COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE PROPOSED REGULATION ON COMMUNITY SERVICE

The Law Society of South Africa (LSSA) has considered the proposed Regulations to be made under section 94(1)(j) of the Legal Practice Act, No. 28 of 2014 (the LPA) with reference to community service by candidate legal practitioners and practising legal practitioners.

The LSSA and its constituent bodies have engaged extensively on the issue of the form and content of pro bono services under the LPA. A task team was set up by the stakeholders to prepare a concept document on community service and pro bono, which was presented at five provincial consultative dialogues held at Pietermaritzburg, Bloemfontein, Johannesburg, Cape Town, and East London during October 2017. A report on Section 29 of the LPA - "Community Service and Pro Bono" - was subsequently produced and is available upon request.

Legal practitioners and other stakeholders have consistently maintained at such consultative workshops that *pro bono* legal services should be recognised within the ambit of community service. We therefore welcome the Minister's proposed recognition of pro bono services as part of community services under section 29 of the LPA for practising legal practitioners. We have reservations that pro bono legal services are not similarly extended to candidate practising legal practitioners.

To this extent, the South African Law Reform Commission (SALRC) has also made proposals to amend section 29 of the LPA, which in our view would further provide clarity on the meaning of community service.

The SALRC's recommendation in this regard, reads:

> The Commission recommends that section 29(2) of the LPA be amended by the substitution for subparagraphs (b) and (e) of the following subparagraphs (b) and (e); and the addition of the following subparagraphs:
>
> Community service (2) Community service for the purposes of this section may include, but is not limited, to the following:
> (a) Service in the State, approved by the Minister, in consultation with the Council;

(b) service at [the South African Human Rights Commission] any of the institutions supporting constitutional democracy referred to in Chapter 9 of the Constitution;
(c) service, without remuneration, as a judicial officer in the case of legal practitioners, including as a commissioner in the small claims courts;
(cA) service at a community advice office;
(d) The provision of legal education and training on behalf of the Council or on behalf of an academic institution or non-government organisation; [or]
(dA) service on a pro bono basis in compliance with the rules made by the Council; or (e) any other service that broadens access to justice which the candidate legal practitioner or the legal practitioner may want to perform, with the prior approval of the Minister.

Importantly, the SARLC recommends that: "Paragraph (e) of section 29(2) must be amended as proposed above to align community service with the purpose of the LPA as provided for in section 3(b) of the LPA, that is, "to broaden access to justice" and not to confine the concept to the provision of legal services only. It is submitted that the above-mentioned proposed amendment of the LPA will enable the Minister to make regulations, and the LPC to make rules, regulating community service and pro bono legal services on the model as provided for under rule 25 of the attorneys' profession."

The LSSA is of the view that *broadening access to justice* should be the primary driver of all community service. Ultimately this is the challenge that is meant to be addressed and should remain the key component of community service. If too many community service options are permitted that are alternatives to direct provision of legal services, there is a risk that legal practitioners may perform their community service without taking on cases and giving direct legal advice. Bear in mind that it is the indigent, marginalised, poor and vulnerable, to whom community service should be directed.

The LSSA supports the insertion of subsection (dA). This is in line with our recommendation that pro bono services should fall within the ambit of community service.

Recommendation: The LPA should be amended to incorporate the proposed amendments, as recommended by the SALRC.

Taking on cases on a pro bono basis is one of the most direct ways in which legal practitioners extend access to justice to those most in need of it. Before the advent of the LPA, it was compulsory for all attorneys to provide at least 24 hours per year of pro bono work and many have performed in excess of

the expected hours. The advocates' profession had similar arrangements, albeit not mandatory. Legal practitioners already serve the community in various ways. They give time to pro bono cases, or work free of charge or at reduced rates. They do amico work, provide services free of charge by law clinics, enter into fee agreements contingent upon success (contingency fee agreements) and preside over Small Claims Courts. These are all demonstrations of the profession's commitment to provide access to legal services and increasing access to the legal profession.

These interventions have been pursued, whilst taking into account the high levels of poverty and inequality. This has in fact been recognised by the Constitutional Court, in the matter of *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* (CCT 76/12) [2012] ZACC 17, when it stated:

> "Many counsel who appear before us are accomplished and hard-working. Many take cases pro bono, and some in addition make allowance for indigent clients in setting their fees. We recognize this and value it"

Assuming that there are 34 000 attorneys, the vast majority of whom are not exempted from mandatory pro bono service, this would translate to some 1 360 000 hours of free work per year according to the proposed 40-hours.

Some of the questions that emanated from the provincial discussions, which are still relevant, included:

How can community service be made more effective in the provision of access to legal services in remote rural areas?

a) Technology, including virtual platforms, can be utilised to further promote access to legal services (especially to remote rural areas) under the community service framework and to monitor the provision of community services. E.g., it should be imperative that members of the public not be expected to travel long distances to access and consult with legal practitioners.
b) Collaboration will be required between legal practitioners and institutions and service-providers operating in the remote rural areas.
c) Co-operative governance between state institutions will be critical in order for community service to be extended to the remote rural areas.

d) Legal Aid South Africa, for example, has a national footprint in South Africa and will be an important partner in promoting community service in rural areas.
e) Where vulnerable communities are inaccessible NGO offices can be used as a base for the provision of services.

It must also be noted that some legal practitioners specialise and should therefore not be required to attend to pro bono matters that are outside of their legal skills and knowledge.

COMMENTS RECEIVED FROM LEGAL PRACTITIONERS:

The LSSA has invited legal practitioners to submit comments and express their views on the proposed Regulations. Some of the comments received by the LSSA are listed below. The views expressed are not necessarily those of the LSSA. The South African legal profession has a long-standing commitment of rendering pro bono legal services.

(*names have been deleted*)

I have reviewed the sections on pro bono and community service and have comments to make to the proposed amendments to section 29 (2)(d): (I've inserted my suggested changes in red)

"the provision of legal education and training on behalf of the Council, or on behalf of an academic institution, ~~or~~ non-government, community organisations and religious organisations, or entities that provide business incubation services to start-up businesses;"

1. There are community organisations that aren't incorporated and thus probably wouldn't be considered as NGOs. They shouldn't be excluded from this provision merely on the basis that are unincorporated. Religions institutions, whilst incorporated, probably wouldn't qualify as NGOs, yet they do a lot of community outreach and again shouldn't be excluded because they aren't NGOs.

2. The rationale for including business incubators here is that there has been a move over the past few years to provide pro bono services for SMEs. ProBono.Org approves requests from SMEs that meet the means test. Only contractual support is provided. If an SME wants to litigate for damages, this can be done on a contingency fee basis.

   In addition if reference is had to the National Development Plan, you see Govt's commitment to supporting SMEs to drive job creation. The legal profession is in a position to provide support to this by providing legal education and contractual pro bono services. The issues of contractual pro bono services would be to be dealt with by the LPC when they make the rules for pro bono. It makes sense to include the legal training aspect in section 29 given that it already appears here.

The Proposed Regulations

Here are my comments on the regulations:

1. The draft regulations are premature. The Minister should wait for the Law Reform Commission's report (on which we recently commented) which deals with, amongst other things, community service and makes suggested changes to section 29. One of the suggested changes is to include pro bono as a specific form of community service. This should happen first. Trying to crowbar pro bono into the rules to when pro bono isn't provided for in the Act isn't the optimal way to go about it. It's a "cart before horse" scenario. There is a disconnect between the Act and the draft regulations.

2. The draft regulations are very light on detail. I assume this means we can expect further regulations?

a. We don't know who will be exempt - the draft regulations simply repeat what s29 says: "4B(2) A legal practitioner may be exempted from the rendering of community service as set out in the rules". These draft regulations are insertions into the rules, so referencing the rules in the rules makes no sense.

b. We have no idea what constitutes "pro bono". Will it be left to the LPC to determine the parameters of a pro bono scheme? Bearing in mind pro bono is not provided for the in Act as it currently stands, I don't see how this is possible.

The draft regulations don't deal with consequences of the failure to render community service. Will practitioners undergo a disciplinary hearing (there may be very good reasons they couldn't do their community service)? Or will they simply just not get their fidelity fund certificate the following year? Such a severe penalty (not getting a fidelity fund certificate) deserves a hearing before being executed.

A short response to the proposed amendment to force Legal Practitioners to render community service. As the old sayings goes "give and take is a two-way street."

In this instance it is Institutions like the Legislature who wish to make demands whilst the same Legislature is guilty of failure to amend the prescribed Legal Fees on a yearly basis, and when adjustments are finally made it is way too little and far too late.

The previous three adjustments in prescribed Legal Fees for attorneys were in February 2015 then in November 2017 and lastly in September 2020.
If one calculates the minimal percentage increases that were granted by the Legislature in the last three adjustments versus the real world increases in expenses, it is shocking that any profession would be treated so badly by government.

One simple example is the prescribed fee an attorney charge for drafting a necessary Letter, on Scale A of the Magistrates Court Act.
The adjustment from February 2015 was from R23-50 to R 25-50 in November 2017 for a letter. That was only R2-00 in more two years and nine months later
Then the adjustment from November 2017 was from R25-50 to R28-50 in September 2020. That was only R3-00 more in two years and ten months later.
It is shocking to realise that there was a only a R5-00 increase from February 2015 to where we are now in June 2022, which is seven years and three months later.
This is less than 12% in more than seven years or an increase of 1.7% per year.

Name one industry that only received an increase of 1,7% yearly increase in the past seven years. There is no industry that will accept this, we all know that. Except attorneys who must be happy if they receive anything and to show gratitude, the attorneys will now also be expected to do forced free community service.

The work normally done to be able to debit such a "glorious" fee, currently of R28-50 to draft a Letter is shortly the following:
After careful thought, having brought oneself up to date of what exactly has been the progress in a certain matter, dictating a letter, handing the file and dictation to a secretary to type the letter, receiving the file back together with typed letter, perusing the contents of the letter, making adjustments, if necessary, handing the file back to the secretary to make the adjustments, receiving

the file back with the amended letter, again perusing the letter, signing it , handing the file back to the secretary to scan and email the letter, doing a printout of the confirmatory page that the letter was indeed received by the person to whom it was addressed, diarising the file and filing the file back in the cabinet. ALL OF THIS FOR R28-50!!!!!

The EXACT same work on a High Court matter would earn a fee of R132-00. The prescribed High Court fee is more in line with the work that are done to be allowed to charge a fee.
How does one balance R28-50 with R132-00 for exactly the same work?

You will never hear of electricians, panel beaters, welders, painters, mechanics etc. who will be forced to do free community service, even though their hourly rate are often more than attorneys are allowed to charge in terms of the prescribed legal fee structure. The current prescribed hourly for an attorney, regardless of experience or how many years in practice, is R722-00 per hour, scale A, Magistrates Court tariff.

There is no distinction whatsoever in the prescribed fees, between a first-year attorney and an attorney with 40 years' experience. There is however a vast difference between the hourly fee a first-year advocate charge in relation to an advocate with 40 years' experience and rightfully so. The case is the same when it comes to doctors, accountants and basically ever other so-called profession. Except for the prescribed fees for attorneys.

It is obvious that the prescribed Magistrates Court Fees have never kept up with the real world increases in expenses and the fees which are not nearly in line with the actual amount of work done.

Judges and Magistrates have recently claimed that yearly "below-inflation salary hikes are unconstitutional" (See full report in The Star newspaper). [Bear] in mind that these salaries are of the States' highest earners which are increased yearly, not only every three years, like the prescribed fee structures that attorneys are bound to. Would it then not mean that the failure to hike attorneys prescribed fees at a rate below inflation on a yearly basis would also make such a failure by the Legislature "unconstitutional"?

We all know what increases there have been in in fuel prices, electricity, property taxes, mandatory salary increases of employees, yearly office rent etc. One could go on and on. All these increases are well beyond 1,7% per year.

Even the Legal Practice Council have increased the mandatory yearly fee.

There [has] not been any news that either the Law Society of South Africa or the Legal Practice Council are lobbying the Legislature to urgently and drastically amend the prescribed fee structure to which attorneys are bound. How many years will attorneys have to wait this time?

But hey, lets go and do some free community service!

XXXXXXX

Thanks for your reply. I never expected any reply.

In my short response I did not want to sound like someone just ranting and raving over nothing.

But unfortunately a large number of firms, more often small firms, act only in accordance with the prescribed tariffs.

There are only so many hours in a day and often no matter how hard you work you reach a ceiling of what you can possibly earn, whilst expenses simply run away.

I truly hope the LSSA can assist in the serious amendment of the prescribed tariffs.

Best regards

Herewith my comment on the proposed amendment. I will summarise it to keep it short and to the point.

1. In my opinion forcing attorneys to do community service free of charge is a clear demonstration of the government's fantastic failure on providing legal clinics to the public, and now make that issue the problems of the private sector and we will carry the cost.
2. We are the only profession which will be forced to give away our expertise and years and years and years (!) of very, very expensive studies which took me, for example, almost 15 years to repay, for free. That is so unfair I am actually speechless.
3. I work at R3 500 per hour. To give away 40 hours a year means I am giving away R140 000 (giving away!) per year if I do not get paid for those 40 hours, but I do not get a tax benefit for that and I can bet you SARS will still be knocking at my door at the end of the year despite me having lost the income. If you want to proceed with this, you should at the very least consider a tax benefit.
4. It would be, in my opinion, unconstitutional to force practicing attorneys to leave their practices, where time is critical, especially in some areas of the law like litigation, to give your time and attention to other matters. To apply one's mind to issues unrelated to one's practice will cause a digression from what you are busy with and you will lose more than 40 hours that is almost guaranteed. We are a free capitalistic society with the freedom to trade, so I cannot see how it would be lawful to force us to give away so much of our practices.
5. Keep in mind that the hours of the work that you want us to work will be also a problem. There is no way on this earth that I, for example, as a single woman, will travel anywhere at night to perform duties at a government institution (which I presume it will be). Nor will I be willing under any circumstances to leave my practice during the day to go and perform an hour to three hours per month at a place unrelated to my own business. I simply do not have the time and I know that all attorneys have the same problems. It takes tremendous, and I can assure you, tremendous effort to manage, market, run and perform the duties of a legal practice. It sucks up all I have and I, for one (and I am very sure I am not the only one) do not have an inch of energy left to give away to anybody but my own practice, especially not for free. I simply cannot afford it.

I am aware that one can apply to be released from such duties, but in principle in my opinion it is very unfair what you are going to do.

You asked for our opinions, this is mine.

In my view, I support community service for Candidate legal practitioners. This is the only way we can be assured that the floor is level for new entrants into the profession. As things stand, there is no structured programs that a candidate legal practitioner needs to complete in order to be regarded as competent besides the academic part. This could be an opportunity to have that structured practical program.

Re: 4B 2 exemption

What are the grounds for this exemption, please?

As a 72 year old sole practitioner without staff, I will not be able to cope with this requirement. I mainly assist families with deceased estates at a low hourly rate (R600) and that provides a service to the community as well as contributing towards my basic needs.

There is not much estate work for attorneys since the banks and big firms now dominate the field. They get special fast-track privileges at the Master and the banks have made it almost impossible for family executors to operate Estate banking accounts.

Please could you also look into the possibility of introducing an exemption or reduction of the annual member's fee in certain instances? I honestly cannot afford the current R4000+. Is any of this member's fee for the LSSA? (I do not see much value for attorneys from the LPC.)

We refer to the above and the newsletter from De Rebus requesting input with regards the performance of pro bono community service by legal practitioners.

We understand that it can be expected of candidate attorneys to perform 8 hours of legal services on a pro bono basis during their years of articles with the assistance of and under the guidance of their principals. That is more or less in accordance with the expectation and generally accepted rule for medical professionals to perform a year of compulsory community service after completion of their studies, however, the medical professionals are remunerated by the State at market related rates for their services during such community service period. Furthermore the community service is limited to that one year following completion of their medical studies and no community service is expected from other practicing health professionals.

It is strange that a similar system has not been implemented in other professions, such as accounting, architects, engineering and others.

The expectation of 40 hours of community service for practicing attorneys and advocates is to say the least, ridiculous. The practicability of the proposed system is questionable. It means that the legal practitioner is expected to sacrifice one whole week of work (and income on which he/ she pays taxes) per annum to perform community service for the duration of his/ her practising career. The institutions set out in S29 of the LPA, relates to very few “approved institutions” and how long will the honourable Minister take to approve any institution outside of the ordinary or besides those set out in S29? Why is the legal profession targeted to perform community service way beyond what is expected from any other profession in the country? The State created the Legal Aid Board to provide legal services to those who cannot afford to pay for legal services themselves and a means test was developed around

it. The officials employed by the LAB are paid by the State, similar to medical professionals who perform their year of compulsory community service.

Although it is recognised by the Constitution that access to legal services is a basic human right, the same Constitution provides that access to water and electricity is a basic human right, however, we all pay the relevant service providers for water and electricity. It does not get provided free of charge to everyone, so why must legal services be rendered free of charge by practicing attorneys, who will be performing such services to their own financial detriment? Those attorneys need to cover overheads, like paying their staff, irrespective of whether they are in their offices earning anything. We cannot simply reduce the salaries of all staff, because we have to sacrifice income. If attorneys are not in their offices, due to having to perform community service elsewhere, it will mean that their staff are working unsupervised, which is a contravention of the rules. So all staff working at law firms will have to be put on compulsory leave for the duration of the practitioner not being in the office, in order not to contravene the rules. How is this justifiable?

Practicing law in SA has become more and more difficult and it is simply impossible to stay abreast of developments in all areas of the law, therefore many of the practicing attorneys and especially those in bigger firms, have become specialists in specific areas of the law.
How will the powers that be expect of a specialist in corporate law, administration of estates or conveyancing, to assist a member of the public in a general litigation matter, if they haven't practiced in that area of the law for 10 years and more? Section 29 does not provide any suitable institution where such specialists can perform such community service and the advice of such practitioner will likely be outdated or lacking detail, which will result in the member of the public being exactly where he was, without proper legal assistance.

For example, everybody cannot be presiding officers at the small claims courts or similar institutions. Experience has taught us in the rural areas that the availability of presiding officers for the small claims court in any case by far exceeds the demand, resulting in such available presiding officers only getting one or two appointments, at most, per annum, of two or three hours each. Similarly, everybody cannot act as lecturers at academic institutions, as the rural areas do not have such academic institutions and how will, for example, 400 attorneys in a city get an opportunity to lecture at the available academic institutions in that city.

How will the public know when and at which firm an attorney will be available to perform community service? That means that a specific facility will have to be set up for the community to know where to go to. How will these facilities be created, at whose cost, by whom and when? In the rural areas, there are special challenges that will be faced and need to be addressed, at great cost, and these challenges were pointed out by various committees and task teams of the erstwhile Cape Law Society when the feasibility of pro bono work by practitioners was investigated and discussed. One such challenge is that there will not be support staff at such facilities. It will in effect boil down to a free consultation and then a referral, where the member of the public will have to pay for the services to be rendered, such as issue of summons, report of an estate, etc. So all that will be created by community service, will be a free consultation, which brings me to my next point.

In this firm and most rural firms that we know of, there is the general practice to consult for free, at least once, with people who don't have the financial means to pay for legal services. Each practitioner in this firm has at least one such consultation per week. Even most radio advertisements of law firms, almost without failure, state that the first consultation is free of charge. Surely this must count for something? By forcing practitioners to perform ridiculous amounts of compulsory free community

service, this practice of a free consultation will disappear very quickly and who will suffer, the public which government wanted to benefit by the community service.

As stated above, we understand that community service can be expected from candidate legal practitioners, but it is unlikely to be practicable for existing legal practitioners and even then, not for 40 hours per annum.

I found your address on De Rebus

The best way to effectively manage the community service by [candidate] legal practitioners is to set up a law clinic.

Or to partner with existing law clinics & supply them with above personnel.

Thus positioning the various practitioners at [labour] courts, [labour] departments, mag courts, CCMA and high courts to advise the public of their rights and recourse.

I refer to the below, my personal view as the Founder and Director of the [organisation]. Is that this section is unconstitutional and also discriminatory to Paralegals, who in many cases are far more versed, experienced and learned than Candidate legal practitioners.

By removing Seasoned and Experienced paralegals from the equation, not only has their right to their occupation been removed. So has their right to be recognised as a legal professional. Which they are. More specifically making more legal support accessible to the general public has been [diminished] as well. Most Candidate Attorneys have neither the knowledge nor the experience to effectively assist in this regard.

Often their [Candidate Attorneys] lack of experience or knowledge causes more harm than help. Which I have witnessed on many occasions. Most frustratingly paralegals are utilised in community work, and often do “all” the work and the praise and recognition goes to the Candidate or the Attorney.