



Legal Practice Bill [B20-2012]

Submission to the Portfolio Committee on Justice & Constitutional Development, 12 February 2013

Introduction

1. The South African Human Rights Commission (Commission) has an interest in the Legal Practice Bill (the Bill) as it provides legal services to persons whose human rights have been allegedly violated. The Commission has thus considered the Bill in terms of its constitutional mandate to “promote the protection, development and attainment of human rights” and its powers “to investigate and to report on the observance of human rights;” and “to take steps to secure appropriate redress where human rights have been violated.”¹ The Commission is concerned that the Bill may not adequately provide for its’ recognition as an institution that provides legal services and the consequences that may flow there from.
2. The Commission is acutely aware and supportive of the need to ensure the transformation of the legal profession in South Africa. Also, that greater access to legal services is needed, particularly by persons who are poor and vulnerable, in appropriate circumstances in order to give effect to the founding values and rights enshrined in the Constitution. It therefore welcomes the Bill and wishes Parliament, the legal profession and relevant stakeholders successful deliberations during the finalization of the Bill.

The mandate of the South African Human Rights Commission

3. The Commission is a constitutionally created independent state institution supporting constitutional democracy. It is mandated by section 184 of the Constitution which states as follows:

“Functions of the South African Human Rights Commission

184. (1) The South African Human Rights Commission must-
- (a) promote, respect for human rights and a culture of human rights;
 - (b) promote the protection, development and attainment of human rights; and

¹ Section 184(10)(b) and 184(2)(a) and (b), The Constitution of the Republic of South Africa, Act 108 of 1996
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- (c) monitor and assess the observance of human rights in the Republic.”²
4. The Human Rights Commission Act (Act 54 of 1994) confers further responsibilities and duties on the Commission in executing its mandate. It is within this mandate that the Commission monitors the legislative process and is presenting this submission for consideration.
 5. In considering the Bill, the Commission also took due regard of its obligations at an international level and its recognition as South Africa’s national human rights institution (NHRI). In terms of the *Principles relating to the Status of National Institutions*, (also known as the Paris Principles), the Commission has a number of duties and responsibilities.³ The Paris Principles also set out the requirements that ensure that the NHRIs remain independent. In order to be recognized as a NHRI, the Commission must fully comply with the Paris Principles, before it is afforded an ‘A’ status by the International Co-ordinating Committee (ICC). This ‘A’ status affords the Commission the opportunity to participate in United Nations treaty body and Human Rights Council processes by way of submitting reports and engaging thereon; and making oral and written statements during Human Rights Council sessions.⁴ NHRIs that are compliant with the Paris Principles are recognized as independent and important actors in the promotion and protection of human rights.⁵ Thus any laws which the State drafts and has a potential impact on the nature and functioning of the Commissions needs to ensure that the provisions do not compromise its’ independence or encroach on its ability to exercise its mandate.

Legal Services Programme

6. It is through the Commission’s Legal Services Programme at Head Office and in all nine provincial offices that persons lodge complaints alleging that their human rights have been violated. The Commission employs admitted attorneys to investigate these complaints and has

²Section 184 of the Constitution of the Republic of South Africa Act 108 of 1996

³ In 1991, the first International Workshop on National Institutions for the Promotion and Protection of Human Rights took place in Paris. A key outcome was the Principles relating to the status of national institutions also known as the Paris Principles. These Principles are broadly accepted as the test of an institution’s legitimacy and credibility, and have become part of the human rights lexicon.

⁴ The Paris Principles are interpreted and applied by the Sub-Committee on Accreditation of the International Coordinating Committee of National Human Rights Institutions who assess National Human Rights Institutions (for compliance with the Paris Principles and give them 'A', 'B' or 'C' status depending on their compliance with the Principles. This process is recognised and supported by the United Nations. The SAHRC has enjoyed an 'A' status for a number of years.

⁵ A/CONF.157/23,Part I, para. 36 In 2005, the Commission on Human Rights (later known as the Human Rights Council), in its resolution 2005/74, reaffirmed the importance of establishing and strengthening independent, pluralistic NHRIs consistent with the Paris Principles and of strengthening cooperation among them.

registered its offices as 'law clinics' with the relevant provincial law societies. In the course of investigating such complaints the Commission has on occasion initiated litigation in order to secure appropriate redress. Due to its constitutional human rights mandate, the Commission has also, on occasion, been cited or joined as a party in legal proceedings before a court. Since the establishment of Equality Courts (in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("PEPUDA")) the Commission has assisted and represented a number of persons in pursuing matters in these courts across the country.

The Legal Practice Bill - Forms of legal practice

7. Clause 34 of the Bill sets out the different forms of legal practice that are recognised. Clause 34(4) addresses the manner in which attorneys may practice. It is unclear to the Commission in terms of which sub section of this clause its admitted attorneys would be entitled to render legal services. Clauses 34(1) and (2) are not applicable as this provides for attorneys and advocates who render legal services in expectation of a fee. The clause states as follows:

“(4) Attorneys may only practise—

- (a) for their own account;
 - (b) as part of a commercial juristic entity referred to in subsection (6), 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;
 - (c) as part of a non-profit juristic entity established in terms of subsection (7);
 - (d) as part of Legal Aid South Africa; or
 - (e) as an attorney in the full-time employment of the State.”
8. In terms of this clause the Commission could only fall within the ambit of Clause 34(4) (e). However, it is unclear whether the Commissions attorneys would be considered to form part of the State for purposes of the Bill given its constitutionally guaranteed independence.
 9. The Commission does not fall within the further provisions contained within clauses 34 as it is not a commercial juristic entity (clause 34(6)), a non profit juristic entity (clauses 34 (7)) or a law clinic (section 38(8)).

Definition of law clinic

10. On a plain reading of the definition of ‘law clinic’ in the definitions clause of the Bill it does not appear that the Commissions’ offices would fall within the scope of this definition in future.⁶ To date the Commission has registered its offices as law clinics with the relevant provincial law societies. However it would appear that this will no longer be the case once the Bill is enacted. The definition reads as follows:

“law clinic” means--

- (a) “(a) a centre for the practical legal education of students in the faculty of law at a university in the Republic; or
- (b) a law centre controlled by, or which is, a non-profit making organisation, which, subject to section 34(8), provides legal services to the public free of charge.”

11. The Commission is not a university nor is it a non-profit making organisation. It does however provide legal services to persons free of charge in instances where it is alleged that a violation of human rights has occurred. It is thus unclear to the Commission on what basis it will be entitled to ensure that it’s admitted attorneys may render legal services.

‘Institutions’

12. Throughout the Bill, the word ‘institution’ is used. However it is only in clause 6 that this word could be interpreted as potentially applying to the Commission. Clause 6 states that the Council has the power to amongst others to”

“(n) provide financial support to legal practitioners, organisations or institutions for the purpose of providing work-place training opportunities for candidate legal practitioners in deserving cases;

and

(o) provide financial support to non-profit organisations and institutions promoting access to justice for poor people;”

The Commission would urge that these sub clauses be amended to reflect that the Commission may also be a beneficiary in terms of the Councils powers.

⁶ Clarity on whether independent State institutions qualify as law clinics will address whether prospective legal practitioners may undergo their vocational training at these places. If so, the Bill should clearly state this.

Practical vocational training

13. Practical vocational training is provided for in clauses 26 through 28. Whilst the rules relating to practical vocational training will be determined by the Council, it should be noted that the Commission has had plans for a number of years to offer articles of clerkship. Thus, ensuring that the Commission is adequately recognised in terms of the Bill as a place where attorneys may practice will become important in the future when these rules are drafted.

Community service

14. Flowing from the lack of clarity as to whether or not the Commission would be considered as part of the State for purposes of its attorneys being able to render legal services, it is furthermore unclear whether the Commission could take advantage of the proposed rendering of community services that is provided for in the Bill.

Clause 29 of the Bill provides,

“Prescription of 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—

- (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 registration as a legal practitioner is dependent.

(2) For the purposes of this section, “community service” includes service

involving—

- (a) the delivery of free legal services to the public in terms of an agreement between the candidate legal practitioner or the legal practitioner with a community-based organisation, trade union or non-governmental organisation
- (b) the provision of legal education and training on behalf of the Council, or on behalf of an academic institution or non-governmental organisation approved by the Council;
- (c) service as a judicial officer, including as a commissioner in the small claims court;
- (d) service to the State, approved by the Minister after consultation with the Council;
- (e) service on regulatory structures established or recognised in terms of this Act;

- (f) any other service as may be determined by the Council in the rules; or
- (g) any other service which the candidate legal practitioner or the legal practitioner may want to perform with the approval of the Minister.”

15. The Commission is uncertain whether in terms of this clause it would be a potential beneficiary of community service. Reference is made in clause 29(2)(a) to free legal services to community based organisations, trade unions or non-governmental organisations. However, this clause would not extend to the Commission. On the other hand, clause 29(2)(d) recognises community service as service to the ‘State’. However, as previously indicated it is not clear whether reference to the State includes independent state institutions. **The Commission has limited resources and would welcome being specifically included as a beneficiary for purposes of community service.**

16. Clause 29 provides that service to the State must be approved by the Minister after consultation with the Council. Whilst it is appropriate that the Minister is involved in determining community service that may be provided to the State, it would not be appropriate given the Commissions independent status that the Minister becomes involved in approving when community service may be provided to the Commission. Should the Commission be considered to be included in the definition of the State, then this provision would be applicable and has the potential to be considered as undermining the Commissions independence which is guaranteed by the Constitution and required in terms of the Paris Principles. **It is submitted that this clause be amended in order that the Minister does not approve service to the Commission.**

Handling of trust monies

17. Clause 84 sets out the obligations of attorneys relating to handling of trust monies and makes reference to state attorneys. Clarity is required as to whether the Commission is included in the definition of the State as this would impact on whether the Commission must obtain a Fidelity Fund Certificate. **Clause 84(10) also needs to be amended to reflect that the Commission is bound by its’ provisions.** These clauses state as follows:

“Obligations of attorney relating to handling of trust monies

84. (1) Every attorney, other than an attorney in the full-time employ of the State as a state attorney, legal adviser, state law adviser or in any other professional capacity and who practises or is deemed to practise—

- (a) for his or her own account, either alone or in partnership; or

- (b) as a director of a practice which is a juristic person, and who receives or holds money or property belonging to any person, must be in possession of a Fidelity Fund certificate

and

(10) No legal practitioner in the full-time employ of the State as a state attorney, legal adviser, 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, and in such a case only on behalf of the State and for no other purpose.”

Conclusion

18. The Commission requests the Portfolio Committee to consider the issues raised in this submission as the Bill has potential serious implications for the manner in which the Commission gives effect to its constitutional mandate. **It is suggested that the Bill be amended by inserting a direct reference either to the ‘Commission’, ‘independent state institutions’, or ‘state institutions supporting constitutional democracy’** at the appropriate instances as indicated in this submission. This is necessary in order to indicate that the commission is an independent state institution that provides legal services in various instances in order to give effect to its constitutional mandate.