

National Forum
SA Law Reform Commission
1st floor, Spooral Park Building
Lenchen South Avenue
Centurion
Attention: Ms Charity Mhlungu, Executive Officer
By email: bongumede@justice.gov.za

26 March 2018

Dear Madam

WRITTEN SUBMISSION ON THE DRAFT RULES REQUIRED UNDER SECTIONS 95(1), 95(3) AND 109(2) OF THE LEGAL PRACTICE ACT, 2014

ClearlawSA Pty Ltd (Clearlaw) is pleased to submit comments on these important Rules. Clearlaw has been established to provide high quality continuing legal education. We therefore have a keen interest in the progress of the National Forum towards the commencement of the Legal Practice Act, 2014 (the Act). Our comments are limited to the provisions of **Part IV, Education and Training** of the Rules:

1. Rule 20.7 provides that the Council will determine the “*areas of knowledge*” as well as the “*standards of proficiency*” required of persons wishing to become attorneys or advocates, from time to time. These areas and standards are to be published “*for the information of legal practitioners and candidate legal practitioners*”. The term “*for the information of*” suggests that the areas of knowledge and standards of proficiency will not be binding on legal practitioners.
 - a. It is not clear what is meant by “*areas of knowledge*” and this term is not defined in the Rules or the Act. Since the determination of the Council is merely “*for information*”, this is not particularly problematic, but it would be helpful to understand what is meant by the phrase “*areas of knowledge*”. Perhaps some examples can be given in the Rule.
 - b. The term “*standards of proficiency*” is not defined either but this can be more easily interpreted to encompass the competencies expected of a legal practitioner. However, if this is the case, then it would seem to be appropriate to publish these standards not only for information, but within the Rules or even the Regulations, so that they are binding. If there is another instrument in which binding standards will be published, then it may also be more sensible to omit reference here or otherwise to cross-reference the other instrument. The provision is otherwise somewhat lacking in weight.

2. The provisions of Rule 21.1.1 require persons intending to serve under a practical vocational training contract (essentially candidate attorneys) to provide certain documents to the South African Legal Practise Council (Council), and to provide “*proof to the satisfaction of the Council that he or she is a fit and proper person...*”. As a person who has not yet begun their life in law, it is our view that it may be difficult to establish what it is exactly that would qualify a person in this early stage, as “*fit and proper*”. We discuss this in more detail below:

a. Section 95 of the Act requires the Rules to, among other things, set out:

“...*(p) procedures and directions pertaining to the assessment of persons undergoing practical vocational training as contemplated in section 28(1);*

(q) the level of competence to be achieved for the admission and enrolment of a person as a legal practitioner as contemplated in section 28(2);...”

The Act therefore anticipates that the Rules would be fairly specific as to the requirements.

b. The Financial Services Board (FSB) has established its own test for the same standard i.e. fit and proper. This test consists in questions about whether a person is morally suitable, a person of integrity and honesty, competent and solvent. The FSB has also proposed to measure its members against the benchmark of their commitment to and completion of, continuing professional development. For each type of advisory service, a member is required to have completed a minimum number of hours of post-qualification education. This requirement in the Rules may be one way that the Rules could more fully carry out the intention of the Act.

c. In an article¹ by Professor Magda Slabbert (Department of Jurisprudence at UNISA), she notes that the test of “fit and proper” in relation to a person is in essence applied retrospectively when considering whether the actions or omissions of a person could be said to be those of a fit and proper person. She notes that the term is also interpreted subjectively and that the term requires continuous moral development. In the article, Professor Slabbert cites some of the qualities of a person that may indicate that they are fit and proper which are not dissimilar to those adopted by the FSB but includes capacity for hard work, respect for legal order, a sense of fairness, and dignity.

d. In the circumstances it may be appropriate to set out with more precision what it is that the Council will consider to constitute a “*fit and proper person*”, without necessarily limiting the list to but so as to indicate how a candidate attorney in particular, could meet the requirements of Rule 21.1.1. The same would apply to Rule 21.2.1. The provisions of Rule 23 may be of use and we have referred to them in paragraph 3.

3. Rule 23 refers to the “*levels of competence*” for admission and enrolment as a legal practitioner. An applicant must satisfy the Council that he or she has “*attained a level of competence contemplated in the Act and the rules regarding the required knowledge, skills and values that will enable him or her*” to do certain things. Ten criteria are set out in this Rule, including “*in general to conduct himself or herself in a*

¹ Slabbert, M. “The requirement of being a “fit and proper” person for the legal profession”. 2011. PER/PELJ Volume 14 No 4.

*manner that enhances the repute of the legal profession in terms of independence, integrity, competence and the promotion of justice in South Africa*².

- a. Without an appropriate cross-reference, Rule 24.1 seems to anticipate a different set of assessments for enrolment and admission from the requirements of Rules 21 and 23. A cross-reference to the preceding sections would clarify that the same requirements will apply in Rule 24.1. The person carrying out the assessment must know what is anticipated from the person seeking admission and enrolment and be able to give reasons for the appointment or rejection as the case may be.
 - b. It may also be appropriate to set out what it is that the Council will consider to constitute a “*fit and proper person*” in order for a legal practitioner to remain on the roll, i.e. that he or she is a “*fit and proper person*” on an ongoing basis (the provisions of Rules 21, 23 and 24 all apply to admission as a candidate attorney or enrolment and admission as a legal practitioner).
 - c. It is with this in mind that we propose that the Rules would also include reference to fulfilling the requirements of continuing legal education in order to be considered to continue to be a fit and proper person, and to remain on the roll. A draft for your consideration is included at paragraph 7 below.
4. Within Rule 23 there are several references to the “*branch*” of the legal profession. This is not defined, therefore:
- a. It is unclear if this is intended to refer to a niche form of law, such as for example, conveyancing or competition law, or if this is intended to refer to more common departments such as finance or property.
 - b. One of the reasons why it is necessary to provide more clarity about the meaning of this word “*branch*” (if it is necessary to use it at all) is that Rule 23.3 for example, requires a legal practitioner to practise “*in accordance with the rules of ethics of the relevant branch of the legal profession to which the applicant seeks admission and enrolment*”.
 - i. Enrolment is required for attorneys and advocates. There is no indication of any other type of legal practitioner that the Act is intended to address.
 - ii. The wording of this Rule suggests that different areas of law (if this is what “*branch*” means) may require different sets of ethics which does not make any sense.
 - c. We do not believe that this can be the intention of the Rules. The ethics of a legal practitioner should – in the absence of any cogent reason to the contrary – be set at the same high standard regardless of what specialty is practised. We suggest that the word “*branch*” be omitted.

² Rule 23.10.

5. Rule 24.2 is limited in its application to persons that are “*practising attorneys*”. It is likely that the persons who are carrying out the practical vocational training and assessments may no longer be practising since they are in teaching role, or an assessment role. It would seem that what is required is that a person *has been* a practising attorney for at least seven years before they can undertake assessments. Rule 24.2.1 should therefore read “...rule 20.2, shall have been a practising attorney for at least seven years”. The same amendment will be required in relation to Rule 24.2.2.
6. As we note in paragraph 3(b) above, the Rules do not contain a requirement that a person who has been admitted to the relevant roll would need to comply with any particular requirements (other than in relation to the Fidelity Fund) in order to remain on the roll. As a result, the emphasis in the Rules on being a “*fit and proper person*” is lost once an applicant has been admitted and enrolled, unless a legal practitioner is subject to disciplinary proceedings. In other words, unless a legal practitioner does something wrong, they continue to remain on the roll once admitted and the implication is they no longer need to be a fit and proper person.
7. We submit that having regard to the requirements of sections 5(h), 6(1)(a)(ix), 6(5)(e) and 6(5)(f) and (g) of the Act, it would be appropriate to introduce, via the Rules, a requirement for remaining on the roll under section 30 which gives effect to these sections as these provisions of the Act are otherwise not addressed in the Rules.
 - a. In paragraph 3 above we examined the references to the standard of “*fit and proper person*” in the context of application for a candidate attorney position, and in the context of admission and enrolment. It is our considered view that this consideration should not be time-limited, or considered only when an attorney is being disciplined, in a retrospective fashion.
 - b. There has never been a requirement to continue one’s professional development in the South African legal profession. It is unclear why this is as it cannot be the case that attorneys do not need to improve or hone their skills, or that attorneys do not need to continually evaluate themselves and their level of knowledge, approach to clients and service, and their knowledge of relevant aspects of the law. It would be not only arrogant to assume that this profession, unlike so many others, does not have to commit to ongoing education and development.
 - c. This is more so the case in a country where a significant number of admitted attorneys do not have a system of support or learning in either the public or private sector unless they enrol in a university course at their own expense. The commitment evidenced by the Act to transformation must also find application in training – and in our view, this should not stop at the level of candidate attorney.
 - d. Absent a reference to mandatory continuing professional development in the Rules, this important initiative will have been ignored – there will in fact be a lacuna in the Rules. The intention of the legislature must, in our view, have been to ensure that professional development for the legal profession be introduced and maintained. It must therefore be given effect to in the Rules and in due course, the Regulations.

- e. Such a requirement could be introduced as a new Rule 25, with the numbering of the existing Rule 25 and the remaining Rules being adjusted accordingly. We have drafted the Rule we propose may address this lacuna, for your review:

25. Requirements for a legal practitioner to remain on the roll of attorneys [sections 5(h) read with sections 6(1)(a)(ix), 6(5)(e) and 6(5)(f) and (g)]

- 25.1 The Council shall issue a practising certificate to every attorney on the roll on an annual basis to confirm that the attorney concerned is permitted to render legal services under section 33 of the Act, subject to the provisions of this Rule.
- 25.2 The Council shall, within six months of the commencement of the Act, determine the requirements for compulsory post-qualification professional development for attorneys that have been enrolled.
- 25.3 The requirements shall take account of those attorneys who, prior to the commencement of this Act, had been admitted to the roll.
- 25.4 Among other things, the requirements shall include the completion of a minimum number of hours of training over a period to be determined by the Council, and whether through lectures, seminars or any other forms of learning requiring the physical presence of the legal practitioner concerned, or through an approved distance learning method or digital transmission, telephone or video conference call, audio tape or electronic network.
- 25.5 The Council shall institute a system to monitor the compliance of legal practitioners and reporting by legal practitioners in this regard, on an ongoing basis.
- 25.6 Unless the Council is satisfied that a legal practitioner has fulfilled the requirements anticipated in this Rule, the legal practitioner shall not be eligible for a practising certificate for the following period.

We trust that this submission has been of assistance. Please do not hesitate to contact us if you require further information or have any queries. We are available for any public hearings that may be held.

Yours faithfully



**Kerron Calenborne
Managing Director**