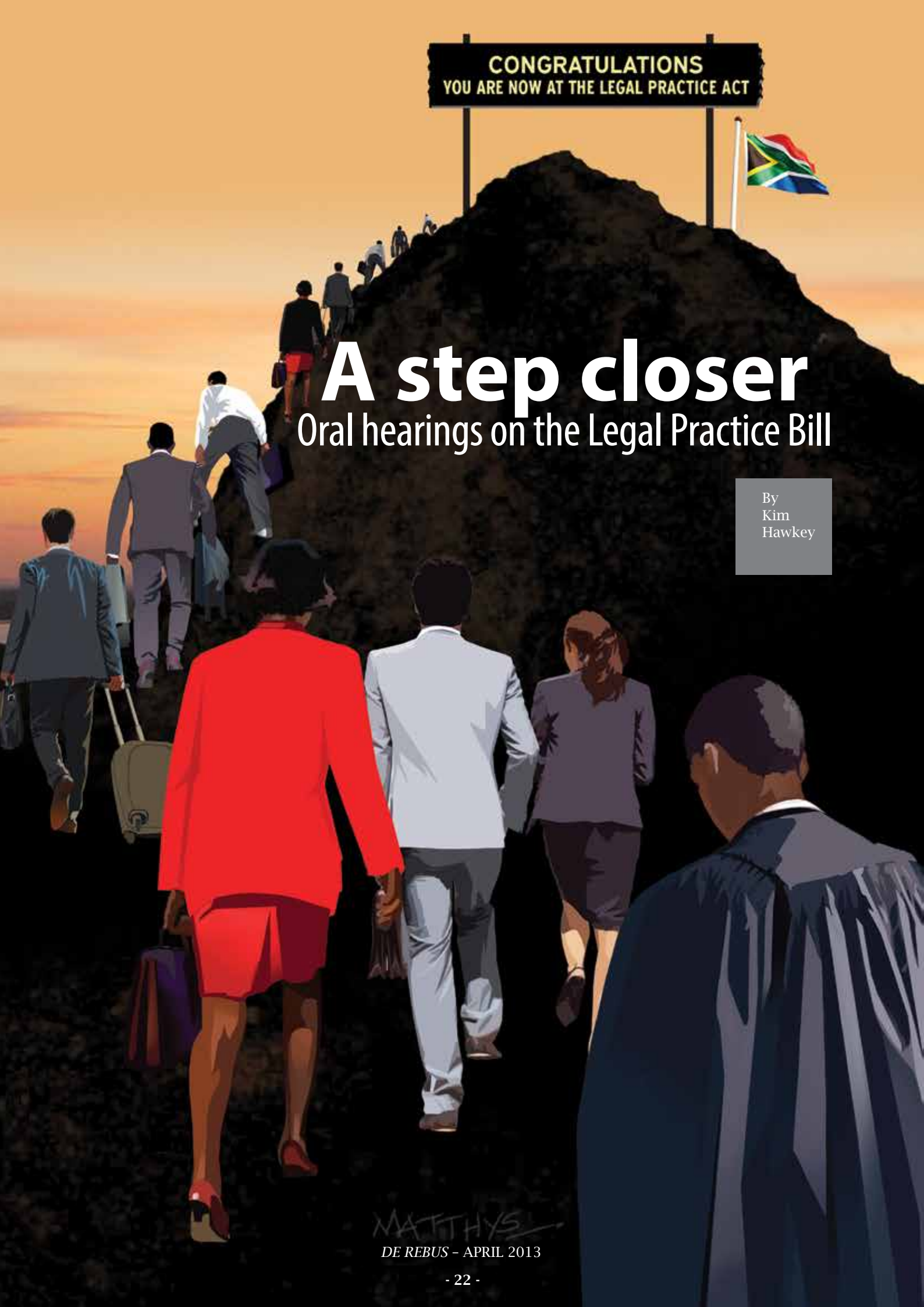


A step closer

Oral hearings on the Legal Practice Bill

By Kim Hawkey

On 19 and 20 February the Justice Portfolio Committee (the committee) held public hearings on the Legal Practice Bill (B20 of 2012), which is set to radically change the regulation and governance of the legal profession.

Those granted an opportunity to address the committee were:

- The Competition Commission.
- The Independent Association of Advocates of South Africa (IAASA).
- The Legal Resources Centre (LRC).
- The Black Lawyers Association (BLA).
- The Law Society of South Africa (LSSA).
- The Attorneys Fidelity Fund (AFF).
- The General Council of the Bar (GCB).
- The Cape Bar Council (CBC).
- Advocate Izak Smuts.
- The South African Human Rights Commission (SAHRC).
- The Association of University Legal Aid Institutions (AULAI).
- The employees of the LSSA.

In addition, the committee received written submissions on the Bill from a number of bodies, including the National Association of Democratic Lawyers; law firms Adams & Adams and Webber Wentzel; the Legal Expenses Group Africa; the South African Institute of Race Relations; the National Alliance for the Development of Community Advice Offices and the National Task Team on Community-based Paralegals; the Centre for Constitutional Rights; the Constitutional Literacy and Service Initiative; the University of the Witwatersrand Law Clinic; Eskom; the Association of Paralegals Practitioners; as well as several individuals (see p 38).

A number of representatives from the Justice Department attended the hearings, including chief state law adviser Enver Daniels; deputy chief state law adviser responsible for policy development, JB Skosana; chief director of legislative development, Lawrence Bassett; and acting deputy director-general of legislative development and secretary for the Rules Board for Courts of Law, Raj Daya.

Chairperson of the committee, Luwellyn Landers, opened the hearings by referring to the genesis of the Bill. He noted that there had been approximately 15 drafts of the Bill, which he said was 'understandable' due to the nature of the proposed legislation.

'We are expecting robust debate on the Bill and we encourage this. We do not expect you to agree with every single thing. Let us see if we can make this the best product,' Mr Landers concluded before the various bodies began making their oral submissions to the committee.

A synopsis of each of the oral submissions, in the order that they were made, is set out below.

Competition Commission

The Competition Commission's deputy commissioner, Tembinkosi Bonakele, represented the commission at the hearings. Mr Bonakele noted that the commission's interest in the Bill lay with the impact it would have on competition, as competition law issues dovetail with those of the public interest. The commission's primary submission was that the Bill was not sufficiently transformational and should include a framework to ensure broader representation within a specified time frame.

Professional rules

Mr Bonakele referred to exemption applications that both the LSSA and the GCB had made to the commission in terms of the respective professional rules for the attorneys' and advocates' branches of the profession. He noted that the LSSA's application had been rejected as the rules in question unjustifiably restricted competition. As this would have led to a lacuna, the commission and the LSSA agreed on an interim arrangement to interpret the professional rules in the least offensive way to competition provisions, he said. In terms of the GCB application, this was also rejected, but challenged and the Supreme Court of Appeal upheld an appeal in respect of the commission's decision relating to the referral rule. The rest of the rules were resubmitted to the commission and the processing of this application recently resumed after the LSSA matter, he added.

Transformation

In terms of transformation, Mr Bonakele said that the commission was concerned with regulatory barriers to access to the profession and skewed briefing patterns, which negatively impacted on competition. Further, the Bill does not address issues of access to the profession and to justice, he said:

'The Bill does not deal with these core issues adequately. … By and large, the status quo has remained.'

He added that the legal services ombud should be given 'more teeth' and its role should include monitoring transformational targets.

He proposed that the Bill should commit the South African Legal Practice Council (the council) to developing a transformation charter to meet the transformation objectives, together with a clear timeline to achieve these.

Fee structures

On fee structures, Mr Bonakele said that the commission was concerned about the possibility of 'cartel-like' behaviour provided for in the Bill.

In response to questions from the committee, Mr Bonakele said that the setting of prices could not be done by the council, which would be dominated by legal practitioners, who had an inherent conflict of interest: 'Lawyers are competitors … and, by them being involved in making a recommendation on fees, you essentially have a group of competitors deciding on what the fees should be.'

He proposed that a separate independent structure be established to set and regulate fees, on which consumers of legal services would be represented.

In respect of a query relating to contingency fees, he said that uncapped contingency fees were problematic and the commission was concerned that this aspect was not addressed in the Bill, although the commission had no objection to the principle of contingency fees.

In terms of fee caps, Mr Bonakele said that, to protect the public, only maximum fees should be provided for – not minimum fees, which 'only protect practitioners': 'Fees that are aimed at protecting the public from overcharging and overreaching do not have to set minimum prices. It is sufficient to protect members of the public to set maximum fees.'

He noted that the Bill left the determination of fees to the regulations to be drafted, but that the Justice Minister's (the Minister's) discretion in this regard was 'too wide'.

He commended the Bill's drafters for being silent on advertising, noting that the Bill would repeal aspects in the Attorneys Act 53 of 1979 relating to advertising, which was 'a step in the right direction'.

Reserved work

Mr Bonakele noted that the Bill maintained the status quo in respect of reserved work for attorneys and advocates in an 'overly restrictive' manner that prevented non-legal practitioners from providing certain categories of legal services. He said that breaking this 'monopoly' could result in reduced legal costs. 'There is value in having restriction. … [However,] there is a lot of work that, in fact, can be done by people who do not need a four-year legal qualification to perform,' he said.

Mr Bonakele said that examples of this type of work included conveyancing and drafting wills. He noted that certain ar-

eas of legal work were under-serviced by the legal profession, which resulted in expensive services.

In this regard, the commission suggested that the Minister designate certain categories of work that could be done by non-legal practitioners.

Multidisciplinary practices

Mr Bonakele said that the commission recommended the removal of the blanket ban on multidisciplinary practices. 'They must, however, be properly regulated,' he said. He added that the Bill ignored the growing relationship between the legal profession and other professions, for example there were instances where law firms employed tax and economic advisers and experts such as medical practitioners to provide a 'one-stop service'.

'There is room for allowing some form of multidisciplinary practices, provided that they are properly regulated,' he emphasised.

In conclusion, Mr Bonakele said that, while the commission welcomed the Bill, it was 'not transformational enough', and that it retained much of the status quo regarding matters of access and briefing patterns. He also cautioned against over-reliance on price setting 'as an issue of access' – prices must be capped and determined objectively by an independent body.

Independent Association of Advocates of South Africa

The IAASA was represented by its chairperson Mark Hawyes, who said that the organisation represented the interests of 430 advocates countrywide. The association supported the Bill and the creation of a single united legal profession, without a distinction between attorneys and advocates, but opposed government – and the Minister in particular – having a role in the governance of the legal profession.

Regulation and independence

Mr Hawyes said that IAASA supported uniform regulation of the profession: 'We do not shy away from regulation. … We want it; we just want it to be consistently applied to the whole profession.'

Mr Hawyes added that government should have a role to play in the regulation, but not the governance, of the profession and that the provision in the Bill that allowed the Minister to dissolve the council should be deleted.

IAASA shared the view that the independence of the legal profession was essential for the rule of law and the promotion of constitutional democracy. In response to a question as to whether IAASA viewed the Bill as a threat to the independence of the profession, Mr Hawyes said that there was potential for undue interference with the governance of the profession and therefore the independence of the profession was indeed threatened by the Bill.

Direct briefing

IAASA supported the provision in the Bill that permits advocates to receive briefs directly from the public in certain circumstances to be determined by the Minister, which it believed supported access to justice by reducing the legal fees of two professionals to one: 'It is heartening to see that the Bill does envisage instances of direct briefing for advocates.'

Mr Hawyes submitted that instances where advocates could be directly briefed included all criminal law matters; opinions; drafting of contracts, wills, memoranda of incorporation; arbitrations and mediations; maintenance matters; forensic investigations; and quasi-judicial matters.

As a condition to this, he added that advocates should be required to have compulsory indemnity insurance and he suggested that the system of payment distribution agents currently used by debt counsellors could be adapted for use by advocates.

Further, the instances in which advocates may be directly briefed must be clearly defined in regulations to be promulgated by the Minister.

Picture source: Gallo Images/Thinkstock

Fees

IAASA does not support the general capping of legal practitioners' fees, except those for practitioners rendering legal services to the state, as this was 'tantamount to restrictive practice' and could create the impression that the independence of the profession was being infringed on, Mr Hawyes said.

One of the committee members questioned whether capping of fees for practitioners rendering services to the state would not be construed as a disincentive to do such work, to which Mr Hawyes responded that this was an attempt to reduce the fiscal burden on the state, which was of national interest, adding that Legal Aid South Africa had successfully implemented such a model.

In response to questions from the committee, Mr Hawyes conceded that advocates' fees can be 'too high' and suggested that better guidelines be enacted to address this.

Representation on the council

The Bill currently provides for one IAASA representative to be appointed to the council, however IAASA argued that this should be increased to two. Further, the association believes that there should be equal representation of attorneys and advocates on the council.

Transformation

Several committee members questioned IAASA's stance on access to the profession, especially for women and black people. Mr Hawyes said that IAASA members did not require chambers in a particular place, which were costly for new entrants. It was also 'more flexible' in its pupillage programme and pupils were, in certain instances, allowed to earn income during their pupillage. He added that IAASA was not limited in terms of the numbers of pupils it could take in, although it was limited in terms of financial resources.

Legal Resources Centre

Advocate George Bizos and senior attorney Steve Kahanowitz represented the LRC at the hearings; they were joined by the centre's national director, Janet Love. The LRC held the strong view that the creation of a united legal profession should be attained by consensus rather than dictation.

Mr Bizos started off by saying: 'There are some people who think this may be my swan song. I am going to disappoint them,' before he spoke about the history of the LRC and of the Bill and some of the general elements relating to it.

On the creation of the LRC, which was relevant to current discussions about uniting the profession, he noted: 'Arthur Chaskalson had to put up a huge battle … in order to be given the right to form such a centre. Both the Bar and the attorneys said: "… [A]dvocates and attorneys occupying the same office, that is taboo and in conflict with the provisions and the rules of the profession. It cannot be done." It took Arthur Chaskalson's patience and integrity to persuade both the Bar Council and the attorneys' profession that the world would not come to an end if some of the rules were not treated as sacrosanct. … Many of us are concerned about what is good for us and what is good for our group, and not what is good for the legal profession as a whole nor what is good for the people of South Africa, and particularly those who look forward to having their fundamental rights protected. And, having fundamental rights, you require lawyers able to go to court and enforce them. If that does not happen, they remain worthless on a piece of paper,' he said.

He added that the LRC had attached to its written submissions to the committee Justice Chaskalson's last speech prior to his passing, which he made at the Cape Law Society's 2012 annual general meeting in November. He also referred to this speech several times during the oral hearings and emphasised that the rule of law was a key value underpinning the Constitution.

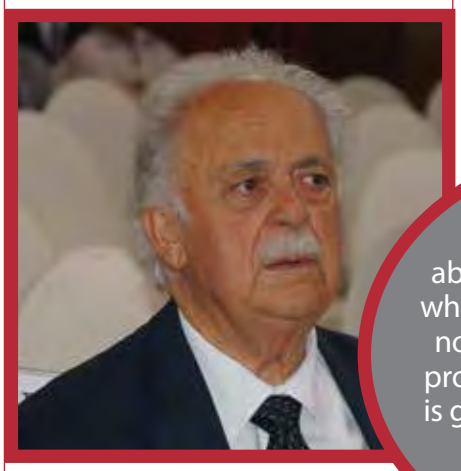
Role of law clinics

Mr Bizos said that the LRC's submission focused on ensuring that law clinics would not be obstructed by the Bill from providing access to justice to all. He noted that some in the profession believed the LRC deprived them of work; however, Mr Bizos refuted this and said that the centre focused on matters such as evictions where people did not have alternative accommodation, education rights, refugees arrested in the middle of the night and miners who may get silicosis.

Mr Kahanowitz addressed the committee on the law clinic perspective and on access to justice. He suggested that various terms in the Bill were unclear and should be better defined and used consistently, adding that confusion could obstruct access to justice.

In particular, he said that there was confusion regarding law clinics in the Bill, which should be clarified in the definition section. He also suggested that the definitions of 'attorney' and 'advocate' should specifically provide for practitioners practising in law clinics. He added that the definition of 'community service' was inadequate and should also be improved.

Members of the committee indicated that the definitions could be improved and that law clinics would be dealt with 'sympathetically'.



'Many of us are concerned about what is good for us and what is good for our group, and not what is good for the legal profession as a whole nor what is good for the people of South Africa ...' – *advocate George Bizos*

Unity and access to the profession

Mr Bizos called for a single Bar to represent all advocates. 'We need one Bar with equality within it, irrespective of your background. … This may be an opportunity to unify the profession,' he said of the Bill.

After quoting from Justice Chaskalson's speech, he warned of one of the possible negative consequences of the Bill if enacted as is:

'You know what is going to happen if this Bill goes through as it is: The big firms are going to set up litigation units where the cream of the crop will be recruited and they will have no difficulty in recruiting the top people. … The single practitioners or pair of attorneys will not be able to find the top advocates to take their cases,' he said, adding that the previously disadvantaged would therefore not receive any benefit.

Independence and the Minister's powers under the Bill

Mr Bizos said: 'Without independent lawyers, our Constitution cannot operate in the manner it was intended to.'

He said it was important that parliament did not sign off its rights to the Minister in a piece of legislation and that it ensured that the Minister was not empowered as he was under the current version of the Bill. He echoed Justice Chasklason's words in his last speech that such powers should not be given to a Minister: 'Maybe we trust this Minister, but we cannot give powers to a Minister because we do not know who the next Minister will be.'

He also noted that currently there was a need to critically reassess aspects of the Bill that relate to regulation of the profession by statutory bodies: 'We cannot have a statutory body conducting the affairs of the independent profession,' Mr Bizos said.

'We in the LRC, while not opposed to the state legislating governance structures for the legal profession – it does in the medical, engineering, accounting and other professions – are opposed to a situation where the end product will be a legal practice which vests members of the executive with far-reaching powers to control important aspects of the functioning of the legal profession. We would therefore encourage a serious reassessment of those aspects of the Bill related to the Minister's regulatory powers and the role of the council.'

In response to a question from the committee as to whether the LRC would be prepared to make submissions to im-

prove the Bill, Mr Bizos said: 'We, as the Legal Resources Centre, are prepared to be of assistance, but I want to make a submission to the committee that … having a very large body to try and draft is almost impossible. What I believe should be seriously considered is that a five-person committee be formed in order to take into consideration the submissions that have been made here and try and put together a new draft, which each one of the five will try and sell to his or her constituency so that there are solutions. But, in a parliamentary committee or for 30 people to express views on every little point that may be argued this way or that is not going to bear the necessary result,' he said.

However, the committee resisted this suggestion, noting that it was the legislative authority and the Bill was in its hands. 'There is a difficulty in handing it … over to somebody outside, but, having said that, we make a habit in this committee of welcoming people of expertise to sit with us when there are areas where we feel that we need other views and perhaps a way may be found along that avenue,' committee member Dene Smuts said, while committee member John Jeffery added: 'I wonder what everybody was doing over the last 15 years. I think we will need to keep the Bill, but would want to work closely with interested parties. … We will endeavour to produce a product that is supported by as many people as possible, albeit a bit reluctantly in some quarters, but we will endeavour to produce a product that has as broad a consensus as possible.'

Mr Bizos assured the committee that he respected the parliamentary process and that his submissions were influenced by statements by Justice Chaskalson along the lines of 'do not try and impose, but try and get together'. He suggested that a mediator from each of the major constituents be appointed to reach a compromise Bill. He also offered the drafting services of the LRC to the portfolio committee.

'Do not let personal fears, real and imagined, prevent us from doing a good job,' Mr Bizos concluded.

Black Lawyers Association

The BLA was represented by its President, Busani Mabunda, who was joined by Deputy President Kathleen Dlepu and member Francois Mvundlela. Mr Mabunda noted that the BLA had contributed to, and aligned itself with, the LSSA's submissions on the Bill as one of its constituents; however, he noted that there were some divergent views and the BLA wished to address the committee on its submissions that differed from those of the LSSA.

'… the current provision in the Bill provide[s] "enough checks and balances". It does not provide or envisage a situation where the Minister can rise up one morning and say: "I do not want this council, it must go"' – *BLA President Busani Mabunda*

The BLA was of the view that fears regarding the Minister's power in the Bill were misplaced as there were sufficient checks and balances in place to counter any abuse of power. Further, aggrieved parties could challenge the Minister through the appropriate channels available in a constitutional democracy.

Transformation

Mr Mabunda said that the race and gender demographics of the legal profession did not reflect those of the country, noting that approximately 30% of the profession was black (African, coloured and Indian), which was 'substantially low'. Therefore, the BLA supported the Bill on representivity.

'The legal profession is extremely fragmented and it does not align itself with the ethos as enshrined in our Constitution and it is so disturbing that after 13 to 15 years the lawyers, being the advisers in various industries when it comes to transformation, cannot themselves come to regularising themselves in line with the Constitution. That is extremely shameful,' Mr Mabunda said.

Regional councils, independence and the role of the Minister

Mr Mabunda said that the BLA did not believe that there was anything untoward with the Minister having an active participatory role in determining the location of the regional councils. 'When we talk of access to justice, we must ensure justice reaches the people in all regions,' he said.

'As much as independence is valued and independence is necessary, political oversight with the view of regularising a society which is not perfect is instructive,' he said.

Mr Mabunda noted that what set the BLA's submissions apart from many of the others was its view on the role of the Minister.

'The biggest issue which is putting the BLA at odds in its submissions with many others … is this issue of the powers of the Minister … to effect the dissolution of council,' Mr Mabunda said, adding that the BLA supported this, since there was no other provision to deal with a dysfunctional council.

He said that the current provision in the Bill provided 'enough checks and balances'. 'It does not provide or envisage a situation where the Minister can rise up one morning and say: "I do not want this council, it must go". He or she can never go on a frolic of his or her own. There are stringent processes that have to be invoked and the solace which we do have is that we are living in a constitutional democracy. Any interested or affected person may approach the courts to effect the very same dissolution. In other words, the powers as given to the Minister do not in any way take away or oust the jurisdiction of any affected person from wanting to deal with the dissolution of the council. Over and above [this], if the designated person acts in a capricious or arbitrary manner, that is still subject to challenge. We have got an inherent jurisdiction and our courts are final arbiters. So, in our respectful view, the fear is misplaced, save to say it seems to enjoy too much attention at various levels internationally …, but we are living in a constitutional democracy with clear checks and balances,' Mr Mabunda said.

However, he added that the BLA should not be construed as 'pro-Minister' in its position, but rather that it had 'to be balanced'.

Fees and community service

Mr Mabunda said that the BLA did not have a problem with the government capping legal fees as a major consumer of these, provided the fees were reasonable and acceptable to those rendering the services. However, in respect of litigious matters, the BLA submitted that these remain regulated and there were currently checks and balances in place, with clear and prescribed tariffs subject to taxation by the taxing master, and that this should continue. In non-litigious matters, he said that there were fee assessment committees to deal with exorbitant fees.

The committee questioned why the BLA had proposed, in its written submissions, that community service should not recur. Mr Mabunda responded that, while the BLA was not opposed to community service, it did not support the view that where lawyers had not performed community service, they were not entitled to receive their practice certificates.

Representation on the council

The BLA, unlike many others who made submissions to the committee, did not find it problematic that the Minister, in terms of the Bill, will appoint two members to the Transitional South African Legal Practice Council (the transitional council) and three to the council. 'Our respectful view is that there is absolutely nothing to suggest any form of interference with the independence of the profession. … Which profession should be acting as a cocoon because it is so sacrosanct?' he said.

Mr Mabunda concluded by asking for a final death knell for the pre-apartheid legislation that affected the practice of attorneys in certain areas.

In response to questions from the committee, Mr Mvundlela said that the views of Justice Chaskalson on the Bill were 'his views': 'As much as you want to be guided by those things that were said by others before you, I think it would be wrong to assume that you cannot move because somebody else said something else. In my view, the late Arthur Chaskalson, whom I respect very greatly, his views are his views, whether we agree with them is another thing. The question is: Out of those views, do we have to take them as sacrosanct and not move away from whatever guidance they give us and align them with whatever transformational agenda that we seek to achieve or whether you are going to take them as cast in stone …? I do not think that anybody sitting here, with all due respect, wants to follow that line,' he said.

Law Society of South Africa

The LSSA was represented at the hearings by council member Max Boqwana, its co-chairpersons Jan Stemmett and Krish Govender, as well as Mr Mabunda.

The LSSA emphasised the importance of unity of the profession and proposed a unified body to represent all legal practitioners.

The LSSA was of the view that the Bill should provide, where applicable, for all references to the Minister to confer 'after consultation' with the profession to be changed to 'in consultation' and emphasised the importance of self-regulation of the profession for the independence of the judiciary. Therefore, its position was that there should be minimal government interference in the profession.

Representation and interests of the profession

Mr Boqwana said that the upside of the Bill was that it would bring the branches of the profession together. He emphasised the importance of the body that emerges from the Bill being one that represents the entire profession. He said that currently the Bill provided for the establishment of a council, but not for a unified body to represent all lawyers. This means that South Africa will remain the only country in the Southern African Development Community without a general body representing all of its lawyers. This would achieve 'exactly what we are trying to avoid' by fragmenting the profession into different sections, Mr Boqwana said.

Mr Stemmett requested that a provision be added to the objectives of the Bill that recognises the interests of the profession, subject to the overriding interest of the public.

Independence and self-regulation

On independence of the profession, Mr Boqwana said: 'If we have got a united profession, then we can talk about a strong profession. It is only a strong profession that can be independent. If we do not have a strong profession, a united profession, we can forget about the independence that everyone is talking about here ... . I think that is where it starts; it does not start by looking at government; it starts by looking at us as legal practitioners and saying that we need to unite as legal practitioners because the strength is in our unity and, resulting from that, we can then talk about independence.'

Mr Stemmett mentioned that there were a 'few issues' in respect of which the constituents of the LSSA could not reach consensus, adding that he spoke primarily on behalf of the statutory component of the LSSA.

'Self-regulation is important for the independence of the judiciary and, for that reason, we should have minimal government interference … . Government should provide the framework, but not run the profession, Mr Stemmett said, adding that he agreed that the judiciary should be the final authority over the profession.

Mr Govender said that it was important not to simply import international elements into South Africa.

'I am firmly of the view that a Legal Practice Bill with the intervention by the state is absolutely necessary. … We are in a developmental state. We are only 18 years down into a democracy. We are still learning the art of being democratic. We sometimes cannot even tolerate opposition and opposition parties, but we must understand that all of that is part of the strengthening of this whole dynamic of building a state. So when we talk about the independence of the judiciary, and even the independence of the legal profession, we cannot make that a mantra ... and say: "At all costs it is going to happen and government cannot manage that process." … When we talk of this Bill and the checks and balances there, whether we have a good Minister or a bad Minister, it is a good democracy that will ensure that these things work and we must also remember that a bad Minister can get fired. Why do we not take it to its logical conclusion? So, if we have to have faith in our developing state, we have an ideal democracy in a way, with a beautiful Constitution, but that Constitution has still not gone very far in even satisfying the needs of the people. How is our legal profession operating in this context? It is so fragmented because we represent all the inequality in our society and this is the challenge for the Legal Practice Bill, our Constitution and our democracy to meet and we cannot take one out of context and say we have got to have absolute independence of a legal profession at all costs and therefore the Minister, the government, should not have a say in this and that. It absolutely makes no sense and is actually doing things out of context and it is disingenuous as well. So we must be bold; we must have faith in our Consti-

tution and in our parliament and in our opposition parties to know that this can work and it can move forward,' he said.

Appointment to, and dissolution of, the council

Mr Boqwana said that the LSSA's constituents could not reach consensus on the Minister's power to dissolve the council in terms of the Bill. However, he noted that accountability and democracy were important and that members of the council must be able to be held to account.

Mr Stemmett said that the statutory component was against the principle of the Minister appointing councillors. Further, the Minister's power to dissolve the council should rather lie with the court, he said.

Specialised work, quality and the difference between attorneys and advocates

Mr Boqwana emphasised the importance of the profession having quality graduates and that the enhancement of standards of practice was essential. 'We must not unleash half-cooked lawyers on the public,' he said.

He added that the profession had a system whereby the public was protected from theft by attorneys and in terms of which negligence was addressed.

The committee queried how much an attorney who briefs an advocate for an opinion charges and what type of work the attorney renders in this regard. In addition, the committee queried what work was done by a conveyancer as opposed to a conveyancing secretary. Mr Boqwana said that it was the attorney who bore the responsibility and the risk in such matters, not the advocate, and this risk was incorporated into attorneys' fees. 'In this country, there has never been a single advocate that has ever been sued successfully for negligence. Even if you give a hopelessly wrong opinion as an advocate, because that opinion is given to an attorney, it is the attorney who takes responsibility for what the advocate said, because the client remains the client of the attorney and the attorney uses the advocate as a resource. So, part of the cost is the risk that the attorney takes in that type of a brief,' he said, adding that the cost also included the amount of time spent considering the opinion, including the correctness thereof.

In respect of conveyancing, he said that conveyancers carried a great responsibility and employed technical expertise. It is an area of law where money changes hands and members of the public have protection if money is stolen by an attorney, he added.

He said that conveyancing should not be left to paralegals as property acquisition was one of the biggest investments for many South Africans and should be accorded the seriousness it deserved. Therefore, it should be effected by attorneys, who were properly trained and could be held accountable. This is critical for public protection, he said.

Mr Govender added: 'If an attorney has to see a member of the public, there is a great deal of talking and consulting and sifting that goes on and there is deciding if there is even a case to move forward on, and obviously that sort of work is time consuming and that is where ... costs arise. … A single person can do it, whether it is the advocate or an attorney, in keeping it simple and finding the quickest solution to a particular problem. However, it could well mean that whoever does it can still charge the same amount at the end … . There are checks and balances and controls, which the law societies have and even the Bar councils, in relation to assessing a person's fee to see whether it is fair and reasonable. Whether that works effectively for everyone and whether people are even aware of these things that they can challenge is part of the problem. … All of these matters need to be brought into the public domain in a more vigorous way.'

The LSSA delegation at the hearings, from left to right: Chief executive officer, Nic Swart; Busani Mabunda; co-chairpersons Jan Stemmett and Krish Govender; and Max Boqwana.

'At the end of it all, we have to take this Legal Practice Bill as something that is going to have to deliver much, much more than just sorting out the legal profession. It has got to be one of the many instruments to save our society as well'
–co-chairperson of the LSSA, Krish Govender

Access to justice and fees

Mr Boqwana said that access to justice was important to practitioners' existence and was not a matter of charity or 'looking good'.

However, he said that the debate about fees was 'elitist': 'There is quite a lot of debate about fees. … It is actually an elitist debate because when we talk about these fees, this generally reflects less than 5% of the "magic circle" firms in this country …, which are the magic circle firms that the government, the parastatals and the big, well-to-do people in this country continuously brief. We have got [a large number] of our firms being two-person and one-person law firms …; those are your firms that people do not even have to make appointments to go into. You walk into a firm, like my firm, … and there are probably 60% of people who are seen by those firms who do not pay any fees,' he said, adding that it was important to strengthen small law firms and to consider the geographical spread of firms.

Mr Govender added that state attorneys operate using taxpayers' money and the work they do is not for profit. Therefore, he said that the costs for legal services rendered to the state must be capped.

Disciplinary matters

The committee noted that there was a perception that the profession was not efficient in terms of its complaints-handling processes, except those relating to theft and, further, there was a perception that the profession protected its own interests.

In response, Mr Boqwana said: 'It is a matter of concern to us as well. There are quite a lot of colleagues … that we manage to catch and flush out of the system.' Mr Boqwana added that the view that the societies protect their own is a matter of perception due to a lack of communication. He said that it was true that the processes could be slow. Also, some of the schemes to steal money were sophisticated and complex and 'we do not want to gloss over' them, he said.

The LSSA was aware of the problem and had been considering a number of intervention measures, such as working with the National Prosecuting Authority and the Asset Forfeiture Unit, he said.

Transformation and direct briefing of advocates

Mr Stemmett said the following on the briefing of advocates: 'We do not have a problem if the advocates want to start tak-

ing briefs from the street, but the public needs to be protected. This is paramount. … If you want to take work from the man in the street and not from an attorney, then get yourself a Fidelity Fund certificate, but then you might as well become an attorney in the current dispensation. We might be working towards fusion, but that is a process. Transformation is a process and the same applies to the colour schemes and gender composition of our profession. We are working towards that. … We are getting there. ... Look, we are not perfect … but we are striving to get there.'

Costs of running the profession

The committee asked the LSSA for information on the cost of running the various constituents of the LSSA. Mr Stemmett informed the committee that the annual budget for the Law Society of the Northern Provinces alone for the current financial year was R 60 million. Committee member Debbie Schäfer expressed concern about the impact of how the costing of the structures under the Bill would affect the attorneys' profession.

Final word from the co-chairperson

In conclusion, Mr Govender said: 'My last note I want to make is that, in looking at the Legal Practice Bill, we also have to look at the future of the largely poor black lawyers, the smaller practitioners, and there is a percentage of poor white lawyers as well, that are also facing … problems now in our country and we are looking at a diminished base that is available for people to access lawyers because of unemployment; lawyers themselves cannot find the clients that can pay. Up to 1994 and even right up to 2000 there was legal aid work that more practitioners were able to access. They were able to do Road Accident Fund work; they were able to do a lot of criminal [law] work, but the people are unemployed these days. There is not enough money going around … . At the end of it all, we have to take this Legal Practice Bill as something that is going to have to deliver much, much more than just sorting out the legal profession. It has got to be one of the many instruments to save our society as well, and this is why we all have to buy in to the solutions, and I believe those solutions can only be driven through parliament, not through our legal profession.'

Attorneys Fidelity Fund

The AFF delegation at the hearings comprised board chairperson Silas Nkanunu, chief executive officer Motlatsi Molefe and finance executive Andrew Stansfield.

The AFF was concerned about the fund's sustainability in light of the provisions of the Bill that provide for the AFF to support the profession financially. This, the AFF submitted, had the potential to derogate from its primary function of reimbursing victims of theft.

At the end of their presentation, Mr Landers noted: 'I have been here since 1994 and I have never had the urge to applaud a presentation such as yours. … It was excellent and I felt like standing up and clapping.'

Mr Molefe told the committee that the AFF's submission was based on four points, namely –

- the nature of its funds;
- the beneficiaries of the funds;
- the custodians of the funds; and
- the business model of the AFF.

Public funds not for 'propping up the profession'

Mr Molefe said that the AFF's core function was not to prop up the legal profession, but to protect the public interest by reimbursing victims of theft.

'These are public funds in essence. ... We are talking about funds that are running into billions of rands that have been, over a period of time, nothing more than the cash cow of the profession. And it became the cash cow of the profession ... because, in terms of the structure of governance as set out in the Attorneys Act currently and as is repeated ... in the current Bill ... , effectively the custodians are the practitioners themselves ... . It boggles the mind why, if these are public funds, members of the public are not party to decisions that relate to the governance of those funds.'

Mr Molefe reported that 60% of the AFF's expenditure in 2012 'went towards propping up the profession', while 23% addressed its core function, theft. 'If you do not cap this, you really have a problem,' he said.

Conflict of interest

Mr Molefe said that attorneys should not sit on the board of the AFF because they were potential defaulters who could steal the very funds they were supposed to protect for the public.

'I steal money from the public, and the public then literally carries the can for my theft by reimbursing the victim of my act of theft. That can never be. That is a position that is inherently conflictual,' he said to illustrate this point.

He added that when this issue was raised with the profession, the response was that the profession, by its nature, knows how to manage conflicts of interest.

However, Mr Molefe believed this view was untenable: 'Conflict of interest can never be managed. ... You can never have men and women who essentially come from societies where they discuss issues that actually make them come into the [AFF] board to discuss how they can be funded, being the people that decide on how they should be funded. ... They are asking money of themselves but in two different capacities.'

Composition of the AFF board

In terms of the composition of the AFF board, Mr Molefe said that the Bill provided for five members of the board to be nominated by the council, which could enable them to decide to 'prop up the profession and not deal with the core function of the fund'.

Future funding of the profession

Mr Molefe noted that the Bill provided for the AFF to make an annual appropriation to the council to run its operations, however he said that this amount must be capped to protect the fund.

'If it is open-ended, and you have a situation where five of the board members … are appointed or designated by the Legal Practice Council, it simply means, whether or not we have money in that particular year to assist them, they can certainly decide to prioritise the regulation and support of the profession, as against the core function of the fund,' Mr Molefe said.

He added that the fund had an interest in regulation of the profession, but this had to be resource dependent. If not, 'then the biggest threat to the collapse of the fund will not be thieves out there; it will be the Legal Practice Council itself', he said.

Sustainability and capping claims

Mr Molefe also raised concern that the Bill did not protect the fund against

'disaster-sized claims', especially in light of the global practices of many firms. Therefore, he said that it was necessary to cap individual claims against the fund to prevent it 'being wiped out by one claim'.

Theft by practitioners

Mr Molefe noted that the trend seen by the fund was not an increase in the number of thieves, but in the value of the theft. He said it was necessary for the AFF to look after its risk. In addition, he said it was 'ridiculous' that the Bill provided for the Minister to consult the council – and not the AFF – on matters that affected the fund.

Mr Molefe concluded by saying: 'In short, all we are seeking from this committee and from the legislature is simply the power to assert our independence as an institution from the profession and, secondly, the power to look after not just us, but to look after the public, because if you do not give us that, ... ten years from now we will not be in existence. And, more importantly, government will begin to be the guarantor for thieves. And I do not think that is the business which government is in.'

General Council of the Bar

The GCB was represented at the hearings by its chairperson, Ishmael Semenya, with Rudi van Rooyen, McCaps Motimele and Anthea Platt. The GCB supported the objects of the Bill and highlighted the importance of the legal profession remaining independent for a healthy democratic dispensation and for the rule of law to prevail. However, it proposed a different structure to that provided for in the Bill.

Mr Semenya started the presentation with the words: 'We recognise that, as a constitutional democracy, one of the tenets under which we obtain the rule of law must automatically mean that we have an independent judiciary. That, too, entails that we have an independent legal profession within the meaning of that concept. We embrace the fact that a democratic dispensation is not possible unless the legal profession is indeed independent.'

He added that there was a distinction between regulation and governance and emphasised that the legal profession was best suited to govern itself, while those aspects related to the protection of the public interest, such as access to justice and to the profession, fell in the province of government to regulate.

The GCB, he said, also suggested that the process provided for in the Bill could be truncated in order to 'come sooner rather than later to a permanent structure'.

Room for improvement

Mr van Rooyen reflected on what had caused the divergent views on the Bill. He conceded that the GCB could have done more to inform others what it was about and could have better addressed negative perceptions about the profession. Further, it perhaps should have engaged with the Competition Commission earlier, he said.

Mr van Rooyen said the GCB had been described as an 'exclusive club', but that it had evolved over many years, with the input of the courts and, further, was in tune with other jurisdictions. 'It has never been an arbitrarily created old boys' club,' he said.

He urged the committee to improve the good elements of the existing governance structures of the profession 'rather than starting from scratch'. He emphasised that, in addition to independence, the perception of independence was important.

Access to the profession

Committee member Mr Jeffery noted that pupils at the Bar were not remunerated, which was 'an appalling bar to the profession'. In addition, once this hurdle was overcome, he said that it was difficult for a new advocate to start off in the profession on his own. He asked whether the GCB had given thought to this 'crucial issue'.

In addition, committee member Ms Schäfer asked why it was necessary to practise from chambers in a particular place, while committee member Makgathatso Pilane-Majake noted that the expense of certain chambers 'drives some out of the profession'. She said that a number of advocates who had done pupillage were not practising because they were 'discouraged by the fees they have to pay when they are not even sure that they will manage to get cases'.

In respect of chambers, Mr Semenya described the 'upside' of this practice as: 'We are able to have general oversight in the disciplined practice of all of us. That proximity gives us the ability to access wisdom, resources, skills [and] experience, which you would otherwise not be able to do if you practise as an advocate in some of the remote areas of our country. It also gives you access to some of the best legal brains that the country produces …, which you would otherwise not be able to have, but public interest is very well guarded in making sure you cannot necessarily have an errant advocate who might compromise the interests of lay clients somewhere without scrutiny or observation.'

He added that the cost of running offices was a serious financial burden and the GCB was investigating ways of using technology to offset this.

Fees

Committee member Ms Schäfer asked how the GCB intended addressing the 'real issue' of fees, while Ms Pilane-Majake noted that South Africans rely on the legal profession and therefore require affordable legal representation, which was negatively impacted by large fees.

Mr Semenya agreed that there was no access to justice if fees were prohibitive, which was a 'huge barrier' to access that required oversight.

> 'We are going to be settling this Bill this year. We would like to be settling it with your support … but we are going to be finalising this Bill. … We are not particularly impressed by the advocates or the attorneys not being able to find each other and we hope you find each other soon because otherwise we will come up with something for you'
> – *commitee member John Jeffery*

Mr van Rooyen said that appropriate mechanisms were in place to ensure that GCB members did not charge unreasonable fees. He suggested that there may be too much focus on fees as a bar to access to justice, when the focus should rather be on improving *pro bono* structures. 'Perhaps we are focusing too much on fees being the bar to access to justice. Suppose we halve advocates' fees, suppose we cut them down to a third. How many of the poor and needy will be able

to afford them? I would like to put my head on the block and say that I do not think it would make that much of a difference. What we need to focus on is … improving on our *pro bono* services,' Mr van Rooyen said.

Committee member Nkosi Patekile Holomisa asked for the GCB's view on the perception that in South Africa one had to pay money to access justice.

Mr Motimele responded that it was generally agreed that the notion of access to justice must be given effect to. However, 'every service must be paid for'; the questions being who was to pay for the services and at what cost, he said.

Difference between attorneys and advocates

In response to a question from the committee as to whether the GCB objected to direct briefing of advocates by the public and, if not, whether such advocates should have Fidelity Fund certificates, Mr Semenya said that there was an 'intrinsic difference' between the practices of attorneys and advocates, which was recognised by the Constitution.

'We find ourselves not sufficiently equipped to deal with matters about conveyancing, about matters that are peculiarly within the province of those who hold public trust money and are responsible for it,' he said.

Mr van Rooyen added that someone without a Fidelity Fund certificate could not be allowed to take money from the public, while Mr Motimele added that it was necessary to have a trust account to handle public funds.

Representation on the council

Committee member Steve Swart noted that the GCB had raised concerns regarding the constitution and dissolution of the council, which he shared. He queried whether the representation of attorneys and advocates on the council was equitable.

Mr Semenya responded by stating that the GCB was of the view that the advocate representatives on the council should have a measure of veto or a deadlock-breaking mechanism in matters particular to the advocates' profession, such as the cab-rank rule, while Mr van Rooyen said that there should be equal representation of attorneys and advocates on the council: 'It is not a numbers' game; we are two different professions,' he said.

Mr Jeffery noted that the GCB seemed to be showing that they were 'very independent' and had a 'take-it-or-leave-it' approach, describing them as displaying a fair amount of 'arrogance'. He said that the key question was whether the GCB could run its affairs in the interests of the people of South Africa, rather than itself.

In response, Mr Semenya assured the committee that the GCB recognised that oversight over matters of public interest in a constitutional democracy was in the province of elected officials in parliament and gave 'due deference' to this. However, he said that there were matters about governance, those regarding the day-to-day running of the profession, that government may not have a great interest in.

Mr Jeffery concluded by saying: 'We would like to produce a Bill that has the support from all sectors of society, not just the legal profession. … The buy-in from the Bar Council, among others, is very important. I think we should give you the opportunity for further engagement. However, we delayed these hearings to give you that opportunity. It did not result in anything. I suspect that the only reason that the small concessions coming at the end of the 15 years is because of the pressure. … We are going to be settling this Bill this year. We would like to be settling it with your support … but we are going to be finalising this Bill. … We are not particularly impressed by the advocates or the attorneys not being able to find each other and we hope you find each other soon because otherwise we will come up with something for you.'

Cape Bar Council

The CBC was represented at the hearings by its chairperson Ismail Jamie and vice-chairperson John Newdigate, who aimed to provide a perspective on the impact of the Bill from an individual Bar.

'We are involved … at the coalface … and can speak more directly and more accurately about what we do as a Bar on a daily basis than can the GCB, which is a federal body, which is removed from what happens in the constituent Bars. We are the third largest Bar in the country; we have more than 450 members.'

Mr Jamie emphasised that the good of the current system should be retained:

'We support … the proposition that the Bar in its present form should remain, whether it is recognised expressly or is recognised, as our submission suggests, by form of accreditation or provision for accreditation. We believe … the constituent Bars should remain as entities whether expressly or not. In its endeavours to better regulate and make provisions for the objects of the Bill, the committee in parliament should ultimately … be careful not to destroy the good and not to throw the proverbial baby out with the bath water. The committee in parliament should preserve what is good about the advocates' profession, while seeking clearly to advance the public interest,' he said.

Difference between attorneys and advocates and the referral rule

Mr Jamie told the committee that advocates had a level of independence that attorneys did not and that the CBC supported the referral rule.

'Advocates practise at hand's length from our clients and that gives us an essential independence, which attorneys simply do not have. Attorneys … are on banks' or other organisations' … panels and, as a matter of course and as a matter of practice, they cannot act against those they act on the panels for. There is a fundamental distinction with the way we practise …; advocates appear both for and against government on a constant basis; we act for the same client, we act against them. We hold no brief for the client other than our immediate brief. We are truly independent. … That is the essential difference.' He added: 'Advocates are specialists in the law, we are bad administrators. I would not want to take … money directly from a member of the public and keep it in trust for which I would need a Fidelity Fund certificate… . I have no practice or facility in doing that.'

Further, on the distinction between attorneys and advocates, Mr Jamie said: ' I do not want to be beholden to the client. I will go to court and do my best whether the client is an individual, a government entity, a big corporation, etcetera. I will argue the case as I see it. In the best tradition of advocacy, we will not take instructions to argue a particular line of argument. We will take instruction, obviously, within the bounds of ethics, to argue a case, but no advocate … will take an instruction on how to argue a case. … You analyse the case yourself, you arrive at a conclusion, you debate it with your colleagues, your attorney, your junior, etcetera, but ultimately, if you are lead counsel in a case, it is your call ... and you are beholden, as our rules of ethics say, to the court; you are beholden to the clients, but ultimately you are beholden to the rule

Continued on page 34

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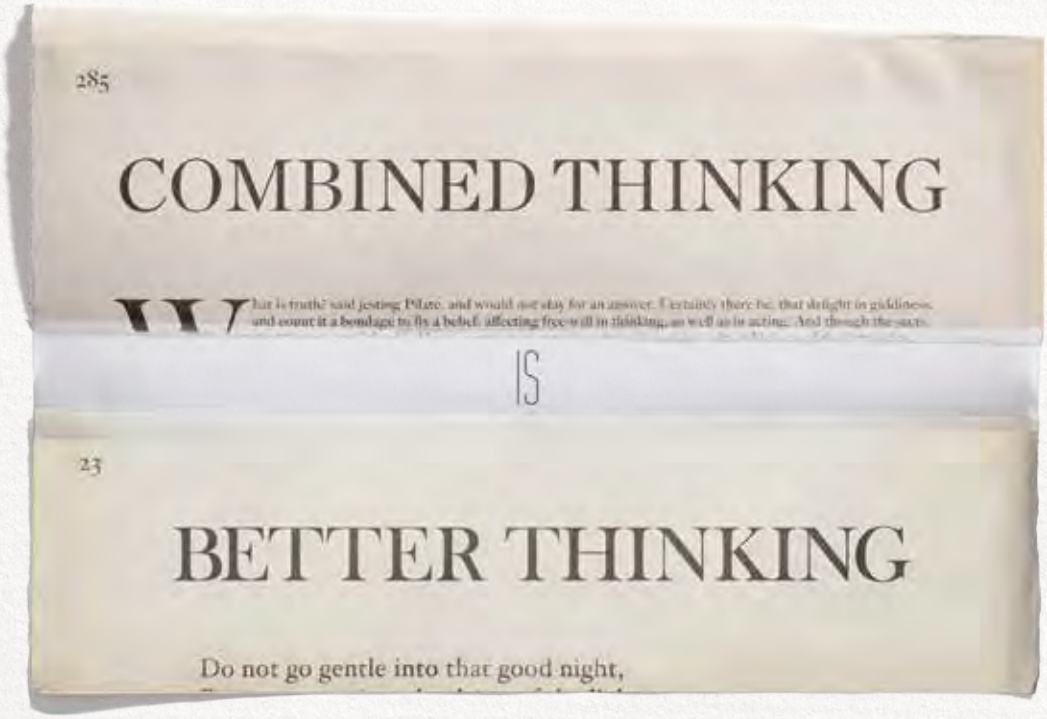

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of law. … I have never been told how to argue a case and I would not accept such an instruction. That is the hallmark of the advocates' profession. … The Constitution and the Bill in its present form recognise the fact that there are two branches of the profession.'

In response to a question from the committee as to whether the CBC was stating that the referral rule contributed to advocates being independent, Mr Jamie said that referral was 'fundamental' to what advocates did and it was linked to the cab-rank principle. This was fundamentally different from the practice of attorneys, he said, who had to carry out conflict of interest checks before representing clients in any matter. In this regard, referral was integral to the independence of the advocates' profession. Advocates are not beholden to clients but to the courts. 'That does not happen with us; we are not a cartel,' he said.

'In its endeavours to better regulate and make provisions for the objects of the Bill, the committee in parliament should ultimately … be careful not to destroy the good and not to throw the proverbial baby out with the bath water. The committee in parliament should preserve what is good about the advocates' profession, while seeking clearly to advance the public interest'
– Cape Bar Council President Ismail Jamie

Pupillage and transformation

Mr Jamie said that the CBC had an 'extensive and sophisticated' pupillage programme and took between 25 to 30 pupils annually. In addition, the CBC has an 'extensive' bursary programme, which awards transformation bursaries to previously disadvantaged individuals.

Committee member Ms Pilane-Majake, who noted the fact that the CBC and the GCB had made separate submissions showed 'how fragmented the legal profession at all levels is', said that the players in the sector must mirror society.

'We need to be careful of what you consider as institutional discrimination,' she added.

Mr Jamie responded by saying that the attrition rate of black practitioners was a concern for the CBC and, further, that there remained a bias towards briefing white advocates, 'at least in the Cape'.

Costs of running the Bar and fees

With regard to fees, Mr Jamie said that, in practice, the CBC did not experience a duplication of fees.

'We have an extremely rigorous practice and process of looking at the reasonableness of fees,' he said, adding that the CBC had a fee ombud to deal with fee disputes.

'Anyone charging fees that are found to be unreasonable … can be the subject of disciplinary proceedings and we have acted against members who have charged fees that are unreasonable or unwarranted,' he said.

In terms of paying money to get justice, Mr Jamie said that it took many years of study and many years of practice to become an 'experienced legal practitioner' and there was a market for those skills, which 'are worth something'.

'There are constitutional rights to freedom of the trade [and] freedom of economic activity, and government has legitimate interests in trying to ensure that more people have access to justice. But, at the end of the day, as unpalatable as it is, justice, … medicine, health, education, etcetera, all have price tags on them, and we believe it is legitimate for people to charge a reasonable fee for their services. We believe that the user of those services can distinguish between what is worthwhile and what is not and we also believe that the corollary to that is that government is entitled to, and should be permitted to, require that people at whatever level provide services free of charge or at reduced rates,' Mr Jamie said, adding that the CBC requires its members to do *pro bono* work.

Mr Jamie said that the costs of running the Bar were 'significant', including in terms of the hours its members provided voluntarily after hours and on weekends to run the Bar.

Advocate Izak Smuts

Advocate Izak Smuts, the former deputy chairperson of the GCB, who resigned shortly before the hearings due to a divergence of views on the Bill, also made submissions to the committee on the Bill.

He said that the major flaw of the draft legislation was that it did not distinguish between regulation and governance.

Mr Smuts said that he parted with the GCB as a matter of principle over the Bill: 'I have no personal differences with my colleagues … but I have to give due consideration to the fact that they do not, in their proposals, meet their own standards; the standards that they laid down themselves … and that is why I felt obliged to make these separate representations.'

In his submission, Mr Smuts proposed the establishment of an accrediting body to regulate both branches of the profession, while leaving the existing societies intact, which would be in keeping with international norms, he said. Further, he was of the view that, until the cost implications of the Bill were considered, the legislature would be irresponsible to adopt it.

'The thrust of my proposal is aimed at looking at what the Bill proposes for the advocates' profession and its structure, and its regulation and governance, and to deal with that and also the proposal that emerged from the GCB, which I have no doubt was a *bona fide* attempt to meet some of the differences that existed with the attorneys' profession but, in my submission, does not deal with the prerequisites that are laid down in international instruments and in our Constitution for the independence of the advocates' profession,' Mr Smuts said.

Independence and self-governance

Mr Smuts referred to an extract from Justice Chaskalson's speech mentioned above regarding lawyers joining associations that protect their professional integrity, among others. He noted the comment by the BLA's Mr Mvundlela that Justice Chaskalson's views were his own; however, Mr Smuts said that these were internationally recognised principles and an integral part of the rule of law, not just an individual's views.

Mr Smuts said that he had parted ways with the GCB on the issue of chambers of attorneys and advocates and whether these should be voluntary or self-governing. He said that neither the Bill's proposed structure nor the alternative structure proposed by the GCB was a vol-

untary or a self-governing association. If entitlement to independence of the Bar was recognised, then neither the Bill nor the GCB's proposed structure meets this requirement, he said.

'The Bill as it stands seeks to obliterate the existing voluntary associations of advocates. It wants their assets, it wants their liabilities … and it wants our staff. It is argued that that does not mean we cannot form voluntary associations, which we already have. … Why does the department wish to obliterate that which currently exists, which functions, which offers the services … . Why will it be necessary to establish new societies if we have existing and functioning ones? The reality is that much of the conflict that emerges with the proposals is that these are not simply regulatory proposals. The Constitution provides … that professions may be regulated by law. … These proposals in the Bill need to be examined as against whether they propose regulation by law or by ministerial regulation,' he said.

This, he said, would result in 'micromanaging governance' of the profession in conflict with international norms, adding: 'If we transfer regulation functions to governance functions in one body, there is no place for a ministerial role. There is a regulatory role to be played and it is currently being played. It falls within the administration of justice, so why should there not be more of a role for the judiciary, rather than the Minister?' he asked.

In terms of Mr Smuts' proposed accreditation model, the regulatory body would accredit self-governing professional associations and would play a monitoring function to determine whether the accredited bodies deserve to continue to receive their accreditation. This model would allow the Bill to comply with the relevant international principles and, further, would not avoid the regulation of the profession and allow it to continue to operate on an independent basis.

He also pushed for a greater regulatory role for the judiciary in the Bill, which would eliminate much of the criticism of state interference that emerged from the structure proposed in the Bill.

Committee member Ms Smuts agreed with him on this aspect, stating: 'All of the sting is taken out of this Bill if the judiciary takes the place of the Minister.'

Costing of the Bill

Mr Smuts raised concern about the cost implications of the Bill. He said that there was no evidence that the department had attempted to cost the implementation of the Bill in the past 14 years.

Mr Smuts added that his concern had increased after the AFF's presentation to the committee.

'It was an eye opener to me. It is a matter of grave concern. … but it has even more grave consequences ... for the Bill that is before you because … the attorneys' profession relies significantly on what it draws from that fund. Well, if the fund is restricted in what it might pour into the profession …, the cost to individual practitioners to fund this unfunded model must of necessity increase. … . If we are going to place an increasing cost burden on practitioners, ... however much this Bill might express as an objective the intention to improve access to the profession, it is going to impede access to the profession. … If the cost of practice is higher, practitioners are going to have to pass on that cost or leave practice and, if they pass on the cost, then it is going to cost litigants more. … Is there going to be a legal profession if you raise the costs and you cap the income that individuals may draw from it? Is this Bill designed to improve the administration of justice or finally to undermine it? If the intention is to improve the administration of justice, it needs a massive rethink and, quite frankly, until such time as the cost implications are considered, with the utmost respect, the legislature would be gravely irresponsible in adopting anything resembling this proposed model,' he said.

Transformation and access to the profession

In response to a question by committee member Sheila Shope-Sithole in respect of inadequate gender representation, Mr Smuts said: 'It is an international problem. … Women are massively under-represented internationally,' he said, adding that, while there had been an improvement, there were no 'quick-fix solutions'.

He suggested options in this regard could include developing capacity to reintegrate women who had been on maternity or early child-rearing leave into practice, as well as to assist them in their practice while they are away. Further, state attorneys should ensure that a prescribed percentage of briefs are given to female practitioners and other historically disadvantaged people. However, he added that the Bill did not address these aspects.

Standards and the quality of LLB graduates

Mr Smuts referred to an extract of a speech by Deputy Judge President of the South Gauteng High Court, Judge Phineas Mojapelo, published in the December 2012 issue of *De Rebus* (2012 (Dec) *DR* 56) and noted that some law graduates were granted pupillage when they should not have passed matric.

'Regulate us, do not allow people into the profession who are under-qualified. Do not lay down regulations that are too lax. I suggest that a reduction in standards has created expectations for admission to the profession which cannot be fulfilled. People are emerging, with respect, at the doors of chambers seeking admission to pupillage who ought not to have matric, but they have been granted LLBs. Specify that it should not just be a four-year LLB, but that it should contain minimum courses that qualify people for potential practice. It does not help to come, with respect, if you are going to be a beginner practitioner… if you do not have criminal law and procedure or civil procedure or the law of evidence because they were electives in your LLB. If you do not have the basics, but you have an LLB, you create expectations … that they will be admitted to practice, which cannot be fulfilled. You have guaranteed that they will fail,' he said, adding:

'In our country … you can get a law degree for toffee. There is a massive overproduction of under-skilled people and, regrettably, … there is any number of legal graduates who ought to be excluded from practice because if you look at what Deputy Judge President Mojapelo says, they offer a disservice rather than a service to their clients,' he said.

Attorneys and advocates, and the administration of justice

Mr Smuts said that he did not support eradicating the referral nature of the advocates' profession, noting that there was no hierarchy between attorneys and advocates, who had disparate and different interests: 'It simply is not enough to say "you are all in legal practice" … . The fact that we are both operating within the administration of justice does not mean that there are not significant differences in how we operate. Why are we required to have a one-size-fits-all [Bill]?'

He said that the Bill's one-size-fits-all approach created unnecessary problems: 'We need to be careful, and again it is a problem that arises from the one-size-fits-all proposal on which the Bill is premised, that we do not suggest that recognition of diversity constitutes fragmentation. Bars have organised themselves around the High Court centres. … We exist where the High Courts are … because those are the practical exigencies of practice as an advocate. Does that sort of structure necessarily suit attorneys? Probably not. There are hundreds, if not thousands, of rural attorneys who may need specific structures that suit their needs. Why do you want to force us all into one mould when the nature of our practices is completely different? That is why we need to draw a distinction. We are not fragmented in that sense; we perform a different function. We have voluntarily structured ourselves differently. … We in this profession are enriched by the diversity we have among the various

Bars that make up the affiliate members of the GCB. … Draw on that diversity, do not eliminate that diversity. … Yes, eliminate the historical nonsense …, but the fact that we operate differently in different regions and in different professions is not a threat. Our constitutional preamble refers to unity in diversity. If we want unity, our unity should be in the promotion of our constitutional values; in the rule of law, in the independence of the judiciary, in excellence of judicial practice, in the administration of justice and we can do that far more effectively drawing on our diversity than turning us all into uniform individuals.'

He added that he was 'certainly not' happy with the status quo. However, he said that what denied people access to justice was, for example, when the basic infrastructure at the courts did not function properly. 'There are many levels on which we need to address access to justice. You cannot simply point fingers at the legal profession,' he said.

'I am suggesting that … the administration of justice is a judicial function and everything that falls within it properly resides under the judiciary and there should be no issue as to a conflict of interest or an invasion of the separation of powers. In fact, the reverse. This Bill seeks to allow executive intervention upon what ought to be the judicial province,' Mr Smuts said.

South African Human Rights Commission

The SAHRC was represented by its chairperson Lawrence Mushwana, deputy chairperson Pregs Govender and international and legislative specialist Judith Cohen. The commission supported the Bill, but raised concerns about how it may impede it in achieving its objectives.

Mr Mushwana spoke on aspects of the Bill that would negatively impact the commission, noting that other similar organisations may be similarly affected.

Ms Cohen said that the SAHRC supported the Bill's purpose of bringing about transformation in legal services and to ensure greater access to justice, particularly for the poor and vulnerable.

Forms of practice

Ms Cohen noted that the SAHRC employed a number of attorneys and it regularly went to court to litigate on behalf of the commission. This was done through the vehicle of acquiring law clinic status.

However, in terms of the forms of legal practice provided for in the Bill, the SAHRC, as an independent state institution, 'does not fit in anywhere', including in law clinics as defined in the Bill. 'We are no longer confident that we will in fact be entitled to do this in future and it has also raised the debate of whether we are a law clinic or not,' she said, adding that in terms of the Bill's transformational aims, perhaps new forms of legal practice should be recognised.

Ms Cohen added: 'If we are not recognised, the major consequence would be that we actually cannot carry out our legal mandate.'

General requests

The commission would, in addition, like to be specifically included as a beneficiary for purposes of community service. It would also like to take on candidate attorneys, Ms Cohen said.

She concluded by saying that there needed to be a 're-look' at the Bill and 'some tweaking' of it, while an investigation was needed on how the SAHRC could be recognised in the Bill, together with the attorneys and advocates who did work for it.

Mr Mushwana added that the exclusion of the SAHRC from the Bill's provisions would be costly to the ordinary person, especially in terms of the work the commission did at the Equality Court.

Committee member Ms Pilane-Majake noted that the committee considered the SAHRC submissions to be 'valuable' and its concerns would be looked at by the committee.

Association of University Legal Aid Institutions

AULAI, the umbrella body of law clinics, was represented by its treasurer, Shamiel Jassiem. He said that the association represented 17 law clinics, 55 attorneys and 130 candidate attorneys and that the clinics provided training to senior law students, who consult with clients and provide advice under supervision.

Forms of practice

Currently, Mr Jassiem said, attorneys at the clinics do not require Fidelity Fund certificates, but the clinics do apply for accreditation. He noted that the definition of 'attorney' in the Bill was restricted to a legal practitioner practising with a Fidelity Fund certificate, which excluded practitioners practising at law clinics or justice centres. He said that AULAI submitted that attorneys at law clinics should not need Fidelity Fund certificates and the status quo should remain.

Fees

Mr Jassiem said that the law clinics did not charge clients fees for their services; however, if they were successful in litigation and were awarded costs in their favour, clients ceded their right to recover legal costs to the clinic. He noted that the Bill was silent on this point.

Representation on the council and the AFF board

Mr Jassiem proposed that AULAI have a seat on the council in addition to the academic staff provided for in the Bill, as well as representation on the AFF board. In response to a question from the committee in this regard, Mr Jassiem said that the AFF was a major funder of law clinics and AULAI could help the fund identify the financial assistance required for law clinics.

Candidate attorneys

AULAI asked that principals at law clinics be able to supervise ten candidate practitioners at one time.

New work for clinics

Committee member Ms Schäfer queried how AULAI proposed to administer minor estates – as it suggested in its written submissions – without managing funds. In response, Mr Jassiem conceded that it was envisaged that the clinics would play an advisory role, with the executor or Master's representative managing the finances.

Employees of the LSSA

The employees of the LSSA, represented by attorney Sicelo Mngomezulu and chairperson of the staff forum of the LSSA, Andries Modiba, highlighted the implications of the Bill for the society's staff.

Mr Mngomezulu said that, to date, little had been said about the fate of the employees of the LSSA, hence they felt the need to appear before the committee to explain the specifics peculiar to them in terms of how they would be affected by the Bill.

He said that the LSSA served the interests of all attorneys nationally by providing, among others, education and development of attorneys and providing information to practitioners in *De Rebus*.

Mr Mngomezulu highlighted the specialist skills among the society's employees and noted that the Bill seemed to provide for the employees of the provincial law societies, but not those of the LSSA. 'This is a critical concern,' he said. He noted that the provision in the Bill that empowered the transitional council to negotiate the transfer of employees of the current regulatory structures of the profession to the council or regional councils did not, as of right, cover employees of the LSSA. Similarly, it appeared that the council did not have a corresponding duty to employ or second employees from the existing governance structures of the professions. It was therefore submitted that LSSA employees be expressly covered under this provision in the Bill.

Mr Mngomezulu also asked whether it would be possible for the LSSA to be entrusted with the operational and management functions of the transitional council.

Mr Modiba emphasised that employees were 'worried' about job security due to uncertainty regarding the Bill. 'There is no certainty or assurance in terms of our future and we wanted to appeal to the members of the portfolio committee to restructure some of the parts that have been highlighted and to review the Bill itself so that they can accommodate us.'

Conclusion of the hearings

At the end of the hearings, Mr Landers noted that two or three more organisations may still need to appear before the committee and they would be accommodated. He added that the hearings should not mark an end to public engagement on the Bill and interested parties were welcome to make further submissions on the draft legislation and sit in on deliberations of the committee or to make use of watching briefs. 'We want you to engage,' he said.

The full audio recordings of the hearings can be found at www.pmg.org.za/node/35978 (day one) and www.pmg.org.za/node/36011 (day two). Further, those on Twitter can view a synopsis of the hearings under the handle @LSSALPB.

Tell us: What are your views on the Legal Practice Bill? E-mail comments to derebus@derebus.org.za

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Written submissions on the Legal Practice Bill

By Kim Hawkey

In addition to the oral submissions on the Legal Practice Bill (B20 of 2012), the Justice Portfolio Committee received several written submissions on the draft legislation. This is a summary of those submissions published on the Parliamentary Monitoring Group's website.

ORGANISATIONS

Adams & Adams

Adams & Adams' submissions focus on issues relevant to it as a law firm providing specialised legal services in various fields of law, including intellectual property (IP) law, commercial litigation and property law.

The primary focus of its submissions relate to fees and the requirements for admission as a legal practitioner.

Fees

The firm submits that legal services in the 'highly specialised' area of IP law merit a sector-specific fee structure that provides remuneration commensurate with the importance, volume and financial implications of this type of work.

Similarly, it recommends that the Justice Minister (the Minister) should also consider determining a sector-specific fee structure for specialised commercial and litigation services.

It refers to the Minister's power in the Bill to make regulations relating to the fee structure of legal practitioners, as well as the factors to be taken into account in determining such structure. It notes the sometimes complicated and often technical nature of IP work, as well as the sector-specific qualifications that practitioners need to do certain work. The firm says that the importance, significance, complexity and expertise of the legal services; the volume of work required and time spent; as well as the financial implications of such work need to be taken into account.

Further, clients of these services include foreign clients, often large companies, which require legal services on a high and consistent level of quality in order to be assured that their IP is properly protected, as well as South African conglomerates, whose foreign market share is protected by IP rights.

'It would not be unrealistic to expect of such clients to pay a fee commensurate with the services demanded. In the case of foreign companies, this also results in a flow of foreign currency into South Africa and increased revenues for the Companies and Intellectual Property Commission,' the firm states.

Further, on the capping of fees, Adams & Adams notes: 'Unduly capping the fees which IP practitioners will be allowed to charge would result in disincentivising talented young law and science/engineering graduates from pursuing careers in IP law. This would lead to a gradual degeneration of the IP system and almost certainly loss of vital IP rights to South African individuals and companies seeking to compete in the global knowledge economy.'

> 'It would not be unrealistic to expect of such clients to pay a fee commensurate with the services demanded – *Adams & Adams*

Admission and enrolment of legal practitioners

Adams & Adams also notes that the provisions in s 24 of the Bill, which deal with admission and enrolment of legal practitioners, may 'open the door for the scales to be tipped in favour of foreign persons' as the usual requirements 'will not always apply to foreign persons'.

It notes that this section permits the Minister (after consultation with the South African Legal Practice Council (the council)) to make regulations in respect of admission and enrolment to, *inter alia*, determine the right of foreign legal practitioners to practise in South Africa; give effect to any reciprocal international agreement regulating the provision of legal services in South Africa by foreign legal practitioners or the admission and enrolment of such foreign legal practitioners; or permit a person or category of persons, if it is in the public interest, to expeditiously commence practising in South Africa as legal practitioners by virtue of academic qualifications or professional experience.

Taking into account the General Agreement on Trade in Services, of which South Africa is a member, this, the firm says, means that if such practising rights, or if expedited admission rights, are granted by the Minister to foreign legal practitioners from one or more specific countries, the same treatment will need to be accorded to legal practitioners of all other World Trade Organization countries.

'It is clear that this would throw wide open the door for foreign legal practitioners to claim entitlement to practising rights in South Africa,' its submissions state.

Aleagis Consulting

The submission of Aleagis Consulting, an 'international network of trade experts, attorneys and scholars', is in the form of a complaint to the Competition Commission, in which it objects to the rules of the constituents of the Law Society of South Africa that relate to –

- organisational forms;
- reserved work;
- advertising, marketing, touting and fee sharing; and
- 'undercutting'.

It says that these rules preclude it from –

- establishing territorial offices;
- approaching the persons who need its services the most, namely government departments, parastatals and multinationals; and
- competing in this market on price, merit, innovation, turnaround times, specialisation, public interest or otherwise.

This amounts to an abuse of dominance and/or an egregious violation of international law, it claims.

Association of Paralegals Practitioners

In its submission, the Association of Paralegals Practitioners requests recognition of paralegal community law workers as legitimate community law practitioners in the Bill, as well as, *inter alia* –

- acknowledgment and recognition that paralegal community law practitioners are an integral part of the South African law community and serve a legitimate constituency and need for law services;
- for paralegal community law workers to be formalised through the South African Qualifications Authority accreditation, with the paralegal national certificate being the entry requirement to practice;
- that a code of conduct be drawn up to regulate paralegal community law workers;
- that those who have been deregistered or debarred as lawyers should not be allowed to emerge later as paralegal law advisers, as this can tarnish the image of the practice;
- the enforcement of a funding and fee structure approved in terms of the Bill; and
- that people with criminal records should not be allowed to practise as paralegal community law workers.

It adds that government support can be modelled around workers' trade union support that has been administered through the Department of Labour.

Centre for Constitutional Rights (CFCR)

In its submission, the CFCR focuses on aspects of the Bill that may negatively impact the independence of the legal profession and, by implication, the judiciary and the rule of law.

It submits: 'The Bill in its current form vests extensive power to control essential aspects of the legal profession in the [Minister] – in our opinion, powers well beyond constitutional parameters and international norms and principles. This is untenable in our constitutional democracy. It is therefore submitted that the relevant matters of concern be seriously considered by the committee, aimed at alignment with constitutional requirements and international norms and standards, in the context of effective transformation and improved access to justice as required by the Constitution.'

Its key concerns relate to aspects of the Bill that 'clearly infringe on the independence of the legal profession'. In this regard, it states: 'The relevant provisions in the Bill provide for a council which is partially to be appointed by the Minister, must advise the Minister and can be dissolved by the Minister on fairly wide grounds. In addition, a number of the powers and functions of the council are to be fulfilled in consultation with the Minister – with the Minister having a final decision over matters such as fee structures, vocational training requirements and community service.'

In detail, this includes:

- The Minister may appoint three members (who do not have to be legal practitioners) to the council. Additionally, it appears to be unclear who or what the 'organisations representing law teachers or legal academics' may be and it appears as if Legal Aid South Africa may appoint any 'person', regardless of qualification, profession or experience. 'As such, the Bill fails to respect those international norms and standards which entitle legal professionals to form and join self-governing professional associations that represent their interests, promote their continuing education and training, protect their professional integrity and exercise of its functions without external interference – especially by the executive.'
- The Minister's power to dissolve the council: Although the Minister must appoint a retired judge to investigate the council's conduct, he will not be bound by the judge's recommendations and can dissolve the council regardless of these. If the Minister dissolves the council, he must appoint an interim council for up to six months and must designate a chairperson of the interim council from its members. Since the council has extensive regulatory powers, 'the Minister could effectively, through an interim council and chairperson, potentially effect undue pressure on the legal profession and individual legal practitioners'.
- It contends that the Minister's powers to regulate on a wide range of matters encroach on the ability of the legal profession to regulate itself on matters that could affect its independence.
- The legal services ombud provided for in the Bill reports to the Minister and its budget is allocated from that of the Justice Department, requiring further reporting obligations to the department, which has implications for independence. It suggests as a possible solution that the ombud be appointed by and report to the Chief Justice.

'[T]he Minister could effectively, through an interim council and chairperson, potentially effect undue pressure on the legal profession and individual legal practitioners'
– Centre for Constitutional Rights

Constitutional Literacy and Service Initiative (CLASI)

CLASI, which lists its primary vision as working with law students and graduates to deepen access to justice and information about the Constitution in communities, comments on aspects of the Bill that relate to access to justice.

In particular, CLASI focuses on community service, legal education and the regulation of paralegals.

In respect of community service, it proposes, *inter alia*:

• That community service should be a requirement for both entry into the legal profession and for continued registration as a legal practitioner, with the possibility of community service as a requirement for entry into the profession taking place during the LLB degree, after graduation or, possibly, as a combination of both.

• Remuneration for community service: 'If the aim is to reach a point where the legal profession is reflective of the demographic composition of the country, it can hardly be feasible to require young graduates, many of whom may be from disadvantaged communities, to find a way to support themselves while working without compensation.'

However, CLASI proposes that aspirant legal practitioners who engage in community service programmes during the course of their legal studies would not need to be compensated, but would receive academic credit.

• The establishment of a working group dedicated to community service under the auspices of the council. The group would be responsible for keeping a register of approved opportunities for placement, as well as facilitating supervision of aspirant legal practitioners by legal practitioners, in fulfilment of both parties' community service obligations.

On legal education, it submits, *inter alia*:

• In order to further the project of 'transformative constitutionalism' in South Africa, legal education needs to be reformed. It recommends expanding clinical legal education and integrating clinical methodology in existing law faculties, which would serve 'the twin goals of providing opportunities to aspirant legal practitioners to fulfil community service requirements, as well as offering a dynamic pedagogy that will develop better law graduates'.

• The new constitutional dispensation requires a shift from the formalistic parameters of legal education and the legal profession to a more substantive one, which considers moral and political values and the social context in which law operates – both in how and what is taught.

• Law faculties, in partnership with the council, should play a more intentional role in rethinking the design and implementation of the LLB curriculum in light of the skills and values desirable in law graduates. Law students must be holistically exposed to the balance between knowledge, skills and values in the course of all doctrinal or theory-based courses, which must not be reserved for a stand-alone legal practice course in their final year.

• That the council and the Transitional South African Legal Practice Council (the transitional council) include one teacher of law or legal academic nominated by law teachers, legal academics or organisations representing law teachers or legal academics, as well as one clinician nominated by and a member of the Association of University Legal Aid Institutions.

On paralegals, it proposes, *inter alia*:

• The regulation of services by paralegals under the same body that will regulate attorneys and advocates.

'The exclusion of paralegals from the Legal Practice Bill and the scheme that it creates undermines the status of the group within the legal landscape of South Africa. In order to play the vital role that it should, the sector requires respect, which could be achieved through external recognition and regulation. Access to justice can be enhanced if the credibility of paralegals is fostered, and their role in the profession concretised. Separate regulation ... will ... detract from the legitimacy of the profession. Moreover, linkages between the formal legal profession and the paralegal sector should be strengthened, a goal that will be achieved by regulating legal and paralegal practitioners together.'

• Paralegals should be regulated, specifically with regard to their training and qualifications, in a separate chapter of the Bill.

• Representation of paralegals on the council.

Eskom

The main emphasis in Eskom's submission is the protection of the independence of the judiciary. 'The question is asked whether, with the Minister appointing members to the main governing professional body, that is possible,' its submission reads.

Further, Eskom asks, *inter alia*:

• Whether the Bill applies to practising members of the profession only and excludes those who have qualified, but are, for example, legal advisers in private or public companies. If such people are excluded, Eskom proposes the establishment of an independent body to regulate their professional affairs.

• Whether the prescription of training for legal practitioners extends to non-practising legal practitioners.

• That consideration be given to the possibility that the rendering of community service should apply to candidate attorneys only and not to legal practitioners.

• For a requirement that Fidelity Fund certificates be clearly displayed at attorneys' offices.

Eskom notes that 'non-practising practitioners make up a significant percentage of the legal fraternity and have direct influence on South African business as legal advisers and legal counsel' and therefore it was of concern that they were not eligible to be members of the council and that it was 'essential' that non-practising attorneys have appropriate representation on the council. It also asks that consideration be given to allowing a qualified, admitted attorney, who is a non-practising full-time legal adviser/corporate counsel, the right of appearance on behalf of his employer, with conditions and/or limitations if necessary. 'This may also enable corporate organisations to take on articled clerks in the future, as is the case in some other professions,' Eskom notes.

Legal Expenses Group Africa (LEZA), comprising LegalWise and Scorpion Legal Protection

In its submission, LEZA focuses on access to the profession, multidisciplinary practices and reserved work, and contends that: '[M]uch of the status quo of what is widely perceived in the private sector in general as unwarranted exclusivity and protection of the legal profession at the expense of the consumer has been left intact.'

In this regard, it claims that few, if any, barriers to entry have been removed and the provincial law societies are 'merely replaced' by a single self-regulating council consisting primarily of legal practitioners, 'which has the potential to impede a holistic approach concerning legal services'.

It states: 'It denies all those lawyers who work in corporations throughout the country as employees, but who may be admitted and are equally qualified, the right to appear in court. Well-meaning corporations, for example, may well find it attractive to employ legal practitioners to attend to the legal needs of its staff, including court appearances, as an employee benefit. The shortage of legal practitioners will be significantly alleviated if all qualified lawyers – subject only to the appropriate and obvious safeguards regarding education, prior and ongoing vocational training, professional indemnity insurance, etcetera – are able to perform the work reserved for legal practitioners as currently defined in the Bill.'

It adds that it is 'difficult to find cogent reasons to justify that it is in the public interest that the largely administrative functions of conveyancing and notarial work should, by virtue of qualification requirements, in effect be provided by legal practitioners only'.

LEZA supports broadening the base of legal practitioners by recognising alternative business structures, such as incorporated legal practices owned and controlled by non-legal practitioner third parties, but with the legal practitioners of the incorporated legal practice being subject to the provisions of the Bill.

'We do not believe that a level of independence that equates to near total autonomy to practise a profession is required in the public interest' – Legal Expenses Group Africa

Among others, it recommends:

- A system in terms of which legal practitioners are obliged to enter into written costs agreements with clients, disclosing the proposed hourly rate, an estimate of the total number of hours to be spent and all other contractual terms to govern the relationship, prior to providing services. 'If a fixed fee is prescribed in terms of this Act or any other Act, the costs agreement must reflect that.'
- Legal practitioners should be allowed to advertise freely, provided that advertisements comply with the requirements of the Advertising Standards Authority of South Africa or any applicable law, which will 'result in an improved consumer-centric approach'.
- On independence, it states: 'We agree with an independent legal profession in the sense of [its members] being able to represent whoever they choose to, whoever the opponent, without interference or prejudice to privileged attorney/client communications, provided that it is underpinned by an independent judiciary and constitutional safeguards. We do not believe that a level of independence that equates to near total autonomy to practise a profession is required in the public interest. Perhaps the term "independence" should be defined.'
- The inclusion in the council of at least two persons nominated by the legal expenses insurance sector, after consultation with the National Consumer Commissioner.

Further, it supports the Minister having three appointees to the council and notes that the power of the Minister to dissolve the council 'appears justifiable in the public interest'.

- The Bill should allow for any juristic entity to conduct an incorporated legal practice, regardless of ownership and control.

National Alliance for the Development of Community Advice Offices (NADCAO) and the National Task Team on Community-based Paralegals (the task team)

In a joint submission, NADCAO and the task team call for the inclusion of community-based paralegals in the Bill, as well as for a national interim governance structure to regulate this sector. It believes that a separate regulatory framework will 'irreparably and irrevocably detach and disconnect community-based paralegals from other legal practitioners and from the mainstream justice sector', adding: 'This divisiveness goes against the intended spirit of the Bill to bring the legal professions together and this will not augur well for sustained access to justice.'

Inter alia, they ask for the following inclusions in the Bill:

- Recognition of community-based paralegals as legal practitioners.
- The possibility of subsidising or wholly paying for the costs of community advice offices.
- The appointment of not less than two community-based paralegals appointed by the Minister to the council or other representative body, after receiving nominations from community-based paralegal practitioners or organisations representing the interests of community-based paralegals.

National Association of Democratic Lawyers (NADEL)

In its submission, NADEL sets out general comments on the Bill, as well as commentary and analysis of certain sections of the draft legislation.

NADEL records its long-term view of 'a truly and entirely unified profession' and notes that it has always argued for fusion, viewing the distinction between attorneys and advocates as archaic and artificial.

In terms of independence, NADEL is of the view that it is appropriate that the legal profession 'govern itself with little or no interference from the executive and legislative branches of government'; however, it believes that the Minister's powers in terms of the Bill do not threaten the independence of the profession:

'The arguments of some elements in the profession that the Bill's provisions constitute an attack by the Minister or the [Justice] Department on the independence of the profession belie the fact that the profession (including both advocates and attorneys) cooperated with the apartheid government and had a poor track record with regard to executive interference. The independence of the profession rather relies upon people with strong values who are able to act in an independent manner when faced with difficult choices. Provided the members of the profession are free to choose the cases they take on and provided there is no attempt to "punish" or isolate those who take on unpopular causes – and the Bill appears not provide any basis for this kind of intervention – the independence of the profession can hardly be regarded as being under threat.'

NADEL does not believe that there is anything objectionable in the requirement that reports are to be made to the Minister on a regular basis, or that the ministerial appointment of three members to a 21-member council could amount to unreasonable governmental interference.

However, NADEL objects to the provision in the Bill allowing the Minister to dissolve the council: 'The power to dissolve the council cannot vest in the hands of the Minister. In line with the principle of independence of the profession, only a court should be able to order the council's dissolution. Nothing would naturally stop the Minister from approaching a court for such an order.'

Further, any interim council appointed on such dissolution would have to be appointed by majority by members of the profession 'and ought not to be appointed by the Minister alone'.

The association also notes that 'a key feature' missing from the Bill is that it does not provide for the council including organisations such as 'trade unions' of legal practitioners with the interest of members as one of its functions: 'At its core, the Bill focuses primarily on the regulation of the profession. The omission of members'/the profession's interests needs to be addressed.'

Further, NADEL does not believe the transformative objectives envisaged in the Bill are achievable during the time of the transitional council 'as the issue of representation actually relates to the permanent council and not the transitional council'. It therefore proposes the continued accreditation of the Black Lawyers Association (BLA), NADEL and Advocates for Transformation (AFT) for a longer period, in the region of five years, 'to sustain achievement of the objective of transformation'.

The association also suggests the possibility of sunset clauses 'in view of the numerical strength of white male lawyers' and the recognition for the need of race and gender balance, and the potential for the governing structures to be dominated by big firms, senior counsel and urban-based lawyers.

In terms of access to work in the light of transformation, NADEL says that this issue has not been 'tackled in a coherent fashion' by the profession, government, statutory bodies, state-owned enterprises and private business, and a single regulatory regime must deal with this matter as a priority.

In respect of particular aspects of the Bill, NADEL submits, *inter alia*:

- A fee structure, as prescribed by the Bill, is likely to fall foul of the Competition Act 89 of 1998 and practitioners' capacity to earn a living 'should not be limited by making access to justice the sole reason for setting fee structures'. It adds that access to justice can be achieved in a number of other ways. 'We need to ensure a balance between greed and unreasonable expectations, on the one side, and sound practice management and fair reward, on the other,' it says.
- The Bill does not provide for the transitional council and the council to have a corporate structure with perpetual succession. The transfer of assets/secondment of staff provided for in the Bill therefore 'raises huge complications'. The role of the director-general of the Justice Department 'is also questionable' in this process, NADEL submits.
- The composition of the transitional council fails to take into account that AFT represents 50% of the General Council of the Bar and therefore ought not to have additional separate representation. Further, BLA and NADEL have non-attorney members, who are advocates or members of the profession in other functions, which ought to be considered when determining the representation of these organisations on the council.

South African Institute of Race Relations (SAIRR)

The SAIRR's main contention is that the Bill seeks to abolish the independent Bar councils and law societies and replace them with a new council, despite 'no sound reasons for this change' being put forward.

It believes the Bill is an attempt to bring the legal profession under ministerial control with the consequence that '[o]nce all legal practitioners are regulated by a council answerable to the Justice Minister, it is likely to become much harder to find lawyers willing to take up contentious cases against the state'.

The council and the transitional council

The institute states: 'This council will report to the Justice Minister. It will also be vulnerable to dissolution by him at any time, without adequate safeguards against potential abuse of this power, militating against its independence.'

It is of the opinion that it is unacceptable for the Minister to have 'so much influence over the council's composition'.

'The new council – like the Judicial Service Commission – is likely to include a core of people who support the ruling party, and might even be its deployed

cadres as well,' its submissions read.

It states that the composition of the transitional council is likely to give the Minister significant influence over the council's deliberations and decisions. 'Moreover, if the transitional council is unable to reach agreement, this will open the way for the Justice Minister himself to decide by regulation what the "election procedure" for the permanent council should be. Effectively, this will allow him to control the composition of the permanent council by executive fiat.'

On the Minister's powers in respect of dissolution of the council, the SAIRR submits that the safeguards against potential abuse of this power are insufficient. While the Minister must afford the council a reasonable opportunity to respond to the reasons for dissolution, and must afford the council a hearing on any submissions received, he is not obliged to take such submissions into account or to give reasons for rejecting them.

Further, although the Minister must appoint a retired judge to conduct an investigation and make recommendations prior to dissolving the council, the Minister is not bound by such recommendations. 'He is not even obliged to take them into account, or explain why he has overruled them.'

'Making the council subject to dissolution by the Minister in such circumstances will erode whatever independence it might otherwise have. Moreover, since the council will control the right of legal practitioners to practise their craft, this will give the Minister an indirect control over the legal profession which is profoundly at odds with the independence needed by the Bar, the Side Bar and the Bench.'

Various academics from the faculty of law at the University of South Africa

Senior lecturer Dalita Ramwell from the department of private law notes the following as potential problem areas of the Bill:

- The definition of 'attorney' has the effect that an attorney who fails to obtain a Fidelity Fund certificate in a specific year is automatically an advocate.
- There is no definition of the 'public interest' in the Bill.
- The objects of the council include ensuring that legal fees are reasonable and promote access to legal services, and regulating legal practitioners. In this regard, Ms Ramwell states: 'It is debatable whether it is wise to fix prices in this manner in a largely capitalist economy. That such price fixing only applies to registered attorneys and advocates seems undeniably discriminatory. It also risks benefiting only the rich and not the poor … . The Bill does not prescribe how the reasonable fees will be achieved, and that is perhaps the key issue.'
- The provisions on the dissolution of the council and the appointment of an interim council seem to create the potential for 'a relatively small number of members to "highjack" the council and pass undemocratic resolutions'.
- The criteria for a fee structure omit seniority and experience of the practitioner.
- The questionable need for a transitional council. 'Why not go from ordinary law societies to the Legal Practice Council? The answer seems to be contained in section 97. It merely postpones the problems and disputes that could not be resolved thus far, in that the transitional council must advise the Minister on problematic and controversial issues … and, most importantly, the transitional council must, within 24 months, "negotiate with and reach an agreement" with the attorneys' and advocates' professions in respect of the transfer of their assets, rights, liabilities, obligations and staff. To provide that parties must reach an agreement seems *contra bonos mores* and unenforceable. Furthermore, taking over the assets of private institutions, operating more or less like a club, where all the members have a shared interest in the assets, seems to indicate a deprivation or expropriation, with all the constitutional implications of that.'

In conclusion, Ms Ramwell states: 'Most concerning, however, is that I did not find any provisions that may strengthen the independence of the legal profession. On the contrary, the over-regulation seems to have the opposite effect.'

> *'It is debatable whether it is wise to fix prices in this manner in a largely capitalist economy. That such price fixing only applies to registered attorneys and advocates seems undeniably discriminatory'*
> *–Dalita Ramwell*

Professor Magda Slabbert of the department of jurisprudence notes a number of positive aspects in the Bill, but raises, *inter alia*, the following concerns:

- Paralegals are not addressed in the Bill.
- Competent persons should be appointed to the council and not political figures with the 'right connections'.
- The four-year LLB is a major concern: Few students succeed in four years and, apart from obtaining the degree, they are not ready for practice.
- Pupillage for advocates should be compulsory.
- A single code of conduct for lawyers will not suffice – there should be separate ones for attorneys and advocates due to their differing roles.
- Council members should be appointed for five-year terms, not three, to work effectively.
- The term 'fit and proper' is vague, subjective and discretionary and a full explanation of its meaning is necessary.

In addition, Professor Slabbert asks why only one teacher of law is to be represented on the council and, further, where the regional councils will be situated.

Professor Heinrich Schulze of the department of mercantile law says that the reference in the preamble to the removal of 'any barriers for entry into the legal profession' is too wide and should be omitted, alternatively amended to proclaim that only unnecessary barriers be removed.

Further, in respect of s 6(1)(*d*) of the Bill – which provides, *inter alia*, that the council may, having due regard to the Constitution, applicable legislation and the inputs of the ombud and parliament, 'perform any act in respect of negotiable instruments or the electronic transfer of monies' – he says that negotiable instruments and the electronic transfer of funds 'are by no means the only, or even the two most important, examples of methods or instruments of payment'. Therefore, the wording of this subsection should encompass all forms of money.

Finally, he says that the structuring and wording of s 91 of the Bill 'do not make sense' and sets out fully why he believes the provisions in this section contradict each other.

University of the Witwatersrand Law Clinic, School of Law

The University of the Witwatersrand Law Clinic submits that:

• Fidelity Fund certificates should be a requirement to practise as an attorney at a university law clinic, since such attorneys are often in receipt of trust money in the form of damages recovered on behalf of clients and deposits for disbursements.

• Limitations on the type of legal work that can be performed by university law clinics 'have no place in the Bill and should be scrapped'. 'It is a form of protectionism which is to the prejudice of the poor,' its submissions read.

• University law clinics must be able to recover costs awarded, which must be taxed in the clinic's name.

• The forms of legal practice in the Bill fail to provide for an attorney who practises in the full-time employ of a university law clinic. The section should be amended to accommodate such attorneys.

• The definition of 'community service' in the Bill does not provide that the legal services rendered by the attorneys and candidate attorneys at university law clinics qualifies as such. The section should be amended to provide that the legal services and training provided by attorneys and candidate attorneys at a university law clinic, free of charge to the public, qualify as community service.

• The right of appearance in the lower courts should be extended to suitably qualified final-year undergraduate students. 'The time is ripe to implement the rule as a matter of principle, with the proposed council to regulate the minutia of the rules determining the conditions under which students will be able to appear in our lower courts.'

• Like in the case of medical graduates, suitable funding should be made available from the national fiscus to cover the running costs of community service as part of law graduates' practical vocational training.

Webber Wentzel

Webber Wentzel raises a number of items relating to the Bill that are of concern to it as a large corporate law firm. These fall under four main headings:

• Regulation of fees: Webber Wentzel says that experience, location and overhead costs should also be included as factors to be taken into account for the fee structure to be determined in terms of the Bill. Further, the firm notes that its clients are 'very sophisticated users of legal services' and the Bill does not expressly take into account their power, bargaining position and ability to regulate and keep fees competitive. It proposes that such users be allowed to contract out of the fee structure. On fee caps, it says: 'We feel that it is inevitable that if fees are regulated as is proposed, almost all lawyers will move to charge the maximum capped rate. This will distort competition in the market … . We believe that the market does and should have the freedom to determine and regulate rates.'

• Multidisciplinary practices: Webber Wentzel submits that the relevant wording in the Bill is too speculative and does not provide set time periods. It notes that firms like it compete with many multidisciplinary practice international firms and clients would benefit from a 'one-stop shop', in particular those offering tax and related financial services.

• Limited liability practices: The firm also believes that the relevant wording in the Bill is too speculative. Allowing limited liability practices will be of great benefit to the public and should be prioritised, it says, adding that sufficient control measures are in place to protect the public. The current barrier discourages the establishment of new firms, it adds.

• Continuing professional development: Webber Wentzel requests clarity and certainty on what this requirement will entail and whether internal training programmes will be capable of being accredited as training providers.

INDIVIDUALS

Swaziland-based attorney Sydney Dlamini

Mr Dlamini has issue with the fact that legal practitioners who are South African citizens residing outside the country cannot be admitted as attorneys in South Africa without 'starting from scratch'. He says that currently an attorney who has been practising for more than ten, or even 20, years in a foreign jurisdiction, must serve articles if he wishes to relocate to South Africa. 'This is not fair considering the history of South Africa,' he says.

'It is not a reasonable thing to require that an attorney who is over 40 years [old] and who has been practising for many years should start from scratch if that practitioner wishes to pursue his/her trade in South Africa,' he says.

He therefore motivates for recognition in the Bill of such attorneys who have practised for more than ten years, and who meet the other requirements in the Bill, being allowed to petition the court for admission as a practitioner.

Advocate Eric du Preez

Mr du Preez says that many legally qualified persons have been excluded by the 'system' in place for many years. 'Please accommodate those of us who have experience, but have not, or could, not afford to follow the current requirement for admission, imposed by a system that emanates from the previous century. Allow these people … to work freely and the market forces will soon make legal assistance affordable to all,' he asks.

In support of his submissions, Mr du Preez cites his personal experience as an LLB graduate at age 55 after a 34-year career in the police service and his subsequent inability to secure pupillage or articles at a law firm. After 15 months of working for free as a candidate attorney at a university law clinic, he was subsequently trained by the Commission for Conciliation, Mediation and Arbitration, where he has been a part-time commissioner for the past nine years.

Despite this, he says: 'As I am admitted as an advocate by the High Court, I have right of appearance in the High Court and other courts, where I practised as an independent practitioner. However, I may not accept money from a client "upfront" and can only receive payment after the task is completed – placing myself a risk of not being paid,' he says, adding:

'The dilemma I find myself in is experienced by many legally qualified persons who have, for whatever reason, not done pupillage and/or the candidate attorney route. These are magistrates, prosecutors [and] legal advisers working for government, in the private sector, provinces, banks, etcetera. Most of these persons have huge knowledge and experience in their particular field, but are marginalised because of the fact that they could not follow the current recognised system to become an advocate or [attorney] and to ply their trade.'

He says that the argument that without formal, post-university training, a person is not competent to do legal work 'does not hold water': 'All industries have in-house training, why not legal practitioners?' he asks. As further support for his submission, he notes that many South Africans have done part-time work to finance their legal studies; they have families and often cannot afford to do pupillage of a year without income or 'candidateship with a salary usually so small that they just could not survive'.

Pretoria advocate Connie Erasmus

Although a deputy director of public prosecutions, Ms Erasmus comments on the Bill in her personal capacity.

She recommends, *inter alia*, the following amendments to the Bill:

- The name of the Bill should be changed to the 'Legal Professions Bill'.
- That the LLB degree as a minimum academic qualification, plus the vocational training by each of the professions, be collapsed into a single legal professional qualification providing, entrance to the attorneys' profession, prosecutors and attorneys engaged as corporate lawyers.
- That the LLM degree as a minimum academic qualification, together with the vocational training of the individual professions, be collapsed into a single legal professional qualification providing entrance to the advocates' profession, specialist prosecutors, specialist corporate lawyers and advocates engaged as researchers of law and judges' professions.
- The proposed legal professional qualification should run over a maximum period of two years full-time.
- After the transitional period provided for in the Bill, advocates with seven or more years' experience can continue practising as advocates, advocates engaged in prosecution, as corporate lawyers or as researchers of law, or they can convert their registration to attorneys. Those with less than seven years' experience and without an LLM can practise as attorneys, attorneys engaged in prosecution or as corporate lawyers. All attorneys with more than seven years' experience who have an LLM can convert their registration to advocates.
- A partially completed LLB degree entitles the holder to practise as a legal adviser/paralegal, which should be provided for in separate legislation.
- All lawyers should be subject to a lawyers' fidelity fund and board (instead of the Attorneys Fidelity Fund (AFF) and board), with prosecutors, state attorneys, governmental corporate lawyers and advocates excluded from such authority.
- That advocates be allowed to form partnerships with each other or attorneys, and that advocates may become notaries and conveyancers.
- That the National Director of Public Prosecutions and/or his delegate be given a seat on the Judicial Service Commission (JSC) and the council.
- All references to the Minister in the Bill be changed to the JSC.

Springbok former public prosecutor Derrick Grootboom

Mr Grootboom, who does not have an LLB degree, but who has other legal qualifications and experience, asks that he – and others in his position – be recognised in the Bill as able to qualify to be admitted as an advocate and/or an attorney.

Mr Grootboom has a BIuris degree and an LLM. Further, during 2009 to 2011 he sat as a member of the Western Cape High Court Bench, presiding with judges in criminal trials, while at the same time practising as a legal consultant for a law firm. He is also a former public prosecutor at the National Prosecuting Authority.

However, he notes that his qualifications do not 'fulfil the LLB requirement': 'Despite the above, I am not allowed to practise as a lawyer representing clients in the South African courts of law, charging clients professional fees, because the requirements set in the Attorneys Act [53 of 1979] and the [Admission of Advocates Act 74 of 1964], which [are] now copied into the Legal Practice Bill, debar me [from earning] my living as a legal practitioner, as guaranteed by the Constitution … in sections 22 (freedom of trade, occupation and profession) and 9 (right to equality).'

He maintains: 'I respectfully submit that I should not be further debarred from appearing in the South African courts of law, earning my living as a legal practitioner with two law degrees, obtained under the harshness apartheid weighed on me as a black person, by the requirements … of the Admission of Advocates Act … (which [are] similar to [those] in the Attorneys Act) and that provision must be made that I, and others like myself, must be regarded to be duly qualified to be admitted as advocates/attorneys by virtue of the Legal Practice Bill.'

Pietermaritzburg legal administration officer Nosihle Gumbi

Ms Gumbi notes her 'great anxiety' over the term 'attorney', defined in the Bill as 'a legal practitioner practising with a Fidelity Fund certificate', which is a 'move away from' the definition in the Attorneys Act. She asks: 'Would it mean that a person such as myself, who met the requirement of being admitted as an attorney but is not in practice, is no longer an attorney?'

Further, she raises concern over s 24(1) of the Bill, which provides: 'A person may only practise as a legal practitioner if he or she is admitted and enrolled to practise as such in terms of this Act.' In this regard, she asks: 'What about us who were admitted in terms of the Attorneys Act? Are we no longer attorneys?'

Andre Jensen

Mr Jensen, from Port Elizabeth, proposes that the Bill 'make the legal profession accountable to their clients' and preclude practitioners from charging for time 'negligently wasted'.

He states that the legal profession, like the medical profession, enjoys 'the latitude of being able to charge for their services even when the outcomes are unsatisfactory', adding that: 'In the light of the fact that there is so often uncertainty of outcome in these professions, this is understandable.' However, he says that this tolerance is being abused by the legal profession. 'Some members of the legal profession find it very tempting to persuade their clients to take legal action even when they know for certain, or should know for certain, that the action will prove futile. In such cases the onus should be on the legal profession to tell their clients that the matter will prove futile, but the temptation is to not tell the clients this and to then enable the earning of fees,' he says.

'Some members of the legal profession find it very tempting to persuade their clients to take legal action even when they know for certain, or should know for certain, that the action will prove futile'
–Andre Jensen

Cape Town attorney Andries Landman

Mr Landman proposes that –

- 'family member' in s 57(1)(*a*) of the Bill be adequately defined as it is vague and will lead to litigation. This subsection excludes liability by the AFF for compensation for loss suffered by a family member or a member of the household of the attorney found guilty of the theft; and
- the words 'contemplated in paragraph (*d*)' be deleted from s 57(1)(*e*) of the Bill. Section 57(1)(*e*) excludes the AFF's liability for loss suffered by any person as a result of theft of money which an attorney has been instructed to invest on behalf of the person contemplated in paragraph *(d)*. Section 57(1)(*d*) excludes liability for loss as a result of theft that occurred after the victim received notice in writing from the council or the AFF board warning against the use or continued use of the legal services of the practice concerned, or the giving of any money or property in trust to that practice, and the person in question has failed to take reasonable steps after being so warned.

Mr Landman claims that the above renders 'the limitation of liability of very little use in practice as thefts are in almost all instances discovered after the event. It thus makes little sense to exclude the fund's liability only in those instances.'

Johannesburg advocate Jacques Lourens

In his submission, Mr Lourens submits that the Bill is 'fatally flawed' for a number of reasons and, if adopted as is, will be unconstitutional. His two main objections are:

- The Bill is a threat to an independent legal profession and the courts, including because the body to regulate the affairs of practitioners will be state controlled.
- Capping of legal fees, which is likely to be deemed uncompetitive, noting that there are already guidelines and review powers in place.

Johannesburg attorney June Marks

Ms Marks informs the committee that the fee charges of advocates are 'out of control' and 'the Bar Council insists on payments and forces attorneys to pay without submission of time sheets and allows conduct which is in fact fraudulent, being many different accounts for one month by the same counsel for the same matter'.

Further, she notes that she has advised the Bar Council of the criminal activities of many members of the profession against whom charges have been laid and dockets have been opened. 'The Bar Council ignores this and, in fact, promotes such counsel to senior positions,' she says.

Joseph Maseko

Mr Maseko, the managing member of Maseko Management Services CC, proposes the following in respect of the Bill:

- Right of Appearance: Certain attorneys already enjoy the right to appear in the superior courts, while no advocates are allowed take briefs directly from the public in all areas. This is unfair and marginalises advocates, he says, adding: 'There is no equality before the law for legal practitioners.'
- Coverage of specialist fields for advocates: Certain advocates should be allowed to take direct briefs from the public in specialist areas like those relating to consumer courts and tribunals, Labour Courts and conveyancing work.
- A possible Fidelity Fund for advocates, which would deal with the concern over safeguarding the public if advocates were to be briefed directly.
- Certain, if not all, categories of counsel should be designated to deal with direct briefs for certain paying clients.

Dr Ramola Naidoo

Ms Naidoo, who was admitted as an advocate in 1979, submits that the Bill does not measure up to its objectives.

Ms Naidoo notes that one of the reasons she does not practise law is the 'old boys' network' in the profession, which is 'as prevalent today as it was 30 years ago'. She highlights some of the difficulties for women advocates in particular:

'It is a huge challenge to practise as an advocate if one has taken a break away from practice (as I have done) as one's own professional network is lost. The loss of sustainable income is not just my own experience, but that of other lawyers as well. Thus it is extremely challenging to practise at the Bar if there are no briefs forthcoming. A number of women have shared the same misgivings.'

She says that the Bill entrenches the current split Bar system 'with a layer of costly bureaucracy and does not fully address the root of the problem'.

She therefore proposes, *inter alia*:

- That the Bill provide for 30% of all briefs from private attorneys and 50% of those from state attorneys to go to female advocates listed on a public database and website operated by the council or the Justice Department. Further, that advocates should not be discriminated against for being out of the traditional matrix of the Bar. The proposed amendment should be implemented for a period of five years subject to annual review by parliament. 'Naturally, women who are already successful and well established in the legal profession may opt out of inclusion in this database but care should be taken to ensure that the work assigned to women on the database should be fair and highly remunerative, as opposed to just a pittance as in *pro deo* cases of the past,' Ms Naidoo submits.
- That advocates should be allowed to practise from any location, including at home, with flexible hours.
- That advocates should be allowed to advertise their services and to give advice electronically, for example on websites.

- That the traditional garb worn by advocates, which is 'cumbersome and archaic', should be abandoned.
- That parliament, not the Minister, should be mandated to dissolve the council.
- There should be minimal state intervention in regulating the legal profession.

Further, Ms Naidoo submits that a legal services ombud is unnecessary. 'It is far too costly and would create a bureaucracy of managers and other bureaucrats. It is hard to imagine thousands of people in the Republic who have legitimate complaints against lawyers,' she says.

In this regard, she adds: 'Where there is embezzlement or fraud, then clients should report this to the commercial fraud office of the South African Police Service. The majority of the people in the Republic neither have the means to go to court nor do they understand their rights to even think of litigation, so they will hardly be in a position to lodge a complaint against a lawyer. Indeed, it would be surprising if there are many lawyers based in rural areas. I have also canvassed opinion from ordinary South Africans, who say that they have not felt the need to get any legal advice and some who say that they pay a monthly fee to LegalWise or similar organisations more as an "insurance" if they ever needed a lawyer, but that this has not yet arisen.'

Further, she says: 'Until we educate the broader public about their legal rights and concomitant obligations, we can hardly develop a sophisticated public who would opt for legal advice and litigation rather than extra-legal means to resolve any conflicts that they may have. ... An affluent society like Sweden can surely afford such a luxury of the services of an ombud … . In South Africa, however, we call ill afford to pay for yet another independent government body that has its own highly paid management and administration when a simple unit with the department would suffice to handle complaints from the public. The money used to create the ombud can surely be well spent elsewhere to ensure true sustainable development in this land where poverty is the norm.'

Ms Naidoo adds that, in the long term, an option would be to expand the mandate of the Public Protector 'so that complaints against state-employed lawyers as well as against lawyers in private practice may be investigated by the Office of the Public Protector'.

Finally, she calls for wider public participation in drafting any amendment to existing laws regulating the profession and for the committee to hold public hearings on the Bill in provinces other than the Western Cape.

Advocate Nick Smythe

Advocate Smythe commends the provision in the Bill that will, in certain circumstances, allow advocates to render legal services directly to the public, which he says will 'considerably reduce the cost of legal services'.

However, he advocates for the eradication of 'obsolete rules' imposed by the Bar that result in clients being required to pay additional amounts.

'For example, advocates may not appear in court unless an attorney is present. That made sense in the days before cell phones, but now the only effect of this rule is to require clients to pay for the cost of both an attorney and counsel at court, when this is often unnecessary. … There may be occasions where the presence of attorneys is warranted but it should not be mandatory … . [I]n many instances law firms send junior attorneys and candidate attorneys to accompany counsel, merely because they are compelled to do so and not because they believe it is necessary, and then pass the cost on to the client,' he says.

Further, Mr Smythe says that another obsolete rule is the one requiring attorneys to be present when an advocate consults with a client. 'By analogy, in the medical profession when a patient consults a surgeon there is no requirement that the referring doctor or general practitioner be present.'

However, he adds that advocates taking work directly from the public should not be allowed to hold money in trust or operate trust accounts. Further, such advocates must have completed pupillage and their training will need to be extended to cover matters such as the issue and service of summonses.

Johannesburg advocate EK Tsatsi

Advocate Tsatsi submits that people who are not practising law or who do not belong to any professional body should not be allowed to use the title 'advocate'.

The reason for this, Ms Tsatsi says, is that such persons are not subject to any ethical and professional rules and are 'difficult to monitor'.

'When a person like this does something wrong, it seems as if the advocate profession is put into disrepute. There is no way of disciplining the said person,' she says.

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