowledge that the trust account practice is not entitled to all money paid into that account or with which that account is credited. 25

(b) The provisions of paragraph (a) do not relieve the bank from any liability or obligation which legally exists and to which it would be subject apart from the provisions of this Act. 30

(2) Despite subsection (1), a bank at which a trust account practice keeps its trust account, or any separate account forming part of a trust account, does not, in respect of any liability of the trust account practice to that bank not being a liability arising out of, or in connection with, any such account, have or obtain any recourse or right, whether by way of set-off, counter-claim, charge or otherwise, against money standing to the credit of that account. 35

(3) This section does not—

(a) deprive any bank of any existing right;

(b) take away or affect any claim, lien, counter-claim, right of set-off, or charge of any kind which a trust account practice has against, or on, any money held or received on account of any person; or 40

(c) relieve any trust account practice which has invested any money referred to in subsection (1) in a trust or other interest-bearing account referred to in section 86, of any liability in respect thereof.

(4) Any bank at which a trust account practice keeps its trust account or any separate account forming part of its trust account, must, if so directed by the Council or the Board, furnish the Council or the Board with a signed statement of that account for the period determined by the Council. 45

## **CHAPTER 8**

### **GENERAL PROVISIONS 50**

#### **Recovery of costs by legal practitioners rendering free legal services**

**92.** (1) Whenever in any legal proceedings or any dispute in respect of which legal services are rendered for free to a litigant or other person by a legal practitioner or law clinic, and costs become payable to that litigant or other person in terms of a judgment of the court or a settlement, or otherwise, that litigant or other person must be deemed to have ceded his or her rights to the costs to that legal practitioner, law clinic or practice. 55



(2) (a) A litigant or person referred to in subsection (1) or the legal practitioner or law clinic concerned may, at any time before payment of the costs referred to in subsection (1), give notice in writing to—

(i) the person liable for those costs; and

(ii) the registrar or clerk of the court concerned,

that the legal services are being or have been rendered for free by that legal practitioner, law clinic or practice.

(b) Where notice has been given as provided for in paragraph (a), the legal practitioner, law clinic or practice concerned may proceed in his or her or its own name, or the name of his or her practice, to have those costs taxed, where appropriate, and to recover them, without being formally substituted for the litigant or person referred to in subsection (1).

(3) The costs referred to in subsection (1) must be calculated and the bill of costs, if any, must be taxed as if the litigant or person to whom the legal services were rendered by the legal practitioner, law clinic or practice actually incurred the costs of obtaining the services of the legal practitioner, law clinic or practice acting on his or her or its behalf in the proceedings or dispute concerned.

### Offences and penalties

93. (1) Any person who, in a practice, without the written consent of the Council, employs in any capacity any person who has been struck off the Roll or suspended from practice, while that person remains struck off or suspended, is guilty of an offence and is liable on conviction to a fine or imprisonment for a period not exceeding one year.

(2) Any person who contravenes the provisions of section 33 is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment.

(3) Any legal practitioner who contravenes any of the provisions of section 34 is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment

(4) Any person who—

(a) fails to comply with the provisions of section 39(7)(a)(i), (ii), (iii) or (iv);

(b) contravenes section 39(7)(b), (e) or (f); or

(c) obstructs or hinders any person in the performance of his or her functions under section 39,

is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year.

(5) Any person who has been summoned to appear before the Ombud in terms of section 48 and who—

(a) without sufficient cause fails to appear at the time and place specified in the summons or to remain in attendance until he or she is excused by the Ombud from further attendance;

(b) at his or her appearance before the Ombud—

(i) fails to produce a book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce; or

(ii) refuses to take an oath or to make an affirmation after he or she has been asked by the Ombud to do so; and

(c) having taken an oath or having made an affirmation—

(i) fails to answer fully and to the best of his or her ability any question lawfully put to him or her; or

(ii) gives false evidence knowing that evidence to be false or not knowing or not believing it to be true,

is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year.

(6) Any attorney or advocate who contravenes section 56(7) is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(7) A claimant who fails to co-operate with the Fund in the exercise of its subrogated rights as contemplated in section 80, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.

(8) Any person who contravenes sections 84(1) or (2) or section 34, in rendering legal services is—

(a) guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years or to both such fine and imprisonment;

- (b) on conviction liable to be struck off the Roll; and
  - (c) not entitled to any fee, reward or reimbursement in respect of the legal services rendered.
- (9) Any person who—
- (a) refuses or fails to produce a book, document or any article in terms of section 37(2)(a) or (b) or 87(5); 5
  - (b) contravenes section 37(2)(c) or 87(6); or
  - (c) obstructs or hinders any person in the performance of his or her functions under those provisions,
- is guilty of an offence and is liable on conviction to a fine or to imprisonment for 10 a period not exceeding one year.

## CHAPTER 9

### REGULATIONS AND RULES

#### Regulations

- 94.** (1) The Minister may, and where required in the circumstances, must, subject to subsection (2), make regulations relating to— 15
- (a) the establishment of a mechanism to provide appropriate legal education and training as contemplated in section 6(5)(f);
  - (b) the establishment of a mechanism to monitor progress on the implementation of the programmes relating to the empowerment of historically disadvantaged legal practitioners as well as historically disadvantaged candidate legal practitioners referred to in section 6(5)(h)(iv); 20
  - (c) a procedure for the election of legal practitioners to the Council as contemplated in section 7(1)(a);
  - (d) the manner in which teachers of law are designated for purposes of the Council as contemplated in section 7(1)(b); 25
  - (e) the areas of jurisdiction of Provincial Councils as contemplated in section 23(2)(b);
  - (f) the admission and enrolment of foreign legal practitioners as contemplated in section 24(3); 30
  - (g) the certificate to be issued by the registrar of a Division of the High Court to the effect that an attorney has the right to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court as contemplated in section 25(3);
  - (h) appropriate relevant experience as contemplated in section 25(3)(b); 35
  - (i) the practical vocational training requirements for candidate legal practitioners as contemplated in section 26(1)(c);
  - (j) the rendering of community service as contemplated in section 29(1);
  - (k) the implementation of recommendations emanating from the investigation of the South African Law Reform Commission in respect of fees as contemplated in section 35; 40
  - (l) the manner in which an application is made to court for purposes of section 40(3)(a)(i) and (b)(i);
  - (m) government and other securities in which the Board can invest surplus funds as contemplated in sections 63(1)(a) and 72(3); 45
  - (n) the matters to be included in the annual report submitted to the Council and Minister as contemplated in section 75(3)(d);
  - (o) any other matter in respect of which regulations may or must be made in terms of this Act; or
  - (p) any other ancillary or administrative matter that is necessary to be prescribed for the proper implementation or administration of this Act. 50
- (2) The regulations contemplated in subsection (1) must—
- (a) in the case of subsection (1)(a) to (l) and (o) and (p), be made after consultation with the Council, unless otherwise indicated; and
  - (b) in the case of subsection (1)(m) and (n), be made after consultation with the Council and the Board. 55
- (3) Any regulation made under subsection (1) must, before publication thereof in the *Gazette*, be approved by Parliament.

## Rules

95. (1) The Council may, and where required in the circumstances, must by publication in the *Gazette*, make rules relating to—
- (i) the fees and charges payable to the Council as contemplated in section 6(4);
  - (ii) the procedures to be followed before a member of the Council is removed or suspended from office as contemplated in section 12(4); 5
  - (iii) the procedure for convening meetings of the Council and the procedure for the conduct of meetings as contemplated in section 16(2);
  - (iv) the procedure for the conduct of meetings of committees of the Council as contemplated in section 18(3); 10
  - (v) the procedure for the appointment of the executive officer and other employees of the Council as contemplated in section 19(4);
  - (vi) the conditions of service of the executive officer and other employees of the Council as contemplated in section 19(6);
  - (vii) the establishment of an executive committee and the determination of its powers and functions as contemplated in section 20(1); 15
  - (viii) the procedure for convening meetings of the executive committee and the procedure for the conduct of meetings as contemplated in section 20(9)(b);
  - (ix) the investment of monies of the Council which are not required for immediate use as contemplated in section 22(3)(b); 20
  - (x) a procedure for the election of Provincial Councils as contemplated in section 23(4);
  - (xi) the information which must be submitted to the Council when a person applies to court for admission as a legal practitioner and the time period within which that information must be submitted as contemplated in section 24(2)(d); 25
  - (xii) the period of practice as an attorney and the advocacy training programme as contemplated in the proviso to section 25(3)(a);
  - (xiii) the information which must be submitted to the Council when an attorney applies to the registrar of a Division of the High Court for a certificate for the right to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court and the time period within which that information must be submitted as contemplated in section 25(4)(a); 30
  - (xiv) competency—based examinations or assessments for candidate legal practitioners, conveyancers or notaries as contemplated in section 26(1)(d), (2) and (3); 35
  - (xv) the minimum conditions and procedures for the registration and administration of practical vocational training and the payment of remuneration, allowances or stipends to all candidate legal practitioners as contemplated in section 27;
  - (xvi) procedures and directions pertaining to the assessment of persons undergoing practical vocational training as contemplated in section 28(1); 40
  - (xvii) the level of competence to be achieved for the admission and enrolment of a person as a legal practitioner as contemplated in section 28(2);
  - (xviii) the criteria for a person, institution, organisation or association to qualify to conduct the assessment of practical vocational training as contemplated in section 28(4); 45
  - (xix) the exemption of any candidate legal practitioner or legal practitioner from performing community service as contemplated in section 29(3);
  - (xx) the manner in which an application by a person admitted by the court as a legal practitioner must be submitted to the Council through the Provincial Council in question for the enrolment of his or her name on the Roll as contemplated in section 30(1)(a) and (b)(iii); 50
  - (xxi) the fee to be paid by a person applying to the Council for enrolment as contemplated in section 30(1)(b)(i);
  - (xxii) the manner in which the Council must keep the Roll of legal practitioners as contemplated in section 30(3); 55
  - (xxiii) the notification by the Council of a person of the cancellation or suspension of his or her enrolment as contemplated in section 31(3);
  - (xxiv) the manner in which an application must be made by a legal practitioner to the Council for the conversion of his or her enrolment as an attorney to that of an advocate and *vice versa* and the fee payable as contemplated in section 32(1)(a); 60

- (xxv) the manner in which an application must be made by an advocate practising as such referred to in section 34(2)(a)(i) to the Council, for the conversion of his or her enrolment to that of an advocate practising as such referred to in section 34(2)(a)(ii) and *vice versa* as contemplated in section 32(1)(b);
- (xxvi) the circumstances in which a legal practitioner can apply for the conversion of his or her enrolment and the requirements that must be complied with as contemplated in section 32(3); 5
- (xxvii) those legal services that may be rendered by an advocate as contemplated in section 34(2)(b);
- (xxviii) the briefing of advocates by attorneys and the briefing of advocates directly by members of the public as contemplated in section 34(3); 10
- (xxix) the instruction of attorneys as contemplated in section 34(4);
- (xxx) the approval for the establishment of law clinics as contemplated in section 34(8)(a);
- (xxxi) the requirements for the engagement of candidate legal practitioners by law clinics as contemplated in section 34(8)(b)(iv); 15
- (xxxii) those legal services which may not be rendered by law clinics as contemplated in section 34(8)(b)(v);
- (xxxiii) the procedure to be followed by disciplinary bodies for dealing with complaints of misconduct as contemplated in sections 38(1) and 39(1); 20
- (xxxiv) the form of a subpoena and the manner of service thereof as contemplated in section 39(3)(b)(i) and (iii);
- (xxxv) the manner in which a legal practitioner, candidate legal practitioner, juristic entity or complainant may lodge an appeal to an appeal tribunal as contemplated in section 41(1)(a) and (b); 25
- (xxxvi) a procedure for the election of legal practitioners to the Board as contemplated in section 62(1)(a), in consultation with the Board; (xxxvii) applications to the Council by legal practitioners for Fidelity Fund certificates as contemplated in section 85(1)(a); (xxxviii) the legal practice management course to be completed by first time attorneys and advocates referred to in section 34(2)(b) and the fee payable in respect thereof as contemplated in section 85(1)(b); 30
- (xxxix) the contribution payable by persons applying for Fidelity Fund certificates as contemplated in section 85(2);
- (xxxx) the form of the application for Fidelity Fund certificates as contemplated in section 85(6)(d); or 35
- (xxxxi) any other matter in respect of which rules may or must be made in terms of this Act;
- (2) The Legal Services Ombud must, by publication in the *Gazette*, make rules relating to—
- (a) the form of a summons and the manner of service thereof as contemplated in section 48(3)(a) and (d); 40
- (b) the preparation and submission of the annual report of the Office of the Ombud to the Minister as contemplated in section 52(1); and
- (c) any other matter concerning the Office of the Legal Services Ombud.
- (3) The Board must, by publication in the *Gazette*, make rules relating to— 45
- (a) the inspection of trust accounts of attorneys and advocates referred to in section 34(2)(b) as contemplated in section 63(1)(e); and
- (b) contributions to the Fund and the issuing and costs of Fidelity Fund certificates, the procedure for the appointment of the executive officer and other employees of the Fund or any other matter concerning the Fund as contemplated in section 63(1)(f). 50
- (4) (a) Before the Council, the Ombud or the Board makes any rule under this section, the Council, the Ombud or the Board, as the case may be, must publish a draft of the proposed rule in the *Gazette* together with a notice, calling on interested persons to comment in writing within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice. 55
- (b) If the Council, the Ombud or the Board alters the draft rules as a result of any comments, it need not publish those alterations before making the rule.
- (5) The Council, the Ombud or the Board may, if circumstances necessitate the publication of a rule without giving notice provided for in subsection (4)(a), publish that rule without prior publication of a draft as provided for in subsection (4), provided that the notice of publication states— 60

- (a) the reason why circumstances necessitated that publication without prior publication of a draft as provided for in subsection (4); and
- (b) that any person who is aggrieved by the rule may make representations to the Council, the Ombud or the Board, as the case may be, within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice. 5

## CHAPTER 10

### NATIONAL FORUM AND TRANSITIONAL PROVISIONS

#### *Part 1*

#### **National Forum on Legal Profession** 10

**96.** (1) A National Forum on the Legal Profession (hereafter referred to as the “National Forum”) is hereby established as a body corporate with full legal capacity and comprising of the following members:

- (a) 16 legal practitioners, namely—
  - (i) eight attorneys designated by the Law Society of South Africa, two of which represent the Black Lawyers Association, two of which represent the National Association of Democratic Lawyers, one of which represents the Law Society of the Cape of Good Hope, one of which represents the Law Society of the Orange Free State, one of which represents the Law Society of the Transvaal and one of which represents the Natal Law Society; 15
  - (ii) five advocates designated by the General Council of the Bar of South Africa; 20
  - (iii) one advocate designated by the National Bar Council of South Africa;
  - (iv) one advocate designated by the National Forum of Advocates; and 25
  - (v) one advocate designated by Advocates for Transformation;
- (b) one teacher of law designated by the South African Law Deans Association;
- (c) subject to subsection (3), two persons who, in the opinion of the Minister, are fit and proper persons who have knowledge of the legal profession, designated by the Minister; 30
- (d) one person designated by Legal Aid South Africa; and
- (e) one person designated by the Board.

(2) The need for the National Forum to reflect—

- (a) the racial and gender composition of South Africa;
- (b) representation of persons with disabilities; and 35
- (c) provincial representation,

must, as far as is practicable, be considered when the National Forum is established in terms of this section, in addition to the terms of reference of the National Forum.

(3) A person referred to in subsection (1)(c) may not be designated as a member of the National Forum if he or she— 40

- (a) is a public servant;
- (b) is a member of Parliament, any provincial legislature or any municipal council; or
- (c) is an office-bearer or employee of any party, movement or organisation of a party-political nature. 45

(4) The duration of the National Forum is for a period not exceeding three years and it ceases to exist on the date of commencement of Chapter 2.

(5) Subject to sections 99, 102 and 103, members of the National Forum hold office for the three year duration of the National Forum.

#### **Terms of reference of National Forum** 50

**97.** (1) The National Forum must, within 24 months after the commencement of this Chapter—

- (a) make recommendations to the Minister on the following:
  - (i) An election procedure for purposes of constituting the Council;

- (ii) the establishment of the Provincial Councils and their areas of jurisdiction, taking into account the factors referred to in section 23(2)(a);
- (iii) the composition, powers and functions of the Provincial Councils;
- (iv) the manner in which the Provincial Councils must be elected; 5
- (v) all the practical vocational training requirements that candidate attorneys or pupils must comply with before they can be admitted by the court as a legal practitioners;
- (vi) the right of appearance of a candidate legal practitioner in court or any other institution; and 10
- (vii) a mechanism to wind up the affairs of the National Forum;
- (b) prepare and publish a code of conduct for legal practitioners, candidate legal practitioners and juristic entities; and
- (c) make rules, as provided for in section 109(2).
- (2) (a) The National Forum must, within 24 months of the commencement of this Chapter, negotiate with and reach an agreement with the law societies referred to in section 56 of the Attorneys Act and any other similar statutory bodies still regulating the legal profession established in the former homelands, in respect of the transfer of their assets, rights, liabilities, obligations and staff, to the Council or Provincial Councils. 15
- (b) The provisions of paragraph (a) do not preclude any non-statutory bodies or voluntary associations which are involved in the regulation of legal practitioners or matters dealt with in this Act, from negotiating and reaching an agreement with the National Forum in respect of the transfer of their assets, rights, liabilities, obligations and staff, to the Council or Provincial Councils. 20
- (3) Section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995), applies in respect of the transfer of the staff contemplated in subsection (2). 25
- (4) If an agreement contemplated in subsection (2) cannot be reached by the parties concerned, any of the parties may agree to refer the matter to arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).
- (5) The Minister may extend the period of 24 months contemplated in subsections (1) and (2) if he or she deems it necessary. 30

### **Powers and functions of National Forum**

- 98.** (1) The National Forum may do all that is necessary or expedient to carry out its terms of reference referred to in section 97, including the following, having due regard to the Constitution and applicable legislation where appropriate and relevant: 35
- (a) Establish one or more committees, including an executive committee, consisting of members of the National Forum only, or members of the National Forum and staff members or other persons, to assist the National Forum in—
    - (i) the performance or exercise of its powers and functions; 40
    - (ii) determining the powers and functions of a committee;
    - (iii) appointing a chairperson and deputy chairperson of a committee;
    - (iv) determining procedures for the functioning of committees; and
  - (b) delegate in writing any of its powers and functions to its committees, subject to any conditions it may impose, which delegation does not— 45
    - (i) divest the National Forum of the power or function so delegated; and
    - (ii) preclude the National Forum from varying or setting aside any decision made under a delegation.
  - (2) The National Forum must, in consultation with the Director-General—
    - (a) appoint an executive officer to perform or exercise the powers and functions determined by the National Forum and supervise the staff of the National Forum; 50
    - (b) employ or second from existing governance structures in the legal profession, so many staff members as may be necessary to enable it to carry out its functions; 55
    - (c) conclude agreements with any person or organisation for the performance of any particular act or any particular work or the rendering of services for the purpose of furthering the objects of the National Forum;
    - (d) enter into contracts in connection with the performance of its functions or the exercise of its powers; 60

- (e) determine the remuneration and other conditions of service of staff members; and
- (f) pay an honorarium or an allowance to any person to cover expenses reasonably incurred by him or her in connection with any act performed at the request of the National Forum or in terms of its directions on behalf of the National Forum and the furtherance of its objects. 5

(3) The National Forum must, taking into account the provisions of this Act, conduct a cost analysis of the operation of the Council and Provincial Councils and make recommendations to the Minister for consideration by Parliament as contemplated in subsection (4), on the funding thereof, with a view to the effective and efficient implementation of the Act. 10

(4) The National Forum must, after its establishment, report to the Minister every six months on its activities and the Minister must, immediately on receipt thereof, submit the report to Parliament.

### **Membership of National Forum** 15

**99.** (1) A member of the National Forum must—

- (a) be a South African citizen; and
- (b) be a fit and proper person.

(2) The following persons are disqualified from becoming or remaining members of the National Forum: 20

- (a) An unrehabilitated insolvent;
- (b) a person declared to be of unsound mind by a court of the Republic;
- (c) a person who has been convicted in a court of first instance—
  - (i) of an offence and sentenced to more than 12 months' imprisonment without the option of a fine; or 25
  - (ii) of an offence which involves any element of dishonesty, either in the Republic, or outside the Republic if the conduct constituting the offence would have been an offence in the Republic, other than a conviction for an offence committed prior to 27 April 1994 associated with political objectives: Provided that if the person in question lodges an appeal against the conviction or sentence, he or she may be suspended from office by the National Forum as contemplated in section 103, until the appeal has been determined: Provided further that he or she may be replaced by the designating body; or 30
- (d) a person who has been removed from office in terms of section 103. 35

### **Chairperson and deputy chairperson National Forum**

**100.** (1) The Minister must, after consultation with the members of the National Forum, at its first meeting, designate one of the members as chairperson and another as deputy chairperson.

(2) The chairperson and the deputy chairperson, subject to section 99, hold office for the duration of the National Forum. 40

(3) The deputy chairperson must, if the chairperson is absent or is for any reason unable to act as chairperson, perform all the functions and exercise all the powers of the chairperson.

(4) If both the chairperson and deputy chairperson are absent from any meeting, the members present must elect a person from among themselves to preside at that meeting and the person so presiding must, during that meeting and until the chairperson and deputy chairperson resumes duty, perform all the functions and exercise all the powers of the chairperson. 45

(5) If both the chairperson and deputy chairperson have been given leave of absence, the members of the National Forum must elect one person from among themselves to act as chairperson until either the chairperson or deputy chairperson resumes duty or is removed from office in terms of section 103. 50

(6) If the office of the chairperson or deputy chairperson becomes vacant, the Minister must, after consultation with the members of the National Forum at the first meeting thereafter or as soon as possible thereafter, designate one of the members of the National Forum as chairperson or deputy chairperson, as the case may be. 55

(7) A chairperson and deputy chairperson may vacate office as such, without relinquishing his or her membership of the National Forum, unless his or her membership has been terminated in accordance with section 102.

### **Term of office**

**101.** A member of the National Forum holds office for the duration of the National Forum. 5

### **Termination of office**

**102.** (1) A person ceases to be a member of the National Forum when that person—

- (a) is no longer eligible in terms of section 99 to be a member;
- (b) resigns; 10
- (c) is removed from office in terms of section 103;
- (d) in the case of a legal practitioner referred to in section 96(1)(a), ceases to be a practising legal practitioner, for whatever reason; or
- (e) is appointed as a judicial officer.

(2) A member may resign after giving at least three months' written notice to the National Forum, but the National Forum may, on good cause shown, accept a shorter period. 15

### **Removal from office**

**103.** (1) The National Forum may remove a member from office on account of—

- (a) a finding of any misconduct under any Act or code which regulates the conduct of the member in question, which, in the opinion of the National Forum, debars him or her from serving as a member of the National Forum; 20
- (b) incapacity or incompetency which, in the opinion of the National Forum, debars him or her from serving as a member of the National Forum;
- (c) absence from three consecutive meetings of the National Forum without the permission of the chairperson, except on good cause shown; or 25
- (d) a request by the body which or person who designated or elected that member in terms of section 96, on good cause shown by the body or person in question, upon confirmation by the High Court.

(2) If the National Forum has commenced proceedings for the removal of a member it may suspend that member from office. 30

(3) A member who is suspended from office may not perform or exercise any of the powers or functions of that office or receive any allowances.

(4) The National Forum must follow due process of law if it intends to remove a member for office, as determined by the National Forum in the rules contemplated in section 109. 35

### **Vacancies in National Forum and filling thereof**

**104.** (1) A vacancy in the National Forum occurs when—

- (a) a member dies;
- (b) a member terminates office in terms of section 102; 40
- (c) a member is removed from office in terms of section 103; or
- (d) a member's resignation takes effect.

(2) A vacancy must be filled as soon as practicably possible in accordance with the provisions of section 96.

(3) Any person appointed to fill a vacancy holds office for the unexpired portion of the term of the vacating member. 45

(4) No decision taken by the National Forum or act performed under the authority of the National Forum is invalid merely by reason of a vacancy on the National Forum, if the decision was taken or the act was authorised, subject to sections 106 and 107.

### **Meetings of National Forum** 50

**105.** (1) The National Forum must hold at least four meetings in each year at venues to be determined by the National Forum and may, in addition, hold any further meetings as the National Forum may, from time to time, determine.



(2) The National Forum must, as soon as practicable after the appointment of its members, meet for the first time at the time and place determined by the Minister.

(3) The National Forum must, before its dissolution, meet with the Council contemplated in section 4 for the purposes of handing over.

### **Quorum and procedure at meetings of National Forum** 5

**106.** (1) The majority of the members of the National Forum constitutes a quorum at any meeting of the National Forum.

(2) The National Forum must determine a procedure in the rules contemplated in section 109 for convening meetings and the procedure for the conduct of meetings.

(3) The National Forum must keep a record of its proceedings. 10

### **Decisions of National Forum**

**107.** (1) The decision of the majority of the members constitutes a decision of the National Forum.

(2) In the event of a deadlock in the voting the chairperson has a casting vote in addition to a deliberative vote. 15

### **Finances, expenditure and accountability of National Forum**

**108.** (1) Expenditure incidental to the exercise of the powers or the performance of the powers and functions of the National Forum must be defrayed from the funds of the National Forum.

(2) The funds of the National Forum consist of— 20

(a) monies defrayed from the budget vote of the Department for the purpose contemplated in subsection (1); and

(b) any other monies received by the National Forum or accruing to the National Forum from any other source, including disbursements made by existing law societies as may be agreed upon. 25

(3) Out-of-pocket expenses incurred by members of the National Forum in exercising their powers or carrying out their functions under this Chapter are borne by the body which or person who designated or elected that member.

(4) The Director-General, as the accounting officer of the Department, is responsible for the funds referred to in subsection (2)(a). 30

## **Part 2**

### **Rules and regulations**

**109.** (1) (a) The Minister must, within six months after receiving recommendations from the National Forum as provided for in section 97(1)(a), make regulations by publication in the *Gazette*, in consultation with the National Forum, in order to give effect to the recommendations of the National Forum as contemplated in section 97(1)(a). 35

(b) If the National Forum fails to make recommendations as provided for in paragraph (a), within the timeframe provided for in section 97, the Minister must, within six months, make the regulations in question, after consultation with the National Forum. 40

(c) Any regulation made under this subsection must, before publication thereof in the *Gazette*, be approved by Parliament.

(2) (a) The National Forum must, within 24 months after the commencement of this Chapter, make rules by publication in the *Gazette* in respect of the following:

(i) A competency-based examination or assessment for candidate legal practitioners, conveyancers and notaries; 45

(ii) the minimum conditions and procedures for the registration and administration of practical vocational training;

(iii) the procedure and directions pertaining to the assessment of persons undergoing practical vocational training; 50

(iv) the criteria for a person, institution, organisation or association to qualify to conduct an assessment;

(v) the procedures to be followed by disciplinary bodies;

- (vi) the manner and form in which complaints of misconduct relating to legal practitioners, candidate legal practitioners or juristic entities must be lodged with the Council; and
- (vii) any other matter in respect of which rules must be made in terms of this Chapter. 5

(b) Before the National Forum makes any rule under this subsection, it must publish a draft of the proposed rule in the *Gazette* together with a notice, calling on interested persons to comment in writing within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice.

(c) If the National Forum alters the draft rules as a result of any comments, it need not publish those alterations before making the rule. 10

(d) The National Forum may, if circumstances necessitate the publication of a rule without giving notice, as provided for in paragraph (b), publish that rule without prior publication of a draft as provided for in paragraph (b), provided that the notice of publication states— 15

- (i) the reason why circumstances necessitated that publication without prior publication of a draft as provided for in paragraph (b); and
- (ii) that any person who is aggrieved by the rule may make representations to the National Forum within a period stated in the notice, which may not be less than 30 days from the date of publication of the notice. 20

### *Part 3*

#### **Abolition of Fidelity Funds of former TBVC States and transfer of assets, rights, liabilities and obligations to Legal Practitioners' Fidelity Fund**

**110.** (1) For the purposes of this Part, “**law society**” means a law society referred to in section 56 of the Attorneys Act. 25

(2) The—

- (a) Attorneys Fidelity Fund referred to in section 26(1) of the Attorneys, Notaries and Conveyancers Act, 1984 (Act No. 29 of 1984), of the former Republic of Bophuthatswana; and
- (b) Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund referred to in section 25 of the Attorneys Act, 1987 (Act No. 42 of 1987), of the former Republic of Venda, 30

cease to exist on the date referred to in section 120(4) and all assets, rights, liabilities and obligations which, on that date, vested in any of the said Funds, vest from that date in the Fund referred to in section 53(1). 35

#### **Transitional provisions in relation to existing Attorneys Fidelity Fund Board of Control**

**111.** The—

- (a) Attorneys Fidelity Fund Board of Control referred to in section 27 of the Attorneys Act; 40
- (b) Attorneys Fidelity Fund Board of Control referred to in section 26(3) of the Attorneys, Notaries and Conveyancers Act, 1984 (Act No. 29 of 1984), of the former Republic of Bophuthatswana; and
- (c) Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund Board of Control referred to in section 27 of the Attorneys Act, 1987 (Act No. 42 of 1987), of the former Republic of Venda, 45

and any committee of any such Board of Control appointed in terms of any such law and which existed immediately before the date referred to in section 120(4), cease to exist on that date and all assets, rights, liabilities and obligations which, on that date vested in any of the Boards referred to in paragraphs (a), (b) and (c), vest in the Board referred to in section 61. 50

#### **Transitional provisions in relation to qualifications**

**112.** (1) Notwithstanding anything to the contrary in this Act—

- (a) (i) the training course presented at a Practical Legal Training School of the Law Society of South Africa, for purposes of the Attorneys Act; or 55

(ii) any other training course approved by any existing society or the General Council of the Bar,

before the date referred to in section 120(4) for the purpose of training persons to qualify as legal practitioners, must be regarded as having been presented or approved pursuant to the regulations pertaining to practical vocational training in terms of this Act; and 5

(b) any period of practical vocational training undergone with an attorney or advocate before the date referred to in section 120(4) must be regarded as having been a period of practical vocational training under supervision of a legal practitioner. 10

(2) Any person upon whom the degree *baccalaureus procurationis* was conferred by a university of the Republic, is regarded as being qualified to be admitted by the court and enrolled as an attorney by the Council as if he or she held the degree *baccalaureus legum*, if all the other requirements in the Attorneys Act are complied with: Provided that such person has not later than 1 January 1999 registered for the first-mentioned degree. 15

### **Transitional provisions relating to Fidelity Fund certificates**

**113.** Any attorney who is in terms of section 84(1) required to be in possession of a Fidelity Fund certificate and who, at the date referred to in section 120(4), is not in possession of such a certificate issued in terms of any law repealed by this Act, must, within 60 days after the said date, apply for such a certificate. 20

### **Existing advocates, attorneys, conveyancers and notaries**

**114.** (1) Any person who has been admitted by the High Court and authorised to be enrolled as an advocate, attorney, conveyancer or notary in terms of any Act in the former Republic of South Africa and former homelands which is still applicable before the date referred to in section 120(4), must be regarded as having been admitted to practice and, where applicable, subject to any condition imposed by the High Court, must be enrolled as a legal practitioner, conveyancer or notary in terms of this Act, subject to the terms of any order of court whereby any such person has been suspended from practice as an advocate, attorney, conveyancer or notary. 25 30

(2) Every person who, in terms of subsection (1), is regarded as having been admitted and authorised to practise and to be enrolled as a legal practitioner, conveyancer or notary, must be enrolled as a legal practitioner, conveyancer or notary on the Roll, and for that purpose—

(a) the registrar of every Division of the High Court must as soon as possible after the appointment of the Council's executive officer, furnish him or her with the name of every person whose name appears on the roll of attorneys, roll of conveyancers or roll of notaries of that Division and with particulars of the order of court in terms of which every such person was admitted to practise as an attorney, conveyancer or notary and of any order of court, if any, in terms of which any such person has been suspended from practice as an attorney, conveyancer or notary; 35 40

(b) the Director-General must as soon as possible after the appointment of the Council's executive officer, furnish him or her with the name of every person whose name appears on the roll of advocates and with particulars of the order of court in terms of which every such person was admitted to practise as an advocate and of any order of court, if any, in terms of which any such person has been suspended from practice as an advocate; and 45

(c) the law societies existing immediately prior to the date referred to in section 120(4) in terms of the Attorneys Act or any other law, must as soon as possible after the appointment of the Council's executive officer, furnish him or her with the name of every person whose name appears on the roll of attorneys, roll of conveyancers or roll of notaries of that society and with particulars of the order of court in terms of which every such person was admitted to practise as an attorney, conveyancer or notary and of any order of court, if any, in terms of which any such person has been suspended from practice as an attorney, conveyancer or notary. 50 55

(3) The Council must compile and consolidate the rolls of the existing practising and non-practising advocates, attorneys, conveyancers and notaries contemplated in subsection (2)(a), (b) or (c) into the Roll referred to in section 30(3).

(4) Every person who, on the date referred to in section 120(4), has the status of senior counsel retains that status after the commencement of this Act. 5

#### **Persons entitled to be admitted and enrolled as advocates, attorneys, conveyancers or notaries**

**115.** Any person who, immediately before the date referred to in section 120(4), was entitled to be admitted and enrolled as an advocate, attorney, conveyancer or notary is, after that date, entitled to be admitted and enrolled as such in terms of this Act. 10

#### **Pending proceedings**

**116.** (1) Any enquiry in terms of any law repealed by this Act into the alleged unprofessional or dishonourable or unworthy conduct of a legal practitioner which has not been concluded at the date referred to in section 120(4), must be referred to the Council which must treat the matter as it deems appropriate. 15

(2) Any proceedings in respect of the suspension of any person from practice as an advocate, attorney, conveyancer or notary or in respect of the removal of the name of any person from the roll of advocates, attorneys, conveyancers or notaries which have been instituted in terms of any law repealed by this Act, and which have not been concluded at the date referred to in section 120(4), must be continued and concluded as if that law had not been repealed, and for that purpose a reference in the provisions relating to such suspension or removal, to the General Council of the Bar of South Africa, any Bar Council, any Society of Advocates, any society or the State Attorney must be construed as a reference to the Council. 20

#### **Transitional provisions relating to existing law societies and voluntary associations of advocates** 25

**117.** The existing law societies must continue to perform their powers and functions until the commencement of Chapter 2.

#### **Interpretation of certain references in laws**

- 118.** Subject to the provisions of this Act, a reference in any other law to— 30
- (a) an advocate, a counsel or an attorney, must be construed as a reference to a legal practitioner in this Act;
  - (b) a conveyancer admitted in terms of any law repealed by this Act, must be construed as a reference to a conveyancer enrolled in terms of section 30;
  - (c) a notary admitted in terms of any law repealed by this Act, must be construed as a reference to a notary enrolled in terms of section 30; 35
  - (d) senior counsel, must be construed as a reference to the status of senior counsel as it existed prior to the commencement of this Act; and
  - (e) the General Council of the Bar of South Africa, the Association of Law Societies of the Republic of South Africa, the Law Society of South Africa, a law society or similar reference made in any law repealed by this Act, must be construed as a reference to the Council. 40

### **Part 4**

#### **Repeal and amendment of laws, and savings**

**119.** (1) (a) Subject to paragraph (b) and subsection (2), the laws specified in the Schedule are hereby repealed or amended to the extent indicated in the third column thereof. 45

(b) Paragraph (a) takes effect on the date referred to in section 120(4).

(2) Any—

- (a) regulation made under any law referred to in subsection (1) and in force immediately before the date referred to in section 120(4); and 50

- (b) rule, code, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document promulgated, issued, given or granted and any other steps taken in terms of any such law immediately before the date referred to in section 120(4) and having the force of law, remain in force, except in so far as it is inconsistent with any of the provisions of this Act, until amended or revoked by the competent authority under the provisions of this Act. 5
- (3) Anything done in terms of a law repealed or amended by this Act—
- (a) remains valid if it is consistent with this Act, until repealed or overridden; and
- (b) is deemed to have been done in terms of the corresponding provision of this Act. 10
- (4) A Provincial Council contemplated in section 97(1)(a)(ii) continues to exist and is deemed to have been established by the Council in terms of this Act.

#### **Short title and commencement**

- 120.** (1) This Act is called the Legal Practice Act, 2013. 15
- (2) Chapter 10 comes into operation on a date fixed by the President by proclamation in the *Gazette*.
- (3) Chapter 2 comes into operation three years after the date of commencement of Chapter 10 or on any earlier date fixed by the President by proclamation in the *Gazette*.
- (4) The remaining provisions of this Act come into operation on a date, after the commencement of Chapter 2, fixed by the President by proclamation in the *Gazette*. 20

**SCHEDULE****(Laws repealed or amended by section 119)**

<b>No. and year of law</b>	<b>Short title</b>	<b>Extent of repeal</b>
Act No. 24 of 1926	Natal Conveyancers Act, 1926	The whole
Act No. 23 of 1934 (Transkei)	Attorneys, Notaries and Conveyancers Admission, 1934	The whole
Act No. 19 of 1941	Attorneys' Admission Amendment and Legal Practitioners' Fidelity Fund Act, 1941	The whole
Act No. 93 of 1962	General Law Further Amendment Act, 1962	Sections 35, 36, 37 and 38
Act No. 74 of 1964	Admission of Advocates Act, 1964	The whole
Act No. 74 of 1964 (Transkei)	Admission of Advocates Act, 1964	The whole
Act No. 74 of 1964 (Bophuthatswana)	Admission of Advocates Act, 1964	The whole
Act No. 74 of 1964 (Venda)	Admission of Advocates Act, 1964	The whole
Act No. 74 of 1964 (Ciskei)	Admission of Advocates Act, 1964	The whole
Act No. 53 of 1979	Attorneys Act, 1979	The whole
Act No. 53 of 1979 (Ciskei)	Attorneys Act, 1979	The whole
Act No. 29 of 1984 (Bophuthatswana)	Attorneys, Notaries and Conveyancers Act, 1984	The whole
Act No. 42 of 1987 (Venda)	Attorneys Act, 1987	The whole
Act No. 114 of 1993	Recognition of Foreign Legal Qualifications and Practice Act, 1993	The whole
Act No. 33 of 1995	Admission of Legal Practitioners Act, 1995	The whole
Act No. 62 of 1995	Right of Appearance in Courts Act, 1995	The whole

## MEMORANDUM ON THE OBJECTS OF THE LEGAL PRACTICE BILL, 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. The legal profession is also not representative of the demographics of South Africa and entry into the profession is, in many 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 through a legal profession that is regulated by means of a single national regulatory body in terms of one statute. While seeking to attain these objectives, the Bill recognises the independence of the legal profession and seeks to strengthen this independence.
- 1.2 The Bill proposes an incremental approach as far as its implementation is concerned. A National Forum on the Legal Profession (the National Forum) 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 (the Council) and putting systems and procedures in place for the second and subsequent phases of the implementation process. The powers and functions of the National Forum 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. The responsibilities of the National Forum will become apparent as the Bill is discussed in greater detail below.

### 2. PURPOSE OF BILL

Some of the main goals of the Bill, as set out in the purpose clause, are to—

- (a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld;
- (b) broaden access to justice—
  - (i) by putting in place a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry;
  - (ii) by putting in place measures to provide for the rendering of community service by candidate legal practitioners and practising legal practitioners;
  - (iii) by putting in place measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic;
- (c) create a single unified statutory body, the Council, in order to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession;
- (d) protect and promote the public interest; and
- (e) protect and promote the interests of consumers of legal services by the establishment of an Office of the Legal Services Ombud.

### 3. CLAUSE BY CLAUSE ANALYSIS

#### 3.1 Clause 1: Definitions

While most of the definitions are self-explanatory, the following definitions are highlighted:

- 3.1.1 An “**advocate**” is defined as a legal practitioner who is admitted and enrolled as such and an “**attorney**” is defined as a legal practitioner who is admitted and enrolled as such. A “**legal practitioner**” is defined as an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30, respectively. These definitions are

noteworthy in the sense that the Bill gives continued recognition to the two main categories of legal practitioners.

- 3.1.2 **“Code of conduct”** is defined as a written code, setting out rules and standards relating to ethics, conduct and practice for legal practitioners and its enforcement through the Council and its structures.

### **3.2 Clause 2: Application of Act**

The Act will be applicable to all legal practitioners and candidate legal practitioners.

### **3.3 Clause 3: Purpose of Act**

Clause 3 sets out the purpose of the proposed Act, as discussed in paragraph 2 above.

### **3.4 Clauses 4 and 5: Establishment of Council and objects of Council**

- 3.4.1 Clause 4 of the Bill establishes the Council, as a body corporate with full legal capacity, to regulate all legal practitioners and all candidate legal practitioners.
- 3.4.2 Clause 5 sets out the objects of the Council. The objects are, among others, to facilitate the realisation of the goal of a transformed and restructured legal profession, 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 broadly reflects the demographics of the Republic.

### **3.5 Clause 6: Powers and functions of Council**

- 3.5.1 Clause 6 extensively sets out the powers and functions of Council. Clause 6(1) sets out the powers and functions which are necessary for the operation of the Council, such as acquiring property and insuring against risks.
- 3.5.2 In terms of clause 6(1)(a)(x), the Council may delegate any of its powers and functions to its committees or Provincial Councils. However, such delegation does not divest the Council of any power or function so delegated.
- 3.5.3 Clause 6(1)(a)(xi) to (xiii) deals with the provision of financial support by the Council to organisations providing legal education and training, to non-profit organisations and to institutions promoting access to justice for poor people.
- 3.5.4 Clause 6(1)(b) states that the Council may develop norms and standards that must guide the conduct of legal practitioners, candidate legal practitioners and the legal profession, advise the Minister with regard to matters concerning the legal profession and develop programmes to empower historically disadvantaged legal practitioners and candidate legal practitioners.
- 3.5.5 Clause 6(2) sets out matters relating to the administration of the Council. In clause 6(2)(a), the Council, in order to perform its functions properly, must employ an executive officer and officials and staff in order to carry out its functions. In terms of clause 6(2)(f) the Council may publish periodicals, pamphlets and other printed material for the benefit of practitioners and the public.



- 3.5.6 In terms of clause 6(3) the Council must enrol all legal practitioners after their admission by the court. Current legislation provides for the keeping of a roll by provincial law societies in respect of attorneys and by the Director-General: Justice and Constitutional Development in respect of advocates.
- 3.5.7 Clause 6(4) empowers the Council to determine certain categories of fees.
- 3.5.8 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, in the prescribed manner, establish a mechanism to provide appropriate 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. Training is recognised in the Bill as a key transformational imperative, as legal practitioners are the main source of candidates for the judiciary, the transformation of which is of paramount importance.
- 3.5.9 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 graduates enrolled 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 to enhance the skills of legal practitioners. 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.
- 3.5.10 Clause 6(5)(i) provides that the Council must advise the Minister on multi-disciplinary legal practices, also with the view to promoting legislative and other interventions on multi-disciplinary legal practices.

### **3.6 Clause 7: Composition of Council**

- 3.6.1 Clause 7(1) provides for the composition of the Council, which consists of a total of 16 legal practitioners, namely 10 attorneys and six advocates. They are to be elected in accordance with the procedure prescribed by the Minister.
- 3.6.2 The ratio of attorneys to advocates is larger, as the legal profession is comprised of more attorneys than advocates.
- 3.6.3 In terms of non-legal practitioners, the Council will consist of two legal academics, three fit and proper persons designated by the Minister who, by virtue of their knowledge and experience, are able to assist the Council in achieving its objects, a person designated by Legal Aid South Africa and one person designated by the Legal Practitioners' Fidelity Fund Board.

### **3.7 Clauses 8 to 14: Membership of Council, chairperson and deputy chairperson of Council, term of office of members of Council, termination of office, removal from office, filling of vacancies and dissolution of Council.**

- 3.7.1 Clause 8 sets out the criteria for persons who qualify to be members of the Council. Clause 9 provides for the appointment of the chairperson and deputy chairperson of the Council, who in terms of clause 9(1), are elected by members of the Council, from among its members.
- 3.7.2 Clauses 10 to 13 deal with the term of office of members of the Council, the termination of office of members of the Council, removal from office and vacancies in the Council and the filling thereof.
- 3.7.3 Clause 12 provides that the Council may remove a member on account of misconduct, inability to perform the powers and functions of office, absence from three consecutive meetings of the Council, a request by the body which or person who elected or designated that member, or his or her becoming disqualified to remain as a member.
- 3.7.4 Clause 14 provides for the dissolution of the Council but only on the authority of a High Court order, and the appointment of an interim Council by the Minister.

### **3.8 Clauses 15 to 22: Operation of Council**

Clauses 15 to 22 deal with operational matters relating to the Council, such as meetings, the quorum for meetings of the Council, decisions at meetings, procedures, the establishment of committees, the appointment of an executive officer and staff members, the delegation of powers and assignment of powers and functions and the finances, expenditure and accountability of the Council.

### **3.9 Clause 23: Provincial Councils**

- 3.9.1 Clause 23 provides for the establishment of Provincial Councils by the Council.
- 3.9.2 The Council must establish a Provincial Council in every province. The areas of jurisdiction will be prescribed by the Minister.
- 3.9.3 The Provincial Councils carry out the powers and functions as determined by the Council or in terms of the Act.
- 3.9.4 The Provincial Councils are to be elected in accordance with a procedure to be prescribed by the Minister on the advice of the National Forum.
- 3.9.5 In constituting the Provincial Councils the proportion of attorneys and advocates practising in the area of jurisdiction of that Provincial Council must be taken into account. The Minister must, for the first Provincial Councils, on the advice of the National Forum, prescribe several matters regarding their operation.

### **3.10 Clauses 24 to 28: Admission, enrolment, right of appearance, legal qualifications, practical vocational training and assessment of practical vocational training**

- 3.10.1 Clause 24 provides that only a legal practitioner admitted and enrolled to practise as such is entitled to practise in terms of the Bill. The Minister may, in consultation with the Minister of Trade and Industry and after consultation with the Council, and having regard to any relevant international commitments of the Government of the Republic of South Africa, make regulations in respect of admission and enrolment of foreign legal practitioners.
- 3.10.2 Clause 25 provides that legal practitioners may practise throughout the Republic in any court and that all legal practitioners have a right to appear in any court on behalf of any person in the Republic. Attorneys

who wish to appear in the High Court, Supreme Court of Appeal or the Constitutional Court must, however, comply with certain requirements.

- 3.10.3 Clause 26 provides for the minimum qualifications, namely the LLB degree, and practical vocational training, which includes doing community service and a legal practice management course, that must be complied with before a person can be admitted and enrolled as a legal practitioner.
- 3.10.4 In terms of clause 27 the Council makes rules in respect of conditions and procedures for the registration of practical vocational training, including the payment of remuneration, allowances or stipends to all candidate legal practitioners, and in terms of clause 28 the Council makes rules for the procedure pertaining to the assessment of persons undergoing practical vocational training.

### **3.11 Clause 29: Community service**

- 3.11.1 Clause 29(1) provides that the Minister must, after consultation with the Council, prescribe the requirements for community service. Community service may be a component of practical vocational training or a minimum period of recurring service by legal practitioners upon which continued enrolment as a legal practitioner is dependent.
- 3.11.2 In terms of clause 29(2), “community service”, may, among others, include the provision of training on behalf of the Council, service, without any remuneration, as a judicial officer in the case of legal practitioners, service at the South African Human Rights Commission and service to the State, approved by the Minister in consultation with the Council.
- 3.11.3 In terms of clause 29(3), the Council may exempt a candidate legal practitioner or legal practitioner from performing community service, on good cause shown.

### **3.12 Clauses 30 to 32: Enrolment, cancellation and suspension of enrolment and conversion of enrolment of legal practitioners**

- 3.12.1 Clause 30 deals with the enrolment of legal practitioners with the Council. All legal practitioners who are admitted by the court must be enrolled with the Council. The Council must keep a Roll of Legal Practitioners (the Roll). The purpose of the Roll is to reflect the particulars of practising and non-practising legal practitioners. Regarding advocates, the Roll must reflect whether they practise with or without a Fidelity Fund certificate.
- 3.12.2 In terms of clause 30(5), the Provincial Councils play a role in the enrolment of legal practitioners, as the registrars of the various Divisions of the High Court, where a legal practitioner has been admitted, must forward the details of the admission to the Council, through the Provincial Council in question.
- 3.12.3 Clause 31 deals with the cancellation or suspension of enrolment of a legal practitioner. A legal practitioner may be suspended or have his or her enrolment 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.

3.12.4 Clause 32 deals with conversion of enrolment. A legal practitioner who has been enrolled as an attorney or advocate may convert his or her enrolment from that of an attorney to advocate and *vice versa*. The Council must make rules setting out the circumstances and criteria to be complied with when applying for a conversion of registration. The aim of this provision is to provide for an easier mechanism for legal practitioners to change direction in their careers, either as attorneys or advocates. A similar conversion of enrolment is provided for in the case of advocates who practise with Fidelity Fund certificates and who wish to practise without a Fidelity Fund certificate and *vice versa*.

### **3.13 Clause 33: Authority to render legal services**

Clause 33 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.

### **3.14 Clause 34: Forms of legal practice**

3.14.1 Clause 34(1) provides that an attorney may render legal services in expectation of a fee, commission, gain or reward directly from the public.

3.14.2 Clause 34(2) provides that an advocate may only render legal services in expectation of a fee upon receipt of a brief from an attorney.

3.14.3 A further provision has been included that an advocate may also render legal services in expectation of a fee, commission, gain or reward determined in accordance with this Act or any other applicable law upon receipt of a request directly from a member of the public for that service, if that advocate is in possession of a Fidelity Fund certificate.

3.14.4 Clause 34(5) provides that attorneys may either practise for their own account, in a commercial juristic entity with other attorneys, at a law clinic, at Legal Aid South Africa or in the full time employment of the State or the South African Human Rights Commission.

3.14.5 In terms of clause 34(6), advocates are precluded from practising in a partnership and may only practise—

- (a) for their own account and as such may not make over to, share or divide any portion of their professional fee whether by way of partnership, commission, allowance or otherwise;
- (b) as part of a law clinic;
- (c) as part of Legal Aid South Africa; or
- (d) as a State Advocate or at the South African Human Rights Commission.

### **3.15 Clause 35: Fees in respect of legal services**

3.15.1 Clause 35 provides that, until the investigation by the South African Law Reform Commission referred to in clause 35(4) has been completed, fees for legal services (litigious and non-litigious legal services) charged by legal practitioners (including juristic entities, law clinics and Legal Aid South Africa) must be in accordance with the tariffs determined by the Rules Board for Courts of Law. The importance, significance and complexity of the service rendered, the seniority and experience of the legal practitioner concerned, the volume of work done and the financial implications of the matter must be taken into account when the fees are determined by the Rules Board.

- 3.15.2 In terms of clause 35(4) the South African Law Reform Commission must, within two years after the commencement of Chapter 2 of the Act, investigate and report back to the Minister with recommendations on how to address the current challenges relating to legal fees.
- 3.15.3 In terms of clause 35(6) the Minister may, by notice in the *Gazette*, determine maximum tariffs payable to legal practitioners who are instructed by any State Department or Provincial or Local Government in any matter.
- 3.15.4 In terms of clause 35(7) a legal practitioner must, when first receiving instructions from a client, provide the client with information regarding the envisaged costs of the legal services in question and the processes involved.

### **3.16 Clauses 36 to 44: Code of conduct and establishment of disciplinary bodies**

- 3.16.1 Clause 36 requires the Council to draw up a code of conduct. In terms of clause 36(4) the code must be published in the *Gazette*. This provision supports the principle of transparency. Clause 36(3) states that the Council must publish the code to inform members of the public of the existence of the code. The Council must also publish the draft code of conduct for public comments before issuing it to legal practitioners.
- 3.16.2 Clause 37 deals with the establishment of disciplinary bodies. In terms of clause 37(1), the Council must establish investigating committees to conduct investigations into complaints against legal practitioners. If such a committee finds that the legal practitioner may be guilty of misconduct, then the matter is referred to a disciplinary committee for a full hearing. The purpose of the investigating committee is to obtain and consider evidence of alleged misconduct and to decide whether a full enquiry is warranted.
- 3.16.3 Clause 37(4) and (5) provides for the composition of disciplinary committees. These committees must, as far as is practicable, be accessible to persons necessary for the finalisation of the matters in question, must promote the efficient resolution of complaints and must be representative in respect of race, gender, national and provincial demographics and include an advocate, an attorney and lay persons.
- 3.16.4 Clause 38 provides that complaints against legal practitioners, candidate legal practitioners and juristic entities (meaning the legal practice itself) must be lodged with the Council and must be dealt with in the manner and form determined in the rules by the Council. In the interests of transparency, the particulars of all disciplinary hearings must be published on the website of the Council, and the proceedings of disciplinary committees are open to the public.
- 3.16.5 Clause 39 sets out the operational requirements relating to a disciplinary hearing, such as subpoenas, representation of the legal practitioner charged and the examination and cross examination of witnesses.
- 3.16.6 In terms of clause 40, a disciplinary committee must, within 30 days after the conclusion of a disciplinary hearing, decide whether the legal practitioner is guilty of misconduct. The legal practitioner, candidate legal practitioner or representative of the juristic entity must be informed of the outcome, if found guilty. Clause 40(3)(a) sets out the sanctions which a disciplinary committee may impose. These range from the payment of compensation to a complainant, the imposition of a fine, temporary suspension or advising the Council to apply for the

striking off of a legal practitioner or other appropriate relief. It is important to note that the Council applies to court for the striking off of a legal practitioner.

- 3.16.7 Clause 41 deals with appeals, which must be done in the manner prescribed in the rules. Both aggrieved complainants and legal practitioners can appeal. The transparency provisions set out in clause 38(3) are also made applicable in respect of appeal tribunals which are established by the Council.
- 3.16.8 Clause 42 sets out the further role of the Ombud which is to monitor the investigation of complaints and the conduct of disciplinary committees and appeal tribunals.
- 3.16.9 Clause 43 provides that the Council may apply to court for the suspension of a legal practitioner where there is evidence that he or she misappropriated trust money or is guilty of other serious misconduct.
- 3.16.10 In terms of clause 44, the High Court retains the ultimate power to adjudicate upon matters relating to the conduct of legal practitioners.
- 3.16.11 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 public.

### **3.17 Clauses 45 to 52: Legal Services Ombud**

- 3.17.1 Clause 45 establishes the Office of the Legal Services Ombud.
- 3.17.2 The objects of the Ombud, which are set out in clause 46, 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.
- 3.17.3 In terms of clause 47 the Ombud must be a judge discharged from active service. The Ombud is independent and subject only to the Constitution and the law. No person may interfere with the functioning of the Ombud.
- 3.17.4 Clause 48 sets out the powers and functions of the Ombud. The Ombud may, among others, investigate any alleged maladministration in the profession or abuse of power, which the Ombud considers may affect the integrity of the profession and the independence thereof. The Ombud is entitled to resolve disputes by means of mediation, conciliation or negotiation or by making recommendations to the relevant authorities on how to address the issues in question. The Ombud may also do anything necessary to enable proceedings to be taken to a competent court or forum.
- 3.17.5 The other clauses relating to the Ombud deal with operational matters, such as staff and term of office, among others. Clause 51(6) provides that the expenditure of the Ombud will be defrayed from money appropriated by Parliament. In terms of clause 51(13) the Office commences to function as from a date fixed by the Minister by notice in the *Gazette*. Before this date the necessary arrangements must be made for the Office to be accommodated, equipped and staffed.
- 3.17.6 Clause 52 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.

### **3.18 Clauses 53 to 83: Legal Practitioners' Fidelity Fund and Legal Practitioners' Fidelity Fund Board**

- 3.18.1 Chapter 6 of the Bill deals with the Legal Practitioners' Fidelity Fund (the Fund) and the Legal Practitioners' Fidelity Fund Board (the Board). The provisions of this Chapter largely replicate the current dispensation in the Attorneys Act, 1979 (Act No. 53 of 1979).
- 3.18.2 Clause 53 provides for the continued existence of the Attorneys Fidelity Fund established by the Attorneys Act. All rights, liabilities and obligations which vest in the current Attorneys Fidelity Fund will vest in the Fund created in the Bill.
- 3.18.3 Clause 54 deals with the revenue of the Fund, which is essentially from interest earned in trust accounts of legal practitioners, investments and money received from insurers.
- 3.18.4 Clause 55 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 or advocate practising with a Fidelity Fund certificate, not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*. Clause 56 sets out the circumstances under which the liability of the Fund is limited. For instance, clause 56(1)(a) provides that a family member or member of the household of an attorney or advocate who committed the theft, cannot claim reimbursement from the Fund. Also, in terms of clause 56(1)(d), a person who received notice from the Council or the Board against the continued use of the services of a practice found guilty of theft, may not claim against the Fund when that person becomes a victim of theft by that practice.
- 3.18.5 Clause 57 regulates the purpose and application of the Fund. The Fund may be utilised for meeting its liabilities, paying the operating costs of the Board and the Fund and paying the costs incurred in investigating and establishing the validity of claims referred to in clause 55, among others. It is also to be noted that the Fund contributes toward the expenses of the Council.
- 3.18.6 Clauses 61 to 83 deal with the establishment of a Board to manage and administer the Fund, and claims against the Fund. These clauses relate to operational matters. In terms of clause 62, the Board is composed of five legal practitioners elected by the Council, two persons designated by the Council who have expertise in the field of finance and two fit and proper persons designated by the Minister.
- 3.18.7 Clauses 74 to 77 provide that every attorney and an advocate who practises with a Fidelity Fund certificate must pay to the Fund annually an amount required for professional indemnity insurance, re-insurance, insurance cover and suretyship, and an annual non-refundable amount determined by the Board.
- 3.18.8 Clause 78 provides that no person may claim against the Fund unless notice of the claim is given to the Board and the Council within three months after the claimant became aware of the theft or within six months of the Board having sent a written demand to him or her. The Board may in its discretion extend these periods.

### **3.19 Clauses 84 to 91: Handling of trust monies and trust accounts**

- 3.19.1 These clauses deal with handling of trust monies and are only applicable to attorneys or advocates referred to in section 34(2)(b). In terms of clause 84, every attorney or advocate referred to in section 34(2)(b) who practises for his or her own account or as a director must be in possession of a Fidelity Fund certificate. Any person who contravenes this clause is, in terms of clause 93, guilty of an offence and is liable on conviction to a fine, or striking off, among others. This clause does not apply to attorneys or advocates, who practise in the full time employ of the State or the South African Human Rights Commission.
- 3.19.2 Clause 85 provides for the application by an attorney or advocate referred to in section 34(2)(b) of a Fidelity Fund certificate, which is determined in the rules by Council. In terms of clause 85(5), the Council may exempt categories of attorneys or advocates referred to in section 34(2)(b) from paying the annual fee for a certificate.
- 3.19.3 Clause 86 requires attorneys or advocates referred to in section 34(2)(b) to open and operate trust accounts. Money held on account of anybody must be deposited in the bank as soon as possible after receipt thereof. Money may, on the instruction of any person, be held in a separate 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.
- 3.19.4 Clauses 87 to 91 deal with technical provisions relating to trust accounts and are virtually the same as the current regime relating to the keeping of trust accounts in the Attorneys Act. These provisions have been retained as they protect the interests of the public.

### **3.20 Clauses 92 and 93: General provisions**

- 3.20.1 Clause 92 provides for the recovery of costs by legal practitioners rendering free legal services.
- 3.20.2 Clause 93 provides for offences and penalties. A practice may not employ a person who has been suspended or struck off the Roll, while that person remains suspended or struck off, without the consent of the Council. A contravention of this provision renders a person guilty of an offence and liable to a fine or imprisonment not exceeding one year. This clause also contains offences and penalties in respect of other acts or omissions, for instance in the case of advocates who take briefs directly from members of the public without being in possession of a Fidelity Fund and persons who masquerade as legal practitioners.

### **3.21 Clauses 94 and 95: Regulations and Rules**

- 3.21.1 Clause 94 sets out the matters in respect of which the Minister may, or where required in the circumstances, must, make regulations.
- 3.21.2 Clause 95 sets out the matters in respect of which rules may, or where required in the circumstances, must, be made by the Council, the Board or the Legal Services Ombud.

### **3.22 Clauses 96 to 120: Transitional provisions**

- 3.22.1 As already indicated 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. Clause 96 provides for the establish-



ment of the National Forum on the Legal Profession as a body corporate with full legal capacity.

- 3.22.2 The National Forum comprises of representatives of all the current statutory bodies and voluntary associations in the legal profession, as well as two persons designated by the Minister, one law teacher and Legal Aid South Africa, and the Board must also designate one person.
- 3.22.3 The National Forum is made up of a majority of legal practitioners, namely 16 in total. In constituting the National Forum regard must be had to the terms of reference of the National Forum and representivity. The duration of the National Forum is three years.
- 3.22.4 Clause 97 provides extensively for the terms of reference of the National Forum. It must, within 24 months after the commencement of this Chapter, make recommendations to the Minister on the following:
- (i) an election procedure for purposes of constituting the Council;
  - (ii) the establishment of the Provincial Councils and their areas of jurisdiction;
  - (iii) the composition, powers and functions of the Provincial Councils;
  - (iv) the manner in which the Provincial Councils must be elected;
  - (v) all the practical vocational training requirements that candidate attorneys or pupils must comply with before they can be admitted by the court as a legal practitioner;
  - (vi) the right of appearance of a candidate legal practitioner in court or any other institution;
  - (vii) a mechanism to wind up the affairs of the National Forum; and
  - (viii) prepare and publish a code of conduct.
- 3.22.5 Clause 97(2) provides for negotiations between the National Forum and the existing statutory law societies in respect of the transfer of assets, rights, liabilities, obligations and staff of these law societies to the Council or Provincial Councils. Section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995), has also been brought in 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. The Minister may extend this period, if necessary.
- 3.22.6 Clauses 98 to 108 provide for the powers and functions of the National Forum and other organisational and operational matters in similar fashion to the same provisions relating to the Council.
- 3.22.7 Clause 108 provides that the funds of the National Forum consist of—
- (a) money appropriated by Parliament; and
  - (b) any other monies received by the National Forum or accruing to the National Forum from any other source, including disbursements made by existing law societies as may be agreed upon.
- 3.22.8 Clause 108(3) provides that out-of-pocket expenses incurred by members of the National Forum in exercising their powers or carrying out their functions under this Chapter, are borne by the body which or person who designated or elected that member.
- 3.22.9 Clause 109(1) provides that the Minister must, within six months after receiving recommendations from the National Forum as provided for in section 97, make regulations, in consultation with the National Forum, in order to give effect to the recommendations of the National

Forum as contemplated in section 97. Should the National Forum fail to make recommendations within the timeframe set, the Minister is empowered to make regulations as required, after consultation with the National Forum.

- 3.22.10 In addition, the National Forum must make and publish rules as set out in clause 109(2), also within the 24 month period referred to above.
- 3.22.11 Clause 110 deals with the abolition of Fidelity Funds of the former TBVC States, to the extent to which they still exist, and the transfer of their assets, rights, liabilities and obligations to the Legal Practitioners' Fidelity Fund.
- 3.22.12 Clause 111 contains transitional provisions in relation to the Board of Control of the Attorneys Fidelity Fund established by the Attorneys Act, and the corresponding Acts of the former Bophuthatswana and Venda referred to above. 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.
- 3.22.13 Clause 112 deals with transitional provisions in relation to qualifications. This clause recognises degrees and training courses in existence.
- 3.22.14 Clause 113 provides that attorneys, who are not in possession of a Fidelity Fund certificate at the date of commencement of the Act, must apply for one within 60 days.
- 3.22.15 Clause 114 provides that any person who has been admitted by the High Court and authorised to be enrolled as an advocate, attorney, conveyancer or notary in terms of any Act in the former Republic of South Africa and former homelands which is still applicable, must be regarded as having been unconditionally admitted to practice and authorised to be enrolled as legal practitioners under the Bill, subject to any court order suspending them from practice.
- 3.22.16 Clause 116 regulates pending proceedings, clause 118 deals with the interpretation of certain references, and clause 119 provides for the repeal and amendment of existing laws and savings. On the repeal of the existing laws, it is important to note that clause 119(1) keeps these laws intact and operational until virtually all the transitional arrangements have been implemented.
- 3.22.17 Clause 120 contains the short title and commencement dates. The Bill will come into operation incrementally. Clause 120 provides that Chapter 10, which contains the provisions regarding the National Forum, comes into operation on a date fixed by the President by proclamation in the *Gazette*. Clause 120(3) provides that Chapter 2 comes into operation three years after the date of commencement of Chapter 10 or on any earlier date fixed by the President by proclamation in the *Gazette*. Clause 120(4) provides that the remaining provisions of this Act come into operation on a date, after the commencement of Chapter 2, fixed by the President by proclamation in the *Gazette*.

#### **4. PARTIES CONSULTED**

The process of consultation on the Bill was extensive and lengthy. The legal profession represented by the Law Society of South Africa, the General Council of the Bar, the Independent Advocates Association of South Africa and the National Forum of Advocates were consulted. The Competition Commission was also

consulted. Organisations representing paralegals were also consulted, namely the National Alliance of Advice Offices.

## **5. FINANCIAL IMPLICATIONS FOR STATE**

5.1 The legal profession will be responsible for the costs arising out of the implementation of the Act, with the exception of the implementation of Chapter 5 dealing with the establishment of an Office of Legal Services Ombud. The implementation of this Chapter will have financial implications for the State. However, clause 52(14) provides that this Office will only commence with its operations as from a date fixed by the Minister in the *Gazette*, before which the necessary arrangements will be made for it to be accommodated, equipped and staffed. This will allow the Office to be established when funds become available.

5.2 The National Forum will be funded mainly from monies defrayed from the budget vote of the Department.

## **6. IMPLEMENTATION PLAN**

Implementation of the envisaged changes will be done incrementally. With regard to the establishment of a single regulatory framework under a national Legal Practice Council the approach is to establish a National Forum that will manage the transition. Other operational aspects will be provided for by way of regulations, rules or other subordinate legislative measures. The detailed transitional provisions of the Bill seek to ensure a smooth transition to the new dispensation. The National Forum, in terms of clause 96(3), will be in existence for a period of three years from the date of commencement of Chapter 10 of the Bill.

## **7. PARLIAMENTARY PROCEDURE**

7.1 The Joint Tagging Mechanism of Parliament was of the view that the Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution since some of its provisions deal with functional areas of concurrent national and provincial legislative competence as set out in Schedule 4 to the Constitution.

7.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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