

# REPORT OF THE TASKFORCE ON LEGAL SECTOR REFORMS

## **SUBMITTED BY**

THE CHAIRMAN, TASKFORCE ON LEGAL SECTOR REFORMS

MR. FRED OJIAMBO, MBS, SC

TO

THE HONOURABLE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA

PROF. GITHU MUIGAI, EGH, SC

PREFACE & LETTER OF TRANSMISSION

The Taskforce on Legal Sector Reforms was set up by the Hon. Attorney General,

Prof. Githu Muigai, EGH, SC on 26<sup>th</sup> September, 2016 to evaluate, review and make

recommendations and reform proposals on:

a) The suitability and quality of legal education and professional legal training,

curriculum, standards, entry qualification criteria, and delivery systems;

b) The legal and institutional frameworks for regulating and licensing legal

education providers;

c) The legal sector practice licensing and membership process, institutional

structure, criteria and participation mechanisms;

d) The professional and ethical standards, codes of conduct, guidelines of the

legal profession and adherence mechanisms thereto; and

e) The legal and institutional disciplinary framework for the legal profession.

The Taskforce was required to complete its work and submit its final report to the

Attorney-General within four months from the date of its appointment. The

Taskforce sought two extensions of its tenure which were granted, vide, Gazette

Notice Nos. 1822 and 5744 of 2017 dated 1st March 2017 and 9th June, 2017

respectively.

The Taskforce has now completed its report and is immensely pleased to present it

to the Hon. Attorney-General, Prof. Githu Muigai, EGH, SC.

Mr. Fred Ojiambo, MBS, SC

Chairman of the Taskforce

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#### TASKFORCE MEMBERS

The Gazetted Taskforce Members comprised of the following:

Fred Ojiambo, MBS, SC Chairperson, Council of Legal Education & Chairman of the Taskforce Mbage Ng'ang'a Chairperson, Kenya Law Reform Commission \*Keriako Tobiko Director of Public Prosecutions Anne Amadi Chief Registrar of the Judiciary Immediate Former Chief Executive Officer, \*David Some (Prof) Commission for University Education Beauttah Siganga Chairperson, Advocates Complaints Commission Chief Executive Officer, Judiciary Training James Otieno-Odek (Prof) Institute Chairperson, Disciplinary Tribunal Ezekiel Wanjama Isaac Okero President, Law Society of Kenya Secretary/ Chief Executive Officer- Council of W. Kulundu- Bitonye (Prof) Legal Education PLO Lumumba (Prof) Secretary/ Chief Executive Officer- Kenya School of Law Patricia Kameri Mbote, SC Immediate former Dean, University of Nairobi Parklands School of Law (Prof) Muthoni Kimani Snr. Deputy Solicitor General, Office of the Attorney General Maryanne Njau Kimani, Head Justice Department, Office of the Attorney **OGW** General Christine Agimba Deputy Solicitor General, Office of the Attorney General

**Note**: The members listed above are those gazetted in Gazette Notice No. 8116 of 2016. However, it is worth noting that the Director of Public Prosecutions Mr. Keriako Tobiko and Prof. David Some (former CEO, CUE) never attended any session of the Taskforce nor were they represented.

## **TASKFORCE SECRETARIAT**

- 1. Ms. Mary Mutugi
- 2. Ms. Wanjiku Wakogi
- 3. Ms. Emily Chweya
- 4. Mrs. Phoebe Kariuki
- 5. Mercy Muthuri
- 6. Ms. Mercy Wambua
- 7. Mr. Moses Muchiri

- Council of Legal Education
- Office of the Attorney General
- Office of the Attorney General
- Council of Legal Education
- Kenya Law Reform Commission
- Secretary/ CEO, Law Society of Kenya
- Council of Legal Education



#### **CHAPTER 1 - INTRODUCTION**

"A profession's most valuable asset is its collective reputation and the confidence, which that inspires" (Bolton v Law Society [1994] 2 All ER 486, 492-3)

#### A. BACKGROUND

- 1. Prior to 1949, the legal profession in Kenya was regulated by common law principles. However, following the enactment of the Law Society of Kenya Act of 1949, the legal fraternity was transformed into a "professional association" that regulates itself, including the discipline of its members. That Act was later revised in 1952, 1962, 1992 and most recently in 2014 and repealed by the current Law Society of Kenya Act, 2014. As for legal education and training, admissibility to the Bar, professional rules of conduct and etiquette, the legal profession is regulated by the Legal Education Act No. 27 of 2012, the Kenya School of Law Act No. 26 of 2012, the Advocates Act, Cap 16 as revised in 2014 and the Law Society Act No. 21 of 2014.
- 2. Kenya's legal profession has undergone tremendous growth as evidenced by the number of lawyers and various legal institutions in play. As at 2016, the Law Society of Kenya membership comprising of all admitted advocates in Kenya are over thirteen thousand in number. With a population of over forty five million (45,000,000) this represents a ratio of one advocate to 3460 which is comparatively low. The question of the size of the Kenyan Bar is not merely one of numbers but invariably about competence, skills and ethical practice. There is need for a focus shift away from numbers *per se* to quality, improved ethical practices and professional conduct, reduction in rent seeking and improved access to legal aid in line with international best practices. Further, there is a

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<sup>&</sup>lt;sup>1</sup> South Africa for example has a ration of approximately 1:2200, and the UK has a ratio of approximately 1:500 <sup>2</sup> See, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted vide UN General Assembly Resolution 67/187 on 20<sup>th</sup> December, 2012. See generally, Economic and Social Council resolution 2007/24 of 26 July 2007, entitled "International cooperation for the improvement of access to legal aid in criminal justice systems, particularly in Africa." See also, Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

very narrow range of practise areas and concentration. The distribution of the number of practising advocates has also favoured urban areas as opposed to rural areas.

- 3. While aspiring to be a premier profession in Africa and indeed in the global marketplace, the Kenyan legal profession has experienced several challenges:
  - a) With regard to legal education and training, key challenges have been experienced including but not limited to:
    - (i) Need to ensure that legal education and training responds to rising demands for competent and professional training which is in touch with market trends and international best practices;<sup>3</sup>
    - (ii) An exponential increase in the number of students admitted to law programmes without a corresponding increase in facilities and resources.
    - (iii) Admission of unqualified students i.e. persons who do not meet the prescribed minimum admission thresholds to law programmes.
    - (iv) Slow growth in the growth of the ATP segment of training leading to high numbers at the Kenya School of Law
    - (v) Deteriorating quality standards of training and apprenticeship as a result of lack of a system of continuous mentorship and/or a distortion of the mentorship structure;
    - (vi) Lack of comprehensive guidelines on open and distance learning for law programmes.

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<sup>&</sup>lt;sup>3</sup> See, The Report of the Ministerial Taskforce on the Development of a Policy and Legal Framework for Legal Education in Kenya, August 2005 (also known as the Muigai Report, 2005) at paragraph 3.

- (vii) The high failure rate in Bar Examinations leading to wastage of resources and investment.
- b) With regard to legal sector practice, licensing, membership processes; the challenges experienced include but are not limited to:
  - (i) Deterioration in the quality, professional capacity and competence of legal practitioners;
  - (ii) Decline in the standard of decorum and propriety of practitioners in public and private practice spaces;
  - (iii) Increase in reported cases of professional misconduct and unprofessional conduct of legal practitioners;
  - (iv) Decline in public confidence, illustriousness and prestige of the legal profession;
  - (v) Erosion of traditional sense of common standards and values of the legal profession.
  - (vi) Increased levels of unhealthy competition driven by profit dynamics;
  - (vii) Decline in public service and *pro-bono* work.
  - (viii) Lack of clarity on specific roles the LSK, CLE and the Judiciary in the admission process and lack of clear and coherent admission process.
  - (ix) Inadequate coordination mechanism within the various segments of the legal fraternity;
  - (x) Increased sense of informality and nonchalance in the conduct and disposition of the profession; and

- (xi) A diminishing use of sanctions exacerbated by a lack of a robust implementation of the Code of Conduct<sup>4</sup>.
- c) With regard to professional and ethical standards and disciplinary framework the key challenges experienced include but are not limited to:
  - (i) The overlaps and/or duplication of aspects of regulation, oversight and disciplinary structure and a resultant lack of clarity or clear definition of the role of state and non-state actors in matters pertaining to Advocates conduct and discipline;
  - (ii) Lack of adequate mechanisms of monitoring professional standards, compliance and discipline;
  - (iii) Limited enforcement options for decisions, awards and findings of the Advocates Complaints Commission and the Disciplinary Tribunal.
- 4. Relatedly, the quality of jurisprudence emanating from judges and judicial officers in some cases lacks coherence and legal gravitas. Concern about the quality of judicial decisions that on occasion are in direct conflict and/or contradicting other precedent, lacking in sound reasoning and legal analysis is rife.
- 5. There have also been reported cases of Senior Counsel not playing a significant role in the stewardship or demonstrating the leadership required to restore and sustain the dignity of the legal profession in Kenya. In few isolated instances, some Seniors Counsel have themselves behaved in a manner unbecoming of their designation as persons "leader[s] by example at the bar, participation in matters affecting the bar, and by their encouragement and advice to the junior at the bar."<sup>5</sup>

<sup>&</sup>lt;sup>4</sup> The Law Society of Kenya passed the Code of Conduct in September 2015 for implementation.

<sup>&</sup>lt;sup>5</sup> Extract from a speech given by the Hon Justice Kiefel on 3 March 2012 at the Bar Association of Queensland's annual conference reported and available at http://www.austlii.edu.au/au/journals/NSWBarAssocNews/2012/16.pdf at page 55.

- 6. The Constitution of Kenya, 2010 which has placed a higher premium on the regulation of and training in legal practice through the national values and principles of governance which are binding on all persons and entities in Kenya. In view of the above concerns, there is need to review and evaluate the legal sector practice licensing and membership process, institutional structure, criteria, professional and ethical standards, codes of conduct, and guidelines of the legal profession and adherence mechanisms with a view to enhancing the image of the legal practice in Kenya and protect the public interest.
- 7. The legal profession will only maintain the prestige and restoration of nobility if members commit themselves corporately and individually to high standards of ethics, integrity and professionalism anchored on an enforceable compliance and audit mechanism. Moreover, advocates have a higher calling and duty to demonstrate professional judgement in course of their practice as beholden officers of the court, fellow counsel, themselves and the nation as well as the clients.
- 8. Cognizant of this fact, it is incumbent upon the profession to design appropriate policy, regulatory, enforceable and deterrence mechanisms that will restore public trust. These mechanisms should broadly cover legal education and professional training, admission to the Bar, practice to conduct and discipline.

# B. APPOINTMENT OF TASKFORCE

9. Aware of the aforementioned challenges besetting the legal profession in Kenya, the Attorney General, Professor Githu Muigai, vide Gazette Notice No. 8116 of 7<sup>th</sup> October, 2016 (Annex 1) constituted a taskforce comprising the following members:

Table 1 - Taskforce on Legal Sector Reforms Members

Fred Ojiambo, SC - Chairperson, Council of Legal
 Education & Chairman of the Taskforce

2.	Mbage Ng'ang'a	-	Chairperson, Kenya Law Reform
			Commission
3.	Keriako Tobiko	-	Director of Public Prosecutions
4.	Anne Amadi	-	Chief Registrar of the Judiciary
5.	David Some (Prof)	-	Chief Executive Officer/Secretary,
			Commission for University Education
6.	Beauttah Siganga	-	Chairperson, Advocates Complaints
			Commission
7.	James Otieno-Odek (Prof)	-	Chief Executive Officer, Judicial
			Training Institute
8.	Ezekiel Wanjama	-	Chairperson, Disciplinary Tribunal
9.	Isaac Okero	-	President, Law Society of Kenya
10.	W. Kulundu- Bitonye (Prof)	-	Secretary/ Chief Executive Officer-
			Council of Legal Education
11.	PLO Lumumba (Prof)	-	Secretary/ Chief Executive Officer-
			Kenya School of Law
12.	Patricia Kameri Mbote, SC	-	Dean, University of Nairobi Parklands
	(Prof)	٦	School of Law & Chairperson Kenya
			School of Law Board
13.	Muthoni Kimani	-	Snr. Deputy Solicitor General, Office
			of the Attorney General
14.	Maryanne Njau Kimani, OGW	-	Head Justice Department, Office of
	X		the Attorney General
15.	Christine Agimba	-	Deputy Solicitor General, Office of the
V			Attorney General

- 10. The Taskforce was mandated with the following terms of reference:
  - (i) To evaluate, review and make recommendations and reform proposals on -
    - (a) The suitability and quality of legal education and professional training curriculum, standards, entry qualification criteria and delivery systems;

- (b) The legal and institutional framework for regulating and licensing legal education providers;
- (c) The legal sector practice licensing and membership process, institutional structure, criteria and participation mechanisms;
- (d) The professional and ethical standards, codes of conduct, guidelines of the legal profession and adherence mechanisms thereto; and
- (e) The legal and institutional disciplinary framework for the legal profession.
- (ii) In the performance of its duties, the Taskforce was required to -
  - (a) Map out issues, functions, responsible institutions and financing strategy for each identified challenge area and for each reform preform proposal;
  - (b) Identify international and regional best practices in the management, oversight, strategic intent, and regulation of the particular aspect of the legal profession under consideration;
  - (c) Consider and propose appropriate mechanisms for collaboration and cooperation among institutions involved in the particular aspect of the legal profession under consideration;
  - (d) Outline the policy, legislative, institutional structures and administrative reform proposals for each identified legal challenge area;

- (e) Hold such number of meetings in such places and at such times as the taskforce considered necessary for the proposer discharge of its functions;
- (f) Use official reports of any previous inquiries relevant to its mandate;
- (g) Establish such sub-committees as it required to facilitate implementation of its mandate;
- (h) Co-opt any other persons as and when necessary to assist in the achievement of the Terms of Reference;
- (i) Make reports or updates, every two weeks, to the Attorney General outlining any matters that may require urgent action;
- (j) Receive views from practitioners, policy making bodies and other stakeholders with relevant information;
- (k) Carry out such assessments, studies or researches as may inform its mandate;
- (l) Carry out such other function including broad based consultations as may be necessary and incidental to the foregoing.
- 11. The Taskforce was required to complete its work and submit its final report to the Attorney-General not later than four (4) months from the date of its first appointment which period was to lapse on 26<sup>th</sup> January 2017. The Attorney-General however at his discretion vide **Gazette Notice No. 1822 of 3<sup>rd</sup> March 2017** (Annex 2) extended the tenure of the Taskforce to the 17<sup>th</sup> May 2017 with effect from 26<sup>th</sup> January 2017.
- 12. The Secretariat of the Taskforce was based at the Council for Legal Education with co-opted representative officials from the Office of the Attorney General

& Department of Justice, the Kenya Law Reform Commission and the Law Society of Kenya. At its meeting held on 26<sup>th</sup> August 2016, the Taskforce members discussed and resolved that Prof. Kulundu-Bitionye, the CEO/Secretary, Council of Legal Education would spearhead and oversee the Secretariat which comprised the following members:

#### Table 2 - Taskforce Secretariat

1. Ms. Mary Mutugi - Council of Legal Education

2. Ms. Wanjiku Wakogi - Office of the Attorney General & Dept. of

**Justice** 

3. Ms. Emily Chweya - Office of the Attorney General & Dept. of

Justice

4. Mrs. Phoebe Kariuki - Council of Legal Education

5. Mercy Muthuuri - Kenya Law Reform Commission

6. Ms. Mercy Wambua - Secretary/ CEO, Law Society of Kenya

7. Mr. Moses Muchiri - Council of Legal Education

#### C. THEMATIC GROUPS

- 13. In order to effectively and organically discharge its mandate and with a view to exhaustively examine all issues which the Taskforce was tasked to look into vide Gazette Notice 8116 of 2016, the Taskforce convened its inaugural meeting on 26<sup>th</sup> August 2016. Members discussed and resolved that the Taskforce was to discharge its mandate in three (3) thematic groups:
  - Theme 1: Legal Education, Legal training and regulation of Legal Education Providers.

Under this theme, the Taskforce reviewed the currency, suitability and quality of legal education and professional training curricular, standards, entry qualification criteria at all segments of legal training beyond academic qualifications, and delivery systems. The Taskforce also reflected upon the legal

and institutional framework for regulating and licensing legal education providers. The following specific items were discussed under this theme:

- → Entry qualifications
- → Curricular
- → Pupillage
- → Teaching methods and resource
- → Professional legal training (Advocates Training Programme)
- → Structure and mode of examination
- → Mentorship
- → Accreditation standards/ benchmarks
- → Collaboration between the Commission for University Education (CUE), Council of Legal Education (CLE), Universities, Law Society of Kenya, the Judiciary and other stakeholders
- → Recognition of foreign academic and professional qualifications
- → The place of the Bar examination

#### • Theme 2: Practise Issues

Under this theme, the Taskforce reviewed the legal sector practice licensing and membership processes, LSK institutional structures, criteria for various segments of memberships and make recommendations for reform. The following specific items were discussed:

- → Practice criteria/ categories of practice
- → Unqualified persons
- → Other qualifications: regulation of paralegals
- → Senior Bar/ Counsel
- → Specialization in the practice of law/ modes of practice and multidisciplinary practice
- → Practice in marginalized areas
- → LSK membership criteria
- → Cross border practice

- → Continuing professional development (CPD)
- → Access to justice, legal aid and linking pro bono work with practice qualification
- → Remuneration of Advocates/ review of the Advocates Remuneration Order
- → Practice restrictions
- → Role of ancillary agents
- → Mentorship
- → Foreign advocates and temporary admission
- → Emerging legal practice areas

The Taskforce also reviewed existing professional and ethical standards, codes of conduct, guidelines and recommended appropriate reforms on the following specific items:

- → Currency of ethical standards
- → Compliance and enforcement framework
- → Criminal misconduct
- → Emerging professional and ethical issues
- → Professional negligence, misfeasance, misconduct and penalties
- → Disbarment and restitution

#### • Theme 3: Discipline

Under this theme, the Taskforce reviewed the legal and institutional disciplinary framework for the legal profession and made appropriate recommendations for reform on the following specific areas:

- → Multiple actors in the discipline of Advocates
- → Role of the judiciary in view of section 56 of the Advocates Act
- → Partnerships in enhancing disciplinary mechanism
- → Protection from double jeopardy
- → Appellate processes

14. The Taskforce considered the relevant laws and regulations and studied the findings of previous reports and relating to the mandate of the Taskforce as listed hereunder:

#### A. The Constitution of Kenya, 2010

#### B. Reports considered

- (i) The Denning Report on Legal Education for Students from Africa, 1961;
- (ii) The Report of the Task Force on the Status and Management of the Kenya School of Law 1994 known as the Akiwumi Report, 1994;
- (iii) Kwach Committee Report, 1998;
- (iv) The Report of the Ministerial Taskforce on the Development of a policy and Legal Framework for Legal Education in Kenya 2005 (also known as the Muigai Report);
- (v) Mark Stobbs Report on the Effectiveness of the Disciplinary Committee of The Law Society of Kenya and the Complaints Commission;
- (vi) The Draft Concept Paper on the Development of a National Policy on Legal Education and Training in Kenya.

### C. Statutes & subsidiary legislation considered

- (i) The Law Society of Kenya Act, 2014
- (ii) The Legal Education Act, No. 27 of 2012
- (iii) The Kenya School of Law Act, No. 26 of 2012
- (iv) The Universities Act, No. 42 of 2012
- (v) The Universities Amendment Act, No. 48 of 2016
- (vi) The Advocates Act [Cap. 16, Laws of Kenya]
- (vii) The East African Community Act, 2004

- (viii) Kenya National Qualifications Framework Act, No. 22 of 2014
- (ix) The Public Officers Ethics Act, Cap. 183
- (x) The Public Service (Values & Principles) Act, No. 1A of 2015)
- (xi) The Legal Education (Accreditation and Quality Assurance) Regulations 2016
- (xii) Kenya School of Law Regulations, 2015
- (xiii) Legal Aid Act, No. 6 of 2016
- (xiv) Advocates (Disciplinary Committee) Rules, 1990
- (xv) Advocates (Complaints Commission) Rules, 1991
- (xvi) Advocates (Complaints Commission) (Structure & Procedure), Rules 2003
- (xvii) Advocates (Accountant's Certificate) Rules, 1967
- (xviii) Advocates (Continuing Professional Development) Rules, 2014
- (xix) Advocates (Marketing and Advertising) Rules, 2014
- (xx) Advocates (Professional Indemnity) Regulations, 2004
- (xxi) Advocates (Deposit Interest) Rules, 1967
- (xxii) Advocates (Accounts) Rules, 1966
- (xxiii) Advocates (Remuneration) Order, 2014
- (xxiv) Draft LSK Regulations (unpublished)

#### D. Bills

(i) Advocates Bill, 2015

#### E. Others

- (i) Mutual Recognition Agreement between the Competent Authorities of Advocates in the East African Community
- 15. Chapters two (2) and three (3) of this report reflect the findings and recommendations of the Taskforce with respect to thematic area 1. Chapter four (4) presents the findings and recommendations on thematic area 2, while chapter five (5) presents the findings and recommendations of the Taskforce with respect to thematic area 3. The conclusions, summary, way forward and

take-away reflections of the Taskforce have been crystallized in the final chapter six (6) of the report.



#### CHAPTER 2 - THE REGULATION OF LEGAL EDUCATION IN KENYA

#### A. BRIEF HISTORY ON DEVELOPMENTS IN LEGAL EDUCATION IN KENYA

- 16. Legal education refers to "experiences and training which help different kinds of people understand and use law in society." Legal education and training in Kenya has undergone tremendous transformation over the last five decades. Interestingly, for many years, legal education and training was under the superintendence of no clearly discernible regulatory framework. One commentator has noted that "in the seventy years of colonial rule in Kenya, no facility for legal education was set up in the country" and that during the colonial era, lawyers were assigned relatively minor roles. Admittedly, University, Diploma and Continuous Professional Development had not been recognized as integral parts of legal education.
- 17. Regulation of the legal profession in East Africa is traceable to the East Africa Legal Practitioners' Rules, promulgated in 1901. The Rules permitted Barristers, and Solicitors from England and pleaders from Indian Courts to practice law in East Africa. However, the Legal Practitioners Act, 1906 restricted practice by pleaders and notaries public. A more encompassing version of East Africa Legal Practitioners' Rules promulgated in 1911 outlawed the licensing of non-lawyers but continued the licensing of *Vakeels*. In addition, the Rules gave advocates from self-governing dominions the right to practice. Regulatory dynamics changed when the Law Society of Kenya joined the scene in the 1920s. Its representations to the colonial administration culminated in the Law Society and Advocates ordinance, 1949.
- 18. The first meaningful attempt to institutionalize legal education came with the Advocates' Ordinance, promulgated in 1961. The legislation was intended to implement the recommendations of the **Denning Committee on Legal**

<sup>&</sup>lt;sup>6</sup> International Legal Centre, *Legal Education in a Changing World* (Report of the Committee on Legal Education in the Developing Countries), New York, 1975, para. 18.

<sup>&</sup>lt;sup>7</sup> J. B. Ojwang and D. R. Salter, *Legal Education in Kenya*, Vol. 33, No. 1 JOURNAL OF AFRICAN LAW (SPRING, 1989), PP. 78-90.

Education for students from Africa of 1961. The Committee was appointed by Lord Kilmuir, the Lord Chancellor, to investigate the question of legal education in Africa and make recommendations for reforms. The Denning Committee was the first structured attempt to address the challenges which legal education in East Africa was grappling with. The Report became an important policy document on legal education for the region. It advocated for *inter alia* the opening of legal practice to persons trained in local law. Although the Committee recommended that legal training be university based, it retained the articled clerkship programme. However, the local politics was not enthusiastic about the recommendation on university teaching of law. The Report envisioned that one Faculty of Law was adequate for the East African region.

- 19. One of the direct consequences of the Denning Report was the establishment of a Faculty of Law at the University of Dar-es-salaam in 1961. Similar faculties were subsequently established at Makerere University and the University of Nairobi in Uganda and Kenya respectively. The Advocates Ordinance established the Council of Legal Education, the harbinger of the current regulator of legal education and training. It was an administrative body with an exceedingly circumscribed mandate. The Colonial Government intended to use the body to streamline admission to the Bar through the dual streams of qualification operational at the time. The Ordinance mandated Council to "exercise of general supervision and control over legal education in Kenya for purposes of the Advocates Act and to advise the Government in relation to all aspects thereof." Significantly, the Council could make Regulations with approval of the Chief Justice.
- 20. Except for a few matters, the Advocates Ordinance, 1961 was exclusively a product of the Law Society. The Council of Legal Education was constituted by nominees of the Chief Justice, the Attorney General and the Law Society of Kenya. By 1967, the Attorney General was solely responsible for managing the Kenya School of Law. To the chagrin of the Law Society, the advent of the Faculty of Law at the University of Nairobi in 1970 became the bellwether for a legal profession without articled clerkships. Subsequently, Kenya School of Law

became a Post-graduate vocational institution for law graduates from the University.

- 21. Perhaps the most comprehensive attempt to streamline the status and mandate of the Council of Legal Education in the legal education and training matrix in Kenya was orchestrated by the Akiwumi Committee (1995) which culminated in what's known as the Akiwumi Report on the Status and Management of the Kenya School of Law. The Akiwumi Report detailed the structural, organizational and operational challenges of both the Council of Legal Education and the Kenya School of Law and suggested fundamental but feasible corrective action. However, the Report failed to appreciate the dichotomy between the Council and the School and thus gave the Council a training mandate which obfuscated its oversight or supervisory role. The Report led to the passage of the (now repealed) Council of Legal Education Act, 1995. The Act came into operation on December 27th, 1995. The legislation bestowed upon the Council of Legal Education corporate personality with perpetual succession and capacity to contract, sue and be sued, borrow and lend money and do such other things or acts in furtherance of its mandate.
- 22. Remarkably, the Act enhanced the composition of the Council to include: judges of the Court of Appeal and High Court, Dean of a School of Law, Head of the Kenya School of Law, Senior Counsel appointed by the Attorney General, Permanent Secretary in charge of Higher Education or a representative and five (5) advocates nominated by the Law Society of Kenya. Although the Act retained the omnibus mandate embodied in earlier statutes, it particularized the legal education functions of the Council to vest Council with a more specific education and training mandate. In 1998 the **Kwach Committee** on the Administration of Justice was similarly appointed to look into wider issues pertaining to the administration of justice.
- 23. Towards the end of the first decade of the 21st Century, Council had internalized its all encompassing statutory mandate. To institutionalize and domesticate the mandate, Council promulgated the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009. The Regulations made provision

for accreditation of legal education providers, application for accreditation, timelines, inspection and re-inspection of institutions, institutional standards on the library, curriculum and physical structures, revocation of accreditation, institutional reporting, discontinuation of law programmes, forms and fees and charges. More importantly, the Regulations prescribed the core units for the Diploma in Law, Under-Graduate and the Post-Graduate Diploma (Advocates Training Programme). These Regulations were an indispensable addition to the Council's toolkit.

- 24. The Muigai Report, 2005 is credited with having positioned legal education and training in Kenya on a platform and trajectory for growth, particularly in quality. The Report culminated in the promulgation of the Legal Education Act, 2012 and the Kenya School of Law Act, 2012. The Acts heralded a new epoch in legal education and training in Kenya. The Muigai Report was unambiguous that the two institutions CLE and KSL had to be divorced and their corresponding roles articulated by legislation. Significantly, the Report provided a working draft of the current statute.
- 25. The **Statute Law (Miscellaneous Amendment) Act 2014** introduced a hodgepodge of amendments to the Legal Education Act including: membership of Council, law making powers and functions. The mandate of Council was extended to encompass, recognition and approval of qualifications obtained outside Kenya for purposes of the Roll of Advocates and to administer such professional examinations as may be prescribed under section 13 of the Advocates Act.
- 26. Council enjoys a very specific and expanded mandate including the responsibility of conducting the Bar Examinations. The Act empowers Council to *inter alia* set and enforce standards in legal education, curriculum, mode of instructions, examinations, and monitoring and evaluation of legal education providers. The Council is a statutory body established under section 4 of the Legal Education Act, 2012 with the power to sue and be sued, own property and borrow money in its own name. Under section 8, the Council shall *inter alia*: regulate legal education and training in Kenya, license legal education

providers, **supervise** legal education providers, **advise** the Government on matters relating to legal education and training, **recognize** and approve foreign qualifications in law and fifthly, **administer** such professional exams as may be prescribed under section 13 of the Advocates Act.

- 27. Since 2012, the Council of Legal Education has been laying the building blocks to ensure prompt, sustainable and effective execution of its mandate. It has developed a rigorous licensing process with scalable and verifiable thresholds. All legal education providers are required to attain the requisite threshold for full accreditation. Importantly, the Quality Assurance, Compliance & Licensing Department at the Council is responsible for handholding institutions through the licensing process. The Department carries out routine and ad hoc audits of programmes and facilities to highlight areas that require corrective action before a final inspection is undertaken by Council. To ensure that Council resources are applied parsimoniously, the Department is required to ascertain whether a legal education provider is indeed ready for inspection. In 2016, the Council promulgated the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 to facilitate the licensing of legal education providers. Unprecedentedly, some institutions have been inspected at their instigation. More importantly, Council has frequently inspected institutions to assess their compliance status for purposes of licensing.
- 28. As of the date of this report, there were eleven (11) licensed Legal Education Providers for the Bachelor of Laws (LL.B) Programme in Kenya and only one (1) licensed Diploma in Law provider.<sup>8</sup>

University, Strathmore University, Riara University and The Jomo Kenyatta University of Agriculture and Technology.

<sup>&</sup>lt;sup>8</sup> Current status of Legal Education Providers is maintained by the Council of Legal Education and accessible publicly here <a href="http://www.cle.or.ke/status-of-universities/">http://www.cle.or.ke/status-of-universities/</a>. The Licensed institution as at May 2017 are; University of Nairobi Parklands Campus, University of Nairobi Mombasa Campus, The African Nazarene University, The Catholic University of East Africa, Kabarak University, Egerton University, Kenyatta University, Strathmere University, Pieza University, and The Jema Kenyatta University of Agriculture and The Jema Henry of Agricultur

#### B. REGULATING LEGAL EDUCATION IN KENYA

- 29. The Taskforce reviewed the currency, suitability and quality of legal education and professional training curricular, standards, entry qualifications at all segments of legal training including academic qualifications, and delivery systems. The Taskforce also reflected upon the legal and institutional framework for regulating and licensing legal education providers. The following specific items were discussed under this theme:
  - → Entry qualifications
  - → Curricular
  - → Pupillage
  - → Teaching methods and resource
  - → Professional legal training (Advocates Training Programme)
  - → Structure and mode of examination
  - → Mentorship
  - → Accreditation standards/ benchmarks
  - → Collaboration between the Commission for University Education (CUE), Council of Legal Education (CLE), Universities, Law Society of Kenya, the Judiciary and other stakeholders
  - → Recognition of foreign academic and professional qualifications
  - → The place of the Bar examination function
- 30. The Taskforce reflected on the statutory mandate of the Council prescribed by law as the regulator of legal education and training in Kenya and the challenges faced by the various institutions involved in the licensing and regulation of legal education. Legal education and training involves several stakeholders including the Council of Legal Education, Legal Education Providers, the Kenya School of Law, the Law Society of Kenya, the Judiciary, Legal Practitioners, Office of the Attorney General, the Office of the Director of Public Prosecutions, the Ministry of Education and the public among other institutions. While the Council is generally at the helm of the regulatory and quality assurance pyramid, it is recognized that it is in the interests of all other stakeholders in the legal market

to support and contribute to the Council's agenda and role in legal education and training in Kenya.

- 31. Vision 2030, the Country's development blueprint, is modelled around the economic, social and political pillars. All three pillars will require competent legal professionals if they are to be realized.
- 32. Over the course of the last decade, both the legal education providers and the total number of students enrolled in law programmes have increased significantly, especially at the undergraduate level. This has resulted in a sharp rise in the number of law graduates. Unfortunately, while the number of graduates has increased, there have been concerns about deterioration in the quality, professional capacity, and competence of these graduates as they transition into practitioners. This decline has in turn been attributed to the decline in quality and standards of training and apprenticeship.
- 33. These trends are visible with regard to the Bar Programme. On average, there has been a 21.4% increase per annum in the enrolment of students into the Bar Programme (ATP) between 2009 2016. However, with the increase in enrolment, there has been a corresponding rise in the failure rate at the Bar Programme which has on average been 35% which is too high.

Table 3 - Data on students who are still in the system

YEAR	SERIES	TOTAL	NO. PASS	NO.FAIL	FAILURE RATE	STILL IN THE SYSTEM
2009		707	654	53	7.5%	53
2010		735	673	62	8.4%	62
2011	JULY	547	347	200	36.5 %	200
	NOVEMBER	842	718	124	15%	124
2012	JULY	467	233	233	50%	233
	NOVEMBER	1282	920	362	28%	362
2013	JULY	579	364	212	37%	212
	NOVEMBER	1275	374	901	71%	901
2014	JULY	754	349	405	54%	405

YEAR	SERIES	TOTAL	NO. PASS	NO.FAIL	FAILURE RATE	STILL IN THE SYSTEM
	NOVEMBER	1667	707	960	58%	960
2015	JULY	878	667	211	24%	211
	NOVEMBER	2167	589	1575	73%	1575
2016	JULY	1376	520	856	62%	856
	NOVEMBER	2810	415	2395	85%	2395
TOTAL		16086	7530	8549	53%	8549

34. There is a relationship between the increase in enrolment numbers and the fail rate. As the number of students enrolled in the LL.B programme increases, the failure rate similarly increases. Importantly, there was a need to accurately determine the number of candidates who have not passed the Bar since 2009 and how the market has absorbed them, if at all, and if absorbed in what capacity and in which areas. In particular, it was necessary to determine the number of Bar candidates who have exhausted the maximum allowed number of attempts of the Bar examination and conduct a tracer study to identify what, where and/or how they were engaged. Council has been mandated to carry out this role and report back to the Taskforce before completion of this exercise.

#### C. INSTITUTIONAL FRAMEWORKS

35. The following parts of the report will review the institutions and regulatory frameworks currently obtained in Legal education in Kenya.

#### (i) THE COUNCIL OF LEGAL EDUCATION

36. As already noted in (para. 26), the Council of Legal Education (hereinafter the "CLE") is a statutory body established under section 4 of the Legal Education Act, 2012 whose mandate under section 8(1) and 8(2) *inter alia* encompass:

"8(1) The functions of the Council shall be to -

- a) regulate legal education and training in Kenya offered by legal education providers;
- b) licence legal education providers;
- c) supervise legal education providers;
- d) advise Government on matters relating to legal education and training;
- e) recognize and approve qualifications obtained outside Kenya for purposes of admission to the Roll; and
- f) administer such professional examinations as may be prescribed under Section 13 of the Advocates. These mandates aim at fostering the CLE in its role under Section 3 of the Legal Education Act."
- "8(2) Without prejudice to the generality of subsection (1), the Council shall, with respect to legal education providers be responsible for setting and enforcing standards relating to the -
- a) accreditation of legal education providers for the purposes of licensing;
- b) curricular and mode of instruction;
- c) mode and quality of examinations;
- d) harmonization of legal education programmes; and
  - e) monitoring and evaluation of legal education providers and programmes."
- 37. CLE has made tremendous gains in the delivery of its mandate, especially given the increase in the number of legal education providers over the past decade. It continues to supervise existing legal education providers by enforcing set

standards and withdrawing licences where a legal education provider fails to comply with the statutory requirements provided under the Legal Education Act.

- 38. CLE has experienced challenges in discharging these functions of setting and enforcing standards relating to legal education and training. There are two main areas of concern namely:
  - (a) Institutional resistance by legal education providers to comply with the set standards by challenging CLE's decisions in the Courts.
  - (b) Perceived regulatory and administrative overlaps with the Commission for University Education in terms accreditation of legal education programmes in Kenya.
- 39. CLE's mandate strikingly contrasts with CUE's mandate under section 8(5) of the Universities Act, 2012 specifically applying to regulating, accrediting and supervising general university education. Whereas the Universities Act is concerned with institutional accreditation, the LEA is specific to legal education and perceptions of conflict and overlaps are misconstrued or exaggerated. The perceived conflict between CUE and CLE has been the subject of litigation and misinterpretation on the roles of both institutions. In *Republic v Council of Legal Education & another ex-Parte Mount Kenya University* [2016] eKLR 9, Odunga J held:

"[CUE] is the only body legally mandated to <u>accredit universities</u> in Kenya... while the setting and enforcement of standards for the said accreditation falls on the CLE..."

Council has appealed this decision as it clearly masculates CLE's regulatory role and misrepresents the complimentary roles of the two institutions.

<sup>&</sup>lt;sup>9</sup> CLE has appealed the decision. The appeal is yet to be determined

- 40. The importance of professional accreditation is recognized by the Ministry of Education which in its Sessional Paper, 2012 espouses a policy framework for education and training in Kenya. Paragraph 16.18 of the said Sessional Paper recognizes the need to *inter alia*:
  - "(iv) Ensure that industry and professional bodies take an active strategic leadership role, ... in ensuring that their needs are addressed in university curricula.
  - (v) Universities will not be allowed to mount or admit students to programmes that require professional accreditation before obtaining the same."
- 41. The Commission for University Education (hereinafter "CUE") is established under section 4(1) of the Universities Act, 2012. Section 5(1)(l) of the Universities Act, 2012 provides that CUE has the function to "accredit and inspect university programme[s] in Kenya." Section 5 provides as follows:
  - "5.(1) The functions of the Commission shall be to—
    - (a) Promote the objectives of university education;
    - (b) Advise the Cabinet Secretary on policy relating to university education;
    - (c) Promote, set standards and assure relevance in the quality of university education;
    - (d) Monitor and evaluate the state of university education systems in relation to the national development goals;

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<sup>&</sup>lt;sup>10</sup> Section 2 defines 'accreditation' to mean "the procedure by which the Commission formally recognizes an institution as a university under Part III of this Act."

- (e) Licence any student recruitment agencies operating in Kenya and any activities by foreign institutions;
- (f) Develop policy for criteria and requirements for admission to universities;.
- (g) Recognize and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time;
- (h) Undertake or cause to be undertaken, regular inspections, monitoring and evaluation of universities to ensure compliance with set standards and guidelines;
- (i) Collect, disseminate and maintain data on university education;
- (j) Accredit universities in Kenya;
- (k) Regulate university education in Kenya;
- (1) Accredit and inspect university programme in Kenya;
- (m) Promote quality research and innovation, and;
- (n) Perform such other functions and exercise such other powers as the Commission may deem necessary for the proper discharge of its mandate under this Act."
- 42. A close look at these functions shows that these are establishment functions which bestow CUE with the mandate of accrediting institutions and programmes at a general level, for the purpose of chartering institutions in Kenya. Importantly, under regulation 49 of the Universities Regulations

**2014**<sup>11</sup>, CUE is required to confirm prior to approval of professional programmes, that such programmes have been approved by the relevant professional body recognized by law. Regulation 49 of the Universities Regulations, 2014 provides as follows:

- "49. The Commission shall only approve a professional programme when it confirms that-
- (a) the requisite basic programmes on which it is dependent are on offer at the said university; and
- (b) the relevant professional body recognized by law has granted its approval for the programme."
- 43. While calling on the two bodies to collaborate in the regulation of legal education, the court appreciated that the standards set by CLE prevail and must be enforced. Most recently, the **Universities (Amendment) Act, 2016** was enacted and assented to by His Excellency the President on 23<sup>rd</sup> December 2016 and Gazetted on 13<sup>th</sup> January 2017. The Taskforce expressed great concern over the risk of subverting the regulatory function of CLE through statute law miscellaneous amendments. This amendment was not the subject of participation by the CLE as required by the Constitution and consequently CLE has filed a Judicial Review action to strike this law out as being unconstitutional.
- 44. Recently, the Universities (Amendment) Act, No. 48 of 2016 further exacerbated this conflict by introducing amendments to the Universities Act, 2012 which in effect establishes CUE as the sole accrediting and approving authority of all academic programmes offered by universities. The said legislation at Section 5 enacts a new Section 5A which seeks to introduce fundamental changes to the provisions of the Legal Education Act No. 27 of 2012 (as amended). This legislation similarly affects provisions of professional programme regulators such

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<sup>&</sup>lt;sup>11</sup> Legislative Supplement No. 31 of 12<sup>th</sup> June, 2014.

as the Engineers Board and the Kenya Medical and Dentists Board to name a few. The proposed amendments effectively curtail the central role of CLE, and any professional body for that matter, in regulating standards and quality assurance in the education and sectoral professional practice in Kenya. Under this amendment, CLE would stand unable to license and supervise legal education programmes.

- 45. The implementation of this new law will have far-reaching implications on the role of the CLE (as with other professional regulatory bodies) in the regulations, licensing and supervision of legal education in this country. It will greatly curtail current efforts by the CLE in enforcing quality standards under the current law and Regulations.
- 46. The Taskforce deliberated on the new legislation and found that, the legislation will have dire consequences on legal education. The legislation is not in conformance with international best practice in the regulation, licensing and oversight of the professions, including the legal profession worldwide. Indeed the legislation will have foreseeable negative consequences not only to the quality of legal and professional services provided in this country, it will also irretrievably water-down the levels of oversight over legal education providers currently exercised by CLE in addition to also making it impossible for CLE to operate as a regulator and licensing authority over legal education programmes in Kenya. However, pursuant to a Court Order, the Universities (Amendment) Act, 2016 has been stayed.

## ii) THE IMPORTANCE OF THE CLE IN ACCREDITATING LAW PROGRAMMES

47. Sessional Paper, 2012 (A Policy Framework for Education and Training on Reforming Education and Training Sectors in Kenya) recognizes the importance of professional bodies in the education and training sector. The proposed amendments and indeed the Universities (Amendment) Act, 2016 are at odds with the existing policy and contrary to international best practice.

- 48. Indeed, accreditation of university programmes by professional bodies is consistent with international best practice as such accreditation allows professional bodies to examine the professional vitality of programmes in greater depth and scope to infuse in them the relevant industry practice. This cannot reasonably be expected from an institution whose primary mandate is ensuring "institutional" accreditation such as the Commission for University Education 'CUE' which has a "generic" mandate to accredit universities and programmes.
- 49. From a policy standpoint, accreditation of professional programmes including legal education programmes should remain the preserve of professional bodies. Professional accreditation usually imposes standards over and above the general standards prescribed by institutional accreditation bodies such as CUE. Furthermore, higher education systems based on single-accreditation regulatory framework are not progressive. For institutions to enforce quality standards across the board, they should seek as many accreditations as reasonably possible to validate the quality of their programmes thereby becoming regionally as well as international recognized and/or affiliated.
- 50. A survey of several prominent legal jurisdictions reveals that regulation and accreditation of law programmes by professional accreditation bodies is the norm and well rooted. Such jurisdictions include but are not limited to: Nigeria, South Africa, the United Kingdom, the United States of America, Canada, Singapore, Hong Kong, New Zealand and Uganda among others. In each of these jurisdictions, the accreditation of law programmes at legal education providers is the exclusive mandate of specific professional legal bodies which are functionally equivalent to the CLE.
- 51. Accreditation of law programmes is both a process as well as a status. It is the process of reviewing colleges, universities, institutions and programs to judge their educational quality how well they serve students and society. The result of the process, if successful, is the award of 'accredited status.' The complexity of accrediting professional education programmes is better understood by professional accreditation bodies which have the wherewithal, skills as well as

- a deeper breadth and scope of understanding the demands of the legal profession. This is not a function that can competently and holistically be dispensed by bodies with general oversight over "institutional" accreditation.
- 52. The Taskforce also deliberated on the purpose and implications of the Kenya National Qualifications Framework and its apparent overlaps with the University Act, 2012 and the Legal Education Act, 2012 as far as licensing of programmes is concerned. Specifically members deliberated on the implication of section 5(1)(a) of the Kenya National Qualifications Framework Act, No. 22 of 2014 which provides that "An institution shall not award national qualifications unless such an institution is recognized or accredited in accordance with this Act; ...". This provision might have the implication that all professional education regulatory authorities such as the Council of Legal Education and others might be required to obtain accreditation from the authority where they award national qualifications. The said act interprets qualifications broadly to mean qualifications in education and training as recognized by the Kenya National Qualifications Authority which could be taken to include professional qualifications such as those acquired by students upon completing the Bar (ATP) Examinations.

### iii) THE COUNCIL OF LEGAL EDUCATION EXPERIENCE

53. Council's experience with regard to accreditation and licensing of legal education programmes in Kenya since it became operational in 2012 has reinforced the importance of programmatic (professional) accreditation of legal education programmes in Kenya. There has been a rise in both the number of legal education providers as well as the number of students pursuing LL.B Degree and the Advocates Training Programme. A review of the enrolment data specific to the Advocates Training ('Bar') Programme between 2009 and 2016 reveals that there has on average been a 21.4% increase in enrolment data per annum to the Bar Programme. However, the average fail rate in the Bar Programme from 2009 to 2015 has been 35% and correspondingly the number of students who have not passed the Bar examinations and are therefore still in the system

continues to increase.<sup>12</sup> Council has been taking stern measures to address the high failure rate and has found that to a large degree, the high failure rate is indicative of and can be attributed to the quality of legal education programmes being offered at by Legal Education Providers both at the undergraduate as well as the Bar Programme levels. This is a situation that needs to be addressed urgently.

- 54. Council has engaged several legal education providers with a view to improving the quality of legal education programmes across the board in terms of quality standards, facilities and Curriculum delivery. The Council has exposed several shortcomings and inadequacies which have led to the deterioration in the quality of legal education programmes in Kenya including but not limited to the following:
  - (i) Inadequate strategic planning for the sustainability and viability of legal education programmes;
  - (ii) Irregular admissions in terms of admissions of un-qualified persons as well as admission of inordinately high numbers over and above the capacity which can be handled bearing in mind the institutional facilities and resources available;
  - (iii) Unsustainable or insufficient plough-back of financial resources in support of legal education programmes particularly financial allocations for research and development, library resources and staff development;
  - (iv) Lack of commitment to regular and periodic review of curricular for law programmes for relevance and market orientation;
  - (v) Lack of or inadequate suitable capital resources available such as lecture rooms, library, recreational facilities etc.; and

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<sup>&</sup>lt;sup>12</sup> Data on the fail rate at the Bar Programme in paragraph 30 above.

- (vi) Lack of or inadequate human capital to sustain teaching at university level. The human resource factor is perhaps the most critical factor militating against the quality of legal education in Kenya.
- 55. The CUE seemed to have been unaware of these issues or the magnitude of these lapses in quality standards until professional accreditation bodies such as the CLE and others have stepped in. The changes introduced by the Universities (Amendment) Act, 2016 are therefore self-serving and will undoubtedly have a negative spill-over effect on the quality of professional legal education programmes in Kenya. At any rate, it will be too late to correct or improve quality standards because CLE's role will as a result of the new legislation be limited to regulating the Advocates Training Programme (ATP) which is after the university stage with the attendant risk that the failure rate at the Bar Programme (ATP) will continue on the upward trend if quality standards at the University segment of training are unchecked. The ideal way to maintain standards is by allowing professional bodies to regulate quality standards ex ante as opposed to ex post the university education segment. Removing the mandate of the CLE as a programmatic (professional) accreditation authority is tantamount to forestalling and reversing the positive and genuine gains that the CLE and other professional bodies have achieved in improving educational quality of legal education programmes in Kenya.
- 56. The foregoing underscores the necessity for the CLE and professional accreditation of law programs not only as consistent with international best practice, but also from a policy and standards perspective. From a policy standpoint, it is a certain means of assuring quality and consistency in development and implementation of robust professional standards in the learning of law and indeed any other professional programme. Any legislation which takes away professional accreditation smacks of bad faith. Furthermore, accreditation by professional bodies allows professional accreditation bodies to provide checks and balances and introduce marketplace considerations in training at professional level.

- 57. As a corollary to these observations above, the Taskforce noted that public regulatory institutions were being set up without being mindful of conflict of interest rules particularly with respect to the composition and appointment of Board Directors. The issue was whether directors appointed to public institutions owed their fiduciary duties to the appointing authority or to the institutions appointed to. Members appreciated that although the 'Mwongozo Code of Governance for State Corporations' of January 2015 expressly recognized that individual Board Members owed their duty to the organization appointed to and not to the nominating or appointing authority, <sup>13</sup> in practice this was not followed.
- 58. For example, for a regulatory authority such as the CLE, members pondered about the appropriateness of having sitting board members who are appointed by institutions that are regulated by the Board. It was appreciated that responsibility and accountability were inseparable. Cases such as these were prevalent in public organizations where too many institutions were being created with conflicting decision making processes and where decision making was essentially subjugated to other external third party organizations which did not understand the prevailing needs of the organizations at land. This has contributed to the blurred reporting lines and weakened conflict of interest structures. There is therefore need for structures which meet clear conflict of interest thresholds prescribed in the Mwongozo Code of Governance.

### **RECOMMENDATIONS: 1**

#### (a) Policy:

The role of the CUE vis-à-vis that of professional accreditation bodies such as the CLE and others must be reviewed to attain a two-tier system of accreditation.

<sup>&</sup>lt;sup>13</sup> Mwongozo Code of Governance for State Corporations, p4.

The Taskforce recommends a <u>two-tier</u> accreditation structure as follows:

- (i) CUE as the overall authority for accrediting and establishing Universities at a general level consistent with section 5 of the Universities Act, 2012 (as existed prior to the amendment introduced by the Universities (Miscellaneous Amendment) Act, 2016.
- (ii) CLE should retain the responsibility for programme (professional) accreditation of law programmes in Kenya consistent with section 8 of the Legal Education Act, 2012.

### (b) Legislative:

- (i) The Legal Education Act, 2012 and Universities Act, 2012 should be amended to define "Programme" and distinguish between "institutional accreditation" and "programme accreditation" and clearly differentiate the roles of both institutions as concerns accreditation of professional programmes in line with (a) above.
- (ii) The Legal Education Act, 2012 sections 8 and part VII thereof should be reviewed and amended to entrench, enhance broader enforcement mechanisms in order to strengthen CLE's ability to enforce compliance with quality standards.
- (iii) That the Schedules in the Legal Education Act 2012 and the Kenya School of Law Act be synchronised in one Legislation.
- (c) Need to enhance collaboration and develop appropriate framework through institutional representation between regulators CUE and CLE as conceived under section 13 of the Legal Education Act, 2012 and Regulation 49 of the University Regulations, 2014.

- (d) Need to establish regional stakeholder engagement including Universities and others to sensitize on the need for compliance with legal education standards.
- (e) CLE should review standards in order to make them in tune with international best practices and to ensure relevance with emerging trends as appropriate.
- (f) The Council of Legal Education should carry out a comprehensive study to map the carrying capacity of legal education providers in Kenya together with the available facilities.
- (g) The Council of Legal Education should come up with the benchmarks and Criteria for licensing Legal Education Providers offering the Advocates Training Programme.
- (h) Appointments to statutory Boards should take congruence of the conflict of interest rule to avoid scenarios where people come to Boards with set interests which contradict the interests of the institution.
- (i) Additional Legal Education Providers should be licensed by the Council of Legal Education to provide the ATP Programme.

# (ii) THE BAR EXAMINATION

- 59. It is the requirement that any individual seeking to join the legal profession in Kenya must sit and pass the Bar Examination conducted by the Council of Legal Education.. The Bar examination is a statutory requirement and is administered by the Council of Legal Education. This examination as currently constituted has the following structure:
  - a) Orals and Projects (20% + 20%);
  - b) A sit in examination; (60%) and,

- c) Pupillage (six months).
- 60. The administration of orals and projects is undertaken as a training/technical component and has been a challenge due to the number of students involved. Further the curriculum for the Bar Programme has run its full course having been introduced in 2009 and last reviewed in 2011.

- (a) The conduct and structure of the Bar examinations should be provided for under the Legal Education Act and not the Kenya School of Law Act, as provided for under LEA;
- (b) Orals and project examination components as modes of assessment should be abolished and be integrated into the training methodologies for the Advocates Training Programme (ATP) at the Kenya School of Law;
- (c) That the structure of the Bar examination should be modified to require candidates to first attend class sessions, then pupillage, then sit the Bar Examination;
- (d) That the topic on billing of clients should be added to the curriculum in civil litigation, conveyancing and other relevant units;
- (e) With a view to long term expansion and in order to decongest administration of the Bar examinations, CLE should look into expanding its capacity by establishing regional examination centres for administering Bar Examinations consistent with international best practice;
- (f) That CLE should define the requirements for taking pupils and emphasise the requirement that lawyers cannot take pupils if they have not taken out a practising certificate;

(g) That the CLE should undertake an urgent review of the Bar Curricular to modernise it.



#### CHAPTER 3 - LEGAL TRAINING AND LEGAL EDUCATION PROVIDERS

#### A. INTRODUCTION AND BACKGROUND

- 61. The teaching of law at all segments of training is an expensive undertaking that requires considerable investment in qualified faculty, learning resources including adequate library materials and ICT infrastructure, as well local and international partnerships with institutions and organizations involved in the legal sector for international benchmarking. A critical factor in this enterprise has been the absence of investment in staff training programmes to run and manage law schools.
- 62. Legal Education Providers ('LEPs')<sup>14</sup> occasionally fail to invest adequately in all aspects of legal education and run foul of the set standards prescribed by both the CLE as well as the minimum standards prescribed by the Commission for University Education ('CUE'). The ability of LEPs to offer quality education is made especially difficult by the admission of large number of students into the programmes without a correspondingly increasing the teaching resources and facilities. Generally, there is a high teacher-student ratio which results in reduced attention and interaction between lecturers and students. Similarly, physical resources including libraries, lecture and tutorial rooms and books are inadequate compared to student populations.
- 63. For purposes of this section, LEPs comprise of licensed institutions under Section 2, 8 and 18 of the LEA to provide legal education for purposes of the award of a post-graduate diploma, degree, diploma or certificate in law and the institution includes law schools chartered under the Universities Act, No. 42 of 2012. The Kenya School of Law occupies a special place in this category as all students seeking to practice law in the capacity of an Advocate of the High Court of Kenya end up enrolling at the School for the final professional qualification.

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<sup>&</sup>lt;sup>14</sup> For purposes of this section, LEP's comprise of licensed institutions under Sections 2. 8 and 18 of the LEA to provide legal education for purposes of the award of a Post-Graduate Diploma, Degree, Diploma or Certificate in law and the institution includes Law Schools Chartered under the Universities Act, 2012. The Kenya School of Law occupies a special place in this category as all students seeking to practice law in the capacity of an

- 64. Council has engaged with several legal education providers with a view to improving the quality of legal education programmes across the board in terms of educational quality, facilities and Curriculum delivery. The Council of Legal Education has exposed several shortcomings and inadequacies which have led to the deterioration of the quality of legal education programmes in Kenya. CLE is proactively engaging with LEP's to find a suitable solution to these issues.
- 65. Increasingly, different universities have different pass rates, with some pass rates being inconceivable. This raises the question of equivalence where the market perceives qualifications from some legal education providers as being superior to those from other legal education providers. In this regard, there in need to put in place measures that promote equivalence of qualifications (grading and assessment) across the various universities offering undergraduate LL.B Degree programmes in Kenya. Currently, there are eleven (11) undergraduate law schools licensed. On institution offering a Diploma is similarly licensed. <sup>15</sup>

#### B. ACADEMIC REQUIREMENTS FOR ENTRY INTO UNDERGRADUATE PROGRAMMES

- 66. It was noted that the entry requirements for admission to the undergraduate Bachelor of Laws (LL.B) Degree programme were too low and this is reflected in the calibre of graduates that the market is absorbing. The standards had gone down which has also had an impact on cases of advocate misconduct and an increase in disciplinary cases.
- 67. It was further underscored that the Diploma in Law programme was initially meant to create an avenue for development of legal support cadre. However, it

<sup>15</sup> Current status of Legal Education Providers is maintained by the Council of Legal Education and accessible publicly here <a href="http://www.cle.or.ke/status-of-universities/">http://www.cle.or.ke/status-of-universities/</a>. The Licensed institution as at May 2017 are;

publicly here <a href="http://www.cle.or.ke/status-of-universities/">http://www.cle.or.ke/status-of-universities/</a>. The Licensed institution as at May 2017 are; University of Nairobi Parklands Campus, University of Nairobi Mombasa Campus, The African Nazarene University, The Catholic University of East Africa, Kabarak University, Egerton University, Kenyatta University, Kisii University, Strathmore University, Riara University and The Jomo Kenyatta University of Agriculture and Technology.

had emerged that the Diploma in Law was currently being used as a stepping stone to the LL.B. Degree which though not illegal in itself, meant that there was a shortage of legal support staff in the para-legal cadre. To address this, it was considered necessary to introduce a requirement for a minimum number of years of work experience for Diploma in Law holders as a requirement prior to undertaking the LL.B Degree. Three (3) years' work experience for holders of Diploma in Law qualification was deemed appropriate.

- 68. Due to differences in Diploma in Law qualification grading, it was important to define what 'Credit Pass' meant in relation to the Diploma in Law qualifications. Furthermore, when describing the Advanced (A) level qualification, other equivalent qualifications e.g. International Baccalaureate (IB), General Certificate of Education (GCE) should be considered.
- 69. It was further observed that in view of the Universities (Amendment) Act, 2016 which casts doubt on the professional accreditation of programmes by professional accreditation bodies, (if this new legislation remains in effect), CLE's regulatory role risks being limited only to the Advocates Training Programme (ATP). This is because the new legislation takes away CLE's statutory role of accrediting legal education programmes to CUE.

- (a) The Legal Education (Accreditation & Quality Assurance Regulations), 2016; the Second Schedule of the Kenya School of Law Act, 2012 and any other applicable Laws and Regulations be reviewed and amended to ensure consistency and harmonized admission requirements to both the LL.B and ATP programmes.
- (b) The Taskforce recommends that the minimum admission criteria to the Bachelor of Laws (LL.B) Degree Programme should be retained as follows:

- (i) Paragraph 5 of the First Schedule to the Legal Education (Quality Assurance & Accreditation) Regulations 2016 be amended to read as follows:
  - a) a mean grade of C+ (Plus) in the Kenya Certificate of Secondary Education examination with a minimum grade of B Plain in English or Kiswahili or equivalent as determined by a competent authority;
  - a Credit pass in a diploma in law examination from an accredited institution with relevant experience of at least three (3) years standing;
  - at least three (3) principal passes at an advanced level beyond
     'O' Levels or an equivalent qualification, one of which must be in the English or Kiswahili language,; or
  - d) a degree from a recognized university.
- (ii) The following legislative proposals/ recommendations were made:
  - a) That there be introduced a requirement for at least three (3) years' relevant post-qualification work experience for holders with a Certificate in Law qualification as a requirement before undertaking the Diploma in Law;
  - b) That there be introduced a requirement for at least three (3)
    years' relevant post-qualification work experience in the
    Diploma in Law qualification as a requirement before
    undertaking the LL.B degree;
  - c) Provision be made for Kenya Certificate of Secondary Education ('KCSE') qualification equivalents as determined by a competent authority;

- d) Define what 'Principal Pass' means in relation to advanced level qualifications.
- e) Qualifications in law which are not Bachelors of Laws (LL.B.) strictly speaking as required by the Kenya School of Law Act, 2012 and the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 should not be recognized or approved unless they meet the criteria of equivalence to be determined by Council.
- f) A Single major component of the degree plus the qualification required to practice in that jurisdiction as determined by Council.

The criteria above for admission to the LL.B Programme should be reflected and harmonized with the admission criteria to the ATP.

- C. NOMENCLATURE OF DEGREE PROGRAMMES APPLICATIONS IN RECOGNITION
  AND APPROVAL OF FOREIGN LAW QUALIFICATIONS
- 70. The minimum entry requirements for admission into the Advocates Training Programme ("ATP") in Kenya specifically require a Bachelor of Laws Degree. These requirements are prescribed in the Second Schedule to the Kenya School of Law Act, 2012 as well as regulation 6 of the Third Schedule of the Legal Education (Accreditation & Quality Assurance) Regulations, 2016. In keeping with these requirements, Council has declined to recognize law qualifications that are not strictly speaking Bachelor of Laws (LL.B.) Degree qualifications such as for instance Bachelor of Arts (Law), Bachelor of Academic Laws or double major qualifications such as Bachelor of Psychology and Law.
- 71. Council had received numerous appeals by students who acquire these degrees, which are not titled Bachelor of Laws (LL.B.) The appeals are grounded on the reasons that those degrees, though not by nomenclature LL.B Degree

qualifications, were comparable and similar in content to LL.B. Degree qualifications obtained in those jurisdictions and those qualifications cover the core content envisaged under the Legal Education Act, 2012. Moreover, those qualifications are qualifying law degrees in the jurisdictions where they were obtained. Examples of such qualifications include the Bachelor of Arts (Law) Degree qualifications obtained from the Universities of Cambridge and Oxford. The mischief is that if degrees other than Bachelor of Laws (LL.B) Degree qualifications were permitted, there would be the risk of admitting to the Advocates Training Programme, persons who had not been subjected to the rigours of studies emblematic of LL.B studies.

72. The Taskforce took cognizance of the fact that the express requirements of Regulation 6 of the Third Schedule to the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 as well as the Second Schedule to the Kenya School of Law Act, 2012 explicitly require a Bachelor of Laws (LL.B) Degree. CLE could therefore not approve qualifications which were not LL.B Degrees strictly speaking. The Taskforce considered the policy imperatives that would arise from changing this explicit requirement and did **not** recommend a departure from the aforesaid requirement of an LL.B Degree requirement.

# **RECOMMENDATION: 4**

Current law on nomenclature requirements of an LL.B be retained as currently espoused in the Regulations barring the special circumstances anticipated in para. 69(e) (f) above.

#### D. PRE-UNIVERSITY ASSESSMENT

73. Admission of government sponsored students into undergraduate programmes is undertaken by the Kenya University and Colleges Central Placement Service (KUCCPS). Self-sponsored students apply to universities of their choice for consideration and possible admission.

- 74. In principle, academic qualifications are not the only requirements for a person wishing to study law. The legal profession places premium on strong personal values (such as honesty and integrity) right from the start. The importance of ethics and integrity to the profession cannot be overstated. Good character is central to good and professional practice. Prospective students of law must understand and be willing to commit themselves to become moral and ethical persons. Against this backdrop, law schools are concerned that many of the students joining the LL.B. undergraduate programme do not possess the appropriate character and moral aptitude to study law. Some students decide to study law under the assumption that later, during practice, they will get rich. By contrast, the ideal practice of law is not motivated by the prospect of making money but by the benefit it brings to society.
- 75. Thus, there is a need to vet prospective students before their entry into university. Foreign jurisdictions, such as the United States, have successfully put in place pre-entry assessment and screening processes that determine the suitability of potential students to study law. Admittedly, the accuracy of pre-university screening is not infallible. The process is subjective and does not deliver immediate results. However, if properly designed and undertaken, its risks and weakness can be minimized while ensuring that only suitable students get enrolled in undergraduate programmes.

- a) Council should encourage Legal education Providers to offer the preuniversity assessments for entry into the LL.B Degree programme whose structure and content shall be determined by the legal education providers; be introduced and offered at the discretion of legal education providers as criteria to admission to the LL.B Programme;
- b) The aforementioned test shall be administered by Legal Education Providers at their discretion;

c) The Council of Legal Education to undertake a study on the model of pre-university assessment currently undertaken at Makerere University in Uganda, Riara and Strathmore Universities in Kenya and report on the findings of the study to the Attorney General.

### E. QUALITY OF UNIVERSITY FACULTY

76. The proliferation of LEPs offering undergraduate degree programmes has not been matched by a corresponding increase in qualified faculty members teaching at universities. Currently, most law schools lack professors of law and have to settle for persons with Masters qualifications to deliver their programmes. Regrettably, in some campuses, there are some lecturers who do not even hold the minimum qualifications required in order to teach law. In some cases, even where the faculty is possessed of requisite qualifications and expertise, such staff are deployed in irrelevant disciplines rendering the expertise ineffectual. On this matter, the Muigai report commented that:

"The general principle would be that a lecturer should hold a higher qualification than the one he/she is teaching in. Simply put, if teaching at the undergraduate level, a lecturer ought to be a holder of a master's degree, which should be developed to doctorate level." 16

77. While universities rely on adjunct faculty to bridge the gap in qualified full-time faculty, standards on the regulation of adjunct faculty are non-existent. CUE already has in place regulations and standards relating to university faculty, and CLE adopts these standards in regulation of legal education programmes. These include but are not limited to the CUE Universities Standards and Guidelines (2014), the Harmonized Criteria and Guidelines for Appointment of Academic Staff in Universities in Kenya.

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<sup>&</sup>lt;sup>16</sup> Muigai Report, p 16

78. However, if CLE were to insist that universities abide strictly by the set faculty standards, very few universities would qualify. In effect, such a move would be deleterious, since it would roll back the gains made in increasing access to legal education. It was further observed that in Council's experience thus far, institutional capacity to produce Ph.Ds in Law was non-existent making it difficult to insist on the requirement that lecturers in the LL.B programme must be Ph.D holders.

### **RECOMMENDATIONS: 6**

In order to improve the quality of university faculty, the Taskforce recommends the following interventions:

- a) CLE should conduct a feasibility study to inquire *inter alia* into the capacity of currently licensed Legal Education Providers to cater for the national legal education and training needs in Kenya. The study should also inquire into the interface between legal training and practice to *inter alia* explore best practice with a view to tapping the capacity of experienced legal practitioners who are non-academics.
- b) CLE should develop a strategic initiative to encourage legal education providers to build capacity of university faculty to teach law. The plan should specify and provide measurable timelines.
- CLE should require Legal Education Providers to undertake capacity Building programmes at undergraduate level to improve on the quality of their legal education programmes.
- d) CLE should develop and enforce a standard for the recognition and regulation of adjunct faculty.
- e) CLE should give incentives to legal education providers to development of postgraduate programmes.

- f) Legal Education Providers must be encouraged to develop robust internal quality assurance mechanisms including mechanisms for quality assurance enforcement.
- g) CLE should develop an interface to allow the public, students and any other stakeholders to raise issues on matters of quality of legal education.
- h) CLE should regularly organize colloquiums for university lecturers and involve key stakeholders such as the Judiciary, Law Society of Kenya, Office of the Attorney General and others on themes related to legal education and training in Kenya.
- i) CLE should originate a proposal as well as clear guidelines for funding in support of post-graduate (masters & doctoral) programmes in law for the next five (5) years. CLE should collaborate with the Higher Education Loans Board (HELB) to set up a Trust Fund and implementation modalities for setting up this initiative.
- j) CLE should develop standards for Part-Time Faculty by Legal Education Providers setting out *inter alia* the differences between adjunct and part-time faculty. Regulation 2 of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 should be amended to define adjunct faculty.
- Legal Education Providers must take initiative and responsibility for legal education and training at all levels with emphasis on post-graduate legal training, capacity building with a view to increasing number of academic staff with requisite post-graduate qualifications. To this extent, Legal Education Providers must take stock of their internal capacity with a view to building on their capacity and develop mechanisms for early selection of candidates for post-graduate legal training opportunities.

 Council must vigorously enforce the requirement that university faculty must teach in only courses where they have expertise and qualifications.

#### F. CONTENT OF LEGAL EDUCATION PROGRAMMES

- 79. The Muigai Committee on the Development of a Policy and Legal Framework for Legal Education and Training in Kenya (2005) undertook a comprehensive reevaluation of legal education and training in Kenya and made recommendations to re-design and re-establishment of all legal institutions implementing legal policy in Kenya including the Council of Legal Education and the Kenya School of Law. The Muigai Report recommended a complete segregation between policy formulation and regulatory oversight from policy consumption at the training level. Consequently the Council and the Kenya School of Law were reestablished.
- 80. Currently, as part of the process of curriculum approval, CLE requires that LEPs undertake to offer the 16 core units obtained in the 2016 Regulations. This is because these core units form part of the criteria for admission of law graduates to the Advocates Training Programme (ATP). Effectively, this implies that LEPs at the undergraduate level must include the 16 core units in their programmes' content.
- 81. The rationale of the 16 core units is that legal practice in Kenya is primarily premised on the field of law covered by these units. As such, it is important that every student understand the subjects if they are to become well-prepared for legal practice. That said, CLE does not have in place standards on the content of legal education programmes. It is recognized that universities retain academic freedom on the content they provide in their programmes and the manner in which they are delivered.
- 82. The requirement that the 16 core units be included in undergraduate programmes was first made in 2009 vide the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations 2009. Since they were

made mandatory, the core courses have never been reviewed. However, the needs and realities of the legal sector have continued to evolve, especially with the adoption of a new constitution in 2010. Furthermore, consideration needs to be given to emerging areas of law and whether they ought to be mandatorily taught at the undergraduate level. Even with the requirement that LEPs provide the 16 core units, the content of the units remains unstandardized, with the effect that different LEPs have different content and different delivery systems

83. Consequently, it is important that CLE periodically reviews and adapts the core courses to suit the realities of the legal profession, the market and to ensure their relevance. In doing so, cognizance should be taken of the fact that CLE is not prescriptive in terms of the content of legal education programmes. Legal Education Providers are largely responsible for the design of content for programmes they want to run including emphasis on "niche" areas they wish their programmes should reflect. Furthermore, cognizant of the need to encourage legal specialization, training therefore to complement these market trends in legal practice specialization by encouraging Schools of Law to develop vibrant, skills based "niche" areas in their curricula.

- (a) The minimum course content of the 16 core units should be standardized to ensure uniformity in their delivery. CLE should develop and publish unit standards to harmonize and ensure consistency and guide content development by legal education providers in the core units while maintaining academic freedom on the part of providers with respect to delivery.
- (b) The unit standards shall be developed in collaboration with Legal Education Providers and inviting public participation and published in order to ensure the public is aware of necessary thresholds. The unit standards should have provisions to cater for regular reviews in order for them to remain relevant and market focused.

- (c) In the process of curriculum approval CLE should:
  - (i) periodically review the core courses to ensure they are responsive to market needs.
  - (ii) ensure that the curriculum content is consistent with the set standards and is distinctive "niche" based responding to the market needs in Country and to allow for growth of expertise and specializations in the legal profession.
  - (iii) guide peer reviewers on the minimum content required of the core units.
  - (iv) enforce the required assessment methods.
  - (v) check for library resources in the various institutions and as much as possible encourage uniformity of library resources.
  - (vi) examine the external examiners reports to ensure maintenance of quality standards.
  - (vii) Ensure that each segment of development is evident in the curricular to make them current and responsive to developments in the legal sector.

#### G. OPEN AND DISTANCE LEARNING (ODEL)

84. Open and distance learning (ODEL) is an emerging practice in the delivery of undergraduate programmes. Several universities have in place ODEL models of delivery which are being used to teach undergraduate programmes. Intrinsically, ODEL models allow students to study away from the physical location of the LEPs and rely heavily on ICT platforms. CUE has developed standards in the regulation

of ODEL.<sup>17</sup> Regulation 45 of the Third Schedule to the Legal Education (Accreditation & Quality) Regulations, 2016 provides that "a Legal Education Provider may award a qualification for a course conducted online through online or distance learning PROVIDED that the programme has been accredited by the Council of Legal Education."

### **RECOMMENDATIONS: 8**

- (a) Regulation 45 of the Legal Education (Quality Assurance & Accreditation) Regulations 2016 should be enforced so that ODEL programmes at LEPs are accredited as stand-alone programmes, meeting the same standards and benchmarks as regular legal education programmes;
- (b) The ODEL delivery mechanisms must meet the equivalent criteria set for the LL.B face to face delivery programmes;
- (c) CLE should conduct a further comprehensive study on ODEL as a mode for learning law and beef up current Regulations on the suitability of ODEL delivery mechanisms and suitability.

# H. LEGAL EDUCATION STANDARDS AT THE POST-GRADUATE LEVEL

85. Currently, only the University of Nairobi is offering post-graduate programmes including a Ph.D programme. Strathmore university has formerly applied to the Council of Legal Education to mount a post-graduate programme. The need for post-graduate programmes in law to bolster the training of academic staff cannot be understated. This is the only way to ensure that the LEPs have competent staff to service their programmes. The Muigai Taskforce envisaged

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<sup>&</sup>lt;sup>17</sup> See, Fourth Schedule 'Standards for Open, Distance and E-Learning' Commission for University Education, Universities Standards and Guidelines, 2014 available at file:///F:/Downloads/universities standards and guidelines 2014.pdf.

the regulation of legal education at the post-university level.<sup>18</sup> It is important and necessary to ensure quality postgraduate programmes for several reasons:

- (i) Section 8(1)(a) of the LEA envisages the regulation of all types and levels of legal education and training. This includes postgraduate legal education.
- (ii) Faculty members who teach undergraduate law programmes almost exclusively comprise persons with Masters or Doctorate qualifications. Thus, these qualifications must be of utmost quality if they are to become effective teachers of law.
- (iii) Post-graduate programmes in law are the only vehicles through which LEPs will be able to develop their research capacity and development of legal knowledge and jurisprudence. This is an important component of university life.
- 86. The Council should develop a robust framework for the regulation of postgraduate programmes in Kenya. Regulation of post-university education should encompass all facets, including curricula development, capacity of LEPs, depth of instruction and quality assurance.

### **RECOMMENDATIONS: 9**

To ensure high quality standards of legal education at the postgraduate level, the Taskforce recommends the following interventions:

(a) CLE should demand a staff development plan from institutions to ensure that they retain high calibre academic staff. These plans should be measurable and licences withdrawn where there is noncompliance.

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<sup>&</sup>lt;sup>18</sup> Muigai Taskforce Report, p 15

(b) CLE should develop standards for post-graduate programmes in law (LL.M. and Phd/ LL.D.) which standards should be aligned generally with the relevant CUE standards for post-graduate programmes.

#### I. PROFESSIONAL TRAINING - THE PRE-BAR EXAMINATIONS

- 87. The rationale of the Pre-Bar examinations was considered. The Pre-Bar examinations are justified on the grounds that they need to sieve further the quality of candidates entering the ATP programme on account of perceived quality of candidates.
- 88. It was observed that the Pre-Bar examination was not justified because CLE had a process accrediting law schools in the country and for recognition and approval of foreign qualifications in law. The Remedial Programme was also operationalized to cater for instances where particular qualified LL.B qualification holders who did not cover all the required sixteen (16) core courses study those units not covered at the university prior to enrolling in the ATP Programme.
- 89. The utility of the Pre-Bar examination was considered against the backdrop of an assumption that if CLE effectively regulated LEPs and legal education, including harmonizing legal training, at the undergraduate level, then all graduates would be qualified for admission to the ATP. The Pre-Bar examination would therefore be rendered superfluous and ineffectual.
- 90. Indeed the Muigai Report recommended that "Graduates seeking to take the Bar who have qualified with an LL.B after following the prescribed CLE Curriculum [...] be automatically exempted from taking Pre-Bar Examinations."<sup>19</sup>

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<sup>19</sup> Muigai Report, p 41

91. As noted above, the Kenya School of Law Act, No. 26 of 2012 now requires that all persons wishing to gain admission into the ATP programme must of necessity undertake the Pre-Bar examination. This requirement has been met with resistance by students, including the lodging of a court case by way of Constitutional Petition challenging the legality and structure of the examination. Aware of all the issues and dynamics surrounding the Pre-Bar examination, and notwithstanding that the Pre-Bar examination is now a statutory requirement, the Taskforce considered the proportionality of the hurdle and inconvenience that would be visited upon LL.B. graduates *vis-a-viz* the envisaged benefits accruing from the Pre-Bar examination. The Taskforce was sceptical of the value the Pre-Bar examination would add to the substance and process of professional legal training.

### **RECOMMENDATION: 10**

The preponderant view of the Taskforce was that the Pre-Bar be retained as is currently the case. The Taskforce favoured the position that the Pre-Bar would help further determine the suitability of applicants of the Bar Programme. There is no risk of over-regulation if the Pre-Bar is administered as a pre-condition for admission to the ATP.

### J. THE ADVOCATES TRAINING PROGRAMME (ATP) (BAR)

92. The Advocates Training programme ('ATP') is the vocational training programme for entry into the legal profession in Kenya as an Advocate of the High Court of Kenya. It is a statutory requirement that before a person can be admitted to the Roll of Advocates of the High Court of Kenya, one must be admitted to and attend the ATP programme. The programme has two components to it namely: the training aspect which is administered by the Kenya School of Law under

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<sup>&</sup>lt;sup>20</sup> Constitutional Petition No. 377 of 2015, *Kevin Mwiti & Others vs. Kenya School of Law & 2 others* [2015] eKLR. The Petitioners in this petition *inter alia* challenged the Constitutional legitimacy of the Statute Law (Miscellaneous Amendment) Act 2014 which introduced the Pre-Bar examination as a mandatory examination prior to admission to the Advocates Training Programme (Bar). The Court found that the amendment act was valid as it did not apply retrospectively.

Section 4 (a) of the Kenya School of Law Act 2012 and the Bar Examination which is administered by the Council of Legal Education, a mandate it holds under the provisions of Section 8 of the Legal Education Act, 2012.

- 93. The Kenya School of Law (hereinafter the "KSL") is a statutory institution established under section 3 of the Kenya School of Law Act, 2012. It is currently the only Bar School in Kenya whose mandate is to train persons looking to join the legal profession as advocates as prescribed by the provisions of Section 12 of the Advocates Act. Currently, the School has approximately 3000 students who are either in session or looking to do resits being the backlog from previous years. The large number has put great strain on the resources and facilities at the KSL. This aforementioned strain is evident in the declining pass rates of the Bar Examination.
- 94. As currently administered, the ATP programme is experiencing a decline in standards occasioned by the large number of students in the programme. The obvious strain in resources and facilities at the KSL is also a major contributing factor to this status and to dilution of the ATP. Capacity building at the KSL is important. As it is, the KSL has reached an optimal growth trajectory in terms of capacity and the increasing number of students qualified to be enrolled to the ATP or who are yet to complete the ATP. There are proposals towards diversification of the training institutions in this programme as a long term measure to alleviate the strain on the KSL and also to provide alternatives for prospective candidates.

- a) CLE should execute its mandate to license other Legal Education Providers to provide training in the ATP programme (in addition to KSL) with urgency in light of the current resource constraints faced by KSL owing to the large student numbers;
- b) CLE should develop and implement standards and Regulations for licensing of Bar Training Institutions;

- c) CLE should propose policy interventions on the management of the number of students joining the ATP (Bar) programme;
- d) The Kenya School of Law to increase and develop capacity to deal with the exponential growth in student numbers including setting up satellite campus in other regional centres;
- e) KSL should petition OAG/DOJ and Treasury to urgently increase the resources of the School to enable it cope with the large student numbers;
- f) KSL should explore and develop a collaborative strategy where professional staff of various Government institutions such as OAG, ODPP, Judiciary, Ministry of Lands could accept and train pupils for purposes of the Bar Programme.

#### K. PUPILLAGE

95. Pupillage is a mandatory requirement for persons undertaking the Advocates Training Programme. It is a six months attachment programme where the candidate is attached to an advocate of more than five (5) years standing. Currently, the programme is managed by the Kenya School of Law.

- a) That CLE should develop Regulations on the assessment of pupillage and require implementation by all legal education providers licensed to teach the Bar Programme;
- b) Review the content of pupillage through curriculum review;
- c) Pupillage should be undertaken after the ATP classes but before the Bar Examinations;

- d) Pupil masters should be required to fill in questionnaires to be submitted to the LSK on how many (if any) pupils the advocate has taken in each year and submit the form during the process of application for licence;
- e) The CPD committee of the Law Society of Kenya should introduce a reward system for taking pupils for instance the award of one CPD point per pupil per year;
- f) CLE should explore whether lawyers can benefit from a tax rebate for taking pupils and provision of legal aid;
- g) Regulations should provide that any advocate who take pupils must be in good standing and have valid Practicing Certificates;
- h) That the code of conduct must make provisions against sexual harassment.

#### L. ADMISSION OF FOREIGNERS TO THE ADVOCATES TRAINING PROGRAMME

- 96. The admission of non- East Africans to the Advocates Training Programme was raised and their resultant admission to the Bar. The Taskforce was referred to the provisions of Section 4 of the Kenya School of Law Act as read with Sections 12 and 13 of the Advocates Act which provisions *inter alia* require that one can only be admitted as an advocate of the High Court of Kenya if they are Advocates for the time being of Kenya, Uganda, Tanzania, Rwanda and Burundi.
- 97. The Taskforce was also made aware of the recent High Court judgments in *Jonnah Tusasirwe & Others vs CLE & Others*, Petition Nos. 505 and 509 of 2016 (consolidated) and *Monica Wamboi Ng'ang'a vs. CLE & Others*, Petition Nos. 450, 448 and 461 of 2016 (consolidated) which touched on the interpretation of Sections 12 and 13 of the Advocates Act, Cap. 16, Laws of Kenya. In both of these cases, the Court found that section 12 of the Advocates Act is "a

standalone provision" and therefore "the applicant for admission to the Kenyan Bar must first and foremost be a citizen of the member country."<sup>21</sup> In the last couple of yars, a sizeable number of foreign candidates admitted to the ATP programme have been admitted to the Roll of Advocates automatically after completing the programme.

Table 3 - Data on Admission of Foreign Advocates

	Gazettment Date	Kenyans	No. of foreigners	Total Number of Candidates
1	29th January, 2016	421	70	491
2	4 <sup>th</sup> March, 2016	99	17	116
3	20 <sup>th</sup> May, 2016	36	1	37
4	10 <sup>th</sup> June, 2016	59	16	75
5	29 <sup>th</sup> July, 2016	20	5	25
6	21st October, 2016	98	1	99
7	9 <sup>th</sup> December, 2016	141	5	146
8	23 <sup>rd</sup> December, 2016	222	31	253
9	10 <sup>th</sup> March 2017	298	14	312
	TOTAL	1394	160	1554

# **RECOMMENDATIONS: 13**

- a) As regards Kenyan students who study abroad and subsequently return to Kenya, CLE must check the qualification at LL.B. entry level before making a determination as to whether or not to recognise their qualifications for purposes of admission to the ATP programme;
- b) Legislative: The Advocates Bill, 2015 be amended to provide either for reciprocity or lock out provisions;
- c) To avoid creating a legitimate expectation on the part foreign students who are admitted to study law or obtain professional legal training in Legal Education Providers in Kenya, foreign students must understand that legal education and training in Kenya does not operate as an automatic guarantee for admission to the Roll of Advocates in Kenya.

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<sup>&</sup>lt;sup>21</sup> Monica Wamboi Ng'ang'a vs. CLE & Others, Petition Nos. 450, 448 and 461 of 2016 (consolidated) at paragraphs 73 - 74. See also, Jonnah Tusasirwe v CLE, [2017] eKLR at page 11.

Foreign students undertaking the ATP (Bar Programme) or law schools (at whatever level i.e. LL.B, Masters of even Doctoral levels) in Kenya should be required to sign a undertaking/disclaimer at the point of admission to the legal education provider and upon admission to the ATP indicating their commitment to return to their country of origin after completing their undergraduate training and/or ATP as the case may be;

- d) In the event they want to practise in Kenya, they MUST meet the requirements set forth by law by the Council of Legal Education and the Law Society of Kenya;
- e) Admission of non-Kenyans to the Advocates Training Programme for purposes of admission to the Bar to practise law in Kenya be stopped forthwith unless the candidate can show that they meet the provisions of Section 13 of the Advocates Act;
- f) That the Advocates Bill should be amended by deleting Section 20 of the Bill, the provision that allows for the admission on non-Kenyans until they meet the requirement that they are advocates in their own countries and until mutual reciprocal initiatives are put in place for Kenyans by the member states of the East African Community;
- g) The Advocates Bill should define cross-border practice on the basis of Article 11 of the EAC Treaty as the basis on which the Attorney General in consultation with the LSK Council may enter into mutual recognition agreements with willing EAC Member States;
- h) The Council of Legal Education should develop succinct regulations on the following:
  - Conditions for admission to the LL.B degree programme for foreign students

- ii. Conditions for admission to the ATP for foreign students with reference to academic qualifications
- iii. Conditions for sitting the Bar Examinations.
- iv. Provisions that allow for signing of the disclaimer
- i) The Advocates Act should be amended to make provisions for:
  - i. The definition of cross boarder practice
  - ii. Conditions for admission to the Roll
  - iii. Conditions to obtaining a license to practise
  - iv. Amend Section 26 of the Advocates Bill to read

"The Registrar <u>may</u> issue in accordance with this part

- j) That the provisions of Section 4(2)(a) of the Kenya School of Law Act should be amended to provide for training that ... May be subject to the Advocates Act ...: "be considered for admission under the Advocates Act", where the requirement therefore would be to refer to the Advocates Act for secondary requirements under the current Section 13 as shall be amended.
- k) That the amendment in (f) above allows the Kenya School of Law to offer the ATP programme as a Post graduate Diploma in Law and not necessarily tied to the Advocates Act.
- l) In the general organisation of the Advocates Bill, Section 6 should come after section 9 and section 8 becomes the new section 6
- m) Section 8 (2) be amended to provide for ....may be admitted to the roll every person... and remove the requirement.......to practise

#### M. THE REMEDIAL PROGRAMME

- 98. The Remedial Programme was conceptually developed to be a temporary programme to harmonize law (LL.B) undergraduate degree qualifications held by Kenyans obtained outside Kenya with the requirements, in terms of core units prescribed in the Legal Education Act, 2012. The Remedial Programme was introduced initially as a transitional interim programme meant to harmonize those foreign qualifications in law obtained outside Kenya with those obtained in Kenya to achieve parity of content prior to admission to the ATP.
- 99. As a mechanism aimed initially at harmonizing shortfalls in qualifications, the remedial programme was an exercise in equity meant to be temporary. The Issue is whether the programme now should become permanent in view of its original purpose. The aim is to transition towards minimum thresholds in terms of minimum number of core courses required to have been covered at the University level in order to be eligible for admission to the ATP programme. Currently, the Remedial Programme is only being offered by one (1) legal education provider. This is despite the fact that Council has widely invited applications from interested Legal Education Providers to offer the said programme.

- a) That in the event a candidate has not undertaken at least twelve (12) of the sixteen core units required for a Bachelor of Laws Programme, the qualification should not be recognised as a legal education qualification. Where a candidate has undertaken twelve or more of the core course, that candidate may be referred to the remedial programme for regularization and recognition of the Bachelor of Laws (LL.B).
- b) It was further resolved that where a student has not covered at least 70% (about 12 units) of the required sixteen (16) core units, that

qualification shall be rejected as a legal education qualification under the LEA.

- c) The Remedial programme should be reviewed and strengthened so that it can effectively bring to parity students who have not completed the 16 core units undertaken at local universities.
- d) The Council of Legal Education should maintain an up-to-date database of students who are subjected to the remedial programme providing such details as nationality, country & institution in which the law qualification was obtained, number of core courses covered at the University and those covered at the Institution.

### N. LAW GRADUATES WHO FAIL THE BAR EXAMINATION

100. CLE has conducted a study on the Bar Examination fail rates from 2009-2016.

Data presented to the Taskforce revealed that there were 5298 candidates who had not passed the Bar since 2009 and were still in the system making attempts at passing the Bar distributed as follows;

Table 4 - Data on students who are still in the system

YEAR	SERIES	TOTAL	NO.	NO.FAIL	FAILURE	STILL IN THE
			PASS		RATE	SYSTEM
2009		707	654	53	7.5%	53
2010		735	673	62	8.4%	62
2011	JULY	547	347	200	36.5	200
					%	
	NOVEMBER	842	718	124	15%	124
2012	JULY	467	233	233	50%	233
	NOVEMBER	1282	920	362	28%	362
2013	JULY	579	364	212	37%	212
	NOVEMBER	1275	374	901	71%	901
2014	JULY	754	349	405	54%	405
	NOVEMBER	1667	707	960	58%	960
2015	JULY	878	667	211	24%	211

YEAR	SERIES	TOTAL	NO. PASS	NO.FAIL	FAILURE RATE	STILL IN TH SYSTEM	E
	NOVEMBER	2167	589	1575	73%	1575	
2016	JULY	1376	520	856	62%	856	
	NOVEMBER	2810	415	2395	85%	2395	
TOTAL		16086	7530	8549	53%	8549	

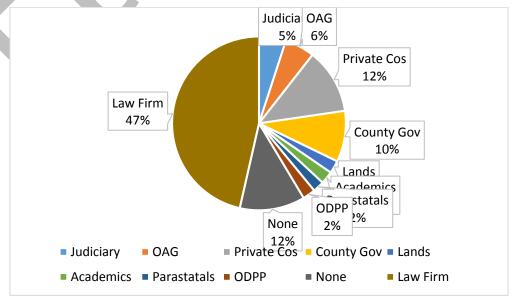
From the data presented, the candidates who failed the Bar Examination had obtained their undergraduate LL.B Degree in the following institutions;

Table 5 - Legal Education Providers from where the candidates in the system undertook the LL.B Study

	LEGAL EDUCATION PROVIDER	PERCENTAGE
1	Kenyatta University	30%
2	Moi University	22%
3	University of Nairobi, Parklands Campus	20%
4	Catholic University of Eastern Africa	8%
5	Kabarak University	6%
6	University of Nairobi, Mombasa Campus	5%
7	Nazarene University	2%
8	Mt. Kenya University	4%
9	JKUAT	2%

The Taskforce also explored the calibre of activities within the legal sector where the 5298 are engaged. The outcome was as follows;

Figure 1 - Distribution of the 5298 in the Legal Profession Judicia OAG



102. From the data above, it would seem that even though these candidates have failed to pass the Bar Examinations, they continue to do some legal work of one kind or the other in various offices. Further, as it has been noted above, there was a correlation between institutional capacity issues and poor performance in the Bar Examinations particularly a relationship between institutional ploughback into law school facilities and the consequential impact on graduates. There was need however for an in-depth study of this issue moving forward. In view of the foregoing, the Taskforce was of the view that there was a need to provide exit avenues/ choices for persons still in the system such as a Para-Legal level entry into the legal system. This is partly because of the heavy investment already spend on these persons. The other avenue is to urge the Council to vigorously enforce quality standards, facilities and resources at legal education providers to improve the quality of training which will in turn improve the pass rates at the law schools and during the ATP programme.

- a) The 8549 candidates should be identified and profiled by the Council of Legal Education.
- b) The responsibility to organise and as a result regulate the 5298 should be vested in CLE and LSK;
- Since LSK has the mandate to regulate paralegals under the Law Society of Kenya Act, the LSK should develop and enforce Regulations towards the organisation and regulation of the 5298 and any others in that category as para-legals. CLE may offer technical support in the process of identifying subsequent paralegals.
- d) There should be a policy limiting the number of attempts to the Bar examination. Bar examination candidates are permitted to attempt the Bar examination within five (5) years. Upon exhausting the maximum number of attempts for the Bar Examination within this

initial five (5) year period, an applicant may be permitted to attempt the Bar examination within a further five (5) years, subject however to the candidate being re-admitted to the ATP training programme afresh as the Bar curriculum for the first five (5) years will have run its course.

e) For the avoidance of doubt, a candidate will not be eligible to attempt the Bar examination after unsuccessfully attempting the same within ten (10) years from first registration.

#### **CHAPTER FOUR - LEGAL PRACTICE ISSUES**

#### A. PRACTISE CRITERIA/ CATEGORIES OF PRACTISE

- 103. The provisions of Section 9 of the Advocates Act lists the requirements for practising law as an Advocate in Kenya as:
  - (i) Having been admitted as an advocates;
  - (ii) Having the name on the Roll; and,
  - (iii) Having in force a Practising Certificate and not serving a suspension by virtue of Section 27 of the Act.
- 104. There are secondary provisions made in Section 12 of the Advocates Act that require one to be a citizen of one of the countries of the East African community; Kenya, Rwanda, Burundi, Uganda or Tanzania AND duly qualified in accordance with Section 13 of the Act. Members noted that South Sudan also became a full member of the EAC in August 2016, yet the Advocates Act has not yet been amended to give effect to the membership of this country.
- 105. There is a requirement on both the professional and academic qualifications.

  In terms of academic qualifications, one must:
  - (a) Be a holder of a Bachelor of Laws (LL.B.) degree from a recognised university;
  - (b) Have completed the post graduate Advocates' Training Programme at the Kenya School of Law including pupillage for six months with a lawyer of more than five (5) years standing; or
  - (c) Possess other qualifications which are acceptable to and recognised by the Council of Legal Education.
- 106. Among the required professional qualifications in section 12 and 13 of the Advocates Act, Cap. 16 is the requirement that one must:

- (a) Be an advocate for the time being of the High Court of Uganda, Rwanda, Burundi or Tanzania;
- (b) Been admitted as an advocate of the superior court of a country within the commonwealth and has practised for more than five (5) years and is on good standing; and
- (c) Where applicable the Council may require a person to undergo such training not exceeding three (3) months.
- 107. Members noted that it was not clear whether the term 'Council' in the proviso of section 13(1) which provides that "Provided that the Council may, in addition, require that a person to whom this paragraph applies undergo such training, for a period not exceeding three months, as the Council may prescribe for the purpose of adapting to the practice of law in Kenya" meant the Council of Legal Education or the Council of the Law Society of Kenya. There was need for legislative clarity on this aspect.

Table 6 - The Roll of Advocates as at 30th March 2017

Active	7,121
Inactive	4,981
Struck Off	58
Suspended	12
Deceased	632
Unknown	1,129
Total	13,933

Table 7 - Admission to the Bar in the last five years

Newly Admitted Advocates			
Year	No of Advocates		
(March )2017	403		
2016	1395		

Newly Admitted Advocates			
Year	No of Advocates		
2015	596		
2014	1219		
2013	304		
2012	819		
Total	4736		

- N/B. 36% of the total advocates in the Roll were admitted in the last 5 years.
- 108. There was need for clear rules under section 9 of the Advocates Bill, 2015 which make provision for Kenyans who have trained in foreign jurisdictions. Members were of the view that it was necessary to harmonize qualifications for Kenyans who had studied abroad especially in civil jurisdictions.
- 109. Members were unanimous that CLE should evaluate law qualifications irrespective of where they are obtained. Law qualifications from civil law jurisdictions could not be equated to the LL.B Degree qualification from common law jurisdictions. Thus holders of such qualifications should be required to acquire LL.B qualifications. There was therefore need to beef up the process of recognition and approval of foreign qualifications in law by having clear regulations for recognition and approval of foreign law qualifications, particularly for those from civil law jurisdictions. Persons with foreign law qualifications irrespective of their jurisdictions should have their law qualifications recognized and approved by CLE subject to the requirement that they must have covered at least twelve (12) of the required sixteen (16) core courses.

## **RECOMMENDATIONS: 16**

- (i) Amendment to the provisions of the Advocates Act in the following terms;
  - (a) Section 13 (i) (e) to specify that the word "Council" in this case refers to the Council for Legal Education and not the Council for the law society. The provisions of the Act are silent.

- (b) Amendment to Section 12 to include South Sudan.
- (c) To make provisions in 13 (i) (e) of the Advocates Act to make provisions for Kenyans who have studied Civil Law. The provisions of the Act only provide for persons trained in the commonwealth and whose determination shall be based on Council of legal Educations' approval. This should include a provision for a competency based examination prior to admission to the ATP for persons with qualifications in law from Civil law jurisdictions.
- (d) For foreigners, the process of recognition and approval should also consider the principle of mutual reciprocity.
- (ii) The changes in (i) above should be made in the Advocate's Bill.
- (iii) That all reciprocal admissions to the Kenyan Bar shall be implemented upon established guidelines set by the Law society and shall be from countries reciprocating such admissions to Kenyans.

## B. CERTAIN OFFICERS WHO ACT AS ADVOCATES

- 110. The provisions of Section 10 of the Advocates Act allows certain persons to act as advocates without necessarily having qualified to practice:
  - a) Officers in the Office of the Attorney General and in the Office of the Director of Public Prosecutions;
  - b) The Principal Registrar of Titles and any Registrar of Titles;
  - c) Any person holding office in the local authority;

d) Such persons being a public officer or an officer in a public corporation as the Attorney General may by notice in the Gazette specify.

The issues arising from these requirements were:

- a) Whether citizenship is a consideration in admission to practise as an advocate in Kenya and
- b) Whether the admission to practise is limited to citizens of East African countries and members of the commonwealth
- c) Whether Kenya can admit non- Kenyans, East Africans who are not admitted to practise in their countries
- d) Whether the admission of citizens from East African countries citizens to the Bar in Kenya should be automatic (within the content of the proposed Mutual Recognition Agreement)
- e) Issues relating to admission of advocates include:
  - i. Whether sitting the Bar Examination automatically guarantees admission to the Roll of Advocates in Kenya;
  - ii. Whether the Petition to the Chief Justice could fail?
  - iii. Whether Gazettement by the Council of Legal Education is a guarantee for admission to the Bar in Kenya?
  - iv. The Office of the Chief Justice does not consult the Law Society before admitting candidates. There is lack of clarity on specific roles of the LSK, CLE and the Judiciary in the admission process.
  - v. The Office of the Chief Justice does not gazette persons to be admitted in compliance with Sec 15(2) of the Advocates Act by the

Registrar - failure to publicly exhibit (1 month) of petitions brought under Sec 13(1)(d) and (e) by the Registrar.

- vi. The names of advocates to be admitted are entered into the Roll before swearing in which leads to confusion especially when an advocate fails to attend the swearing in ceremony and appears later to sign the Roll.
- vii. The Roll is by Law maintained by the Judiciary in hard copy.
- 111. Members noted with concern that the efforts put forth by Kenya in the recognition of qualifications from other East African countries had not been reciprocated by other Member States. Members proposed that the changes recommended should be placed in the substantive Legislation and not subsidiary legislation especially for the Law Society of Kenya Act to give it the force of law it requires.
- 112. Reference was made to Annex VI of the East African Community Common Market (Mutual Recognition of Academic and Professional Qualifications) Regulations 2011, which provides mechanisms for implementation of the Mutual Recognition Agreements and make them legally binding instruments of the EAC. The Mutual Recognition Agreement was still at the negotiations stage between partner states and had not been concluded. Reference was also made to the High Court Judgment in Jonnah Tusasirwe & 10 others vs. Council of Legal Education & 3 Others [2017] eKLR, Petition No. 505 of 2016 where the court held that sections 12(a) and 13(d) of the Advocates created two different avenues for persons from East African Countries to be admitted to the Roll of Advocates in Kenya.

### **RECOMMENDATIONS: 17**

 That the provisions under section 13 of the Advocates Act in relation to academic and professional qualification should be embellished in the following ways;

- i. Provide for Regulations to prescribe qualifications for issuance of practising certificates for the following categories;
  - a. Advocates admitted in Kenya
  - Advocates seeking cross boarder admission as envisaged by the EAC protocol and
  - c. Foreign advocates
- ii. Separate the qualifications for admission to the Bar / admissibility to the Bar placing such conditions such as
  - a. Nationality/citizenship and the requirement of a work permit
  - b. Residency
  - c. Whether a disclaimer envisaged in (a) above was signed
  - d. Make provisions for exemption of any of the conditions by the Council of Legal Education
- iii. Legislate on the requirements for licensing of persons to practise Law.
  - a. In the event the advocate is of less than five (5) years, the person should attend the ATP programme
  - b. In the event the advocate is of more than five (5) years, the person should be admitted under reciprocal admission.
  - c. That the licensing of foreigners should be differentiated from that of Kenyans and should be properly captured in Law in Part V dealing with practising certificates of the Bill.
  - d. Amend section 6 of the Advocates Bill, 2015 to include persons who qualify for admission to the Bar under sections 16 and 19 of the Advocates Bill.

- b) That the conflict in admission requirements between the Legal Education Act and the Kenya School of Law Act be clearly defined in the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 to give clarity on the admissibility of persons in every segment of academic programmes and in the professional programme. Importantly, qualifications at all points of legal training should be clarified.
- c) That admission to the Roll of all persons is the exclusive role of the Chief Justice once the Law Society has been consulted as required
- d) That all persons who are to be admitted must be gazetted by the Chief Justice before admission as is required by Law
- e) That CLE shall provide the list of qualified candidates to the Office of the Chief Justice which office shall gazette the candidates
- f) That gazettement for purposes of "admission" to the Bar should be undertaken once the petition to the Chief Justice has been accepted.
- g) That the Advocates Bill should make provision for appeal of the petition to the Chief Justice in the event the petition fails.
- h) That the Law Society should spearhead the creation of a digital Roll of Advocates

## C. PRACTISING CERTIFICATES

113. Under the provisions of Section 21 and 22 of the Advocates Act, a Practising Certificate is a requirement for one to practice as an Advocate. Currently Practising Certificates are issued by the Judiciary. The process has been characterized by delays in processing Practicing Certificates despite payments for the same and applications being processed in the first quarter of each year. However, with effect from January 2017 the LSK is processing and printing the

certificates and forwarding to the Chief Registrar for issuance. This is important to ensure efficiency in the issuance of certificates to Advocates.

- 114. A Practicing Certificate is a regulatory tool and a requirement. Consideration should be given to allow the certificates to be issued by the LSK as opposed to the Judiciary to strengthen the Society as a self-regulated profession.
- 115. The committee adopted the categorization as put in the Advocates Bill under section 13 with recommendations as follows:

### **RECOMMENDATIONS: 18**

- a) That current practice where the admission Certificate is issued by the Registrar continues, however, Sections 21 and 22 of the Advocaes Act should be amended to authorize the Secretary of the Law Society of Kenya to issue Practising Certificates to advocates on an annual basis forwarding a copy to the Judiciary;
- b) As a result of (a) above, amend the Part V of the Advocates Bill to allow LSK to issue Practising Certificates. The entire Part V of the Advocates Bill needs to be amended to resonate with the recommendations made by the Taskforce on this point;
- That the Law Society of Kenya should define the conditions for issuing Practising Certificates including conditions such as taking out fidelity issurance;
- d) That the categories of those that can practise as Advocates in Kenya are well defined in Part III- (sections 9 11) of the Advocates Act, Cap. 16 including those in OAG and judicial officers;
- e) That the OAG pay fees for the advocates so as the ensure that the advocates benefit from the perks of fully paid up membership such as

CPD/ make Regulation to pay subscription fees for public officers/ require nominal fees to keep them active in the professions.

f) Section 12 of the LSK Act, 2014 should be amended with a view to setting out the rights and benefits of each member/ non-member. For example section 12(e)-(h) should fall under section 12(d).

#### D. TYPES OF PRACTICE

#### 116. International Trends In The Practise Of Law:

International trends in categories of practise have placed the practise of law in the following broad areas;

- a) **Private Practice**—includes all positions within a law firm, including sole practitioners, associate, law clerk, paralegal, and administrative or support staff.
- b) **Public Interest**—includes positions in state corporations and others providing civil, legal, and indigent services. Also includes public defenders as well as positions with unions and cause-related organizations.
- c) **Government**—includes all levels and branches of government, including prosecutor positions, positions with the military, and all other agencies, such as the state or local authorities, parliamentary committees, law enforcement, and social services.
- d) **Judicial Clerkship**—a one- or two-year appointment clerking for a judge.
- e) **Business and Industry**—includes positions in accounting firms; insurance companies; banking and financial institutions; corporations, companies, and organizations of all sizes, such as private hospitals, retail establishments, and consulting and public relations firms; political campaigns; and trade associations.

- f) **Academic**—includes work as a law professor, law librarian, administrator, or faculty member in higher education or other academic settings.
- 117. Currently there is a lot of discussion about changes in the practice of law and the future of the legal profession. There are major drivers of change that are starting to have some impact and will become more significant in coming years. These include:
  - a) **Globalization**: Both corporate and individual clients have been and continue to be influenced by globalisation
  - b) **Demographics**: The profession is aging and there are large numbers of lawyers approaching retirement age. This is a significant issue in many smaller and rural communities because younger lawyers are not starting up new practices in these communities but preferring the city centre.
  - c) **Technology**: The internet and other technologies are having a disruptive impact, allowing many new ways for lawyers and clients to communicate and collaborate and opening the door for new types of legal service offerings.
  - d) **Self-help and DIY tools**: The internet has given individual or consumer clients access to virtually all the legal information and resources that only lawyers could access just a few decades ago such as company registration.
  - e) Legal process outsourcing: Firms are exploring new ways to cut costs, including outsourcing legal work (e.g., research, document drafting and review, e-discovery, etc.) and non-legal work
  - f) Law firm management- Improved professional management of law firms
  - g) Marketing and advertising- Improved law firm marketing which is driving a decline in the relative cost of marketing and an improvement in sales efficiency

- 118. There are several categories of practise of law in Kenya:
  - (a) Active Practitioners
  - (b) State Lawyers
  - (c) Corporate Lawyers
  - (d) Judicial Officers
  - (e) Legal Officers
  - (f) NGO/ Civil Society Lawyers
  - (g) Academia Lawyers
  - (h) Others ODPP/ Registrars of Titles etc.

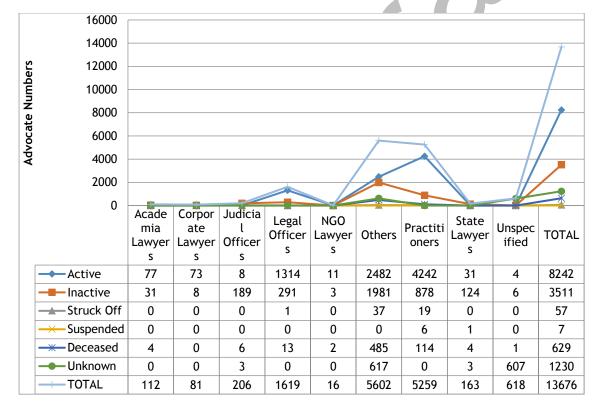


Figure 2 - Distribution of members by categories of practise

#### E. LAW FIRMS

119. The Kenyan legal market is split between large domestic firms and boutiques of sole proprietors with the largest firm employing around 70 advocates. Law firms in Kenya can be incorporated in any of the following ways;

- a) Sole proprietorships/business names This is a business structure where the law firm is owned and operated by one person and that person is liable for any of the law firms' obligations
- b) General Partnerships These are the most common in Kenya. A partnership consists of two or more people who own and run the law firm. The partnership is often governed by a partnership agreement which sets forth the partners' responsibilities and obligations.
- c) Limited Liability Partnerships These provide some protection from personal liability for certain acts of the other partners. In a partnership, partners are:
  - (i) Personally liable for the law firm's obligations in the case of general partnerships
  - (ii) Partners owe a fiduciary duty to each other

In each case, the benefits include low costs, profits that flow through the partners and incentives for employees to become partners. On the downside, joint and several liability, profit sharing and disputes between partners over law firm decisions.

d) Limited Liability Company - These are law firms whose members are protected from personal liability for acts and debts of the law firm in the same way as a corporation. The advocates in these firms have to deal with dissolution if an advocate leaves the firm or dies although the agreement can address this issue.

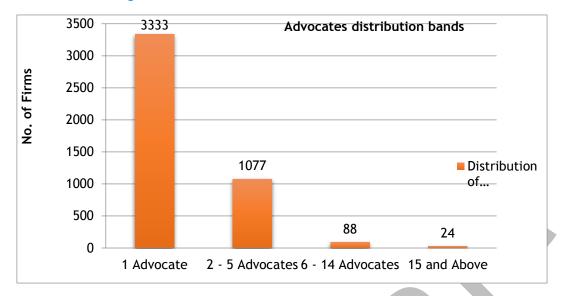


Figure 3 - Distribution of Advocates Firms 2016

#### 120. Issues raised:

- (a) Whether the society should encourage Sole Proprietorship or partnerships in practise;
- (b) Whether the formation of joint ventures and alliances be encouraged;
- (c) Appropriate measures that should be undertaken by LSK in view of the large number of advocates not taking out PC's;
- (d) Whether the LSK should look into the Regulation of all the categories of practice;
- (e) Whether the LSK should reconsider issues such as winding up of law firms upon striking off, suspension or demise of a sole proprietor.

## **RECOMMENDATIONS: 19**

a) That the Law Society should encourage partnerships and Limited Liability Partnerships (LLP)

- b) In terms of discipline of members, the society should determine the process of discipline of special members of the society. Amend the Advocates Act accordingly.
- c) Develop Regulations on use of generic names, joint ventures and international alliances.
- d) LSK should develop regulations providing for the Registration of law firms.

## F. UNQUALIFIED PERSONS

- 121. These are persons who are not qualified under Section 9 to the Advocates Act, Cap. 16, to act as an advocate. Section 31 of the Act requires that unqualified persons should not to act as advocates. The courts have pronounced themselves in the Supreme Court Petition no. 36 of 2014 National Bank of Kenya Ltd vs Anaj Warehousing Ltd. where on 2nd December 2015 the Supreme Court of Kenya delivered judgement holding that a deed or instrument of conveyance drawn or attested by an advocate who has no practising certificate is legal, valid and enforceable. The said decision by the court established new law by overturning the traditional legal position as established by the Court of Appeal in Civil Appeal No. 119 of 2002, National Bank of Kenya Limited v. Wilson Ndolo Ayah [2009] eKLR, which established that such documents were null and void ab initio.
- 122. The issues arising from this were that the profession must be regulated to curb the practise of law for unqualified persons. The jurisprudential legitimacy of the Supreme Court's decision in *Anaj* was scrutinized by the Taskforce. While it was understood that the decision protects innocent clients who might not be aware of whether the advocate in question holds a current practicing certificate, nevertheless it was the general consensus that the profession is the one that should step in from a regulatory point of view to deter advocates without practising certificates from practicing without certificates.

123. It was understood that section 34(3) of the Advocates Act, [Cap. 16] only states that violating section 34(1) is an offence but does NOT speak to the validity or invalidity of docs prepared by an unqualified person. Section 34(3) of the Advocates Act, could be amended by expounding it so as to make documents prepared by an unqualified person invalid.

## **RECOMMENDATIONS: 20**

- a) The Law Society should set up an inspectorate within the Advocates

  Act to coordinate and spearhead enforcement and compliance efforts

  with a view to weeding out unqualified persons and strengthen the

  mechanisms of enforcement of dealing with unqualified persons;
- b) That the compliance as envisaged in (a) above should be in line with the objects of the society including the code of conduct and Regulations;
- c) That the Law Society should train advocates on their obligations to the profession including compliance with the accounts rules;
- d) The Law Society should seek the authority of the ODPP in appointment of special prosecutors under the Advocates Act;

## G. PARA-LEGALS

- 124. Paralegals assist lawyers in the delivery of legal services. The career began to develop in the late 1960's when law firms and individual practitioners sought ways to improve the efficient and cost effective delivery of legal services. Utilization of paralegals in a law firm ultimately reduces the cost to the client and frees time for Advocates.
- 125. Paralegals are qualified by education, training or work experience and are employed or retained by an advocate, law office, corporation, governmental agency or other entity to perform specifically delegated substantive legal work

for which an Advocate is responsible. In a law firm setting, paralegal's time spent on substantive legal work is billed to clients at market rates, similar to other professional staff, but often at a lower rate. This distinguishes paralegals from other non-lawyer staff members.

## 126. There are several clusters of paralegals:

- a) Corporate Paralegals
- b) Community based Paralegals- Civil Society
- c) Prison Paralegals
- d) Legal Clerks- Law Firms, Judiciary, Government

Members appreciated that paralegals in other jurisdictions notably UK, South Africa, Australia are trained professionally as such. Those jurisdictions have distinct legal regulatory framework for paralegals as professions. In these countries, Paralegals are not dropouts from law schools or a support profession but a distinct profession.

## 127. In Kenya, the current legislative framework that deals with paralegals include:

- a) The Legal Aid Act, 2016 which provides limited framework on engagement of paralegals. Under Section 68; an accredited paralegal employed by accredited body may provide legal advice and assistance. However, the accredited paralegal shall not demand payment of a fee from a person who qualifies for legal aid under the Act. An accredited paralegal who demands payment of a fee commits an offence. It was observed however that the Legal Aid Act only applies to paralegals who provide free legal aid. The Act is therefore limited in scope and is not a general regulatory framework.
- b) The Advocates Act Cap 16, under section 72 provides for disciplinary powers as to Clerks working in law firms, as follows:
  - (i) conviction of an offence;

- (ii) fraud,
- (iii) causing advocate to be summoned to disciplinary Tribunal;
- (iv) where the conduct of the clerk may be subject to disciplinary

  Tribunal if the clerk were an advocate.
- c) NALEAP programme under the office of Justice and Constitutional Affairs has further developed Draft Paralegal Regulations, which are yet to be shared for discussion.
- d) The Paralegal Support Network (PASUNE) has labored for paralegal legal recognition as enablers in the legal sector.
- e) Law Society of Kenya Act: Sec 41(0) The Council may make regulations for recognition and regulation of paralegals, however no specific provision in the substantive Act on the regulations.
- f) Kenya School of Law offering Diploma in Law (Paralegal Studies).
- 128. Issues arising from the discussions included;
  - a) Whether there was a need to regulate paralegals since the practice of law expands the role and activities of paralegals;
  - b) The regulatory programs of paralegals vary in context and substance; from merely establishing voluntary qualification criteria to requiring minimum educational standards.
  - c) Whether paralegals are merely assistants to lawyers and hence conjoined inseparably or do they constitute an independent profession that requires separate regulation and supervision?
  - d) Is there a need for a governing body of paralegals?

- e) Shall it be mandatory for all paralegals to register with the governing body?
- f) Shall there be a licensing authority?
- g) Will the compliant paralegals get certification?
- h) What types of work shall the qualified paralegals undertake?
- i) Is there need to expand the role of paralegals in the delivery of legal services, thereby protecting the public from unauthorized practice of law?
- j) Should there be distinction between services rendered by certified and uncertified paralegals?

## **RECOMMENDATIONS: 21**

- That the Law Society should study how paralegals are treated in other jurisdictions and develop a regulatory mechanism for paralegals in Kenya within the Law
- b) That the definition of paralegals must be conceived from a wider perspective and not just within the purview of legal aid
- c) Legislate on standards for education, experience, qualification registration and regulation of paralegals
- d) Define and enforce professional standards relating to paralegals including disciplinary processes.
- e) Write Rules of Professional Conduct or Code of Professional Responsibility to allow for expanded roles and responsibilities for paralegals, including revision to the references concerning ultimate

responsibility and accountability of a lawyer for paralegal work, rather than under direct supervision;

- f) Revise the provisions of Section 34 of the Advocates Act and determine what can be done by advocates and what paralegals can do e.g. formation of companies, filling of grants of probate and letters of administration
- g) Provide a model for revisions to court rules that would permit expanded roles and responsibilities for paralegals;
- h) Substantive legislation for the development, support and regulation of para-legals be developed by the Law Society of Kenya.

#### H. LSK MEMBERSHIP CRITERIA

- 129. The membership of LSK is informed by Part II of the Law Society Act No. 21 of 2014 under Section 7 (1) as:
  - a) Persons who have been admitted as advocates and whose names are entered on the Roll of Advocates,
  - b) Persons who are admitted to membership as special members under Section 8 of the Law Society Act,
  - c) Persons elected as honorary members of the Society under section 9 of the Act.
- 130. The Act excludes the following from membership of the society;
  - a) Persons who have been struck off the Roll of advocates and
  - b) Persons who have been expelled from membership of the society.
- 131. In terms of the categories of members of the Society, members are either;

- a) Ordinary members
- b) Special members
- c) Non- practising members or
- d) Honorary members.
- 132. Further, that a member of the Society must be an Advocate of the High Court of Kenya except where one is appointed an honorary member. In the admission of members to the society, it arose that there were grey areas in relation to qualification for admission to the society. The law is silent on the admission of pupils to the Advocates Training Programme. Further, the provisions of Section 4 of the Kenya School of Law Act limits the admission of candidates to the programme for purposes of meeting the provisions of sections 12 and 13 of the Advocates Act.
- 133. It was appreciated that LSK had no legal or regulatory basis to deny Practising Certificates to persons who are still on the Roll of advocates but who were found culpable of professional misconduct elsewhere e.g. judicial officers or Lands Ministry Registrars and who have been declared unfit to continue holding office or acting as judicial officers etc. Members also considered:
  - (a) LSK members who were members of professional bodies in view of the requirements of section 5 of the Public Service (Values and Principles) Act, 2015; and
  - (b) Advocates who are public officers and whose names continue to be on the Roll of Advocates but who were not in active practice e.g. Judicial Officers (Judges and Magistrates); Registrars at the Companies Registry, Lands Ministry and elsewhere, Clerks of the National and County Assemblies etc. The issue for this category of persons was what happens as far as their status as Advocates is concerned if they commit misconduct in their areas of service and are subsequently removed from service, should the findings from such proceedings also inform their status as Advocates and therefore membership of the LSK? Members were

cognizant of the issues connected with this problem area including but not limited to the double-jeopardy rule, and *res judicata*. Moreover, there is need to distinguish between what it means to be an Advocate of the High Court of Kenya and member of the LSK. There is need therefore to review section 10 of the LSK Act to be clear that other categories are exempt from Practicing Certificates.

## **RECOMMENDATIONS: 22**

- a) The case of Jonnah Tusasirwe and other Vs. Council of Legal Education and Another High Court petition no. 505 of 2016, seeking direction of the admission of non-Kenyans must be pursued to conclusion so that there is a judicial pronouncement on the interpretation of the provisions of Section 4 of the Kenya School of Law Act as read together with the provisions of Section 12 and 13 of the Advocates Act.
- b) Section 4 of the Kenya School of Law Act be amended to remove the tie band that training at the school can only be in satisfaction of the provisions of Section 12 and 13 of the Advocates Act.

#### I. THE SENIOR BAR

# i) INTRODUCTION AND BACKGROUND

- 134. In medieval times literacy was largely confined to the clergy, and clerics acted in the administration of civil justice. The first organised body of lay practitioners was the order of *sergeants-at-law* established at about the time of King Edward I. The Church forbade clerics to appear as advocates in the secular courts and there then emerged a class of lay advocates. The Court of Common Pleas was for a substantial period the dominant court in England, and the *sergeants-at-law* had an exclusive right of audience in that court.
- 135. As the practice of appointing ecclesiastics and public officials to the bench was abandoned, the judges themselves were recruited from the ranks of sergeants.

Another class of professional lay advocates, with a right of audience in the Court of Kings Bench and the Exchequer later grew up. These advocates, called barristers, were organised in Inns of Court. They came to be divided into inner barristers and outer barristers. By the end of the sixteenth century there had been established a practice of the appointment by the Sovereign, by letters patent, of King's Counsel from amongst the ranks of barristers. King's Counsel were originally appointed to assist, where necessary and when called upon to do so, the Attorney General and Solicitor General, the first and second law officers of the Crown. In addition, up until the early part of this century they required a dispensation to appear against the Crown.'22 In 1670, during the reign of King Charles II, the Privy Council declared that King's Counsel took precedence over the sergeants-at-law<sup>23</sup>. When the legal profession was established in the various British colonies the usage and practices of the profession in England and Ireland were adapted.

- 136. The appointment to the rank of Queen's/ Senior Counsel is an important and professionally valuable step in the life of a lawyer. Appointment to a new rank, differently styled and differently chosen, of senior counsel would not carry the same respect, at least until it was earned. That would take time. There is also no doubt that there would always remain in the legal profession a position of senior advocate. In many of the countries of the Commonwealth which are now republics there are appointments of senior counsel, so styled (SC). In Sri Lanka, counsel appointed to the Inner Bar are appointed as President's Counsel (PC). In Nigeria, senior counsel are appointed as Senior Advocates of Nigeria (SAN).
- 137. In Kenya, the same is styled as Senior Counsel and provisions for appointment made under the Advocates Act and Advocates (Senior Counsel Conferment and Privileges) Rules 2011.

<sup>&</sup>lt;sup>22</sup> Halsbury's Laws of England, 4th ed., vol. 3(l) para 359.

<sup>&</sup>lt;sup>23</sup> Halsbury, op cit. para 359.

Table 8 - Comparative statistics on the membership of Senior bar vis a vis the General Membership

Kenya	0.18%
England & Wales	8.5%
Nigeria	0.34%

## ii) MEMBERSHIP OF THE SENIOR BAR (SENIOR COUNSEL)

- 138. Applications are received under the provisions of section 17 of the Act. The application must be submitted to the secretary and the applicant must meet the following criteria;
  - a) meets the requirements specified under section 17(2) of the Act;
  - b) is an active legal practitioner and undertakes training of other members in the legal profession;
  - c) holds a valid practicing certificate or is entitled to act as an advocate under section 10 of the Act, at the time of making the application;
  - d) has not been found guilty of professional misconduct by the Disciplinary Committee established under the Act;
  - e) possesses sound knowledge of law and professional competence;
  - f) is a person of integrity, irreproachable professional conduct and good character;
  - g) has argued a substantive matter before a superior, regional or international court;

- h) has actively served the Society or other regional or international bar association to which the Society is a member or has undertaken community service; and
- i) has contributed to the development of the legal profession through scholarly writings and presentations.
- 139. Members considered the issues of discipline of Senior Counsel, mentorship, appointment as Senior Counsel vis-à-vis low numbers of Senior Counsel and roles of senior counsel with recommendations as hereunder.

## **RECOMMENDATIONS: 23**

- a) That rules should make for provisions to expand the membership of Senior Counsel in realization that there is a need to create a bigger pool of senior counsel since as it is senior counsel mentorship is limited;
- b) That the rules should also make provision for the composition, management and regulation of the senior bar;
- c) That the Senior Counsel Rules of 2011 should be reviewed to accommodate recommendations in (a) and (b) above;
- d) The Rules for appointment of Senior Counsel should be amended to provide for:
  - (i) A meeting of the Senior Counsel committee so that calls for nomination of persons to the senior bar are made;
  - (ii) Calls for appointment of Senior Counsel shall be made, once every two (2) years;
  - (iii) Quorum for the committee be five (5) Persons;

- (iv) That the president of the Law Society should provide the Secretary of the committee;
- (v) That LSK develops Rules for the committee for Disciplinary processes of the Senior Bar.
- e) There should be a process for nomination from members of the bar to the Senior Bar so that becoming a Senior Counsel is either on application or by nomination by members;
- f) The membership should allow nominations from the public service, academia including special members;
- g) That the law and relevant rules and regulations should be amended to provide for the above proposals and for the requirement that the advocate has argued a substantive matter before a superior regional or international court be an alternative and not a stand alone requirement.

## J. FOREIGN ADVOCATES (TEMPORARY ADMISSION)

- 140. The provisions of Section 11 provide that in his absolute discretion, the Attorney General may admit to practice as an advocate a practitioner entitled to appear before superior courts of a Commonwealth country if such person has come or intends to come to Kenya for the purpose of appearing, acting or advising in that suit or matter and is not disqualified or suspended by virtue of the Act.
- 141. The Advocates Bill 2015 in Sections 16 and 17;
  - (c) Introduces the element of reciprocity (subject to verification by CLE) in the process; and,

- (d) Requires the LSK council to approve in writing provision of legal services specified in the warrant for the purposes of particular proceedings and Anticipates regulations made by the CJ.
- 142. Members agreed that the presence of foreign advocates in the practice of law in Kenya enhanced transfer of knowledge, legal expertise and capacity building. Issues were raised on the brand names of law firms and the inconsistencies experienced in practice.

## **RECOMMENDATIONS: 24**

- a) Amend the provisions of Section 34 (1) (f) of the Advocates Act to include arbitration work as legal work and with it restrict immigration services as legal services under section 34 (1) (f) of the Act.
- b) Create a distinction between Section 16 and 17 of the Advocates' Bill
- c) Define 'matters' or 'suits' within the context of non-litigation work e.g. mergers & acquisitions.
- d) That the Law Society should develop a mechanism to keep track of all foreign advocates and the services they are providing as advocates in Kenya.
- e) That the use of trade names must be regulated to the extent that it is not accepted. The Law Society of Kenya should develop appropriate regulations to effect this recommendation; and
- f) That practise regulations should allow for application for waiver on the use of name.

#### **CHAPTER FIVE - DISCIPLINE**

#### A. INTRODUCTION

- 143. The Advocates Complaints Commission is a department within the Attorney General's Office. It consists of such commissioner or commissioners as may be appointed by the President for the purpose of inquiring into complaints against any advocate, firm of advocates, or any member or employees of an advocate or firm of advocates. Where the President appoints a single commissioner, the person appointed must be a person who is qualified to be appointed as a Judge of the High Court under Chapter IV of the Constitution of Kenya. The Commission is obliged by law to receive and consider a complaint from any person, regarding the conduct of any advocate, firm of advocates, or any member employee thereof. If it appears to the Commission, whether before or after instruction, that there is substance in a complaint but that the matter complained of constitutes or appears to constitute a disciplinary offense, the Commission refers the matter to the Disciplinary Tribunal for appropriate action. In practice, the Complaints Commission prosecutes such matters before the Disciplinary Tribunal.
- 144. Complaints against Advocates may be made to the Advocates Complaints Commission in writing and supported by relevant documentary or other evidence. Complaints may also be addressed to the Disciplinary Committee, or the Law Society of Kenya. In practice, most complaints are dealt with by the Advocates Complaints Commission and the matter will normally be taken to the Disciplinary Tribunal if it is of a serious nature or if it involves professional misconduct on the part of the advocate.
- 145. The discussions in this thematic group were led by the Disciplinary Tribunal ('DT') and the Advocates Complaints Commission ('ACC').

#### B. NATURE OF COMPLAINTS RECEIVED BY ACC

146. The majority of complaints received by the ACC involved administrative lapses in an advocates' offices. Neither the current Advocates Act nor LSK Code of Conduct prescribe mandatory timelines within which advocates have to account to clients for all monies received, or time within which the monies must be transmitted to the client. It is also observed that advocates do not typically discuss issues like costs and communication with clients. These issues should ideally be discussed during the commencement of the advocate-client relationship. However, many clients do not know (and do not have facilities to learn) the particularities of the legal issues facing them and how they ought to be dealt with. The advocate-client relationship is not one of equal parties, and the law ought to be amended to require advocates to provide certain information to their clients (e.g. the service they will provide, how much it will cost, how often they will communicate, the chances of success, the possibility of referring the matter to ADR etc). This will enable the client to participate in his case and to give informed consent to recommendations that the advocate makes.

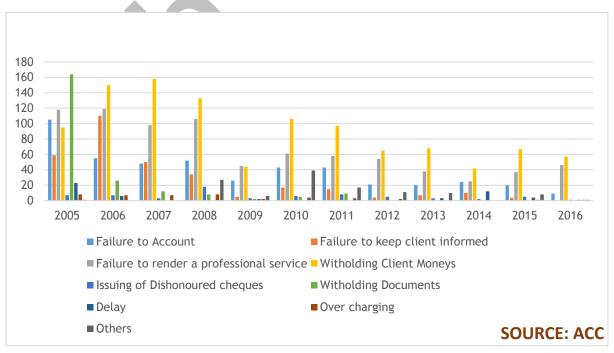


Figure 4 - Nature of Complaints Received by ACC

#### C. ACC CLASSIFIED COMPLAINTS

147. When the ACC receives a complaint, a Preliminary Enquiry is conducted to confirm that the grievance fall within the Commission's mandate and that it is meritorious. Thereafter the complaint is "Classified" for further enquiry and collection of evidence. A 2012 independent audit of the complaints received by ACC revealed that 72% of all complaints were rejected or resolved through Alternative Dispute Resolution at an early stage. There is therefore need for public education on client-advocate relations and what constitutes misconduct.

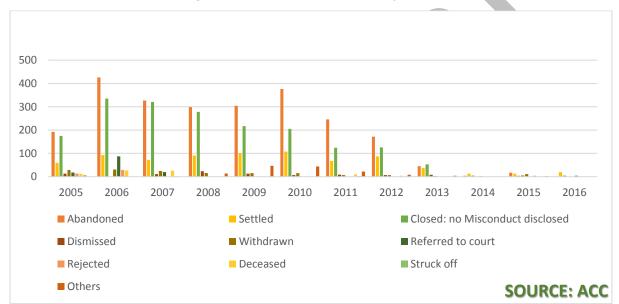


Figure 5 - ACC Classified Complaints

## D. OUTCOME OF COMPLAINTS FILED BY ACC TO DISCIPLINARY TRIBUNAL

148. About half of the cases filed before the Disciplinary Tribunal are typically dismissed. A contributory factor is that many advocates do not respond to letters from the ACC, which often has to proceed with available evidence if the complaint discloses a *prima facie* case. When advocates who have previously ignored correspondence receive formal charges, many appear to defend themselves and are able to give adequate responses to the client's grievances. Advocates ought to receive regular information on the workings of the disciplinary system and the importance of their cooperation with it. This will also help resolve matters early.

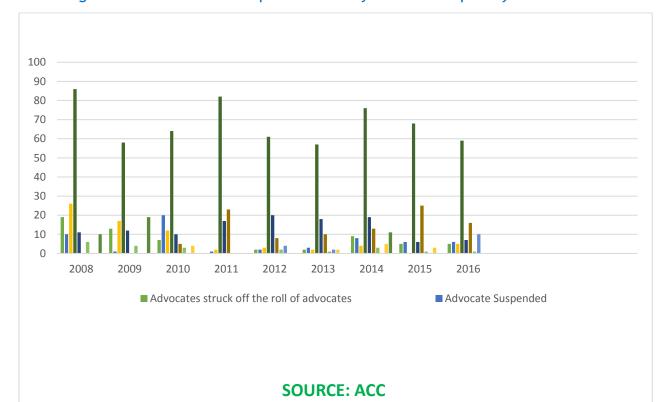


Figure 6 - Outcome of Complaints Filed by ACC to Disciplinary Tribunal

#### F. NATURE OF COMPLAINTS FILED BEFORE THE DISCIPLINARY TRIBUNAL

149. Advocates have a duty to cooperate with the disciplinary system when complaints are lodged against them. However, many do not, and the single largest category of charges filed against advocates by the ACC is "failure to respond to correspondence from the ACC". Indeed, there have been instances where an advocate is acquitted by the DT of all the charges brought against him by the complainant, but is still convicted to failing to respond to letters from the ACC. Because a complaint takes, on average, one year to complete, early responses are helpful because they allow the ACC to distill the issues and propose solutions without the need to file a formal charge. The LSK needs to support the ACC by educating advocates on this.

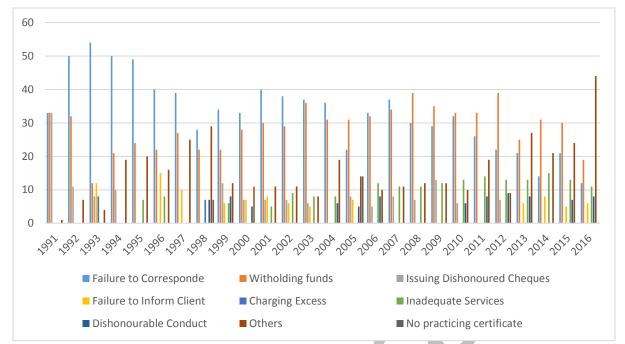


Figure 7 - Nature of complaints filed before the Disciplinary Tribunal

Source: ACC

### G. PROSECUTORS BEFORE THE DISCIPLINARY TRIBUNAL

150. The ACC and the LSK have statutory mandates to enquire into and prosecute before the Disciplinary Tribunal complaints of professional misconduct against advocates. However, since the establishment of the ACC in 1990, the majority of charges before the Tribunal have been filed by the complainants in person or through advocates as "Private Prosecutions". Causes of this include the fact that the investigation process by the ACC can take several months, and many are impatient and proceed directly to the DT. Additionally, when the LSK rejects a complaint as unmeritorious, the complaints often re-file them before the ACC (and vice versa) and when the ACC rejects it too, they file their complaints directly to the DT. In order to rationalize this situation, it is suggested that one single independent body be established to enquire into complaints, and that this body be the only one authorized to file charges before the ACC. AS this would be a free service (financed partly by fines and costs levied on the advocates), no person will be disenfranchised, and there will be restoration of order.

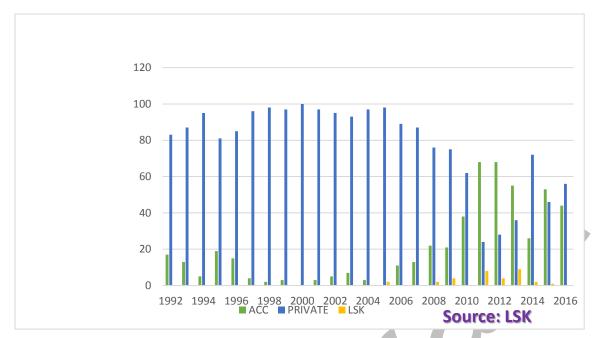


Figure 8 - Prosecutors before the Disciplinary Tribunal

## H. ADVOCATE'S NATURE OF ENGAGEMENT

151. The majority of complaints are received are against sole practitioners and advocates in small partnerships. Having several partners appears to foster accountability. The profession should encourage specialization and the formation of larger firms. In the meantime, sole practitioners ought to receive CPD training on issues like keeping of accounts, client care, and time management, which appear to be among their biggest challenges.

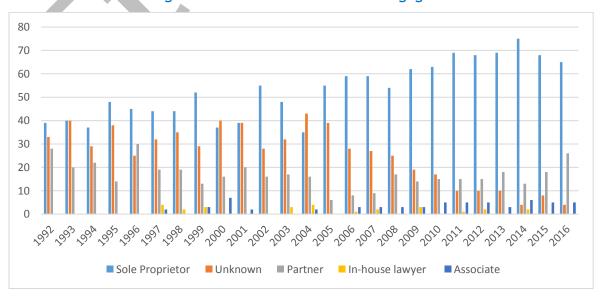


Figure 9 - Advocate's Nature of Engagement

152. From the foregoing, it was noted that the high areas for discipline issues are;

a) Withholding clients' money

b) Failure to account and

c) Abandoned cases

153. The majority of cases before the disciplinary tribunal are

a) Failure to correspond

b) Inadequate services and

c) Withholding funds

#### I. CURRENCY OF ETHICAL STANDARDS

154. There are constitutional provisions under Art. 46 (1) where consumers are guaranteed services of reasonable quality. Under Article 46(2) Consumers are entitled to information necessary for them to gain full benefit from the services.

155. The Code of Ethics and Conduct for Advocates adopted at LSK AGM on March 11 2017 and previously, the Digest of Professional Conduct and Etiquette and Advocates Act were in use. The Advocates Bill in Part IX, sections 76-79 sets out what constitutes unsatisfactory professional conduct and professional misconduct.

156. Code of Ethics and Conduct for Advocates:

Rule 1: Requirement for a practicing certificate

Rule 2: requirement for advertising

Rule 3: competence and diligence in client care

Rule 4: Professional fees

Rule 5: fiduciary duty over client funds and other property

Rule 6: conflict of interest

Rule 7: confidentiality and advocate-client privilege

Rule 8: fidelity to the law and due process

Rule 9: Professional Undertakings

Rule 10: Social Media

Rule 11: Outside interest

Rule 12: Honesty and integrity

#### J. THE FRAMEWORK FOR ENSURING COMPLIANCE

157. There are several measures legislated to ensure compliance;

- a) Compulsory fee agreements (section 45 Advocates Act appears to make them optional)
- b) American rule or English Rule? Section 46 (section 60 in Bill)
- c) Filing of advocate-client Bill of Costs and taxation by courts after formal complaint filed.
- d) Lawyer lending/Fee Financing Financial Institutions/individuals to finance lawyer costs and recover their money after a suit is concluded.
- e) Do away with the Advocates Remuneration Order. Freedom of contract. Note however that the US did this in 1975 with the expectation that competition would keep fees low. Today lawyer costs in the US are the highest in the world.

### 158. Issues arising from these discussions;

- a) Section 45 of the Advocates Act should be amended to ensure that the fee agreements are not optional.
- b) In running down matters, the provisions of section 46(a) in as far as they relate to advocates having a stake in the clients matter

c) There is a need to clarify the provisions of section 46(d)

#### K. CRIMINAL MISCONDUCT

- 159. Advocates' Act creates the 15 criminal offences against advocates and others. Under section 61(3) the Act may, if the offence of betrayal of trust under section 80 is disclosed, refer matter to DPP for possible prosecution. There have been no prosecutions by DPP despite recommendations by DT and ACC. The process of forwarding complaints to the DPP for possible prosecution should be clarified, so as to create an obligation on the DPP to consider the matter and act in suitable cases.
  - [1] Section 31 Unqualified person acting as an advocate
  - [2] Section 32B irregularly determining remuneration of in-house advocate
  - [3] Section 33 pretending to be an advocate
  - [4] Section 34 Unqualified person preparing certain documents or instruments
  - [5] Section 35 Failure to endorse instruments with name and address of drawer
  - [6] Section 36 Undercutting
  - [7] Section 37 Sharing Profits with unqualified persons
  - [8] Section 39 Advocate acting as agent for unqualified person
  - [9] Section 42 Failure to disclose fact of having been struck off
  - [10] Section 43 Body corporate pretending to be qualified or recognised as qualified
    - to act as an advocate
  - [11] Section 53(3A) Failing or refusing to assist the Advocates Complaints
    Commission
  - [12] Section 74(1) Clerk seeking or accepting employment or remuneration from an advocate without disclosing the fact that an order under Section 72 in force against him.
  - [13] Section 74(2) knowingly contravening an order made under section 72 or any condition set by the Council of the Society.
  - [14] Section 77 Failure to comply with an order of the Disciplinary Tribunal

# [15] Section 80 Betrayal of trust

- 160. Issues arising from these discussions were;
  - a) In the context of the no contact rule, the advocates were in contact with the complainants in matters which were the subject of the complaint or disciplinary proceedings;
  - b) There is no current period of limitation for when a client can bring a complaint against an advocate.

Members considered introducing automatic suspension of Advocates under section 82(2) who have confirmed complaints against them, which have a *prima facie* basis for success on the basis of the evidence as determined by the Disciplinary Tribunal. A procedure should be prescribed for this purpose bearing in mind the rules on natural justice and principle of fair hearing. Section 88 of the Advocates Act should be reviewed to reflect the foregoing.

- a) That the regulation be amended to provide procedures and presentation of a prima facie case in section 88 (1) (2) of the Bill;
- b) That once a prima facie case has been established in (a) above, that the advocate should be suspended until the matter is determined;
- c) That the remuneration order should define what overcharge means;
- d) Fee agreements must be made compulsory;
- e) The processes of Lawyer lending/ fee financing should be Regularised under the Regulations;

- f) The Law should make it clear what an advocate can charge in running down matters;
- g) The law should make it clear that the ceiling for billing is 25%;
- In the context of disciplinary proceedings, the advocate should not contact the complainant;
- i) The limitation period should be set at three to six years;
- Rules on professional conduct be reviewed by the Law Society of Kenya in line with emerging best practices;

### L. OTHER EMERGING PROFESSIONAL ISSUES

- 161. **Communication** Advocates spend about 30% of their time with clients counselling. Need to improve client interactions. CPD, Code of Conduct.
- 162. **LSK Inspectorate** Those advocates who continue to operate their offices without practising certificates; Inspect advocates' accounts where more than 2 complaints have been brought against the advocate.
- 163. Client care Ethics of care to be taught in universities and KSL.
- 164. Lawyer Assistance Programme Impaired advocates receiving confidential assistance.
- 165. **No-contract rule** Advocates with complaints contacting and negotiating with complainants.
- 166. **Public information** Cooperation with other stakeholders to prepare and present radio programmes on pertinent legal issues. Have public become aware of the institutions that regulate the profession.

- 167. Limitation there is currently no period of limitation to bringing a complaint of professional misconduct against an advocate. This can work unfairness as the advocate may have destroyed his file in accordance with the guidelines in the Digest of Professional Conduct & Etiquette. ACC and DT have become debt collectors due to limited powers of tribunals and lack of comprehensive enforcement provisions- section 45(2A).
- 168. Clients' Accounts It emerged that Advocates sometimes used client funds as office accounts including in some instances, to pay for office or personal expenses. Provisions of Section 81(1) (b) Advocates Act authorise the Council of the LSK to make rules covering "the keeping of accounts". The Advocates (Accounts) Rules are not tight enough to deter the practice of withholding they do not place on an advocate the obligation to remit funds to client at the earliest opportunity, and where the advocate holds the money to pay for a transaction, there are no safeguards to ensure that he does not spend the money.

- a) That the disciplinary process should be decentralised;
- b) Amend section 88(2)(c)(v) to read such advocate pays the aggrieved person, compensate or reimburse as shall be deemed fit to grant;
- c) Make appropriate Regulations for:
  - (i) A requirement that when an advocate receives monies/cheques/payments on behalf of a client, he has seven (7) days to notify the client of receipt of the funds;
  - (ii) A requirement with respect to Bills of Costs that advocates must prepare their bill of costs or other notification of fees (e.g. fee notes) and forward it, together with the client's payment within 30 days;

- (iii) Statements of accounts to be supplied to clients;
- (iv) When insurance companies forward cheques/payments to advocates, a copy of the letter to be sent to client;
- (v) Enforce the keeping of accounts many advocates do not keep proper accounts and commingling of funds may occur due to this fact. Accountants Certificates. LSK should collaborate with ICPAK to iron out appropriate measures to streamline issuance of Accountants' Certificates.

#### M. DISCIPLINARY TRIBUNAL

- 169. The (advocates) Disciplinary Tribunal consists of the Attorney-General as its Chairman, the Solicitor-General or a person deputed by the Attorney-General, seven advocates (other than the Chairman, Vice-Chairman or Secretary of the Society) of not less than ten(10) years standing. The committee may act as a tribunal of either three or five members. The Tribunal acts largely as a court however, the proceedings as set out under Rule 18 encourages quick resolution to complaints by giving of Affidavit Evidence in a bid to expediently determine matters as opposed to orally evidence. A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable incompatible with the status of an advocate, may be made to the Tribunal by any person. The Complaint is made by affidavit by the complainant setting out the allegations of professional misconduct.
- 170. Where a case of professional misconduct on the part of an advocate has been made out, the Disciplinary Tribunal may order -
  - (i) That such advocate be admonished; or
  - (ii) That such advocate be suspended from practice for a specified period not exceeding five years; or

- (iii) that the name of such advocate be struck off the Roll of Advocates; or
- (iv) That such advocate does pay a fine not exceeding one million shillings, or such combination of the above orders as the Committee thinks fit.
- (v) That such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings.

Every advocate is subject to the jurisdiction of this tribunal. The Secretary of the Law Society of Kenya serves as the secretary to the Tribunal. The LSK Secretariat serves as the administrative arm of the committee. It receives the framed charges from the Advocates Complaints Commission, sets them down for plea and undertakes service of the process upon advocates. It is also in charge of ensuring compliance with orders of the Tribunal.

- 171. The tribunal is set up under section 87 of the Advocates Act. The tribunal can mete out sanctions.
- 172. Fidelity Fund: The fidelity fund was a confidence restoration and assurance provision whose purpose was to ensure the public maintains confidence in the profession and to protect the public at large from incidences of misappropriation of client monies in the short terms as a sort of indemnity arrangement purely for 3<sup>rd</sup> party protection similar to the Deposit Protection Fund. The object is to maintain confidence in the legal profession and is additional to (and not an alternative to) any disciplinary measures that may be imposed. Members appreciated that Canada had a similar fidelity fund but cases of misappropriation of client funds were far lower. Members were however cautioned that the fund might not achieve the desired effect and could be perceived as encouraging proliferation of misappropriation of client funds instead and therefore in addition to the fund, disciplinary measures should be strengthened in such cases. Section 81(f) of the Advocates Act (read together with section 48 and 108 of Advocates Bill)- has not been implemented. The Taskforce members affirmed that in view of the LSK's past experience on this

matter, this has to get buy in of the entire LSK Council as well as the LSK membership.

173. There was need for clarity on what was meant by compensation i.e. reimbursement of pecuniary loss? To what extent? What is the limitation? It is necessary to have the Fidelity Fund but the modalities for communicating to the LSK members is left to LSK.

#### 174. Administrative matters of the tribunal

- a) The remuneration of Tribunal
- b) If the sittings are covered by fines

- (a) Make for provisions for the Disciplinary Tribunal to hear appeals from the Complaints Commission;
- (b) The Advocates Bill should be amended to provide for the framework for the Disciplinary Tribunal to determine whether it will remain a tribunal or revert to a committee;
- (c) That members of the tribunal serve for 2 years in consonance with LSK elections. In the event the term of any serving member of the Tribunal ends before the LSK elections, there should be a provision that such term will be deemed to continue until the elections are held. The LSK Act to be amended to reflect this;
- (d) That the Attorney-General be or appoint the chair of the Tribunal;
- (e) That if the term of the members ends, that they shall serve until they are replaced;

- (f) LSK to provide clarity on the need of the fidelity fund, sensitize its membership on the fund and consult widely with LSK membership on the need of the fund to ensure 'buy-in' and reinforce the need for the fund as a means to ensure accountability and consumer protection for the consumers of legal services;
- (g) The limits of the fund should be clearly stated as well as its purpose. It should also be made clear that payment out of the fund to affected clients should not affect reimbursement by errant lawyers to the fund nor should it absolve them of the actual complaints for which the reimbursement has been made. Taskforce recommends the Fidelity Fund as conceived under section 48 of the Bill subject to this proviso;
- (h) The fund should be set up with money enough to pay where advocates cannot pay;
- (i) Strengthen the Disciplinary Tribunal in terms of enforcement mechanisms, powers of civil execution e.g. committal to civil jail;
- (j) Funding for the activities of both Disciplinary Tribunal and the Advocates Complaints Commission including sitting allowances for members of the ACC and Tribunal and administrative costs for running of the Disciplinary Tribunal, should be clarified;
- (k) A sentencing policy for the Disciplinary Tribunal should be developed;
- (l) Reporting mechanism from the Disciplinary Tribunal to the OAG with a copy to the LSK be inbuilt into appropriate regulation.

#### CHAPTER SIX - LEGAL AID IN KENYA

#### A. BACKGROUND

- 175. Access to justice is a human right enshrined in the constitution of Kenya. Articles 48, requires the state to provide access to justice to all persons, and where any fee is required, it shall be reasonable. Kenya is also a state party to various regional and international treaties that recognize the importance of providing justice for all. Kenya's Vision 2030 and the sustainable development goals reaffirm the need for access to justice as a critical pillar for economic development and poverty reduction. There have been various initiatives aimed at promoting access to justice through the provision of legal aid to the poor and the disadvantaged. These include; Pauper briefs by the judiciary; The National Legal Aid and Awareness Programme established by the Government in 2008 to provide legal aid to the poor in six regions on a pilot basis and legal aid provided by non state actors.
- 176. The State's most comprehensive and structured effort towards the development of an efficient, accessible, timely, affordable legal and judicial legal aid service has been through the enactment of the National Legal Act 2016. The Legislation establishes the National Legal Aid Service, which provides an institutional framework to enhance access to justice in the country.
- 177. However, despite the many efforts to promote access to justice in the country, there have been a number of setbacks: High cost of legal services, including representation, Institutions that offer legal aid services and those that dispense justice are located far away and concentrated in the urban centres leaving out the rural areas. Geographical distance of courts has resulted in a lot of miscarriage of justice because witnesses and litigants travel long distances to attend court.

#### B. PARALEGALS

178. Due to the limited number of lawyers relative to the population, lack of legal services in large parts of the country, and the fact that paralegals play an

important role in helping citizens to navigate the legal system, and easing the workload from lawyers, the participation of paralegals should be encouraged.

# **RECOMMENDATIONS: 28**

In order to encourage more lawyers to undertake *pro bono* work and provide free legal services the Taskforce recommends that:

- (i) The provision of free legal services/pro bono should be a basis for earning Continuing Professional Development points;
- (ii) Renewal of the practising certificate should be conditional on legal aid provision;
- (iii) Only legal aid providers with wide reach will be accredited to provide legal aid under the National Legal Aid Service;
- (iv) The provision of legal aid service should be one of the conditions for appointment as senior counsel;
- (v) The development of a legislative framework for the recognition of paralegals, and establishment of an oversight mechanism and standards for paralegals;
- (vi) The Legal Aid Fund: an allocation of sufficient funds to the National Legal Aid Fund is urgent.

#### CHAPTER SEVEN - CONCLUSION AND RECOMMENDATION

#### INTRODUCTION

This chapter presents the recommendations reached by the Taskforce in a cohesive manner to allow for the legislative initiative as recommended variously in the individual chapters. A majority of these recommendations represent a policy posture taken by the Taskforce which in the majority of cases form clear instructions to the draftsman to take appropriate action. In some cases, proposals are made to amend current law to specific objectives arrived at by the Taskforce.

#### CHAPTER 2 - THE REGULATION OF LEGAL EDUCATION IN KENYA

# **RECOMMENDATIONS: 1**

#### (a) Policy:

The role of the CUE vis-à-vis that of professional accreditation bodies such as the CLE and others must be reviewed to attain a two-tier system of accreditation.

The Taskforce recommends a two-tier accreditation structure as follows:

- (i) CUE as the overall authority for accrediting and establishing Universities at a general level consistent with section 5 of the Universities Act, 2012 (as existed prior to the amendment introduced by the Universities (Miscellaneous Amendment) Act, 2016.
- (ii) CLE should retain the responsibility for programme (professional) accreditation of law programmes in Kenya consistent with section 8 of the Legal Education Act, 2012.

#### (b) Legislative:

- (i) The Legal Education Act, 2012 and Universities Act, 2012 should be amended to define "Programme" and distinguish between "institutional accreditation" and "programme accreditation" and clearly differentiate the roles of both institutions as concerns accreditation of professional programmes in line with (a) above.
- (ii) The Legal Education Act, 2012 sections 8 and part VII thereof should be reviewed and amended to entrench, enhance broader enforcement mechanisms in order to strengthen CLE's ability to enforce compliance with quality standards.
- (iii) That the Schedules in the Legal Education Act 2012 and the Kenya School of Law Act be synchronised in one Legislation.
- (c) Need to enhance collaboration and develop appropriate framework through institutional representation between regulators CUE and CLE as conceived under section 13 of the Legal Education Act, 2012 and Regulation 49 of the University Regulations, 2014.
- (d) Need to establish regional stakeholder engagement including Universities and others to sensitize on the need for compliance with legal education standards.
- (e) CLE should review standards in order to make them in tune with international best practices and to ensure relevance with emerging trends as appropriate.
- (f) The Council of Legal Education should carry out a comprehensive study to map the carrying capacity of legal education providers in Kenya together with the available facilities.
- (g) The Council of Legal Education should come up with the benchmarks and Criteria for licensing Legal Education Providers offering the Advocates Training Programme.

- (h) Appointments to statutory Boards should take congruence of the conflict of interest rule to avoid scenarios where people come to Boards with set interests which contradict the interests of the institution.
- (i) Additional Legal Education Providers should be licensed by the Council of Legal Education to provide the ATP Programme.

- (a) The conduct and structure of the Bar examinations should be provided for under the Legal Education Act and not the Kenya School of Law Act, as provided for under LEA;
- (b) Orals and project examination components as modes of assessment should be abolished and be integrated into the training methodologies for the Advocates Training Programme (ATP) at the Kenya School of Law;
- (c) That the structure of the Bar examination should be modified to require candidates to first attend class sessions, then pupillage, then sit the Bar Examination;
- (d) That the topic on billing of clients should be added to the curriculum in civil litigation, conveyancing and other relevant units;
- (e) With a view to long term expansion and in order to decongest administration of the Bar examinations, CLE should look into expanding its capacity by establishing regional examination centres for administering Bar Examinations consistent with international best practice;
- (f) That CLE should define the requirements for taking pupils and emphasise the requirement that lawyers cannot take pupils if they have not taken out a practising certificate;

(g) That the CLE should undertake an urgent review of the Bar Curricular to modernise it.

#### CHAPTER 3 - LEGAL TRAINING AND LEGAL EDUCATION PROVIDERS

- (a) The Legal Education (Accreditation & Quality Assurance Regulations), 2016; the Second Schedule of the Kenya School of Law Act, 2012 and any other applicable Laws and Regulations be reviewed and amended to ensure consistency and harmonized admission requirements to both the LL.B and ATP programmes.
- (b) The Taskforce recommends that the minimum admission criteria to the Bachelor of Laws (LL.B) Degree Programme should be retained as follows:
  - (i) Paragraph 5 of the First Schedule to the Legal Education (Quality Assurance & Accreditation) Regulations 2016 be amended to read as follows:
    - a) a mean grade of C+ (Plus) in the Kenya Certificate of Secondary Education examination with a minimum grade of B Plain in English or Kiswahili or equivalent as determined by a competent authority;
      - b) a Credit pass in a diploma in law examination from an accredited institution with relevant experience of at least three (3) years standing;
      - c) at least three (3) principal passes at an advanced level beyond 'O' Levels or an equivalent qualification, one of which must be in the English or Kiswahili language,; or
      - d) a degree from a recognized university.

- (ii) The following legislative proposals/ recommendations were made:
  - a) That there be introduced a requirement for at least three (3) years' relevant post-qualification work experience for holders with a Certificate in Law qualification as a requirement before undertaking the Diploma in Law;
  - b) That there be introduced a requirement for at least three (3) years' relevant post-qualification work experience in the Diploma in Law qualification as a requirement before undertaking the LL.B degree;
  - c) Provision be made for Kenya Certificate of Secondary Education ('KCSE') qualification equivalents as determined by a competent authority;
  - d) Define what 'Principal Pass' means in relation to advanced level qualifications.
  - e) Qualifications in law which are not Bachelors of Laws (LL.B.) strictly speaking as required by the Kenya School of Law Act, 2012 and the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 should not be recognized or approved unless they meet the criteria of equivalence to be determined by Council.
  - f) A Single major component of the degree plus the qualification required to practice in that jurisdiction as determined by Council.

The criteria above for admission to the LL.B Programme should be reflected and harmonized with the admission criteria to the ATP.

Current law on nomenclature requirements of an LL.B be retained as currently espoused in the Regulations barring the special circumstances anticipated in para. 69(e) (f) above.

### **RECOMMENDATIONS: 5 -**

- a) Council should encourage Legal education Providers to offer the preuniversity assessments for entry into the LL.B Degree programme whose structure and content shall be determined by the legal education providers; be introduced and offered at the discretion of legal education providers as criteria to admission to the LL.B Programme;
- b) The aforementioned test shall be administered by Legal Education Providers at their discretion;
- c) The Council of Legal Education to undertake a study on the model of preuniversity assessment currently undertaken at Makerere University in Uganda, Riara and Strathmore Universities in Kenya and report on the findings of the study to the Attorney General.

#### **RECOMMENDATIONS: 6**

In order to improve the quality of university faculty, the Taskforce recommends the following interventions:

a) CLE should conduct a feasibility study to inquire *inter alia* into the capacity of currently licensed Legal Education Providers to cater for the national legal education and training needs in Kenya. The study should also inquire into the interface between legal training and practice to *inter alia* explore best practice with a view to tapping the capacity of experienced legal practitioners who are non-academics.

- b) CLE should develop a strategic initiative to encourage legal education providers to build capacity of university faculty to teach law. The plan should specify and provide measurable timelines.
- c) CLE should require Legal Education Providers to undertake capacity Building programmes at undergraduate level to improve on the quality of their legal education programmes.
- d) CLE should develop and enforce a standard for the recognition and regulation of adjunct faculty.
- e) CLE should give incentives to legal education providers to development of postgraduate programmes.
- f) Legal Education Providers must be encouraged to develop robust internal quality assurance mechanisms including mechanisms for quality assurance enforcement.
- g) CLE should develop an interface to allow the public, students and any other stakeholders to raise issues on matters of quality of legal education.
- h) CLE should regularly organize colloquiums for university lecturers and involve key stakeholders such as the Judiciary, Law Society of Kenya, Office of the Attorney General and others on themes related to legal education and training in Kenya.
- i) CLE should originate a proposal as well as clear guidelines for funding in support of post-graduate (masters & doctoral) programmes in law for the next five (5) years. CLE should collaborate with the Higher Education Loans Board (HELB) to set up a Trust Fund and implementation modalities for setting up this initiative.
- j) CLE should develop standards for Part-Time Faculty by Legal Education Providers setting out *inter alia* the differences between adjunct and part-

time faculty. Regulation 2 of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 should be amended to define adjunct faculty.

- k) Legal Education Providers must take initiative and responsibility for legal education and training at all levels with emphasis on post-graduate legal training, capacity building with a view to increasing number of academic staff with requisite post-graduate qualifications. To this extent, Legal Education Providers must take stock of their internal capacity with a view to building on their capacity and develop mechanisms for early selection of candidates for post-graduate legal training opportunities.
- Council must vigorously enforce the requirement that university faculty must teach in only courses where they have expertise and qualifications.

- (a) The minimum course content of the 16 core units should be standardized to ensure uniformity in their delivery. CLE should develop and publish unit standards to harmonize and ensure consistency and guide content development by legal education providers in the core units while maintaining academic freedom on the part of providers with respect to delivery.
- (b) The unit standards shall be developed in collaboration with Legal Education Providers and inviting public participation and published in order to ensure the public is aware of necessary thresholds. The unit standards should have provisions to cater for regular reviews in order for them to remain relevant and market focused.
- (c) In the process of curriculum approval CLE should:
  - (i) periodically review the core courses to ensure they are responsive to market needs.

- (ii) ensure that the curriculum content is consistent with the set standards and is distinctive "niche" based responding to the market needs in Country and to allow for growth of expertise and specializations in the legal profession.
- (iii) guide peer reviewers on the minimum content required of the core units.
- (iv) enforce the required assessment methods.
- (v) check for library resources in the various institutions and as much as possible encourage uniformity of library resources.
- (vi) examine the external examiners reports to ensure maintenance of quality standards.
- (vii) Ensure that each segment of development is evident in the curricular to make them current and responsive to developments in the legal sector.

- (a) Regulation 45 of the Legal Education (Quality Assurance & Accreditation)
  Regulations 2016 should be enforced so that ODEL programmes at LEPs are accredited as stand-alone programmes, meeting the same standards and benchmarks as regular legal education programmes;
- (b) The ODEL delivery mechanisms must meet the equivalent criteria set for the LL.B face to face delivery programmes;
- (c) CLE should conduct a further comprehensive study on ODEL as a mode for learning law and beef up current Regulations on the suitability of ODEL delivery mechanisms and suitability.

To ensure high quality standards of legal education at the postgraduate level, the Taskforce recommends the following interventions:

- (a) CLE should demand a staff development plan from institutions to ensure that they retain high calibre academic staff. These plans should be measurable and licences withdrawn where there is non-compliance.
- (b) CLE should develop standards for post-graduate programmes in law (LL.M. and Phd/LL.D.) which standards should be aligned generally with the relevant CUE standards for post-graduate programmes.

### **RECOMMENDATIONS: 10**

The preponderant view of the Taskforce was that the Pre-Bar be retained as is currently the case. The Taskforce favoured the position that the Pre-Bar would help further determine the suitability of applicants of the Bar Programme. There is no risk of over-regulation if the Pre-Bar is administered as a pre-condition for admission to the ATP.

- a) CLE should execute its mandate to license other Legal Education Providers to provide training in the ATP programme (in addition to KSL) with urgency in light of the current resource constraints faced by KSL owing to the large student numbers;
- b) CLE should develop and implement standards and Regulations for licensing of Bar Training Institutions;
- c) CLE should propose policy interventions on the management of the number of students joining the ATP (Bar) programme;

- d) The Kenya School of Law to increase and develop capacity to deal with the exponential growth in student numbers including setting up satellite campus in other regional centres;
- e) KSL should petition OAG/DOJ and Treasury to urgently increase the resources of the School to enable it cope with the large student numbers;
- f) KSL should explore and develop a collaborative strategy where professional staff of various Government institutions such as OAG, ODPP, Judiciary, Ministry of Lands could accept and train pupils for purposes of the Bar Programme.

- a) That CLE should develop Regulations on the assessment of pupillage and require implementation by all legal education providers licensed to teach the Bar Programme;
- b) Review the content of pupillage through curriculum review;
- c) Pupillage should be undertaken after the ATP classes but before the Bar Examinations;
- d) Pupil masters should be required to fill in questionnaires to be submitted to the LSK on how many (if any) pupils the advocate has taken in each year and submit the form during the process of application for licence;
- e) The CPD committee of the Law Society of Kenya should introduce a reward system for taking pupils for instance the award of one CPD point per pupil per year;
- f) CLE should explore whether lawyers can benefit from a tax rebate for taking pupils and provision of legal aid;

- g) Regulations should provide that any advocate who take pupils must be in good standing and have valid Practicing Certificates;
- h) That the code of conduct must make provisions against sexual harassment.

- a) As regards Kenyan students who study abroad and subsequently return to Kenya, CLE must check the qualification at LL.B. entry level before making a determination as to whether or not to recognise their qualifications for purposes of admission to the ATP programme;
- b) Legislative: The Advocates Bill, 2015 be amended to provide either for reciprocity or lock out provisions;
- c) To avoid creating a legitimate expectation on the part foreign students who are admitted to study law or obtain professional legal training in Legal Education Providers in Kenya, foreign students must understand that legal education and training in Kenya does not operate as an automatic guarantee for admission to the Roll of Advocates in Kenya. Foreign students undertaking the ATP (Bar Programme) or law schools (at whatever level i.e. LL.B, Masters of even Doctoral levels) in Kenya should be required to sign a undertaking/disclaimer at the point of admission to the legal education provider and upon admission to the ATP indicating their commitment to return to their country of origin after completing their undergraduate training and/or ATP as the case may be;
- d) In the event they want to practise in Kenya, they MUST meet the requirements set forth by law by the Council of Legal Education and the Law Society of Kenya;
- e) Admission of non-Kenyans to the Advocates Training Programme for purposes of admission to the Bar to practise law in Kenya be stopped

forthwith unless the candidate can show that they meet the provisions of Section 13 of the Advocates Act;

- f) That the Advocates Bill should be amended by deleting Section 20 of the Bill, the provision that allows for the admission on non-Kenyans until they meet the requirement that they are advocates in their own countries and until mutual reciprocal initiatives are put in place for Kenyans by the member states of the East African Community;
- g) The Advocates Bill should define cross-border practice on the basis of Article
  11 of the EAC Treaty as the basis on which the Attorney General in
  consultation with the LSK Council may enter into mutual recognition
  agreements with willing EAC Member States;
- h) The Council of Legal Education should develop succinct regulations on the following:
  - Conditions for admission to the LL.B degree programme for foreign students
  - ii. Conditions for admission to the ATP for foreign students with reference to academic qualifications
  - iii. Conditions for sitting the Bar Examinations.
  - iv. Provisions that allow for signing of the disclaimer
- i) The Advocates Act should be amended to make provisions for:
  - i. The definition of cross boarder practice
  - ii. Conditions for admission to the Roll
  - iii. Conditions to obtaining a license to practise
  - iv. Amend Section 26 of the Advocates Bill to read

"The Registrar may issue in accordance with this part ....."

- j) That the provisions of Section 4(2)(a) of the Kenya School of Law Act should be amended to provide for training that ... May be subject to the Advocates Act ....: "be considered for admission under the Advocates Act", where the requirement therefore would be to refer to the Advocates Act for secondary requirements under the current Section 13 as shall be amended.
- k) That the amendment in (f) above allows the Kenya School of Law to offer the ATP programme as a Post graduate Diploma in Law and not necessarily tied to the Advocates Act.
- l) In the general organisation of the Advocates Bill, Section 6 should come after section 9 and section 8 becomes the new section 6
- m) Section 8 (2) be amended to provide for ....may be admitted to the roll every person... and remove the requirement......to practise

- a) That in the event a candidate has not undertaken at least twelve (12) of the sixteen core units required for a Bachelor of Laws Programme, the qualification should not be recognised as a legal education qualification. Where a candidate has undertaken twelve or more of the core course, that candidate may be referred to the remedial programme for regularization and recognition of the Bachelor of Laws (LL.B).
- b) It was further resolved that where a student has not covered at least 70% (about 12 units) of the required sixteen (16) core units, that qualification shall be rejected as a legal education qualification under the LEA.
- c) The Remedial programme should be reviewed and strengthened so that it can effectively bring to parity students who have not completed the 16 core units undertaken at local universities.

d) The Council of Legal Education should maintain an up-to-date database of students who are subjected to the remedial programme providing such details as nationality, country & institution in which the law qualification was obtained, number of core courses covered at the University and those covered at the Institution.

- a) The 8549 candidates should be identified and profiled by the Council of Legal Education.
- b) The responsibility to organise and as a result regulate the 5298 should be vested in CLE and LSK;
- c) Since LSK has the mandate to regulate paralegals under the Law Society of Kenya Act, the LSK should develop and enforce Regulations towards the organisation and regulation of the 5298 and any others in that category as para-legals. CLE may offer technical support in the process of identifying subsequent paralegals.
- d) There should be a policy limiting the number of attempts to the Bar examination. Bar examination candidates are permitted to attempt the Bar examination within five (5) years. Upon exhausting the maximum number of attempts for the Bar Examination within this initial five (5) year period, an applicant may be permitted to attempt the Bar examination within a further five (5) years, subject however to the candidate being re-admitted to the ATP training programme afresh as the Bar curriculum for the first five (5) years will have run its course.
- e) For the avoidance of doubt, a candidate will not be eligible to attempt the Bar examination after unsuccessfully attempting the same within ten (10) years from first registration.

#### **CHAPTER 4 - LEGAL PRACTICE ISSUES**

- (i) Amendment to the provisions of the Advocates Act in the following terms;
  - (a) Section 13 (i) (e) to specify that the word "Council" in this case refers to the Council for Legal Education and not the Council for the law society. The provisions of the Act are silent.
  - (b) Amendment to Section 12 to include South Sudan.
  - (c) To make provisions in 13 (i) (e) of the Advocates Act to make provisions for Kenyans who have studied Civil Law. The provisions of the Act only provide for persons trained in the commonwealth and whose determination shall be based on Council of legal Educations' approval. This should include a provision for a competency based examination prior to admission to the ATP for persons with qualifications in law from Civil law jurisdictions.
  - (d) For foreigners, the process of recognition and approval should also consider the principle of mutual reciprocity.
  - (ii) The changes in (i) above should be made in the Advocate's Bill.
  - (iii) That all reciprocal admissions to the Kenyan Bar shall be implemented upon established guidelines set by the Law society and shall be from countries reciprocating such admissions to Kenyans.

- That the provisions under section 13 of the Advocates Act in relation to academic and professional qualification should be embellished in the following ways;
  - i. Provide for Regulations to prescribe qualifications for issuance of practising certificates for the following categories;
    - a. Advocates admitted in Kenya
    - Advocates seeking cross boarder admission as envisaged by the EAC protocol and
    - c. Foreign advocates
  - ii. Separate the qualifications for admission to the Bar / admissibility to the Bar placing such conditions such as
    - a. Nationality/citizenship and the requirement of a work permit
    - b. Residency
    - c. Whether a disclaimer envisaged in (a) above was signed
    - d. Make provisions for exemption of any of the conditions by the Council of Legal Education
  - iii. Legislate on the requirements for licensing of persons to practise Law.
    - a. In the event the advocate is of less than five (5) years, the person should attend the ATP programme
    - b. In the event the advocate is of more than five (5) years, the person should be admitted under reciprocal admission.

- That the licensing of foreigners should be differentiated from that of Kenyans and should be properly captured in Law in Part V dealing with practising certificates of the Bill.
- d. Amend section 6 of the Advocates Bill, 2015 to include persons who qualify for admission to the Bar under sections 16 and 19 of the Advocates Bill.
- b) That the conflict in admission requirements between the Legal Education Act and the Kenya School of Law Act be clearly defined in the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 to give clarity on the admissibility of persons in every segment of academic programmes and in the professional programme. Importantly, qualifications at all points of legal training should be clarified.
- c) That admission to the Roll of all persons is the exclusive role of the Chief Justice once the Law Society has been consulted as required
- d) That all persons who are to be admitted must be gazetted by the Chief Justice before admission as is required by Law
- e) That CLE shall provide the list of qualified candidates to the Office of the Chief Justice which office shall gazette the candidates
- f) That gazettement for purposes of "admission" to the Bar should be undertaken once the petition to the Chief Justice has been accepted.
- g) That the Advocates Bill should make provision for appeal of the petition to the Chief Justice in the event the petition fails.
- h) That the Law Society should spearhead the creation of a digital Roll of Advocates

- a) That current practice where the admission Certificate is issued by the Registrar continues, however, Sections 21 and 22 of the Advocaes Act should be amended to authorize the Secretary of the Law Society of Kenya to issue Practising Certificates to advocates on an annual basis forwarding a copy to the Judiciary;
- b) As a result of (a) above, amend the Part V of the Advocates Bill to allow LSK to issue Practising Certificates. The entire Part V of the Advocates Bill needs to be amended to resonate with the recommendations made by the Taskforce on this point;
- c) That the Law Society of Kenya should define the conditions for issuing Practising Certificates including conditions such as taking out fidelity issurance;
- d) That the categories of those that can practise as Advocates in Kenya are well defined in Part III- (sections 9 11) of the Advocates Act, Cap. 16 including those in OAG and judicial officers;
- e) That the OAG pay fees for the advocates so as the ensure that the advocates benefit from the perks of fully paid up membership such as CPD/ make Regulation to pay subscription fees for public officers/ require nominal fees to keep them active in the professions.
- f) Section 12 of the LSK Act, 2014 should be amended with a view to setting out the rights and benefits of each member/ non-member. For example section 12(e)-(h) should fall under section 12(d).

- a) That the Law Society should encourage partnerships and Limited Liability Partnerships (LLP)
- b) In terms of discipline of members, the society should determine the process of discipline of special members of the society. Amend the Advocates Act accordingly.
- c) Develop Regulations on use of generic names, joint ventures and international alliances.
- d) LSK should develop regulations providing for the Registration of law firms.

- a) The Law Society should set up an inspectorate within the Advocates Act to coordinate and spearhead enforcement and compliance efforts with a view to weeding out unqualified persons and strengthen the mechanisms of enforcement of dealing with unqualified persons;
- b) That the compliance as envisaged in (a) above should be in line with the objects of the society including the code of conduct and Regulations;
- c) That the Law Society should train advocates on their obligations to the profession including compliance with the accounts rules;
- d) The Law Society should seek the authority of the ODPP in appointment of special prosecutors under the Advocates Act;

- That the Law Society should study how paralegals are treated in other jurisdictions and develop a regulatory mechanism for paralegals in Kenya within the Law
- b) That the definition of paralegals must be conceived from a wider perspective and not just within the purview of legal aid
- c) Legislate on standards for education, experience, qualification registration and regulation of paralegals
- d) Define and enforce professional standards relating to paralegals including disciplinary processes.
- e) Write Rules of Professional Conduct or Code of Professional Responsibility to allow for expanded roles and responsibilities for paralegals, including revision to the references concerning ultimate responsibility and accountability of a lawyer for paralegal work, rather than under direct supervision;
- f) Revise the provisions of Section 34 of the Advocates Act and determine what can be done by advocates and what paralegals can do e.g. formation of companies, filling of grants of probate and letters of administration
- Provide a model for revisions to court rules that would permit expanded roles and responsibilities for paralegals;
- h) Substantive legislation for the development, support and regulation of para-legals be developed by the Law Society of Kenya.

- a) The case of Jonnah Tusasirwe and other Vs. Council of Legal Education and Another High Court petition no. 505 of 2016, seeking direction of the admission of non-Kenyans must be pursued to conclusion so that there is a judicial pronouncement on the interpretation of the provisions of Section 4 of the Kenya School of Law Act as read together with the provisions of Section 12 and 13 of the Advocates Act.
- b) Section 4 of the Kenya School of Law Act be amended to remove the tie band that training at the school can only be in satisfaction of the provisions of Section 12 and 13 of the Advocates Act.

- a) That rules should make for provisions to expand the membership of Senior Counsel in realization that there is a need to create a bigger pool of senior counsel since as it is senior counsel mentorship is limited;
- b) That the rules should also make provision for the composition, management and regulation of the senior bar;
- c) That the Senior Counsel Rules of 2011 should be reviewed to accommodate recommendations in (a) and (b) above;
- d) The Rules for appointment of Senior Counsel should be amended to provide for:
  - (i) A meeting of the Senior Counsel committee so that calls for nomination of persons to the senior bar are made;
  - (ii) Calls for appointment of Senior Counsel shall be made, once every two (2) years;

- (iii) Quorum for the committee be five (5) Persons;
- (iv) That the president of the Law Society should provide the Secretary of the committee;
- (v) That LSK develops Rules for the committee for Disciplinary processes of the Senior Bar.
- e) There should be a process for nomination from members of the bar to the Senior Bar so that becoming a Senior Counsel is either on application or by nomination by members;
- f) The membership should allow nominations from the public service, academia including special members;
- g) That the law and relevant rules and regulations should be amended to provide for the above proposals and for the requirement that the advocate has argued a substantive matter before a superior regional or international court be an alternative and not a stand alone requirement.

- a) Amend the provisions of Section 34 (1) (f) of the Advocates Act to include arbitration work as legal work and with it restrict immigration services as legal services under section 34 (1) (f) of the Act.
- b) Create a distinction between Section 16 and 17 of the Advocates' Bill
- c) Define 'matters' or 'suits' within the context of non-litigation work e.g. mergers & acquisitions.

- d) That the Law Society should develop a mechanism to keep track of all foreign advocates and the services they are providing as advocates in Kenya.
- e) That the use of trade names must be regulated to the extent that it is not accepted. The Law Society of Kenya should develop appropriate regulations to effect this recommendation; and
- f) That practise regulations should allow for application for waiver on the use of name.

#### **CHAPTER 5 - DISCIPLINE**

- a) That the regulation be amended to provide procedures and presentation of a prima facie case in section 88 (1) (2) of the Bill;
- b) That once a prima facie case has been established in (a) above, that the advocate should be suspended until the matter is determined;
- c) That the remuneration order should define what overcharge means;
- d) Fee agreements must be made compulsory;
- e) The processes of Lawyer lending/ fee financing should be Regularised under the Regulations;
- f) The Law should make it clear what an advocate can charge in running down matters;
- g) The law should make it clear that the ceiling for billing is 25%;

- h) In the context of disciplinary proceedings, the advocate should not contact the complainant;
- i) The limitation period should be set at three to six years;
- j) Rules on professional conduct be reviewed by the Law Society of Kenya in line with emerging best practices;

- a) That the disciplinary process should be decentralised;
- b) Amend section 88(2)(c)(v) to read such advocate pays the aggrieved person, compensate or reimburse as shall be deemed fit to grant;
- c) Make appropriate Regulations for:
  - (i) A requirement that when an advocate receives monies/cheques/payments on behalf of a client, he has seven (7) days to notify the client of receipt of the funds;
  - (ii) A requirement with respect to Bills of Costs that advocates must prepare their bill of costs or other notification of fees (e.g. fee notes) and forward it, together with the client's payment within 30 days;
  - (iii) Statements of accounts to be supplied to clients;
  - (iv) When insurance companies forward cheques/payments to advocates, a copy of the letter to be sent to client;
  - (v) Enforce the keeping of accounts many advocates do not keep proper accounts and commingling of funds may occur due to this fact. Accountants Certificates. LSK should collaborate with ICPAK

to iron out appropriate measures to streamline issuance of Accountants' Certificates.

- (a) Make for provisions for the Disciplinary Tribunal to hear appeals from the Complaints Commission;
- (b) The Advocates Bill should be amended to provide for the framework for the Disciplinary Tribunal to determine whether it will remain a tribunal or revert to a committee;
- (c) That members of the tribunal serve for 2 years in consonance with LSK elections. In the event the term of any serving member of the Tribunal ends before the LSK elections, there should be a provision that such term will be deemed to continue until the elections are held. The LSK Act to be amended to reflect this;
- (d) That the Attorney-General be or appoint the chair of the Tribunal;
- (e) That if the term of the members ends, that they shall serve until they are replaced;
- (f) LSK to provide clarity on the need of the fidelity fund, sensitize its membership on the fund and consult widely with LSK membership on the need of the fund to ensure 'buy-in' and reinforce the need for the fund as a means to ensure accountability and consumer protection for the consumers of legal services;
- (g) The limits of the fund should be clearly stated as well as its purpose. It should also be made clear that payment out of the fund to affected clients should not affect reimbursement by errant lawyers to the fund nor should it absolve them of the actual complaints for which the

reimbursement has been made. Taskforce recommends the Fidelity Fund as conceived under section 48 of the Bill subject to this proviso;

(h) The fund should be set up with money enough to pay where advocates

cannot pay;

(i) Strengthen the Disciplinary Tribunal in terms of enforcement

mechanisms, powers of civil execution e.g. committal to civil jail;

(j) Funding for the activities of both Disciplinary Tribunal and the Advocates

Complaints Commission including sitting allowances for members of the

ACC and Tribunal and administrative costs for running of the Disciplinary

Tribunal, should be clarified;

(k) A sentencing policy for the Disciplinary Tribunal should be developed;

(l) Reporting mechanism from the Disciplinary Tribunal to the OAG with a

copy to the LSK be inbuilt into appropriate regulation.

**CHAPTER 6 - LEGAL AID IN KENYA** 

**RECOMMENDATIONS: 28** 

In order to encourage more lawyers to undertake pro bono work and provide

free legal services the Taskforce recommends that:

(i) The provision of free legal services/pro bono should be a basis for earning

Continuing Professional Development points;

(ii) Renewal of the practising certificate should be conditional on legal aid

provision;

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- (iii) Only legal aid providers with wide reach will be accredited to provide legal aid under the National Legal Aid Service;
- (iv) The provision of legal aid service should be one of the conditions for appointment as senior counsel;
- (v) The development of a legislative framework for the recognition of paralegals, and establishment of an oversight mechanism and standards for paralegals;
- (vi) The Legal Aid Fund: an allocation of sufficient funds to the National Legal Aid Fund is urgent.

# **BIBLIOGRAPHY**



# **APPENDICES**

