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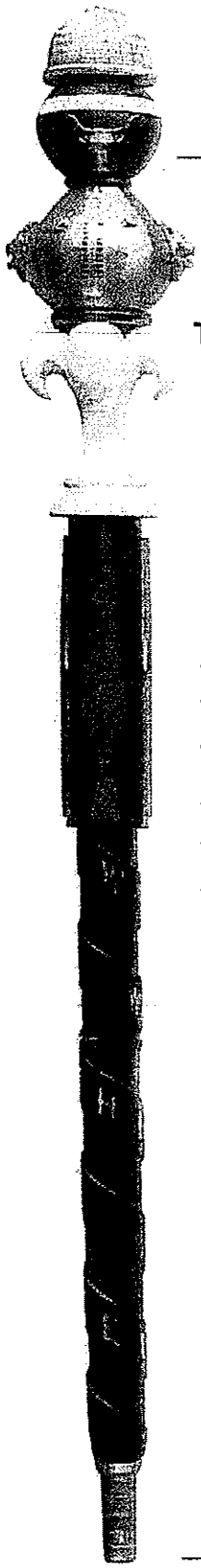

IPHALAMENDE LAKWAZULU-NATALI KWAZULU-NATAL PROVINSIALE PARLEMENT
KWAZULU-NATAL PROVINCIAL PARLIAMENT

NEGOTIATING MANDATE

TO: HON TMH MOFOKENG
CHAIRPERSON: SELECT COMMITTEE ON SECURITY AND CONSTITUTIONAL DEVELOPMENT

NAME OF BILL: LEGAL PRACTICE BILL

NUMBER OF BILL: B20B-2012

DATE OF DELIBERATION: FRIDAY, 21 FEBRUARY 2014

VOTE OF THE LEGISLATURE:
The Portfolio Committee on Community Safety met today, Friday, the 21st of February 2014 to consider the **Legal Practice Bill [B20B-2012]**.

The comments and amendments received as a result of public hearings on the Bill, were considered by the Committee and are attached hereto as Annexure A as proposals for inclusion into the Bill.

However, the Committee agreed to mandate the KwaZulu-Natal delegation to the National Council of Provinces *to abstain from voting* on the Bill at this negotiating stage.

.....
HON MB NTULI
CHAIRPERSON OF HUMAN SETTLEMENTS
PORTFOLIO COMMITTEE

21/2/2014
.....
DATE

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COMMUNITY SAFETY PORTFOLIO COMMITTEE REPORT ON THE LEGAL PRACTICE BILL [B20B-2012] IN TERMS OF RULE 229 OF THE STANDING RULES

INTRODUCTION

In terms of section 42(4) of the Constitution, the National Council of Provinces represents provinces to ensure that provincial interests are taken into account in the national sphere of government by participating in the national legislative process. The Legal Practice Bill [B20B-2012], which is a Section 76 Bill in terms of the Constitution, was referred to the Conservation and Environmental Affairs Portfolio Committee in terms of Rule 228(1). In turn, the Legislature was, in terms of section 118 of the Constitution, compelled to facilitate the public involvement in the legislative process of the legislature and its Committees.

METHOD OF WORK

The Committee subsequently had a briefing from the Department of Justice and Constitutional Development in terms of Rule 229(1). Due to the limited time for public consultation process, one public hearing was held on 07 February 2014 in the Legislature Chamber. Oral submissions were presented to the Committee during its public hearings and a call for written submissions was opened until 20 February 2014.

The following submissions were received:

"Advocate" – clauses 1 and 34

It is submitted that the importance of the referral rule, as illustrated below *inter alia* by way of reference to the previously quoted observations by Justice Cameron [1]:

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[1] **De Freitas v Society of Advocates of Natal** 2001 (3) SA 750 (SCA) at 763 para [10]

> *"...it is in the public interest that there should be a vigorous and independent Bar serving the public, which, subject to judicial supervision, is self-regulated, whose members are in principle available to all, and who in general do not perform administrative and preparatory work in litigation but concentrate their skills on the craft of forensic practice."*

It is proposed that the definition of **"advocate"** be amended to read as follows:

> "means a legal practitioner practising as a sole practitioner on a referral basis and without a Fidelity Fund certificate";

Alternatively—

> " means a legal practitioner who was duly admitted and enrolled in terms of the Admission of Advocates Act, 1964, or who is admitted, enrolled and registered as such under this Act".

It is proposed that the definition of **"attorney"** be amended to read as follows:

"attorney" means a legal practitioner who was duly admitted and enrolled in terms of the Attorneys Act, 1979, or who is admitted, enrolled and registered as such under this Act".

"Legal Profession"

It is proposed that a definition of **"legal profession"** be inserted in clause 1 and that it reads as follows:

"means the attorneys profession and the advocates profession"

Clause 3- Purpose of Act

1. Consistent with the long title of the Bill, **Clause 3** ought to include a sub-clause reading as follows:

   "(h) protect and promote the independence of the legal profession ".

Clause 3 (b)-Access to justice

The term *"access to justice"* is perhaps appropriate as emotional rhetoric but it is grammatically inelegant and serves no purpose in a piece of legislation which must convey in technically correct but plain language, the primary purpose of the Bill, which is to make legal services affordable to most.

We recommend the following wording:

"Broaden access to **[justice]** affordable legal services by putting in place - ... (list specific mechanisms/objectives by which this would be achieved)

Clause 3 (b) (i)

(a) Delete the current clause 3(b)(i) and insert the following:

"structures to determine reasonable fees chargeable by legal practitioners for legal services rendered and the provision of pro bono work."

The proposed wording will comply with the object of the Council provided for in clause 5(b) which is to *"ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice"*.

(b) **Clause 3(b)(ii)** – It is unrealistic and not in the public interest to expect of candidate legal practitioners to render community service. They are occupied by their full training programme and have not reached the level of competence required to render legal services.

(c)Insert the following clauses:

Clause 3(b)(iv)

"A system in terms of which a legal practitioner is obliged to enter into a written costs agreement with a client, disclosing the proposed hourly rates for actual time spent, 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."

Clause 3(b)(v)

A provision in the Code of Conduct that it is permissible for legal practitioners to advertise their services and rates in any manner, provided that it complies with the guidelines or rules of the Advertising Standards Authority of South Africa or any other applicable law;

Clause 3(b)(vi)

A system that will facilitate the registration and regulation of alternative structures through which legal services may be dispensed;

In this regard comparative law in the UK (Legal Services Act 2007) may be instructive. The latter provides for a system whereby *"approved regulators"* can authorise *"licenced bodies"* to offer *"reserved legal services"* (the issue of legal professional privilege was also extended to such *"authorised persons"*).

Section 3(b)(vii)

"A system that will establish, promote and facilitate easy access by the public to any fee structures or guidelines that may be put in place by the Council pursuant to the provisions of this Act."

Clause 3(c)

We agree with an independent legal profession in the sense of it 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 practice a

profession, is required in the public interest. Perhaps the term "independence" should be defined.

Clause 5 – Composition of Council

As per clause 5 of the Bill, but with the following amendments:

(i)Clause 5(g) – delete the word **[determine]"** at the beginning of that clause and replace it with monitor.

(ii) Clause 5(k) - Make provision for the protection of the interests and independence of the profession by inserting immediately after the words "the administration of justice", the words the interest and independence of the legal professions.

Powers, Duties and Functions of Legal Practice Council

As per **clause 6** of the Bill with the following amendments:

(i)Clause 6(1)(b)(i) – delete the word **[develop]** at the beginning of that clause and replace it with monitor the development of.

(ii) **Clause 6(4)** – the only funding to be raised by the Council by way of fees and charges are to be for the fulfilment of its functions. The two Chambers and the Regional Councils are to be funded as set out below.

(iii) **Clause 6(5)(a)** – the meaning of "*conduct visits*" ought to be clarified. It ought to be restricted to local educational institutions.

(iv) **Clause 6(5)(d)** – delete.

(v) **Clause 6(5)(e)** - delete the word **[determination]** and replace with monitor.

Insert the following proposed amendments

Part 3

23A Objects of Chambers

(1) **The objects of the Chamber of Attorneys are to—**

(i) co-ordinate the management and governance of attorneys in accordance with the provisions of this Act;

(ii) determine, in consultation with the Legal Practice Council, and enforce appropriate standards of professional practice for attorneys and ethical conduct of attorneys;

(iii) provide, in consultation with the Legal Practice Council, high standards of legal education and training for attorneys;

(iv) co-operate with the Legal Practice Council to enable the latter to fulfil its duties and functions.

(2) The objects of the Chamber of Advocates are to:

(i) co-ordinate the management and governance of advocates in accordance with the provisions of this Act;

(ii) determine, in consultation with the Legal Practice Council, and enforce appropriate standards of professional practice for advocates and ethical conduct of advocates;

(iii) provide, in consultation with the Legal Practice Council, high standards of legal education and training for advocates;

(iv) co-operate with the Legal Practice Council to enable the latter to fulfil its duties and functions.

(3) Powers, Duties and Functions of Chambers

(a) The Chambers may, and where required in the circumstances, must, do all that is necessary or expedient to achieve their objects referred to above.

(b) The Chamber of Attorneys will be funded by the Provincial Councils of Attorneys and the Chamber of Attorneys may determine the sum of the contributions to be made by the Provincial Councils of Attorneys from time to time.

(c) The Chamber of Advocates will be funded by the Provincial Councils of Advocates and the Chamber of Advocates may determine the sum of the contributions to be made by the Provincial Councils of Advocates from time to time.

(d) Consequential amendments need to be effected to the Bill where necessary in order to provide for the Chamber's Attorneys and Advocates, and their powers and functions.

Clause 7-Composition of the Council

A.

The Bill, in accordance with the Constitution, provides for the continuation of the two professions.

1. Whilst the Council will create a useful platform for the two professions collectively to ensure that the objects of the Bill be met, the Council (that only needs to have four meetings per year – clause 15) will not have the capacity to govern and manage the two professions on a day-to-day basis.

2. Given the magnitude of the day-to-day governance and management of the two professions, their respective peculiarities and the significant extent to which the governance and management of the professions depends on the involvement of their members without remuneration, the General Council of the Bar strongly urges that governance and management of the two professions must be left to two dedicated structures representing attorneys and advocates respectively. The Bill fails to achieve this. Separate governance and management of the professions will not detract from the notion of unity contemplated in the Bill and discussed above. Quite apart from matters of principle, the question of **capacity** cannot be ignored.

3. As to **principle**, such a proposed structure will also be in the interest of the independence of the profession. That is

necessitated by the specialised focus of each of the two professions. In the words of Justice Cameron[2]:

> *"...it is in the public interest that there should be a vigorous and independent Bar serving the public, which, subject to judicial supervision, is self-regulated, whose members are in principle available to all, and who in general do not perform administrative and preparatory work in litigation but concentrate their skills on the craft of forensic practice."*

B.

Clause 7(1)(a) envisages the appointment of 16 legal practitioners, comprising 10 practising attorneys and 6 practising advocates. Provision ought to be made for 20 legal practitioners and equal representation of attorneys and advocates, namely 10 practising advocates elected by practising advocates and 10 attorneys elected by attorneys.

Different views exist regarding Ministerial appointees to the Council. Both views will be articulated below.

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[2] **De Freitas v Society of Advocates of Natal** 2001 (3) SA 750 (SCA) at 763 para [10]

The view that Ministerial appointees are not objectionable

1. According to this view, Ministerial appointees should be reduced to a single appointee and by virtue of the following considerations the provision for such an appointee does not offend the independence of the legal profession:

(i) There are public interest matters which are a legitimate province of the government.

(ii) Whilst government should not be involved in governance/management of the professions, regulation of matters such as access to justice and compulsory community service is government business.

The view that Ministerial appointees are objectionable

2. According to this view, it is agreed that there are public interest matters, such as access to justice and compulsory community service, which concern the government. The appointment of a Legal Services Ombud and the provisions of Chapter 5 of the Bill create a strong mechanism available to members of the public and the government to ensure that the objectives of the Bill, including access to justice, be addressed sufficiently by the

professions and that the Minister be informed in this regard. Reference is made to the following provisions of Chapter 5:

a. In terms of clause 46 the Ombud must protect and promote the public interest.

b. In terms of clause 47(3) the Council must assist and protect the Ombud to ensure his/her effectiveness.

c. In terms of clause 48 the Ombud has wide-ranging powers, including the power to investigate, on his/her own initiative or on receipt of a complaint, any alleged maladministration in the application of the Act, abuse or unjustifiable exercise of power or unfair or other improper conduct or undue delay in performing a function in terms of the Act and acts or omissions which result in unlawful or improper prejudice to any person, which the Ombud considers may affect the integrity and independence of the legal profession and public perceptions in respect thereof.

d. In terms of clause 52 the Ombud must prepare and submit to the Minister an annual report which must include the following documents:

i. A report of the activities undertaken in terms of the functions of the Ombud.

ii. A statement of the progress made during the preceding year towards achieving the objects of Chapter 5.

e. In terms of clause 52(3) the Minister must table in Parliament each annual report submitted by the Ombud.

3. The interests of the public and government are therefore protected as:

a. The legal profession is compelled to ensure access to justice and to render community service.

b. The Ombud will be a watchdog who has to report to the Minister and who can be approached by the Minister and members of the public if they are of the view that the legal profession does not comply with the objectives of the Bill.

4. In this context **Clauses 7(1)(b), 7(1)(c), 7(1)(d)** and **7(1)(e)** ought to be deleted as they constitute an infringement of the independence of the legal profession. Once appointed to the Council its members should act independently (and should be perceived to act independently) and in the best interests of the profession and the public and not as delegates or representatives of any sectoral interests. It has to be borne in mind that the government often is a party to litigation. In any event, the contemplated appointees can certainly not be of assistance in matters concerning the governance/management of the profession.

C.

The further proposal is that provision be made for at least two persons, appointed by the legal expenses insurance sector, to be included as members of Council.

A recommendation proposes the following insertion to the Section:

Clause 7(1)(f)

"Two persons nominated by the legal expenses insurance sector, after consultation with the National Consumer Commissioner."

Clause 14 - Dissolution of Council

Clause 14 empowers the Minister to be involved in the dissolution of the Council if the Minister loses confidence in the ability of the Council to perform its functions effectively and efficiently.

This provision ought to be deleted as it constitutes an infringement of the independence of the profession.

If the Minister has any problem with the Council that cannot be resolved by way of consultation between the Minister and members of the legal profession, the Minister may approach the Ombud as contemplated in Chapter 5.

Clause 17 - Decisions of Council

Clause 17 – advocates ought to have a veto right in respect of matters peculiar to advocates.

Clause 24- Admission and enrolment

Clause 24(3)(c)

In line with our comments about developments abroad, we agree with the need for this clause as it provides a mechanism that allows flexibility for necessary change in a fast changing society, without the need for cumbersome and slow amendments to legislation.

While regulated fees properly designed by taking into account the realities on the ground may have a small impact, the Bill has not addressed one of the main issues which is the removal of barriers to entry. 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 on-going vocational training, professional indemnity insurance etc, are able to perform the work reserved for legal practitioners as currently defined in the Bill.

The same principle is proposed to apply with legal professionals in the employ of the State.

Clause 24(2)(d) requires that an application for admission as a legal practitioner be served on the Council. Provincial Councils in the

jurisdiction where such applications will be brought will mostly be better positioned than the Council to investigate the background of applicants, where necessary. Consequently it is proposed that, in addition to service on the Council, service be effected on the Provincial Council for Attorneys (in the event of an application for admission as an attorney) or the Provincial Council for Advocates (in the event of an application for admission as an advocate) in the area of jurisdiction of the court where the application is launched.

Clause 25 – Right of appearance of legal practitioners and candidate legal practitioners

It is proposed that the expression "candidate attorney" must be substituted by "candidate legal practitioner" which appears in the present sub-clause (5).

Clause 26 - Vocational Training

Clause 26(1)(b)– due to falsification of foreign degree certificates courts, in certain instances, have refused to admit persons who allegedly had a law degree obtained in a foreign country and recognised by the South African Qualifications Authority. This provision therefore ought to be reconsidered.

Clause 26(1)(c) empowers the Minister to prescribe the practical vocational training requirements. This is inimical to the principle of independence of the professions. It should be left to the professions.

The proposed Chamber of Attorneys and Chamber of Advocates must determine the requirements for vocational training of attorneys and advocates respectively. That has been the case for many years during which the two professions have been conducting intensive vocational training in accordance with their specific requirements.

Clause 29 - Community Service:

(i)Clause 29 provides that the Minister must prescribe the requirements for community service. "*Community service*" is not defined in the Bill but in sub-clause (2) a number of examples of what may be considered to be community service are given. Subject to what is set out below, the introduction of a system of community service may assist in promoting access to justice.

(ii) In the first place, community service should not be confused with pro bono work. The GCB and its constituents have

adopted comprehensive pro bono rules. In essence, these provide for advocates to perform services at no fees to persons who are not able to pay for the services rendered. The pro bono system has proven successful in improving access to justice and the failure of the Bill to contain any framework for pro bono is an unfortunate oversight. It is suggested that a new clause be introduced along the following lines:

"1. *All advocates and all attorneys must undertake and perform pro bono service as determined by the Legal Practice Council.*

2. *Taking into account the differences between attorneys and advocates, the Council must formulate, adopt and publish requirements for pro bono service which requirements must: -*

   (i) Contain a definition of pro bono service which definition must take into account that the essential purpose of pro bono service is for practitioners to deliver legal services for no remuneration to the indigent who do not have to pay for the services in order to facilitate access to justice;

   (ii) prescribe time periods that legal practitioners are obliged to perform pro bono work;

   (iii) describe the classes of work that qualify as pro bono work;

   (iv) prescribe procedures whereby legal practitioners have to report on the pro bono work that they performed;

(v) describe circumstances that will excuse or exempt legal practitioners from performing pro bono work;

(vi) prescribe sanctions should a legal practitioner fail to perform pro bono work or to report as required."

(iii) In the second place, the community service as contemplated in the Bill is vague, contradictory and impractical to implement. It is suggested that clause 29 should simply be an enabling provision and that the particulars of the system be determined by the Legal Professional Council.

Clause 33 – Authority to render legal services

Clause 33 (1) grants authority to a Legal Practitioner to render legal services "provided that such individual is admitted and enrolled."

We make the following observations but have no specific recommendations.

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. This reality has caused legislators elsewhere to de-regulate this to permit non-lawyers to do so. In Australia for example, conveyancing is largely performed by "Settlement Agents", who do not have to be lawyers but have their own industry specific rules and regulations. Competition is rife and

since this work is very simple and repetitive, these Settlement Agents compete solely on service and price, to the benefit of consumers.

Clause 34 – Forms of legal practice

1. Unity will be attained by the fact that one statute will provide for the statutory framework within which the members of the two professions will be regulated and that a single forum, the Council, will be created where a unified approach to principles such as the rule of law, access to justice and ethics can be formulated.

However, unity does not (and should not) mean fusion of the two professions.

2. There should be one form of legal practice, namely that of an advocate who practice with Fidelity Fund certificate;

   The profession of an attorney should be abolished; and

   The profession of advocates who accept briefs should be abolished and replaced by advocates who practiced with Fidelity Fund certificate (clause 34(2)(b)(ii) for own account, in partnership and juristic persons.

3. Clause 34(1) provides that that an Attorney may render legal services upon receipt of a request "directly" by members of the public for that service.

The phrase "directly", needs clarification. If it means that a member of the public may not appoint an agent to deal with an attorney on his/her behalf, we do not support it. Our substantiation is as follows :

(a) Any member of the public should have the right to appoint any third party to deal with a lawyer on their behalf. If not, it may constitute an infringement of the constitution rights of that person. In addition the ability of the average consumer to negotiate fees with a lawyer and to monitor the adequacy of the services received as against the fees paid, is very limited.

(b) Lawyers are generally not perceived by the public as being receptive to negotiations about reducing their fees. An ordinary person feels powerless and extremely vulnerable in this situation. Interposing a knowledgeable paying third party (a legal expenses insurer for example) at this juncture, changes the situation drastically, to the benefit of the client and the legal practitioner. The latter may realize the potential benefit of charging less in return for becoming a preferred supplier for the members of the legal expenses insurer. With the promise of a steady flow of work if performance (monitored by the insurer), is satisfactory, coupled with guaranteed payment for services rendered, it constitutes an opportunity to the attorney. The client benefits financially because the insurer has a vested interest in keeping legal costs down (via its own fixed tariffs), for the sake of its own profitability, but also to keep monthly member

contributions at an affordable level. The client is also likely to benefit from better service.

(c) We suggest the following amendment :

34(1)(a) "...upon receipt of a request directly from a member of the public or any person duly appointed by that member of the public; or

34(1)(b) " any communication between such a person and his/her duly appointed agent, as well as the communication between the appointed agent and the appointed legal practitioner, are privileged communications, as provided for in the relevant legislation."

Alternatively,

Clause 34(9)

The global trend is to simplify and relax regulations to promote the provision of more affordable and more readily accessible legal services. In Australia, deregulation has already resulted in legislation enabling law firms to be incorporated and owned by companies or other juristic bodies, not being legal practitioners. The result is that banks for example, are able to provide affordable legal services via such incorporated legal firms, based in-house. The lawyers (not the corporation), are subject to the same regulations as lawyers in private practice. The UK is moving in a similar direction and there is no reason to believe that other countries will not follow the lead.

The Bill in its current form leaves it up to the Council to make recommendations to the Minister within a timeframe of 2 years on the issue of multidisciplinary practices, alternate business structures and para-legals. If however, the Council consists primarily of attorneys and advocates, recommendations skewered in the interest of the profession rather than the public, could result.

There exists little justification to leave this important matter out of the legislation and leave it up to the Council, unless the legal expenses insurance industry is represented on the Council.

If our recommendation for 2 persons from the legal expenses insurance to serve on the Council is not acceptable, we recommend that the Bill must allow for any juristic entity to conduct an incorporated legal practice, regardless of ownership and control. That will open the door to venture capitalists to provide funding to entrepreneurially minded legal practitioners wanting to establish their own legal practices, on condition of a share in the profits of the legal practice, as opposed to onerous loan repayment terms.

Clause 34(7)(c)

To hold shareholders of a corporation liable is contrary to common law and the provisions of the Companies Act. If all the shareholders of a corporation are legal practitioners, the corporation serves merely as a vehicle for them personally to conduct a legal practice and joint and several liability is appropriate. If however, the shareholders are not legal practitioners, but merely equity participants, it is inappropriate.

In the context of a corporation, it is not appropriate to refer to *"partners"*.

We suggest the following amendment :

Clause 34(7)(c)

Those shareholders or directors of an incorporated legal practice who are legal practitioners, are liable jointly and severally with the corporation, for ... then follows the remainder of the wording of clause 34(7)(c)(i).

Clause 34(7)(c)(ii)

This clause should be deleted. Except for vicarious liability and negligence, it is not in line with existing laws to hold anyone other than the perpetrator, liable for the latter's criminal acts. The clause will also make it prohibitively expensive for such legal practitioners to obtain professional indemnity insurance.

Clause 35 – Fee structure of legal practitioners, juristic entities and justice centres

The ability of the Council to determine fee structures within the vague parameters in clause 5(b), of what is reasonable and will promote access to legal services, has to be read with this clause. There are shortcomings that we do not believe will address some of the principal reasons for the unaffordable and uncertain nature of legal fees. They are :

a) Lack of competition (on price and otherwise), for legal services.

Most lawyers are naturally concerned about the ability of a person of moderate means, to pay their fees. As a result it is common practice to demand significant deposits before any legal services will be rendered, or disbursements incurred. These deposits are often prohibitive to the majority of people. A person who does not qualify for legal aid and who cannot afford to pay a deposit will not get legal representation, and that can result in a miscarriage of justice. Economic realities dictate that a legal practitioner should be able to demand financial security before accepting an instruction and we are not critical of this practice. However, if allowed to advertise freely, some legal practitioners may well become innovative and devise alternative strategies to overcome this problematic issue for consumers.

b) The sometimes arbitrary nature of charging for legal services by individual legal practitioners.

To use an uncomplicated example, quotes for the cost of an uncontested divorce can vary by 400% or more. A structured fee approach has the potential to remedy this type of disparity to a minor degree, but it may also fail to address it. As a result, we again emphasize the potential of unlimited advertising (subject only to existing laws applicable to advertising) by legal practitioners. Please note suggested amendments to clause 3 as contained in this submission above.

It is proposed that the Minister should not be involved in the determination of a fee structure for legal practitioners. It is a diminution of the independence of the profession.

Clause 36 – Code of Conduct

Certain safeguards are required. The power of the Council to draft and enforce a Code of Conduct, may, with the best of intentions, result in a Code that frustrates the transformation objectives of the Bill. The Code will have the force of law and could introduce regulatory constraints that inhibit innovation in the delivery of legal services.

To give some examples :

> Certain forms of advertising, even though they may be in line with the dictates of the Advertising Standards Authority of South Africa, could be scripted in the Code as not "*enhancing the status*", of the legal profession. There is no justification for a subjective notion such as "*status*" to be afforded legislative prominence at the possible expense of consumers who could be denied access to essential information and/or avenues through which to secure access to legal services. It opens the door to arbitrary interpretation contrary to the public interest. We provide two examples :
>
> 1. In order to be accessible to all levels of society, legal expenses insurers may sell their products with slogans like

"*Get a Lawyer on Your Side*", inter alia, via sales booths in shopping malls and in booths next to informal sector food vendors at taxi ranks. This has been criticised on the grounds that it "*damaged the status and prestige*" associates with the legal profession, without consideration of the public need for accessibility.

2. In the past, the ability of legal practitioners to have their contact details published in free publications like telephone directories has been the victim of fluctuating interpretation. At one stage it was permissible. Then it became impermissible on the grounds that it constituted unprofessional conduct. That was clearly not in the public interest. Similar restrictions could be prescribed in future about advertisements by legal practitioners aimed at informing the public and wider market of their specialities, prices and modus operandi. It could for example be considered as unprofessional and not enhancing the status of the profession for XYZ attorneys to place an advertisement to the effect that the going rate for an uncontested divorce is R5,000, but XYZ attorneys will charge R1,000.

We therefore recommend the following amendment, which highlights the crucial importance of the Council consisting of more persons from outside the legal profession:

<u>Clause 36(1)</u>

With the unanimous assent of all council members, the Council must develop, review and if necessary amend, a Code of Conduct that applies to.....

If the above recommendation is not acceptable, we strongly recommend that the Code of Conduct should be approved by the Minister before taking effect. It is again emphasized, that the Code of Conduct will have the force of law. As the Bill stands, it effectively allows the legal profession to make its own laws.

Alternatively—

Clause 36 provides for a code of conduct to be developed by the Council. In accordance with the structure proposed above a code of conduct for attorneys ought to be developed by the Chamber of Attorneys after consultation with the Chamber of Advocates and a code of conduct for advocates ought to be developed by the Chamber of Advocates after consultation with the Chamber of Attorneys.

The aforequoted passage from the judgment of the Supreme Court of Appeal in the **De Freitas** matter, when it considered the Bar's referral rule, illustrates why the development of a code of conduct for advocates should be left to the Bar.

Disciplinary Proceedings

Clauses 37-42 provide for the establishment of investigating committees by the Council, the hearing of disciplinary matters by committees established by the Council and appeals to appeal tribunals.

In terms of **clause 40(3)**, the relevant disciplinary body may order the legal practitioner to pay compensation to the complainant. Thus, where a client complains that her/his legal practitioner's misconduct has caused loss, that loss may be assessed by the disciplinary body and a compensatory order may be made. This is unacceptable. Misconduct is not necessarily the cause of damages, if any, suffered by a client. Moreover, the function of the courts will be usurped by disciplinary committees.

The proceedings contemplated in clauses 37-42 are cumbersome and do not take proper account of the substantial number of disciplinary matters dealt with on a regular basis. In order to expedite matters disciplinary hearings at the Bar mostly take place after hours.

The proposed Chamber of Attorneys (when attorneys are involved) and the Chamber of Advocates (when advocates are involved) should

deal with disciplinary matters internally (with participation of a lay person as may be determined by the Council). A right of appeal to a tribunal appointed by the Council (with possible participation of legal academics or retired judges) will best meet the interests of members of the public while retaining an appropriate degree of independence of the advocates profession.

Clause 50(2)

Amend a typographical error "of a judge" line 28

Chapter 5- Legal Services Ombud

The establishment of the office of an Ombud in the Bill creates a mechanism to ensure that the legal profession operates within the framework of the Bill. An Ombud will serve as a watchdog through whom the Minister and members of the public can ensure compliance with the objectives of the Bill. Particular reference is made to clauses 46 and 48.

Whilst it is the prerogative of the Minister to provide the statutory framework within which the legal profession is to be regulated by

professional bodies, the State may not be involved in the governance and management of the profession.

The Bill correctly emphasises the independence of the legal profession in the preamble and in clause 5(e). It should therefore be ensured that the balance of the provisions of the Bill comply with that requirement.

It is of particular importance to bear in mind the distinction between the Minister's prerogative to provide the statutory framework within which the legal profession is to be regulated by professional bodies as discussed above and the governance/management of the profession in which the State may not be involved.

In a policy document adopted by the IBA in 1990, entitled the "IBA Standards for the Independence of the Legal Profession" (*"the standards document"*), the IBA recognised that the independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights, and that professional associations of lawyers have a vital role to uphold professional standards and ethics, to protect their members from improper restrictions and infringements, to provide legal services to all in need

of them, and to co-operate with governmental and other institutions in furthering the ends of justice.

Clause 17 of the standards document records the following:

> *"There shall be established in each jurisdiction one or more* ***independent self-governing*** *associations of lawyers recognised in law,* ***whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person.*** *This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists."*[3]

Shortly before his death **Justice Chaskalson** (formerly CJ) recently stated the following concerning the Bill as it currently exists[4]:

> *"The United Nations Basic Principles on the Role of Lawyers provides:*[5]
>
> *Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training, and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external influence*
>
> *According to the preamble to the Basic Principles their provisions,*

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[3] Emphasis supplied

[4] In his address to the Cape Law Society on 9 November 2012, entitled "*The Rule of Law: The importance of independent courts and legal professions*".

[5] Para.24, *United Nations Basic Principles of the Role of Lawyers, available at www2.ochr.org.english/law/lawyers/htm*

Should be respected and taken into account by governments within the framework of national legislation and practice.

The drafters of the Bill have not done this. The Bill does not respect the freedom of lawyers to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. These functions are now to be dealt with in terms of the Bill, and the assets, liabilities and staff of existing associations dealing with such matters, are to be transferred to new bodies to be established in terms of the Bill.

...

The Ombud and the Minister are both appointed by the President which means that members of the executive have significant powers to control important aspects of the functioning of the legal profession. There is no reason to believe that these powers will be abused. But that is not the point. We do not know what might happen in the future. A structure is being proposed which opens the door to important aspects of the profession being controlled by the executive, and that is inconsistent with an independent legal profession.

...

The legal profession has a duty to itself and to the people of our country to do all that it can to protect its independence. That involves ... raising its voice against measures calculated to erode that independence. The Legal Practice Bill in its present form is such a measure."

Clause 47(1) - The Ombud ought to be appointed on the recommendation of the Council to preserve the independence of the profession.

Clause 48 – Appointment of Legal Services Ombud

It is submitted that it is in the public interest that the Ombud be independent and be seen as such, it is proposed that the Ombud be appointed by the Chief Justice

Citizens are by law entitled to refuse to answer incriminating questions. Clause 48(4)(a) which makes it an offence to refuse to answer questions, is a serious and disturbing inroad into a citizen's right to silence. That provision should therefore be removed from the Bill.

Chapter 9 - Regulations and Rules

Regulations

8. **Clause 94(2)** – the words ***[after consultation]*** ought to read in consultation.

In accordance with the necessity for the independence of the profession and the considerations set out above, clauses 94(1)(**a**), (**i**) and (**j**) ought to be deleted. In any event, the Council will be able to make, and when necessary amend, rules relating to the matters

addressed in those provisions more swiftly and efficiently than the Minister can by regulations.

Clause 95- Rules

Clause 95(1) - In accordance with the Chambers structure as proposed earlier herein, clauses 95(1)(**xiv**) - (**xviii**), (**xxvii**), (**xxviii**), (**xxxiii**) and (**xxxv**) ought to be revised.

Clause 96 – National Forum on Legal Forum

To give effect fully to the consultative and transformative nature of the National Forum and to ensure the inclusivity of all stake-holders we suggest the insertion of the following:

Clause 96(1)(f)

"Two persons nominated by the legal expenses insurance sector, after consultation with the National Consumer Commissioner."

Alternatively—

National Forum on the Legal Profession

1. There will be no necessity for a National Forum on the Legal Profession (*"the National Forum"*) if the structure proposed above (Chambers of Attorneys and Advocates) is accepted.

2. A transitional body such as the National Forum will delay the implementation of the objectives of the Bill.

3. If the provisions for the National Forum are retained in the Bill:

   a. Provision ought to be made for equal representation of attorneys and advocates to avoid the present in-built dominance of attorneys over advocates.

   b. Advocates for Transformation are represented in the GCB and should not be represented individually in the Transitional Council. See in this regard the provisions of the GCB's constitution, referred to in paragraph 1.3 above.

   c. Advocates ought to have a veto right in respect of issues peculiar to advocates.

Clause 117 – Transitional provisions relating to existing law societies [and voluntary associations of advocates]

The heading to clause 117 is "*Transitional Provisions Relating to Existing Law Societies and Voluntary Associations of Advocates*". However, it is evident from the contents of clause 117 that they only relate to existing law societies (defined in clause 110 as law societies referred to in section 56 of the Attorneys Act) and that voluntary associations of advocates are not meant to be included. It is therefore proposed that the words **[Voluntary Associations of Advocates]** be removed from the heading to clause 117 and table of contents on page 6.

CONCLUSION

The Committee met on 21 February 2014 in order to confer its negotiating mandate. Having considered all the above proposals the Committee resolved not to express its view on the Bill pending all proposed amendments above being considered and incorporated in the final version of the Bill.

The Committee also confers authority on the provincial delegation to the NCOP to abstain from supporting the Bill pending a revised version of the Bill incorporating the proposed amendments. Negotiating mandate is attached as Annexure "A" of the report.

HON B NTULI – MPL
CHAIRPERSON: COMMUNITY SAFETY AND LIAISON PORTFOLIO COMMITTEE