

TERMS OF REFERENCE: SURVEY EXPERT and TEAM

Deadline for submission of Expression of Interest: 21 October 2016, 12:00

1. BACKGROUND

The Law Society of Namibia (LSN) is a statutory regulatory body of legal practitioners. It also serves a dual function as being a representative body of the legal profession. The LSN has commenced a comprehensive Change Project. A steering committee (StC) consisting of LSN councillors was established by the LSN Council to drive this project. A project manager coordinates the execution of the project. The project is estimated to run from September 2016 to July 2017. Surveyed data should be available by end of February 2017.

This project aims to critically assess all aspects of the legal profession in Namibia and to propose changes to ensure the profession is accessible, relevant and responsive to the Namibian society and maintains international standards and best practices.

The overall objective of the project is:

“Through a credible and transparent process, and after obtaining sufficient stakeholder input and appropriate research, to design innovative, sustainable and practical recommendations for change and possible amendment of laws governing all aspects of the legal profession and operations of its regulator to ensure a proactive, trusted and relevant legal profession in Namibia”.

It is vital that the research and data collection methodology followed in project is sound, transparent and credible. For this purpose the project will employ a team of survey consultants to design (in consultation with the StC and Research Expert) and oversee the execution of surveys in line with the research methodology to be

designed by the Research Expert (appointed separately). This document serves as initial **Terms of Reference** for the appointment of a survey expert and team.

These terms of reference are subject to a written agreement to be concluded with the Survey Expert.

2. BROAD METHODOLOGY

It is envisaged that THREE distinct approaches will be followed to obtain the necessary information to enable the StC to draft meaningful and informed recommendations for change:

2.1. Topic-specific research teams will be established to conduct desktop research (including interviews where appropriate). These topics are contained in paragraph 5 hereunder.

2.2. A survey team will conduct data collection from stakeholders based on the methodology to be designed by the Research Expert. It is crucial that the data collection tools are carefully designed to ensure that all focal areas are sufficiently covered and information is received from all relevant stakeholders. Data collection tools may differ, and be customized for different stakeholders based on their different areas of interest in the project.

2.3. A business process analysis within the regulator will be conducted._

3. FOCAL CONCERNS

The following concerns will be the initial focal areas for research and possible change in the legal profession:

3.1. Government

The following are initially identified concerns from government:

3.1.1. Lack of access to legal services.

3.1.2. The definition of “lawyer”, which is essential an equality issue.¹

¹ Section 21 of the Legal Practitioner’s Act states: “(1) A person who is not enrolled as a legal practitioner shall not-

- 3.1.3. The slow pace of real transformation in terms of race and gender.
- 3.1.4. The gap between what is expected from lawyers and what they actually produce
(in terms of their skills and quality of service).
- 3.1.5. The unresponsiveness of the profession to pressing issues requiring amendments to existing legislation or new legislation.
- 3.1.6. Competition Law related concerns (regulatory prescriptions vs free competition).^{2 3}

3.2. Recipients

The following are initially identified concerns from recipients of legal services:

- 3.2.1. Lawyers lack the necessary competence or willingness to fulfil their purpose of assisting the court to reach the right decision in a timely and cost-effective manner.⁴
- 3.2.2. Lawyers are unaffordable, which inhibits access to justice, which is inimical to the rule of law.
- 3.2.3. The LSN only protects its members and operates like a cartel.⁵
- 3.2.4. The mismatched client and lawyer needs and expectations, regarding the quality of service and value for money (in other words, the way lawyers service clients and bill for those services).

3.3. Legal Practitioners

The following are initially identified concerns from Legal Practitioners themselves:

- 3.3.1. The Justice Training Centre (“JTC”) is not effective and has become a barrier to entry into the profession and to the efficient running of a law practise (especially for practitioners based outside of Windhoek).

(a) practise, or in any manner hold himself or herself out as or pretend to be a legal practitioner; (b) make use of the title of legal practitioner, advocate or attorney or any other word, name, title, designation or description implying or tending to induce the belief that he or she is a legal practitioner or is recognised by law as such;... (3) A person who contravenes any of the provisions of subsection (1) or (2) shall be guilty of an offence ...”

2 Relating to the Competition Commission Ruling dated 18 December 2015.

3 A dedicated NaCC team will be appointed for this focal concern.

4 Contributing to this perception is possibly also the occasional delay by the High Court and Supreme Court to deliver judgements.

5 This perception could be exacerbated by the LSN’s statutory position as both a regulator and a representative body.

- 3.3.2. The material inroads that have been made in to what was previously accepted as work reserved solely for lawyers, which may make the practice of law in its current form unattractive and unsustainable.
- 3.3.3. Real transformation is taking too long.
- 3.3.4. The lack of real equality between attorneys and advocates, including the reservation of senior counsel status for advocates and the absence of any oversight over the practice related financial affairs of advocates, and whether the LSN should recognise the distinction between the form of practice at all.
- 3.3.5. The increasing challenges to lawyer compensation.
- 3.3.6. The negative public image of lawyers (without any factual basis).
- 3.3.7. The mismatch between lawyer and judiciary needs and expectations.

3.4. The Regulator

The following are initially identified concerns from the Regulator(s):

- 3.4.1. The rapid pace of innovation in the provision of legal services and our failure to keep up with it, means that the LSN does not know how far behind it is or how it is going to catch up to eventually plan ahead and avoid performing functions in a reactive manner.
- 3.4.2. The LSN cannot effectively identify or mitigate against the risks to clients and the public interest arising from the changes in the legal landscape.
- 3.4.3. The LSN cannot identify or mitigate against the risk for lawyers arising from the changing legal landscape.
- 3.4.4. The LSN cannot assist lawyers to maximise all opportunities created by the changing legal landscape.
- 3.4.5. The LSN struggles to make and implement timely and consistent decisions.
- 3.4.6. The roles of the Council and the directorate are often blurred and lead to frustration on both sides.⁶
- 3.4.7. Member participation in the work of the Law Society is low.

⁶ This is exacerbated by the fact that the Legal Practitioners Act does not create an executive body apart from the Council, or makes provision for delegation, and therefore most matters dealt with by the LSN must be placed before Council.

- 3.4.8. The Law Society needs increased and sustainable funding.
- 3.4.9. There is an absence of evaluation processes and tools, including a database and facilities and capacity to allow the Law Society to conduct or promote applied legal research (which is necessary for the effective and efficient operation of the LSN and the legal profession at large).
- 3.4.10. Disciplinary proceedings are extremely time consuming and impacts on the LSN's credibility, although the DC is separated from the LSN. The current DC system does not allow for proper compensation for time spent; it is a quasi-volunteer system and severely hampers the efficiency of the DC.

4. STAKEHOLDERS

Apart from the LSN and general public the following stakeholders were identified. These stakeholders must be engaged on different levels ranging from one-on-one in-depth consultations (to be done by the **survey team**) to only being continuously informed. The Survey Expert must consult the Research Expert and StC in the scope and design of data collection tools to ensure a credible and appropriate research methodology is followed. At least the focal concerns should be addressed and relevant and complete input should be obtained from relevant stakeholders (with reference to the different interests different stakeholders will have). Data collected should be sufficient and in digestible format to enable the StC to make meaningful and relevant recommendations for possible change. The following stakeholders were identified:

4.1. Regulated Profession

- 3.1.1 Law Society of Namibia (LSN)
- 3.1.2 Legal Practitioners' Fidelity Fund (LPFF)
- 3.1.3 Statutory Disciplinary Committee (LPDC)
- 3.1.4 Admitted Legal Practitioners practicing with FFCs (FFC)

3.1.5 Admitted Legal Practitioners practicing with Exemption Certificates (Exempt)

3.1.6 Admitted Legal Practitioners not practicing (NonPrac)

4.2. Judiciary and Judicial Management

4.2.1. Honourable Chief Justice (CJ)

4.2.2. Honourable Judge President (JP)

4.2.3. Registrars of the High Courts (Reg)

4.2.4. Magistrates' Commission (MagCom)

4.2.5. Clerks of the Lower Courts (CLC)

4.3. Government and Law Enforcement

4.3.1. Ministry of Justice (MJ)

4.3.2. Office of the Attorney General (AG)

4.3.3. Office of the Prosecutor General (PG)

4.3.4. Legal Aid (LA)

4.3.5. Master of the High Court (Mast)

4.3.6. Deeds Office (DO)

4.3.7. Law Reform and Development Commission (NLRDC)

4.3.8. Office of the Ombudsman (OO)

4.3.9. Namibian Police (NAMPOL)

4.4. Educational Sector

4.4.1. Board for Legal Education (BLE)

4.4.2. University of Namibia (UNAM)

4.4.3. Namibian University of Science and Technology (NUST)

4.4.4. Justice Training Centre (JTC)

4.4.5. UNAM Legal Aid Clinic (Clinic)

4.4.6. Namibia Qualifications Authority (NQA)

4.5. Civil Society

4.5.1. Legal Assistance Centre (LAC)

4.5.2. Namibia Legal Practitioner's Trust (NLPT)

4.5.3. Law Society Rule of Law Trust (RLT)

4.5.4. Society of Advocates (SA)

4.5.5. Namibia Law Association (NLA)

4.5.6. Black Caucus (BC)

4.5.7. Paralegal Interest Group (PLIG)

4.6. Other

4.6.1. Clients / Beneficiaries of Legal Services (Clients)

4.6.2. Namibian Competition Commission (NaCC)

4.6.3. Institute for Chartered Accountants (ICAN)

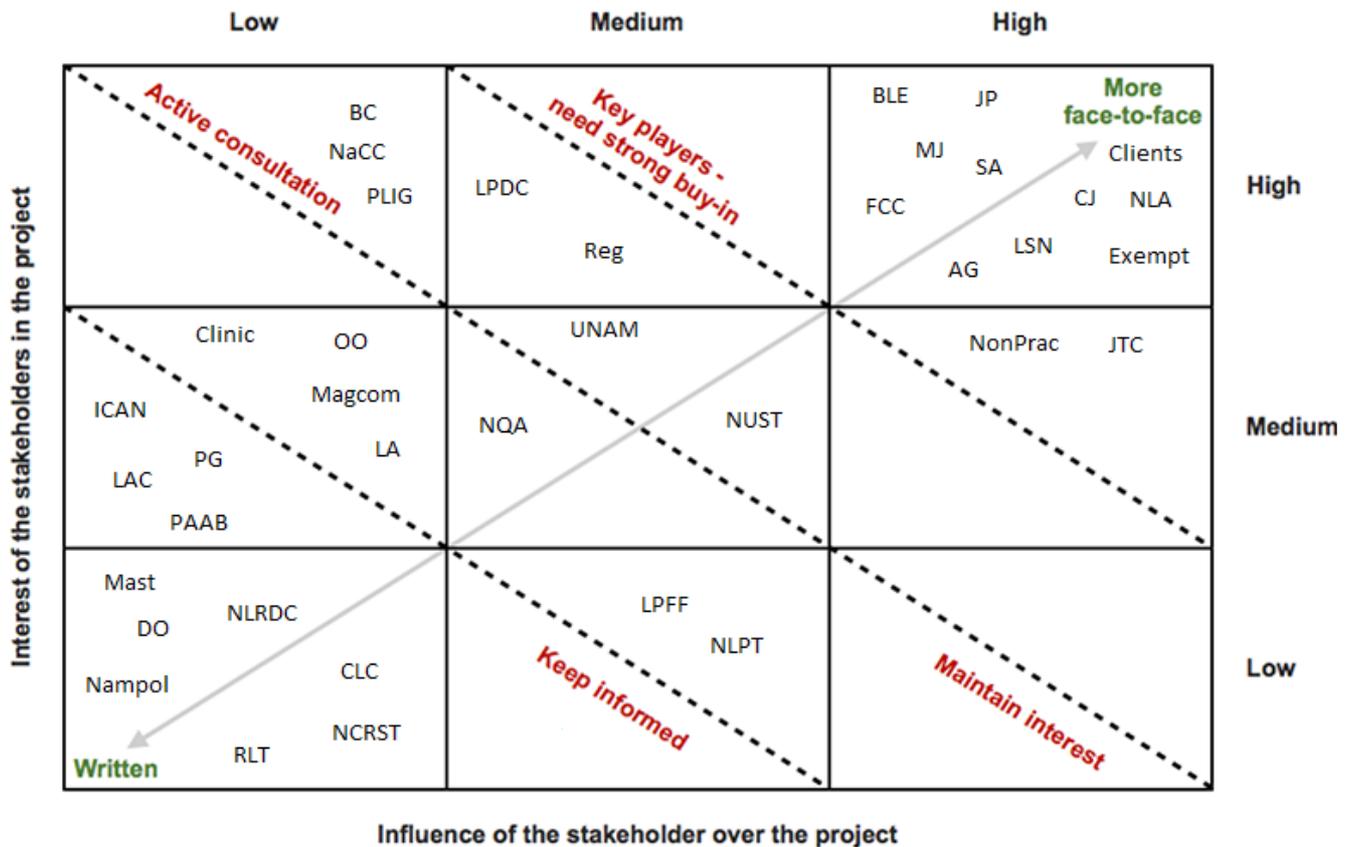
4.6.4. Public Accountants and Auditors Board (PAAB)

4.6.5. National Commission on Science, Research and Technology (NCRST)

4.6.6. Media

It is possible that more stakeholders may still be identified during the design phase.

The following analysis provides an indication of the level of engagement envisaged with different stakeholders. It is envisaged that data collection by the survey team will range from remote collection of data (via data collection tools, survey forms) to in-depth consultations to obtain especially qualitative data. Legal practitioners themselves and recipients of legal services (clients of legal practitioners) are important stakeholders and this group will likely pose the biggest challenge to the data collection exercise due to the size of the surveyed population. It is envisaged that clients and legal practitioner firms be categorized and sampled while every individual legal practitioner must be provided the opportunity to provide input. The Research Expert, in consultation with the Survey Expert, must advise on the most practical methodology, while ensuring sufficient reach and relevant input.



5. FURTHER AREAS FOR RESEARCH

Apart from the above-mentioned focal concerns as departure point, other areas of research should also be conducted. Dedicated research teams (outside the scope of the survey) will conduct most of the research in this section, but the Research Expert and the Survey Expert in consultation with the StC may decide to also include some of the following topics under the survey driven data collection.

- 5.1. Comparative indicators between Namibia and other major jurisdiction, to allow fair / appropriate comparisons
 - 5.1.1. Population
 - 5.1.2. Average income
 - 5.1.3. Political system
 - 5.1.4. Legal system
 - 5.1.5. Literacy levels
 - 5.1.6. Ratio of lawyers to general population
 - 5.1.7. Other social development indicators, like
 - 5.1.7.1. Growth rate - population

5.1.7.2. GDP

5.1.7.3. Nutrition levels

5.1.7.4. Freedom of speech and other relevant human rights (i.e. fair trial)

5.1.7.5. Public sentiment toward justice system and legal profession

5.1.7.6. Government sentiment toward justice system (i.e. is independence truly respected?) and legal profession

5.2. Disciplinary systems of select countries in Africa, Asia, Europe and Americas

5.2.1. Differences and similarities measured against Namibia

5.2.2. Strengths and weaknesses from regulator's perspective

5.2.3. Strengths and weaknesses from Government and public perspective

5.2.4. Legislative history

5.3. Upholding the rule of law

5.3.1. Active programs

5.3.2. Strengths and weaknesses

5.3.3. Evaluation mechanisms

5.4. Managing the conflict between the Law Society's regulatory and trade union functions (New Zealand, Ireland, Northern Ireland, Israel, other countries)

5.5. Access to justice initiatives in other jurisdictions

5.6. On independence of self-regulators:

5.6.1. What does it mean in other jurisdictions

5.6.2. Methodology in other jurisdictions

5.6.3. Rationale

5.6.4. Experience

5.6.5. Proposals for reform / reform anticipated and why and how

5.7. Review trends in lawyer regulation (one team for each topic) and identify strengths and weaknesses

- 5.7.1. What exactly, or who, should be regulated – legal services or legal service providers. (Not all legal services are provided by lawyers – should non-lawyer legal service providers also be regulated and if so, by whom and how?)
- 5.7.2. When lawyers should be regulated – proactively or reactively or a combination of the two.
- 5.7.3. Where lawyers should be regulated – geographically or virtually. (Many legal service providers to Namibians for reward are based outside of Namibia and sometimes provide their services “in a virtual space”. Should they be regulated by the Law Society and if so, how?)
- 5.7.4. Why lawyers are regulated? Here the LSN must examine its existing regulatory objectives to determine whether they adequately define the true purpose of regulation, and if they do not, adopt additional regulatory objectives or replace the current with new regulatory objectives.
- 5.7.5. One of the important purposes of this step is to provide guidance for a consistent response to future and currently unforeseen challenges.
- 5.7.6. How lawyers should be regulated – compliance-based regulation vs principle based regulation vs regulation by comprehensive and prescriptive rules (etc).
- 5.8.** Essential features of successful regulators (general and legal profession specific)
- 5.9.** One research area will involve a study of the work of the LSN and a desktop component, but as this topic is focused on the LSN’s operations, this does not form part of the survey and instead will involve the proposed business process analyst and then the economist or actuary or accountant who must help with preparing a costing model that will influence several critical LSN operational decisions.

5.10. Unpack all the current programs / work of the Law Society and match each program or area of work with one or more of the Law Society's current objects.⁷

5.11. Unpack the remaining objects of the LSN to see

5.11.1. If the LSN is meeting these objects,

5.11.2. Why it is not meeting these objects,

5.11.3. Where and how the LSN can improve in meeting its objects,

5.11.4. Whether the current objects need to be broadened or whether the LSN's focus should be narrowed,

5.11.5. Whether the LSN should "outsource" some of the functions it currently performs to specialist bodies, such as the Fidelity Fund, and play a more deliberate role in the work of others.

5.12. What have other Law Societies done about the mismatches between their objects and capacity?

5.13. What are viable sources of funding for legal profession regulation and fidelity cover (and perhaps regulation generally?)

6. TERMS OF REFERENCE FOR SURVEY EXPERT and TEAM

With the objectives set out above, and with the aim of conducting research following a methodology that is beyond reproach, the Survey Expert and his team will be required to do the following:

6.1. Ensure compliance with the Research, Science and Technology Act.

6.2. In line with the Research Methodology, and in consultation with the Research Expert and StC, design the survey methodology and data collection tools. This is crucial to the integrity and success of the project.

6.3. Execute the survey and conduct all activities agreed upon (i.e. including in-depth interviews with key stakeholders) to collect data.

⁷ Could form part of the business process analysis.

- 6.4. Oversee timeous delivery of good quality data in easily digestible format by end of February 2017.
- 6.5. Assist the Standing Committee in assessing / interpreting data collected.
- 6.6. Research results should be ready by the end of February 2017 as the assessment phase should start by March 2017.

7. EXPRESSION OF INTEREST

The Expression of Interest should include the following documents / information:

- Proposed methodology to be followed
- Consultant / firm profile
- CVs of consultant(s)
- Specific detail on similar projects / related work done
- Fees & costs

Deadline for submission: 21 October 2016 at 12:00

Delivery: Via Email at eben@isgnamibia.com

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