

REPUBLIC OF SOUTH AFRICA

LEGAL PRACTICE AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 40804 of 21 April 2017)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 11—2017]

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Amendment of section 23 of Act 28 of 2014

2. Section 23 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (b) of the following paragraph:

“(b) The Minister **[must]** may, from time to time, prescribe the areas of jurisdiction of the Provincial Councils in consultation with the Council.”. 5

Amendment of section 33 of Act 28 of 2014

3. Section 33 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“Subject to any other law no person other than a practising 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—”; and

(b) by the substitution for subsection (3) of the following subsection:

“(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]** a practising advocate, attorney, conveyancer or notary, as the case may be.”. 15

Amendment of section 91 of Act 28 of 2014

4. Section 91 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection— 20

“(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]** transaction history of that account for the period determined by the Council or the Board, as the case may be.” 25

Amendment of section 96 of Act 28 of 2014

5. Section 96 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

“(4) The **[duration of the]** National Forum **[is for a period not exceeding three years and it]** ceases to exist on the date of the meeting with the Council as envisaged in section 105(3), or such other date as the Minister may determine after consultation with the National Forum [commencement of Chapter 2].” 30

Amendment of section 97 of Act 28 of 2014

6. Section 97 of the principal Act is hereby amended— 35

(a) by the deletion in subsection (1)(a) of subparagraph (iv);

(b) by the substitution in subsection (1)(a) for subparagraph (v) of the following subparagraph:

“(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;” 40

(c) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) make rules, as provided for in section 109(2) and (3).”;

(d) by the substitution in subsection (2) for paragraph (a) of the following paragraph: 45

“(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 as well as a date on which the law societies shall be dissolved and such transfer effected: Provided that such date may not be 50

later than six months after the date of commencement of Chapter 2.”;
and

(e) by the addition of the following subsection:

“(6) The National Forum must, at least six months before the date of commencement of Chapter 2, make recommendations to the Minister for purposes of making the regulations contemplated in section 94.”.

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Amendment of section 109 of Act 28 of 2014

7. Section 109 of the principal Act is hereby amended—

(a) by the insertion in subsection (1) after paragraph (b) of the following paragraph:

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“(bA) The Minister must, after receiving recommendations from the National Forum as contemplated in section 97(6), and in consultation with the National Forum, make the regulations contemplated in section 94 by publication in the *Gazette*, before the date of commencement of Chapter 2.”; and

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(b) by the addition of the following subsection:

“(3) The National Forum must, before the date of commencement of Chapter 2, make rules as contemplated in section 95 by publication in the *Gazette* and the provisions of subsection (2)(b), (c) and (d) apply with the changes required by the context.”.

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Substitution of section 117 of Act 28 of 2014

8. The following section is hereby substituted for section 117 of the principal Act:

“Transitional provisions relating to existing law societies

117. The existing law societies must continue to perform their powers and functions until the **[commencement of Chapter 2]** date of transfer contemplated in section 97(2)(a).

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Short title

9. This Act is called the Legal Practice Amendment Act, 2017.

MEMORANDUM ON THE OBJECTS OF THE LEGAL PRACTICE AMENDMENT BILL, 2017

1. BACKGROUND

- 1.1 The Legal Practice Act, 2014 (Act No. 28 of 2014) (“the Act”), was enacted by Parliament in order to provide a legislative framework for the transformation and restructuring of the legal profession and to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic.
- 1.2 The Act was assented to on 20 September 2014 but only Chapter 10, which deals with the National Forum on Legal Profession (“the National Forum”) and transitional provisions, has been promulgated and came into operation on 1 February 2015.

2. OBJECTS OF BILL

The primary aim of the Legal Practice Amendment Bill, 2017 (“the Bill”), is to address practical and technical issues of a non-contentious nature, including the transitional provisions of the Act in respect of the implementation of the Act.

3. CLAUSE-BY-CLAUSE ANALYSIS

3.1 Clause 1

Clause 1 of the Bill amends section 6 of the Act which provides for the powers and functions of the South African Legal Practice Council (“the Council”), in order to add as functions of the Council that the Council must establish, promote, administer or assist in the establishment, promotion or administration of insurance schemes, medical aid schemes, medical benefit schemes, pension funds, provident funds, pension schemes or benevolent schemes for legal practitioners, for employees of legal practitioners, and for officials and employees of the Council. Section 59 of the Attorneys Act, 1979 (Act No. 53 of 1979), has a similar provision.

3.2 Clause 2

- 3.2.1 Clause 2 of the Bill proposes an amendment to section 23(2)(b) of the Act. Section 23 of the Act generally provides for the establishment of Provincial Councils.
- 3.2.2 Section 97(1) of the Act provides that the National Forum must, within 24 months after the commencement of Chapter 10, make recommendations to the Minister on several matters, including the areas of jurisdiction of the Provincial Councils. Section 23(2)(b) of the Act provides that the Minister must prescribe the areas of jurisdiction of the Provincial Councils in consultation with the Council.
- 3.2.3 A small amendment to clarify the position is proposed. Section 97(1)(a)(ii) is in the Act for purposes of establishing the first Provincial Councils and their areas of jurisdiction. The proposed amendment to section 23(2)(b) of the Act will allow the Minister to prescribe the areas of jurisdiction of Provincial Councils in consultation with the Council, from time to time. That is after the Act becomes fully operational. It is suggested that section 23(2)(b) be amended in order to clarify the difference between sections 23 and 97.

3.3 Clause 3

Clause 3 of the Bill amends section 33 of the Act which provides for the authority to render legal services. Clause 3 amends section 33(1) and (3) to

provide that only practising legal practitioners may perform certain acts or render certain services by inserting the word “practising”.

3.4 Clause 4

Clause 4 of the Bill amends section 91 of the Act which provides for the right of banks in respect of trust accounts. Clause 4 amends section 91(4) of the Act to provide that the Legal Practitioners’ Fidelity Fund Board (“the Board”), may also determine the period for which a bank statement must be issued. It also replaces the word “statement” with the words “transaction history”. This is deemed necessary because a statement sometimes only reflects the bank balance and details of the transaction history of the trust account may be required in certain circumstances, for instance for purposes of an inspection of the trust account of an attorney by the Council or the Board as contemplated in section 87(2) of the Act.

3.5 Clause 5

Clause 5 of the Bill amends section 96 of the Act which provides for the establishment of the National Forum. Clause 5 proposes an amendment to section 96 of the Act to provide that the National Forum ceases to exist on the date of the meeting with the Council as envisaged in section 105(3), or such other date as the Minister may determine after consultation with the National Forum.

3.6 Clause 6

3.6.1 Clause 6 amends section 97 of the Act which sets out the terms of reference of the National Forum. The mandate of the National Forum was originally intended to be limited to what was thought to be absolutely essential for purposes of preparing for the installation of the proposed new permanent regulatory structures contemplated in the Act. It has, however, been suggested that the mandate of the National Forum is perhaps not broad enough to ensure a smooth handover of ongoing work carried out by the existing regulatory bodies (the statutory law societies) when the new regulatory bodies come into existence on a particular day. The mandate of the National Forum in terms of section 97 is limited to certain rules and regulations as an interim measure. Sections 94 and 95 envisage the making of permanent regulations and rules, respectively, once the entire Act becomes operational. It is proposed in clause 6(c) and (e) that the mandate of the National Forum be broadened to advise the Minister on the first set of regulations that must be made in terms of section 94 and to make the first set of rules in terms of section 95. This will ensure that the rules and regulations are in harmony and will avoid a period during which there are no regulations while the Minister will need to make the regulations in consultation with the Council, once the latter has been established and functional. Section 95(1) provides for the Council to make rules relating to a number of issues, many of them relating to the regulation of legal practitioners. If this amendment is not promoted the implication is that, when the Council takes office on a particular day, there will be no rules governing a number of issues for which rules will be required. The Council will not be in a position to carry out all of its regulatory functions until the rules have been made and published. This could take some time. It is therefore suggested that the Act be amended to place the responsibility for making the first set of rules contemplated in section 95 on the National Forum.

3.6.2 Clause 6(a) and (b) effect technical corrections.

3.6.3 Clause 6(d), which amends section 97(2)(a), read with clause 8, which is a consequential amendment to section 117, as a result of clause 6(d), empowers the National Forum to negotiate a date on which the law

societies will dissolve, a date which may not be later than six months after the commencement of Chapter 2 of the Act. Chapter 2 regulates the establishment and operation of the (permanent) Council.

3.7 Clause 7

Section 109 of the Act sets out the role and responsibilities of the National Forum regarding the promulgation of provisional or interim rules and regulations in preparation for the establishment of the permanent regulatory structures. Since the role of the National Forum is limited in terms of making these rules and regulations, clause 6 proposes the extension of the mandate of the National Forum to make recommendations for regulations as contemplated in section 94 and to make rules as contemplated in section 95 of the Act. Clause 7 proposes consequential amendments to section 109 of the Act which confirm and give effect to the extension of the mandate of the National Forum as contemplated in clause 6.

3.8 Clause 8

Clause 8 amends section 117 of the Act which contains transitional provisions relating to the existing statutory law societies. The amendment proposes that the existing law societies must continue to perform their powers and functions until the date of transfer of assets, rights, liabilities, obligations and staff, from the current law societies to the Council or Provincial Councils as contemplated in section 97(2)(a), as amended by clause 6. This will facilitate a smooth hand-over, particularly in respect of the functions currently carried out by the law societies and the staff of the law societies.

3.9 Clause 9

Clause 9 of the Bill contains the short title.

4. FINANCIAL IMPLICATIONS

No additional financial implications are foreseen in the implementation of the Bill.

5. PARTIES CONSULTED

The Bill was submitted to the National Forum for comments. Comments were received from the National Forum.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution prescribes the procedure for the classification of Bills. A Bill must be correctly classified so that it does not become inconsistent with the Constitution.
- 6.2 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.3 The established test for classification of a Bill is that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The process is concerned with the question of how the Bill should be considered by the provinces and in the National Council of Provinces. Furthermore, how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more the Bill affects the interests, concerns and capacities of the provinces, the more say the provinces should have on the contents of the Bill.

- 6.4 Therefore the issue to be determined is whether the proposed amendments to the Act, as contained in the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 6.5 The Bill seeks to amend the Act to address practical and technical issues, including the transitional provisions of the Act. The Bill seeks to establish insurance schemes, medical aid schemes, medical benefit schemes, pension funds, provident funds, pension schemes or benevolent schemes for legal practitioners, for employees of legal practitioners, and for the officials and employees of the Council. The Bill seeks to further regulate the prescription of the areas of jurisdiction of the Provincial Councils and to provide that only practising legal practitioners may perform certain acts or render certain services. The Bill further regulates the duties of banks to furnish the Council or the Board with a signed transaction history in respect of a trust account, for the period determined by the Council or the Board, as the case may be. The Bill provides for the duration of the National Forum and provides for the National Forum to make rules and the Minister to make regulations on the recommendation of, and in consultation with, the National Forum. The Bill also seeks to clarify the matter of the transfer of the assets, rights, liabilities, obligations and staff of the statutory law societies, to the Council or Provincial Councils, as well as to provide for the dissolution date of the law societies.
- 6.6 The proposed amendments reflected have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
- 6.7 The subject matter of the proposed amendments does not fall within any of the functional areas listed in Schedule 4 to the Constitution and it does not affect provinces whereby the procedure set out in section 76 of the Constitution would be applicable.
- 6.8 Since the Bill does not deal with any of the matters listed in Schedule 4 of the Constitution, it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.
- 6.9 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.