

REPUBLIC OF SOUTH AFRICA

LEGAL AID BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 37774 of 26 June 2014)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 8—2014]

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BILL

To ensure access to justice and the realisation of the right of a person to have legal representation as envisaged in the Constitution; for that purpose to establish an entity called Legal Aid South Africa with a Board of Directors and to define its objects, powers, functions, duties and composition; to provide for the independence and impartiality of Legal Aid South Africa; to provide for the appointment of the Board of Directors and qualification for membership thereof; to provide for the appointment of a chairperson and a deputy chairperson; to provide for the term of appointment of a member of the Board of Directors; to provide for the termination of membership of the Board of Directors; to provide for meetings of the Board of Directors, quorum and procedure; to provide for the establishment of committees by the Board of Directors; to provide for the delegation of powers and the assignment of duties or functions of the Board of Directors; to provide for the appointment of a chief executive officer and his or her functions; to provide for the appointment of employees and agents of Legal Aid South Africa and their terms and conditions of employment; to provide for the protection of client privilege in certain circumstances; to provide for the recovery of costs by Legal Aid South Africa; to provide for the finances of Legal Aid South Africa; to provide for the provision of legal aid by direction of courts in criminal matters; to provide for the compilation of a Legal Aid Manual; to provide for the making of regulations; to provide for the amendment or repeal of laws; to provide for transitional arrangements; and to provide for matters incidental thereto.

Parliament of the Republic of South Africa enacts as follows:—

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CHAPTER 1

DEFINITIONS 30

Definitions

1. In this Act, unless the context indicates otherwise—
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| “ agent ” means an official of the Department of Justice and Constitutional Development who is appointed to assist legal aid applicants in completing applications for legal aid; | 35 |
| “ Board ” means the Board of Directors appointed in terms of section 6; | |
| “ chief executive officer ” means the chief executive officer appointed in terms of section 15; | |
| “ Constitution ” means the Constitution of the Republic of South Africa, 1996; | |
| “ director ” means a member of the Board of Directors; | 40 |
| “ Legal Aid South Africa ” means the national public entity, that is established under section 2(1), in order to give effect to the objects provided for in section 3; | |
| “ legal practitioner ” means a practising attorney or advocate; | |
| “ Minister ” means the Cabinet member responsible for the administration of justice; | 45 |
| “ Public Finance Management Act ” means the Public Finance Management Act, 1999 (Act No. 1 of 1999); and | |
| “ this Act ” includes the regulations made under section 24(1). | |

CHAPTER 2

LEGAL AID SOUTH AFRICA

Establishment of Legal Aid South Africa and its relationship with Board

2. (1) There is hereby established a national public entity as provided for in the Public Finance Management Act, to be known as Legal Aid South Africa, which is governed by a Board appointed under section 6. 5

(2) The Board, of which the powers, functions and duties are set out in section 4, is represented by the chief executive officer and any director or directors as may be designated by the Board.

Objects of Legal Aid South Africa 10

3. The objects of Legal Aid South Africa are to render or make available legal aid, legal advice and to provide legal representation to persons at state expense as envisaged in the Constitution, this Act and any other law, and to provide education and information concerning legal rights and obligations.

Powers, functions and duties of Board 15

4. (1) The Board may do all that is necessary or expedient to achieve the objects referred to in section 3, including the following:

- (a) Provide legal services, representation and advice, by—
 - (i) employing legal practitioners;
 - (ii) employing paralegals, who are persons that are not legal practitioners but have knowledge and understanding of the law, its procedures and its social context acquired through training, education, work experience or a national registered qualification in paralegal practice; and 20
 - (iii) procuring the services of legal practitioners in private practice by entering into contracts or agreements with them and other entities. 25
- (b) Determine, in consultation with the Minister and the Minister of Finance, its own staff establishment and the terms and conditions of employment for its staff as provided for in section 18.
- (c) Purchase or otherwise acquire, hold or alienate any—
 - (i) movable property; or 30
 - (ii) immovable property with the approval of the Minister acting in consultation with the Minister of Finance.
- (d) Hire or let any movable or immovable property.
- (e) Fix conditions subject to which legal aid is to be rendered, including—
 - (i) conditions in accordance with which any rights in respect of costs recovered or recoverable in any legal proceedings or any dispute in respect of which the aid is rendered, are ceded to Legal Aid South Africa; and 35
 - (ii) the payment of contributions to Legal Aid South Africa by persons to whom legal aid is rendered. 40
- (f) Provide legal representation at state expense as envisaged in the Constitution, this Act and any other law, where substantial injustice would otherwise result.
- (g) Conduct programmes to promote public awareness of constitutional and other legal rights and public understanding of the objects, role and activities of Legal Aid South Africa. 45
- (h) Pay out of the funds of Legal Aid South Africa such remuneration and allowances to members of the Board, their alternates and any committee members appointed in accordance with section 13 who are not in the full-time service of the State, as may be determined by the Minister of Finance from time to time. 50
- (i) Do all things and perform all functions necessary for, or incidental to, the attainment of the objects of Legal Aid South Africa.

(2) The Board is the accounting authority of Legal Aid South Africa in accordance with section 49 of the Public Finance Management Act, and is charged with the responsibilities referred to in that Act. 55

Independence and impartiality of Legal Aid South Africa

5. Legal Aid South Africa, its directors, employees and agents must serve impartially and independently and exercise their powers and perform their duties and functions in good faith and without fear, favour, bias or prejudice.

Composition and appointment of Board

5

6. (1) The Board consists of the following 14 voting members, appointed by the Minister in writing:

- (a) A judge in active service of a court referred to in section 166(a), (b) or (c) of the Constitution, nominated by the Chief Justice of South Africa.
- (b) Eight members who, collectively, have the skills referred to in section 7(d). 10
- (c) The chief executive officer.
- (d) Three employees appointed by the Board for the management of Legal Aid South Africa, and who are responsible for the management, including the financial management, of Legal Aid South Africa and who are actively involved in developing and implementing Legal Aid South Africa's strategy nominated by the Board. 15
- (e) The Director-General: Justice and Constitutional Development, or his or her nominee.

(2) The Minister may appoint a person to serve as an alternate in the place of any member referred to in subsection (1)(b), (c) and (d) during that member's absence from any meeting of the Board, if that person is qualified to be appointed as such member and has been nominated in the same manner as that member. 20

(3) A decision taken by the Board or an act performed under the authority of the Board is not invalid merely because of a vacancy on the Board or because a person who is not entitled to sit as a member sat as a member at the time the decision was taken or the act was authorised, if the decision was taken or the act was authorised by the required majority of members present at the time, who were entitled to sit as members. 25

(4) In the case of directors referred to in subsection (1)(b), the Board must, whenever necessary, invite nominations for the appointment of persons as directors in the manner determined by the Minister in consultation with the Board. 30

(5) Any vacancy on the Board arising pursuant to section 10 must be filled in accordance with this section.

Qualification for membership of Board

7. The directors must—

- (a) be fit and proper persons; 35
- (b) be South African citizens;
- (c) collectively, be broadly representative of the diversity of the South African population;
- (d) collectively, have skills which include business management, information technology, legal services, corporate governance, accounting or auditing skills, or community-based knowledge relevant to legal aid; and 40
- (e) not have been convicted of theft, fraud, perjury, or an offence under the Prevention of Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), or have been convicted after the commencement of the Constitution of an offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act No. 51 of 1977). 45

Chairperson and deputy chairperson

8. (1) The judge appointed in terms of section 6(1)(a) is the chairperson of the Board and the Minister must, in writing designate one of the directors referred to in section 6(1)(b) as deputy chairperson of the Board, who must act as the chairperson if the position of chairperson is vacant or during the absence or incapacity of the chairperson. 50

(2) The deputy chairperson, when acting as chairperson as provided for in subsection (1), has all the powers, duties and functions of the chairperson.

(3) If both the chairperson and deputy chairperson are absent from a meeting of the Board, a person elected by the directors present from among themselves, must preside at that meeting. 55

Term of appointment

9. The chairperson, the deputy chairperson and a director referred to in section 6(1)(a), (b) and (d) and any alternate member appointed in terms of section 6(2) holds office for a term of not less than three years and not more than five years, as determined by the Minister, in writing, at the time of his or her appointment and may be reappointed for one additional term only. 5

Termination of membership of Board

10. (1) A director ceases to be a director of the Board when that person—
- (a) resigns on one month's written notice addressed to the Minister and the Board;
 - (b) no longer meets the qualifications for membership listed in section 7; or 10
 - (c) referred to in section 6(1)(c) and (d), is no longer in the employment of Legal Aid South Africa.
- (2) The Minister may remove a director from office for—
- (a) failing to perform the duties of a director or to perform them diligently and efficiently; 15
 - (b) permanent incapacity;
 - (c) being absent from three consecutive meetings of the Board without the chairperson's leave and without good reason; or
 - (d) engaging in any activity that is reasonably capable of undermining the integrity of Legal Aid South Africa. 20

Meetings of Board

11. (1) The Board must meet at least four times every year at a time and place as determined by the Board.
- (2) (a) The secretary of the Board must, at any time, upon the request in writing of—
- (i) the chairperson of the Board; or 25
 - (ii) not less than four directors, subject to paragraph (b),
- convene a special meeting of the Board, to be held at a time and place as the chairperson may determine.
- (b) At least one of the directors referred to in paragraph (a)(ii) must be a director referred to in section 6(1)(a) or (b). 30

Quorum and procedure

12. (1) The quorum at any meeting of the Board is half of its members, plus one.
- (2) Any decision at any meeting of the Board must be taken by a majority of votes of the directors present, 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. 35
- (3) The Board may determine the procedure of its meetings.

Committees of Board

13. (1) The Board may, in writing and in the interest of good governance, establish one or more committees, consisting of one or more directors, employees or other persons designated or appointed by the Board, to assist it in exercising its powers and the performance of its functions as it may deem necessary. 40
- (2) The Board—
- (a) must determine the powers, duties and functions of a committee;
 - (b) must designate a member of a committee as chairperson and, if it deems it necessary, may designate a member of a committee as deputy chairperson; 45
 - (c) may, at any time, remove a member of a committee or dissolve a committee; and
 - (d) may determine the procedure for the conduct of the meetings of a committee.

Delegation of powers and assignment of duties or functions of Board

14. (1) Subject to the provisions of the Public Finance Management Act, the Board may, in writing, delegate any of its powers or assign any of its duties or functions 50

imposed on or assigned to it, to any director, committee, employee or agent of Legal Aid South Africa.

- (2) A delegation or assignment in terms of subsection (1)—
- (a) is subject to any conditions and directions as the Board may deem appropriate; and
 - (b) does not divest the Board of the responsibility for the exercise of the power or the performance of the duty or function.

CHAPTER 3

PERFORMANCE OF ADMINISTRATIVE WORK OF LEGAL AID SOUTH AFRICA

Appointment of chief executive officer

15. (1) The Board must, whenever necessary, appoint a fit and proper person who has applicable knowledge and experience, as the chief executive officer of Legal Aid South Africa.

- (2) The chief executive officer—
- (a) holds office—
 - (i) for an agreed term not exceeding five years, which may be renewed; and
 - (ii) on the terms and conditions as determined by the Board which must be in a written contract of employment and which must include the terms and conditions of employment and set specific measurable performance standards; and
 - (b) receives the remuneration, allowances and other service benefits as the Board may determine in accordance with section 18.

(3) Whenever the chief executive officer is absent, unable to perform the functions of that office or during a vacancy in the office of the chief executive officer, the chairperson, in conjunction with the chief executive officer if he or she is available, must designate a senior employee of Legal Aid South Africa, excluding members of the Board, to act as the chief executive officer.

Functions of chief executive officer

- 16.** (1) The chief executive officer under the strategic direction of the Board—
- (a) is responsible for the general administration of Legal Aid South Africa;
 - (b) must manage and direct its activities to promote and give effect to the objects of Legal Aid South Africa; and
 - (c) must supervise its staff.

(2) Subject to the provisions of section 56 of the Public Finance Management Act, the chief executive officer has such powers and duties as may, in writing, be delegated or assigned to him or her by the Board.

CHAPTER 4

SUPPORT STRUCTURE OF LEGAL AID SOUTH AFRICA

Employees and agents of Legal Aid South Africa

17. (1) The chief executive officer must, subject to section 18—

- (a) in consultation with the Board, appoint as many senior employees; and
- (b) appoint as many other employees and agents,

as may be necessary to assist Legal Aid South Africa in the exercise of its powers and performance of its functions.

(2) (a) Legal Aid South Africa has the right to operate its offices and justice centres without having to seek accreditation from any law society referred to in the Attorneys Act, 1979 (Act No. 53 of 1979), and is entitled to employ candidate attorneys, subject to the provisions of the Attorneys Act, 1979.

(b) For the purposes of paragraph (a), “justice centre” means offices of Legal Aid South Africa which administer and provide legal aid in the Republic.

(c) Despite the provisions of paragraph (a), attorneys and candidate attorneys employed by Legal Aid South Africa must be members, in good standing, of the law

society having jurisdiction and are subject to the disciplinary control of the law society in question.

Terms and conditions of employment of employees

18. (1) The Board may, in consultation with the Minister and the Minister of Finance, appoint on such conditions and at such remuneration, employees referred to in sections 15 and 17 to assist in the performance of its functions. 5

(2) The provisions of the Labour Relations Act, 1995 (Act No. 66 of 1995), relating to collective bargaining are applicable when the terms and conditions of employment are determined as provided for in subsection (1).

(3) Any expenditure arising from the application of this section may not exceed the appropriated budget allocation to Legal Aid South Africa in terms of the Public Finance Management Act. 10

Protection of client privilege in certain circumstances

19. (1) A private legal practitioner who has been instructed by Legal Aid South Africa to represent a person who qualifies for legal aid under this Act must, when requested by Legal Aid South Africa, grant access to the information and documents contained in the file relating to the person in question for the sole purpose of conducting a quality assessment of the work done by the legal practitioner. 15

(2) The information and documents referred to in subsection (1) remain privileged information against any other party as information between attorney and client, despite having been made available to Legal Aid South Africa. 20

Recovery of costs by Legal Aid South Africa

20. (1) Whenever in any judicial proceedings or any dispute in respect of which legal aid is rendered to a litigant or other person by Legal Aid South Africa, costs become payable to that litigant or other person in terms of a judgment of the court or a settlement or otherwise, it is, subject to the powers of the Board referred to in section 4 with regard to the fixing of conditions, deemed that the litigant or other person has ceded his or her rights to those costs to Legal Aid South Africa. 25

(2) A litigant or person referred to in subsection (1) or his or her legal representative or Legal Aid South Africa must, at any time before payment of the costs deemed in terms of subsection (1) to be ceded to Legal Aid South Africa, whether before or after those costs become payable, give the person by whom the costs are to be paid at his or her last known address and the registrar or clerk of the court concerned notice in writing that legal aid is being or has been rendered, and Legal Aid South Africa may proceed in its own name to have those costs taxed and to recover them, without being substituted on the record of the judicial proceedings concerned, if any, for the litigant in question. 30 35

(3) The costs referred to in subsection (1) must be calculated and the bill of costs concerned, if any, must be taxed or agreed as if the litigant or person to whom legal aid was rendered, had obtained the services of the legal representative acting on his or her behalf in the proceedings or dispute concerned, without the aid of Legal Aid South Africa. 40

Finances of Legal Aid South Africa

21. The funds of Legal Aid South Africa consist of—

(a) money appropriated by Parliament; and

(b) money received from any other source, 45

and must be budgeted for, managed and accounted for, in terms of the Public Finance Management Act.

CHAPTER 5

GENERAL PROVISIONS

Provision of legal aid by direction of courts in criminal matters

22. (1) A court in criminal proceedings may only direct that a person be provided with legal representation at state expense, if the court has— 5
- (a) taken into account—
 - (i) the personal circumstances of the person concerned;
 - (ii) the nature and gravity of the charge on which the person is to be tried or of which he or she has been convicted, as the case may be;
 - (iii) whether any other legal representation at state expense is available or has been provided; and 10
 - (iv) any other factor which in the opinion of the court should be taken into account; and
 - (b) subject to subsection (3), referred the matter, together with any report the court may consider necessary, for the attention of Legal Aid South Africa, for evaluation and report by Legal Aid South Africa and Legal Aid South Africa has made a recommendation that the person concerned qualifies for legal representation, as provided for in subsection (2)(c)(i). 15
- (2) (a) If a court refers a matter in terms of subsection (1)(b), Legal Aid South Africa must, in accordance with the regulations made under section 24(1) and the Legal Aid Manual, evaluate and report on the matter. 20
- (b) The report in question must be in writing and be submitted to the registrar or the clerk of the court, as the case may be, who must make a copy thereof available to the court and the person concerned.
- (c) The report must include— 25
- (i) a recommendation whether the person concerned qualifies for legal representation;
 - (ii) particulars relating to the factors referred to in subsection (1)(a)(i) and (iii); and
 - (iii) any other factor which, in the opinion of Legal Aid South Africa, should be taken into account. 30
- (3) A court may only refer a matter in terms of subsection (1)(b) if the person concerned—
- (a) (i) has applied to Legal Aid South Africa for legal representation at state expense; 35
 - (ii) has been refused legal representation at state expense by Legal Aid South Africa; and
 - (iii) has exhausted his or her internal right to appeal within the structures of Legal Aid South Africa against the refusal;
 - (b) has applied for legal representation and has not received any response to the application within a reasonable time; or 40
 - (c) has been refused legal representation at state expense by Legal Aid South Africa and the court is of the opinion that there are particular circumstances that need to be brought to the attention of Legal Aid South Africa by the court in a report referred to in subsection (1)(a)(ii). 45
- (4) (a) Any decision by Legal Aid South Africa in any criminal proceedings relating to—
- (i) the particular legal practitioner to be assigned to any person;
 - (ii) the fee to be paid by Legal Aid South Africa to a particular practitioner;
 - (iii) the number of legal practitioners to be assigned to a particular person or group of persons; or 50
 - (iv) the contribution, if any, to be paid to Legal Aid South Africa by the persons in question and when and the manner in which the fee is to be paid,
- is subject to review by the High Court at the instance of the person affected thereby.
- (b) Legal Aid South Africa may, in any review proceedings referred to in paragraph (a)(ii), not be required to pay more than the maximum amounts determined in the Legal Aid Manual in terms of section 23(1)(c). 55
- (5) Only a court in review proceedings may make an order relating to the matters referred to in subsection (4).

- (6) In determining whether any person is entitled to legal representation at state expense and before any court orders the provision of legal representation at state expense, the legal aid applicant bears the onus of showing, on a balance of probabilities, that he or she—
- (a) is unable to afford the cost of his or her own legal representation; 5
 - (b) has made a full disclosure of all relevant facts and documents pertaining to his or her inability to pay for his or her own legal representation;
 - (c) has a lifestyle that is consistent with his or her alleged inability to afford the cost of his or her own legal representation; and
 - (d) has cooperated fully with any investigation conducted by Legal Aid South Africa. 10
- (7) No accused person may receive legal representation at state expense if that person has applied for the release of an amount for reasonable legal expenses in terms of section 44(1)(b) of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998), and where the court has turned down the application due to a lack of a full disclosure as required in terms of section 44(2)(b) of that Act. 15

Legal Aid Manual

- 23.** (1) The Board must compile, review, amend and approve a Legal Aid Manual and must at least every second year review the Legal Aid Manual relating to—
- (a) the procedures in terms of which applications for legal aid are administered; 20
 - (b) the systems and methods whereby legal aid is delivered;
 - (c) the requirements and criteria for accreditation of private legal practitioners who render legal services to legal aid recipients on the instructions of Legal Aid South Africa and the terms and conditions subject to which such instructions are allocated to accredited legal practitioners, including the fees and disbursements that are payable by Legal Aid South Africa to accredited legal practitioners, taking into consideration the salary scales applicable to the public service; and 25
 - (d) the regulation of any other administrative matter which the Board deems necessary for the effective and efficient functioning of Legal Aid South Africa. 30
- (2) The Board must submit the Legal Aid Manual and any amendment thereof to the Minister who must—
- (a) table the Legal Aid Manual and any amendment thereof in Parliament; and
 - (b) simultaneously give notice thereof by notice in the *Gazette*.
- (3) The Legal Aid Manual and any amendment thereof takes effect 60 days after the publication of the notice referred to in subsection (2)(b) and is binding on all persons and organisations providing legal aid assistance in terms of this Act. 35
- (4) The Board must publish the Legal Aid Manual and any amendments thereof on its website and a copy thereof must be available for inspection at all offices of Legal Aid South Africa. 40

Regulations

- 24.** (1) The Minister must, after receipt of recommendations of the Board, make regulations relating to—
- (a) the types of matters, both civil and criminal, in respect of which Legal Aid South Africa— 45
 - (i) provides legal aid;
 - (ii) does not provide legal aid; and
 - (iii) provides limited legal aid and the circumstances in which it does so;
 - (b) the requirements or criteria that an applicant must comply with to qualify for legal aid as well as the terms and conditions on which such legal aid is made available to the applicant; 50
 - (c) the policy relating to the approval or refusal of legal aid, the termination of legal aid and appeals against refusal or termination of legal aid; and
 - (d) any matter which it is necessary or expedient to prescribe for the proper implementation or administration of this Act. 55
- (2) Any regulations made under subsection (1) must be tabled in Parliament by the Minister at least 30 days before they are published in the *Gazette*.

(3) The regulations made under subsection (1) may provide that any person who contravenes a provision thereof or fails to comply therewith is guilty of an offence and on conviction is liable to a fine or to imprisonment for a period not exceeding one year.

Amendment or repeal of laws

25. (1) The laws mentioned in the second column of the Schedule are amended or repealed to the extent indicated in the third column thereof. 5

(2) Any reference to “the Legal Aid Act, 1969 (Act No. 22 of 1969)” in any law must, with the changes as may be required by the context, be construed as a reference to “the Legal Aid Act, 2014”.

(3) Any reference to “the Legal Aid Board” in any law must, with the changes as may be required by the context, be construed as a reference to “the Board” established under section 2 of this Act. 10

Transitional arrangements

26. (1) (a) Any person who, immediately before the commencement of this Act, held an office in terms of section 4(1) of the Legal Aid Act, 1969 (Act No. 22 of 1969), is deemed to have been appointed in terms of this Act, and remains in that office for a period of 12 months after the commencement of this Act. 15

(b) The persons referred to in paragraph (a), the chief executive officer referred to in paragraph (c) and the three persons referred to in paragraph (d) must, within the 12 month period referred to in paragraph (a), facilitate the composition and appointment of a Board as provided for in section 6. 20

(c) Despite paragraph (a), the chief executive officer of Legal Aid South Africa holding office at the time of the commencement of this Act is deemed to be a member of the Board for the 12 month period referred to in paragraph (a), who is thereafter eligible for appointment in terms of section 15. 25

(d) Despite paragraph (a), the Board, as constituted by virtue of paragraphs (a) and (c), must, as soon as possible after the commencement of this Act, but not later than three months thereafter, nominate the three persons referred to in section 6(1)(d) for purposes of appointment by the Minister in terms of that section for the 12 month period referred to in paragraph (a), who are thereafter eligible for appointment in terms of that section. 30

(e) The Minister must, as soon as possible after the commencement of this Act, but not later than three months thereafter, designate one of the persons referred to in paragraph (a) as deputy chairperson of the Board for the 12 month period referred to in paragraph (a).

(2) Any person who, immediately before the commencement of this Act, was employed by the Board under the Legal Aid Act, 1969 (Act No. 22 of 1969), continues in that employment and is deemed to have been appointed in terms of this Act. 35

(3) Anything done in terms of a law repealed by section 25 and which could have been done in terms of this Act is regarded as having been done in terms of this Act.

(4) (a) Subject to paragraph (b), all measures which, immediately before the commencement of this Act, were in operation and applied to office-bearers, officers, employees and agents of Legal Aid South Africa, including measures regarding their remuneration, pension, leave and any other terms and conditions of service, continue in operation and apply until they are amended or repealed by this Act. 40

(b) No measure referred to in paragraph (a) may, except in accordance with an applicable law or agreement, be changed in a manner which affects those office-bearers, officers, employees and agents of Legal Aid South Africa to their detriment. 45

(5) All assets, rights, liabilities and obligations which, immediately before the commencement of this Act, vested in the Legal Aid Board under the Legal Aid Act, 1969 (Act No. 22 of 1969), pass to Legal Aid South Africa established under this Act on the date of commencement of this Act. 50

(6) (a) The Legal Aid Guide in force on the date of commencement of this Act remains in force until it is withdrawn and replaced by regulations made under section 24(1) and the Legal Aid Manual referred to in section 23(1).

(b) The first regulations and Legal Aid Manual referred to in paragraph (a) must be made and published within 24 months after the commencement of this Act. 55

Short title and commencement

27. This Act is called the Legal Aid Act, 2014, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

LAWS AMENDED OR REPEALED

Number and year of law	Title	Extent of amendment or repeal
Act No. 22 of 1969	Legal Aid Act, 1969	The repeal of the Act.
Act No. 51 of 1977	Criminal Procedure Act, 1977	<p>1. The amendment of section 73 by the substitution in subsection (2C) for the words “the Legal Aid Act, 1969 (Act No. 22 of 1969)” of the words “the Legal Aid Act, 2014”.</p> <p>2. The amendment of section 77 by the substitution in subsection (1A) for the words “in terms of section 3B of the Legal Aid Amendment Act, 1996 (Act No. 20 of 1996) of the words “in terms of section 22 of the Legal Aid Act, 2014”.</p> <p>3. The amendment of section 143 by the substitution in subsection (2)(a) for the words “the Legal Aid Act, 1969 (Act No. 22 of 1969)” of the words “the Legal Aid Act, 2014”.</p> <p>4. The amendment of section 309D by the substitution in subsection (3) for the words “the Legal Aid Board referred to in section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969)” of the words “Legal Aid South Africa referred to in section 2 of the Legal Aid Act, 2014”.</p>
Act No. 53 of 1979	Attorneys Act, 1979	<p>1. The amendment of section 1 by—</p> <p>(a) the substitution in paragraph (b) of the definition of “community service” for the words “the Legal Aid Board established under section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969)” of the words “Legal Aid South Africa established under section 2 of the Legal Aid Act, 2014”; and</p> <p>(b) the substitution in paragraph (c) of the definition of “principal” for the words “the Legal Aid Board established under section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969)” of the words “Legal Aid South Africa established under section 2 of the Legal Aid Act, 2014”.</p> <p>2. The amendment of section 3 by—</p> <p>(a) the substitution in subsection (1)(fA) for the words “the Legal Aid Board” of the words “Legal Aid South Africa” and for the substitution of the words “the Legal Aid Board” of the words “Legal Aid South Africa”; and</p> <p>(b) the substitution in subsection (1)(i)(i) for the words “the Legal Aid Board” of the words “Legal Aid South Africa”.</p> <p>3. The amendment of section 4A by the substitution in paragraph (c) for the words “the Legal Aid Board” of the words “Legal Aid South Africa”.</p>

Number and year of law	Title	Extent of amendment or repeal
		<p>4. The amendment of section 6 by the substitution in subsection (3)(b) for the words “the Legal Aid Board” of the words “Legal Aid South Africa”.</p> <p>5. The amendment of section 8 by the substitution in subsection (4)(a) for the words “the Legal Aid Board” of the words “Legal Aid South Africa”.</p>
Act No. 66 of 1995	Labour Relations Act, 1995	<p>1. The amendment of subsection (1) of section 149 by—</p> <p>(a) the substitution in paragraph (a) for the words “the Legal Aid Board” of the words “Legal Aid South Africa”; and</p> <p>(b) the substitution in paragraph (b) for the words “the Legal Aid Board” of the words “Legal Aid South Africa”.</p>
Act No. 4 of 2000	Promotion of Equality and Prevention of Unfair Discrimination Act, 2000	<p>1. The amendment of section 30 by the substitution in subsection (1)(c) for the words “the Legal Aid Board” of the words “Legal Aid South Africa”.</p>
Act No. 17 of 2002	Mental Health Act, 2002	<p>1. The amendment of section 15 by the substitution in subsection (2) for the words “section 3(d) of the Legal Aid Act, 1969” of the words “section 4(1)(e) of the Legal Aid Act, 2014”.</p>
Act No. 38 of 2005	Children’s Act, 2005	<p>1. The amendment of section 55 by the substitution in subsection (1) for the words “the Legal Aid Board referred to in section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969)” of the words “Legal Aid South Africa referred to in section 2 of the Legal Aid Act, 2014”.</p>
Act No. 75 of 2008	Child Justice Act, 2008	<p>1. The amendment of section 1 by the deletion of the definition of “Legal Aid Board”.</p> <p>2. The amendment of section 1 by the insertion of the following definition:</p> <p>“ ‘Legal Aid South Africa’ means the entity referred to in section 2 of the Legal Aid Act, 2014”.</p> <p>3. The amendment of section 80 by the substitution in subsection (2) for the words “in the case where the legal representative concerned has been employed by the Legal Aid Board, the Board; or” of the words “in the case where the legal representative concerned has been employed by Legal Aid South Africa, the Board of Directors of Legal Aid South Africa; or”.</p>

Number and year of law	Title	Extent of amendment or repeal
		<p>4. The amendment of section 82 by the substitution for subsection (1) of the following subsection: “(1) Where a child appears before a child justice court in terms of Chapter 9 and is not represented by a legal representative of his or her own choice, at his or her own expense the presiding officer must refer the child to [the Legal Aid Board] <u>Legal Aid South Africa</u> for the matter to be evaluated by the Board as provided for in [section 3B(1)(b) of the Legal Aid Act, 1969 (Act No. 22 of 1969)] section 22(1)(b) of the <u>Legal Aid Act, 2014</u>.”.</p> <p>5. The amendment of section 83 by the substitution for subsection (2) of the following subsection: “(2) If a child referred to in subsection (1) does not wish to have a legal representative or declines to give instructions to an appointed legal representative, the court must enter this on the record of the proceedings and a legal representative must, subject to the provisions of the [Legal Aid Guide] <u>Legal Aid Manual</u> referred to in [section 3A of the Legal Aid Act, 1969 (Act No. 22 of 1969)] section 23(1) of the <u>Legal Aid Act, 2014</u>, be appointed by [the Legal Aid Board] <u>Legal Aid South Africa</u> to assist the court in the prescribed manner.”.</p> <p>6. The amendment of section 89 by the substitution in subsection (5)(a) for the words “the Legal Aid Board” of the words “<u>Legal Aid South Africa</u>”.</p>

MEMORANDUM ON THE OBJECTS OF LEGAL AID BILL, 2014

1. BACKGROUND

Currently the Legal Aid Act, 1969 (Act No. 22 of 1969) (“the Act”), regulates matters relating to the provision of legal aid. The Act was passed in 1969 and has been amended on a piece-meal basis. Its revision and substitution are long overdue because many of its provisions do not accord with changed circumstances. Its application gives rise to challenges that are sought to be addressed in the Legal Aid Bill (“the Bill”). The revision of the Act is therefore intended to replace it with a new Act in accordance with prevailing circumstances, particularly the new constitutional dispensation, and to streamline its application, by substituting the provisions which currently give rise to the challenges and impact on service delivery.

2. PURPOSE OF BILL

The Bill seeks to repeal the Act, as the Act is not aligned with the Constitution of the Republic of South Africa, 1996 (“the Constitution”), and its founding principles.

3. CLAUSE BY CLAUSE ANALYSIS

3.1 Clause 1: Definitions

3.1.1 “Director” is defined as a member of the Board of Directors and “Legal Aid South Africa” is also defined so as to create a clear distinction between the two entities.

3.1.2 Other notable definitions are the definitions of “Constitution” and “legal practitioner”. The definition of “Constitution” aims to clarify the reference and applicability of “the Constitution”, as the Act in section 3(*dA*) refers to the Interim Constitution, 1993 (Act No. 200 of 1993), in so far as the State’s duty to provide legal aid is concerned. The “chief executive officer” is a new concept and is defined.

3.2 Clause 2: Establishment of Legal Aid South Africa and its relationship with Board

Clause 2 provides for the establishment of Legal Aid South Africa as a national public entity as provided for in the Public Finance Management Act, 1999 (Act No. 1 of 1999). It also establishes a Board and provides that Legal Aid South Africa is represented by the chief executive officer, director or directors as may be designated by the Board.

3.3 Clause 3: Objects of Legal Aid South Africa

Clause 3 provides for the objects of Legal Aid South Africa, namely to render or make available legal aid and legal advice and to provide legal representation at state expense, as contemplated in the Constitution and other legislation. Clause 3 also provides that the object of Legal Aid South Africa is to provide information concerning legal rights and obligations.

3.4 Clause 4: Powers, functions and duties of Board

Clause 4 provides for the powers, functions and duties of the Board. Clause 4(1)(*g*) empowers the Board to conduct public awareness programmes in order to promote public understanding of the objects, role and activities of the Board. Clause 4(2) stipulates that the Board is the accounting authority of Legal Aid South Africa, and imposes the responsibilities referred to in the Public Finance Management Act, 1999, on the Board.

3.5 Clause 5: Independence and impartiality of Legal Aid South Africa

Clause 5 of the Bill relates to the operational independence and impartiality of Legal Aid South Africa.

3.6 Clause 6: Composition and appointment of Board

3.6.1 Clause 6(1) of the Bill makes provision for the appointment of fourteen Board members by the Minister, namely a judge in active service, nominated by the Chief Justice, eight members who are experts in legal aid or an associated field, the chief executive officer of Legal Aid South Africa, three managers of Legal Aid South Africa nominated by the Board and the Director-General: Justice and Constitutional Development, or his or her nominee.

3.6.2 Clause 6(2) provides that the Minister may appoint certain alternate members.

3.6.3 Clause 6(4) provides that the Board must, whenever necessary, in the case of the eight members referred to in clause 6(1)(b), invite nominations for the appointment of persons as directors in the manner determined by the Minister in consultation with the Board.

3.7 Clause 7: Qualification for membership of Board

Clause 7 specifies, inter alia, that members must be fit and proper persons and be broadly representative of the diversity of the South African population. Members are also required, collectively, to have certain skills, for instance in business management, legal services, corporate governance, accounting or auditing skills or community based knowledge relevant to legal aid.

3.8 Clause 8: Chairperson and deputy chairperson

The judge who is appointed in terms of clause 6(1)(a) is chairperson and the Minister must designate a deputy chairperson from the eight members referred to in clause 6(1)(b).

3.9 Clause 9: Term of appointment

The term of office for the appointment of the Board members is set at not less than three years and not more than five years, as determined by the Minister, with the possibility of re-appointment, for one additional term only.

3.10 Clause 10: Termination of membership of Board

Clause 10 sets out the circumstances under which a member of the Board may terminate his or her membership, when membership of the Board ceases and the circumstances under which the Minister may remove a Board member.

3.11 Clause 11: Meetings of Board

Clause 11 provides that the Board must meet at least four times per year and that special meetings can be convened.

3.12 Clause 12: Quorum and procedure

The purpose of the provision is to enhance decision making and to achieve maximum participation of the Directors of the Board. The Bill provides for a quorum of half of its members, plus one. A decision must be taken by a majority of votes.

3.13 Clause 13: Committees of Board

Clause 13 provides that the Board may establish one or more committees to assist it in the exercising of its powers and the performance of its duties.

3.14 Clause 14: Delegation of powers and assignment of duties or functions of Board

Clause 14 provides that the Board may delegate any of its powers or assign any of its duties and functions, subject to the Public Finance Management Act, 1999. Any delegation or assignment is subject to any conditions and directions the Board may deem appropriate and does not divest the Board of the responsibility for the exercise of the power or the performance of the duty or function.

3.15 Clauses 15 and 16: Appointment of chief executive officer and functions of the chief executive officer

3.15.1 Clause 15 requires the Board, whenever necessary, to appoint a fit and proper person who has applicable knowledge and experience, as the chief executive officer. The chief executive officer holds office for an agreed term not exceeding five years, which is renewable and on the terms and conditions set out in a written employment contract which must include terms and conditions, setting out specific measurable performance standards.

3.15.2 Clause 16 sets out the functions of the chief executive officer and provides that the chief executive officer is responsible for the strategic direction and general administration of Legal Aid South Africa and must manage and direct its activities and supervise its staff.

3.16 Clauses 17 and 18: Employees and agents of Legal Aid South Africa and terms and conditions of employment of employees

3.16.1 Clause 17 provides that the chief executive officer must, in consultation with the Board and subject to clause 18, appoint as many employees or agents as may be necessary to assist Legal Aid South Africa in the exercise of its powers and the performance of its duties and functions.

3.16.2 In terms of clause 18(1) the Board may appoint employees in consultation with the Minister and the Minister of Finance, on such conditions and at such remuneration as may be determined.

3.16.3 In terms of clause 18(2), the provisions of the Labour Relations Act, 1995 (Act No. 66 of 1995), relating to collective bargaining are applicable when the terms and conditions of employment are determined as provided for in subsection (1).

3.16.4 Clause 18(3) provides that any expenditure arising from the application of this clause must not exceed the appropriated budget allocation to Legal Aid South Africa in terms of the Public Finance Management Act, 1999.

3.17 Clause 19: Protection of client privilege in certain circumstances

Clause 19 is necessary to enable Legal Aid South Africa to conduct quality assessments of the work completed by private practitioners in respect of cases allocated to them. The information and documents remain privileged information against any other party as information between attorney and client.

3.18 Clause 20: Recovery of costs by Legal Aid South Africa

Clause 20 provides for the recovery of costs by the Board. Clause 20(1) deals with the cession of rights to costs of litigants represented by Legal Aid South Africa. Clause 20(2) provides that if a notice that legal aid is being rendered in the matter is filed with the registrar or clerk of the court and with the person who is liable to pay the costs, then Legal Aid South Africa need not substitute itself on the record to recover those costs. In terms of subclause (3) costs are to be calculated and taxed, or agreed upon, as if the litigant had obtained a legal representative without the aid of Legal Aid South Africa.

3.19 Clause 21: Finances of Legal Aid South Africa

Clause 21 provides that the funds of Legal Aid South Africa consist of money appropriated by Parliament and money received from any other source.

3.20 Clause 22: Provision of legal aid by direction of courts in criminal matters

3.20.1 Clause 22(1) provides that before a court in criminal matters directs that a person be granted legal aid, the court must take into account the personal circumstances of the person concerned, the nature and gravity of the charge on which he or she is to be tried, or has been found guilty of, whether other legal representation at State expense is available, or any other factor which in the opinion of the court should be taken into account.

3.20.2 The court must also before making any decision in this regard, refer the matter, together with any report the court might deem necessary, to Legal Aid South Africa for an evaluation and a report and await Legal Aid South Africa's recommendation on whether the person qualifies for legal representation. The referral of the matter to Legal Aid South Africa is, however, subject to clause 22(3) which limits the circumstances in which a matter may be referred by the court to Legal Aid South Africa for a report (and a decision) in terms of clause 22(1)(b).

3.20.3 In terms of clause 22(2)(a), where the court refers a matter to Legal Aid South Africa for an evaluation and a report, Legal Aid South Africa must evaluate the matter in accordance with the provisions of the regulations made under clause 24 and the Legal Aid Manual under clause 23, and report on the matter. In terms of clause 22(2)(c) the report must include a recommendation whether the person qualifies for legal aid, the particulars referred to in clause 22(1)(a)(i) and (iii), and any other factor which, in the opinion of the Board, should be taken into account.

3.20.4 Clause 22(7) provides that no accused person may receive legal representation at state expense if that person has applied for the release of an amount for reasonable legal expenses in terms of section 44(1)(b) (a preservation of property order), of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998), where the court has turned down the application due to a lack of a full disclosure as required in terms of section 44(2)(b) of that Act.

3.21 Clause 23: Legal Aid Manual

3.21.1 Clause 23 provides that the Board must compile, review and amend a Legal Aid Manual whenever necessary but must review the manual at least every second year.

3.21.2 The Manual is intended to deal with more administrative issues relating to the provision of legal aid and in respect of which a legislative instrument is not necessary.

3.21.3 Subclause (1) sets out the matters that must be included in the Manual.

3.22 Clause 24: Regulations

3.22.1 Clause 24(1)(a) provides that the Minister must, on the recommendation of the Board, make regulations relating to the types of civil and criminal matters in respect of which legal aid is both provided and not provided, as well as circumstances in which limited legal aid is provided.

3.22.2 Clause 24(1)(b) provides that the Minister must make regulations relating to the requirements and criteria an applicant must comply with to qualify for legal aid (the means test), as well as the terms and conditions on which it is provided.

3.22.3 Clause 24(1)(c) provides that the Minister must make regulations relating to the policy for the approval, refusal and termination of legal aid and appeals against refusal or termination of legal aid.

3.23 Clause 25: Amendment or repeal of laws

Clause 25 deals with the consequential amendments to, or repeal of, laws which are referred to in the Schedule to the Bill.

3.24 Clause 26: Transitional arrangements

3.24.1 Clause 26(1)(a) provides that the persons holding office as a Board member under the Act are deemed to have been appointed under the Bill and continue to function in terms of the Bill for a period of 12 months after the commencement of the new Act. Subclause (1)(b) provides that the Board members constituted under subclause (1)(a) must, in the above-mentioned 12 month period, facilitate the composition and appointment of a new Board as provided for in clause 6 of the Bill. The chief executive officer holding office at the commencement of the Bill remains in office and is deemed to have been appointed in terms of the Bill.

3.24.2 Clause 26(2) provides that persons employed by Legal Aid South Africa before the commencement of the Bill remain in their posts and continue to function as in the past. They are deemed to have been appointed in terms of the Bill. Their conditions of employment will, in effect, remain unchanged. Subclause (5) provides that all Legal Aid South Africa's assets, rights, liabilities and obligations, before the commencement of the Bill, vested in the Legal Aid Board under the Act, pass to Legal Aid South Africa under the Bill.

3.24.3 Subclause (6) provides that the existing Legal Aid Guide remains in force until it is withdrawn and replaced by regulations and the Legal Aid Manual. The first regulations and Legal Aid Manual must be published within 24 months after commencement of the Bill.

3.25 Clause 27: Short title and commencement

Clause 27 provides for the short title of the Bill, and suggests that it be named the Legal Aid Act. It will come into operation at a date fixed by the President.

4. PARTIES CONSULTED

Consultation with the following stakeholders took place: The Director-General: Department of Public Service and Administration, the Director-General: National Treasury, the legal profession, the relevant Chapter 9 Institutions, Lawyers for Human Rights and the Legal Resources Centre. Legal Aid South Africa was involved in the drafting of the Bill and its Board approves of the provisions of the Bill.

5. FINANCIAL IMPLICATIONS FOR STATE

Legal Aid South Africa receives state funding. No additional financial implications are foreseen in the implementation of the Bill.

6. PARLIAMENTARY PROCEDURE

6.1.1 A Bill must be dealt with (tagged) in accordance with the procedure established by section 75 of the Constitution if it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies. Section 74 deals with Bills amending the Constitution and does not apply to the Bill under discussion. Section 76 deals with ordinary Bills affecting provinces. In terms of section 76(3) a Bill must be dealt with in accordance with section 76(1) or (2) if it falls within a functional area listed in Schedule 4 or provides for legislation envisaged in paragraphs (a) to (f) of section 76(3). In terms of section 76(4) of the Constitution a Bill must be dealt with in accordance with the procedure established by section 76(1) if it provides for legislation envisaged in paragraph (a) or (b) of section 76(4).

6.1.2 Whether a Bill is a section 76 Bill is determined in two ways. First, by the explicit list of legislative matters in section 76(3)(a) to (f) and second, whether the provisions of the Bill in substantial measure fall within a concurrent provincial legislative competence. Tagging focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect the functional areas listed in Schedule 4 and not whether or not any of its provisions are incidental to its substance.

6.1.3 The Bill seeks to establish Legal Aid South Africa whose objectives are to render or make available legal aid and legal advice and to provide legal representation at state expense, as envisaged in the Constitution and other legislation and to provide information concerning legal rights and obligations. The provisions of the Bill are discussed in paragraph 3 above. None of the provisions of the Bill provide for legislative matters listed in section 76(3)(a) to (f) and none of the provisions fall within a functional area listed in Schedule 4 to the Constitution. It can therefore not be said that the provisions of the Bill substantially affect the functional areas listed in that Schedule. The provisions of the Bill also do not provide for legislation envisaged in section 76(4)(a) or (b) of the Constitution.

6.1.4 In terms of section 35(2)(c) of the Constitution, everyone who is detained, including every sentenced prisoner, has the right “to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly”. The Bill gives effect to the rights enshrined in section 35(2)(c).

6.1.5 The Department of Justice and Constitutional Development and the State Law Advisers are therefore of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

6.2 The State Law Advisers are of the opinion that it is not necessary to refer the 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.