

PREAMBLE

- 1) Provide a legislative framework
- 2) Ensure the Constitutional values
- 3) Ensure **affordable legal services**
- 4) Regulate the profession in the **public interest**
- 5) Remove barriers for entry into the profession
- 6) Ensure the **accountability** of the profession

PURPOSE OF THE ACT

- (1) **Restructuring and Transformation** of the profession
- (2) **Broaden access to justice** by fees chargeable, community services, and equal opportunities
- (3) Create a **single unified statutory body = LPC**

FUSION OF PROFESSION

One of the initial *transformational objectives of the Act* which has dominated the formulation of the Legal Practice Act has been whether to discontinue the statutory recognition of the *advocates' and attorneys' professions*.

The idea of a fusion of the advocates' and attorneys' professions was however met with fierce opposition and abandoned after 20 years of negotiations

A unified regulator, **the Legal Practice Council**, was chosen instead.

INDEPENDENCE OF THE PROFESSION

In order to achieve these objectives, it must be stressed that an independent, effective and competent legal profession is fundamental to the upholding of the **rule of law and the independence of the judiciary**.

Attempts by the government to exercise state control over advocates and attorneys is not new. *The National Party* government made similar unsuccessful attempts in the 1960s. There were frequent threats from government to place the legal profession under the control of a *central council with government-nominated members*.

This proposal was successfully resisted because it was well understood that to *remove the control of the profession to government* would have meant the end of independence of the profession and the independence of the bench.

Courts can only be independent if judges were appointed from the ranks of those in whom the rigour of **independent representation** has been inculcated by years of proficient practice.

A strong bench demands a **strong and independent legal profession**. As *Judge Johann Kriegler* once said, "Falcons do not come from hen houses."

INDEPENDENCE OF THE PROFESSION (cont)

The late Chief Justice Arthur Chaskalson warned that it will open the door to important aspects of the profession being controlled by the executive and said that it was calculated to **erode the independence** of the legal profession. He further said the judiciary, as **guardian of the Constitution**, is to ensure that everybody, including the other arms of government act lawfully.

The Constitution entrenches *democracy, the rule of law and internationally recognised human rights as foundational values of commitment made in the preamble of the Constitution to "lay the foundation of a democratic and open society"*

The Constitution also provides in **s165(2)** that the courts of this country are independent, subject only to the law and the Constitution, which they must apply impartially without *fear, favour or prejudice*.

Judicial independence is a requirement demanded by the Constitution in the public interest, without that protection judges may not be, or be seen by the public to be able to perform their duties without *fear or favour*.

INDEPENDENCE OF THE PROFESSION (cont)

The judiciary demands an **independent legal profession** to enable it to perform its constitutional duty.

An independent, effective, and competent law profession is fundamental to the upholding of the rule of law and independence of the judiciary.

There are several provisions in the Act which affect the **independence of the legal profession**

- the first issue is whether the Minister of Justice should have the right to appoint members of the Legal Practice Council (**s7**)

- the act states as its primary purpose the creation of a **"a unified body to regulate the affairs of legal practitioners."**

- the minister also has the power to dissolve the Legal Practice Council if she loses confidence in its ability to perform its functions effectively. (**s14**)

- she can then appoint an interim council, which can hold office for up to six months before new elections are held. While the minister must appoint a *retired judge* to conduct an investigation into the council, he is not bound by these recommendations.

INDEPENDENCE OF THE PROFESSION (cont)

- In addition, *any interested party*, including the minister, may on proper grounds, apply to the court for the council to be dissolved.

NB: the concern is that if there are differences on important issues, the minister has the power to dissolve the council and that is *inconsistent with the independence of the profession*. The legal profession is not a *parastatal* which the ministers may simply dissolve.

LEGAL PRACTICE COUNCIL

Section 5 - Objects of the Council

Section 6 - Powers, duties, and functions

Section 7 - Composition of the Council

- 16 legal practitioners = **10 attorneys + 6 advocates**

- **2 teachers of law**

- **3 persons appointed by the Minister**

- 1 person from the **Fidelity Fund Board**

- 1 person from **Legal Aid SA**

Sections 8-23 - Membership and operation of the Council

REGULATION OF LEGAL PRACTITIONERS

Section 24- must be admitted in the High Court if duly qualified and -

1) SA citizen or permanent resident

2) Fit and proper person

The Minister may determine the right of foreign legal practitioners to practice in SA.

RIGHT OF APPEARANCE

Section 25- legal practitioners are entitled to practice throughout South Africa

- Right of appearance in High Court, Supreme Court of Appeal and Constitutional Court if in practice longer than **3 years + LLB degree**

Candidate Attorneys may not appear in the High Court, Supreme Court of Appeal and Constitutional Court. They may only appear the *regional division* of the Magistrates' Court if previously practiced for **1 year** or completed **1 year** of *vocational training*.

REQUIREMENTS FOR ADMISSION

Section 26

1. LLB degree
2. Practical Vocational Training
3. Community Service
4. Legal Practice Management Course
5. Passed examination/assessment

REGISTRATION AS LEGAL PRACTITIONER

Section 30

Must apply to the Council once admitted for enrolling your name on the **Roll of Legal Practitioners** - attorney or advocate

Section 31

Cancellation or suspension of registration

Section 32

Conversion of registration at any time: attorney-advocate-attorney

AUTHORITY TO RENDER LEGAL SERVICES

Section 33

Only legal practitioners may, in expectation of any fee -

- appear in a court/board/tribunal

- draw up pleadings

No person may hold himself out as a legal practitioner or imply to be one if not qualified

If **suspended or removed**, may not render legal services.

FORMS OF LEGAL PRACTICE

Section 34

An attorney: may render legal services upon receipt of a request directly from the public.

FORMS OF LEGAL PRACTICE (cont)

An advocate: may render legal services upon receipt of a brief from an attorney OR upon receipt of a request directly from the public if in possession of a FIDELITY FUND CERTIFICATE.

The council must take recommendations regarding:

- multi-disciplinary practices
- recognition of paralegals

FEES IRO LEGAL SERVICES

Section 35

The South African Reform Commission must report back to the minister regarding determination of fees

- 1) Maximum tariffs
- 2) Access to Justice

CODE OF CONDUCT & DISCIPLINARY BODIES

Section 36 - 44

The Council must develop a code of conduct and establish disciplinary committees.

LEGAL SERVICES OMBUDSMAN

Section 45-52

To **protect and promote** the public interest.

Ensure **fair and effective** investigation of complaints

Promote high standards of integrity

Promote independence of the profession

THE LEGAL PRACTITIONER'S FIDELITY FUND

LIABILITY OF THE FUND - *Section 55*

The Fund is liable to reimburse persons who suffer pecuniary loss 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.

LIMITATION OF LIABILITY OF FUND - *Section 56*

The Fund is not liable in respect of any loss suffered:

- by a **family member** of the household of any attorney or advocate who committed the theft.
- by any **partner or co-director** in the trust account practice in which the theft occurs
- by any person as a result of any theft committed after the victim of the theft received *notice in writing* from the Council or Board warning against the use or continued use of the legal services of the trust account practice concerned.
- by any person as a result of theft of money which any attorney or an advocate has been instructed to invest on behalf of such a person.

CLAIMS AGAINST THE FUND

THE LEGAL PRACTITIONER'S FIDELITY FUND (cont)

No person has a claim against the fund in respect of any theft, unless-

(a) **written notice** of the claim is given to the Council 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

(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 they may reasonably require.

Any action against the Fund in respect to loss suffered by any person as a result of theft, must be instituted within **one year**

Industrial & Commercial Factors v Fidelity Fund

Money must be entrusted in the course of practice.

King v Fidelity Fund

- Theft of trust money
- Factoring scheme for estate agents' commission
- Claim excluded

TRUST MONIES

S84- must be in possession of a Fidelity Fund certificate.

S86(1)- every attorney must operate a trust account

THE LEGAL PRACTITIONER'S FIDELITY FUND (cont)

S86(5)- interest accrued must be paid to the Fund

S87- Accounting records

