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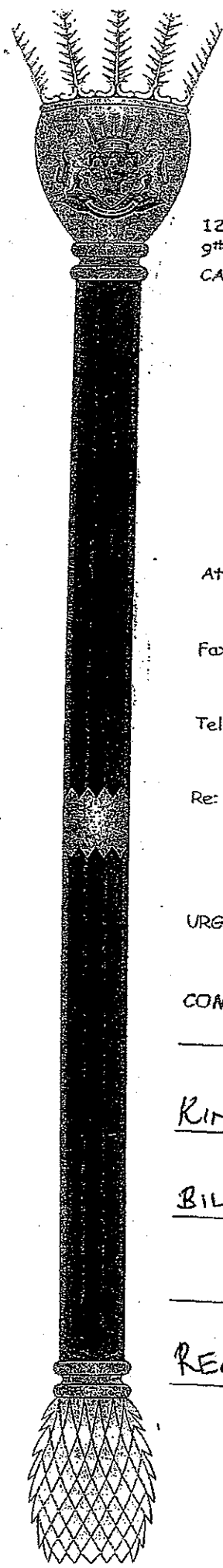
Re: NEGOTIATING
FINAL MANDATES

URGENT FOR REVIEW PLS COMMENT PLS REPLY PLS RECYCLE

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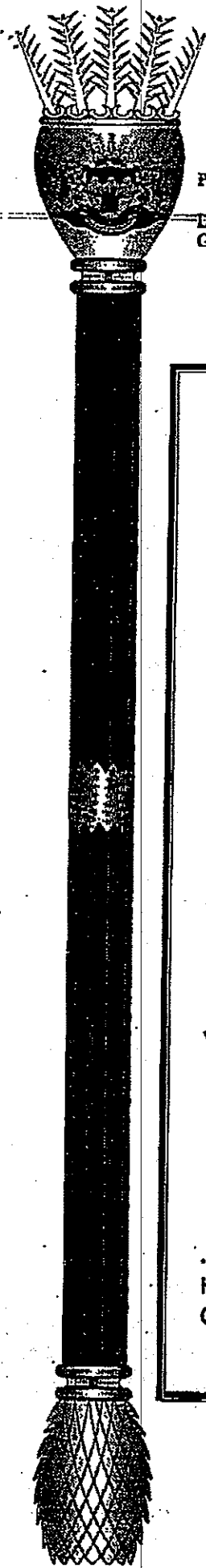
KINDLY RECEIVE NEGOTIATING MANDATES ON LEGAL PRACTICE
BILL AND JUDICIAL MATTERS A/B

REGARDS



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NEGOTIATING MANDATE

To : The Chairperson of the Select Committee on
Security and Constitutional Development

Name of Bill : Legal Practice Bill

Number of the Bill : [B208 – 2012]

Date of Deliberation : 21 February 2014

Vote of the Legislature : Provincial NCOP Permanent Delegates to consider
Inputs by stakeholders and to negotiate in favour
of the Bill.

P. P. Moloto

HON. P. MOLOTO
COMMITTEE CHAIRPERSON

24/02/2014

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NEGOTIATING MANDATE OF THE PORTFOLIO COMMITTEE ON SAFETY, SECURITY AND LIAISON ON LEGAL PRACTICE BILL [B 20B-2012]

1. INTRODUCTION

The Legal Practice Amendment Bill [B 20B-2012] was referred to the Legislature of Limpopo Province by the National Council of Provinces (NCOP). Subsequently, Limpopo Legislature referred the above-mentioned Bill to the Committee on Safety, Security and Liaison for consideration and to confer a negotiating mandate to NCOP Permanent Delegates.

2. PURPOSE OF THE BILL

The Bill seek to provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic; to provide for the establishment, powers and functions of a single South African Legal Practice Council and Provincial Councils in order to regulate the affairs of legal practitioners and to set norms and standards; to provide for the admission and enrollment of legal practitioners; to regulate the professional conduct of legal practitioner so as to ensure accountable conduct; to provide for the establishment of an Office of a Legal Services Ombud; to provide for a Legal Practitioners 'Fidelity Fund and a Board of Control for the Fidelity Fund; to provide for the establishment, powers and functions of a National Forum on the Legal Profession; and to provide for matters connected therewith.

3. CONSIDERATION OF THE BILL

The Portfolio Committee met the NCOP on 05 February 2014 to be briefed on principle and the provisions of the above- mentioned Bill. During the briefing, a decision was taken to facilitate public involvement in finalizing the inputs on the Bill.

4. PUBLIC HEARINGS

A provincial public hearing was conducted on 14 February 2014 at Bolivia Lodge in Capricorn District. The public hearing provided provincial stakeholders a platform to express their views on the Bill. The Public hearing was well attended by Stakeholders and the general public. The following inputs were made:

SUBMISSIONS BY LAW SOCIETY OF SOUTH AFRICA

Section 5: Objects of the Bill

Inasmuch as it is a stated object of the Bill that it seeks to promote the public interest, we submit that the Bill must also promote the interest of the

profession that has integrity, subscribing to the highest standard of service delivery and ethics. All of these are not only beneficial to the legal profession, but will promote the public interest.

Section 5: Objects of the Bill

Inasmuch as it is a stated object of the Bill that it seeks to promote the public interest, we submit that the Bill must also promote the interest of the profession. The interest of the public is integral to that of the profession and *vice versa*. The promotion of the interest of the legal profession will promote a profession that has integrity, subscribing to the highest standard of service delivery and ethics. All of these are not only beneficial to the legal profession, but will promote the public interest.

Section 6(5)(i): Multidisciplinary practices (MDPs)

We submit that the Minister's decision must be made in consultation with the Legal Practice Council (LPC) and must give regard to the views of the Competition Commission and the professional bodies of other professions, if the MDP is to involve another profession. 10

Section 14(4) to (7): Interim Council

This provision has caused great anxiety to the legal profession. Although it has since been scaled down in relation to the role of the Minister, it is important that the Interim Council, which will be appointed by the Minister, has the following features:

- the majority of those appointed should be legal practitioners; and
- the time span of the Interim Council should be limited.

The importance of these features is that, even if this is an interim arrangement, the principle of the independence of the legal profession must be maintained at all times.

Section 24(3): Admission and enrolment of foreign legal practitioners

In making this determination, the Minister of Justice and Constitutional Development, in consultation with the Legal Practice Council, must take the following matters into account:

- the reciprocity between South Africa and the respective country;
- the over-saturation of the market in South Africa and the need to protect the interest of South African practitioners; and
- the need to protect the interest of the public, for example in cases of theft of trust funds.

The Minister's determination should also be done in consultation with the LPC, rather than after consultation. Furthermore, the regulations should be published in the *Government Gazette*.

Section 35: Fees

The issue of fees must be understood in the context of access to justice. It is important that, whatever is done in this respect must also assist in creating certainty in the minds of the public and to build public confidence in the profession. There are three phases that the Bill seeks to address: 11

The investigative phase:

The LSSA shall co-operate fully with the South African Law Reform Commission (SALRC) in its investigations into finding the best model to determine fee guidelines. To this extent, the LSSA will provide valuable industry experience and research work by its various committees dealing with this subject.

The post-transitional phase:

Although the LSSA's preferred view is that the LPC must determine the fees and assess the reasonableness of fees in the case of a complaint by a client, it will be guided by the findings of the SALRC. It is important that the application of this section be done in a manner that is clear and unambiguous. Although we fully support the concept that legal practitioners must upfront provide the client with clear explanations, advice on the likely success of the matter and an explanation of the cost implications and how the costs are likely to be calculated, in this regard we wish to point out some anomalies that may be impractical in practice:

- S35 (3) – Variation from prescribed fees: the provision that only the client can request the variation on his/her own initiative is inadequate. The practitioner cannot offer to charge a lower fee or *pro bono*. The phrase “on his/her own initiative” should be deleted.
- S35 (7) – Cost estimate notice: this requirement as currently worded, is too rigid and can only apply in the case of first instructions. It is impossible to determine all the likely financial implications of any matter upfront. The words “to the best of his/her ability, in the light of the then available information” should be inserted.
- S35 (8) – Verbal explanation of every aspect of the cost estimate notice: This cannot be a requirement in all cases. Clients should be allowed to waive this requirement in writing.

Section 32(4): Conversion of enrolment

In order to protect members of the public, there must be a reasonable notice / display in the office of the legal practitioner concerned to identify himself or herself as a legal practitioner with or without a Fidelity Fund certificate. This will avoid confusion. It is important for the client to know whether or not the practitioner concerned has a Fidelity Fund certificate or not.

Sections 47, 49 and 50: The Ombud

The Acting Ombud must be a former judge and possess the same qualifications and competencies as the Ombud, as he or she will be exercising the same powers as the Ombud.

Section 55: Liability of the Legal Practitioners Fidelity Fund

The Fund should also reimburse persons who suffer pecuniary loss as a result of theft should the theft be committed by an attorney or person employed by that attorney, who acted as estate agent, if the work is performed in the course of his / her practice and in the name of his/her practice as an attorney.

This is important in order to protect the public, particularly in the rural areas, where attorneys often perform estate agency work in the course of their practices. The Estate Agency Affairs Act, 1976, exempts an attorney from the definition of "estate agent" in respect of his activities as estate agent if the work is done in the name of and from the premises of his / her practice. Thus, the public will not be covered by the Estate Agency Affairs Act in these circumstances.

Section 60: Tax and insurance laws

We submit that, as a body created by Statute to protect the interest of the public, it is imperative that the Legal Practice Council be exempt from the provisions of any law relating to the payment of income tax or any other tax or levy by the State. This will also align the position of the LPC regarding exemption with the provisions of Section 60 in respect of the Legal Practitioners Fidelity Fund.¹³

Section 63(1)(e): Power of inspection of the Board of Control of the Fund

Inspections by the Board of the Fund should be done in consultation with the Legal Practice Council to prevent unnecessary duplication of costs.

Section 64(2)(e): Disqualification of members of the Board of Control of the Fund

Section 64(2)(e) provides that a member of the Council or any of its committees may not be a member of the Board. There is no rational basis to exclude committee members. The LSSA submits that a committee member should be allowed to be a member of the Board of the Fund.

Section 40(3): Sanctions by disciplinary committee

Temporary suspension from practice, withdrawal of a Fidelity Fund certificate or cancellation suspension of vocational training are drastic steps. These should not fall in the power of the disciplinary committee, but should be reserved to the Legal Practice Council.

Section 79(1): Actions against the Fund

This provision has caused untold difficulties to those who are victims of theft. In practical terms the money – invariably the last savings of a client – is stolen by an attorney, in many instances leaving the client almost bankrupt. The Fund will not assist

the client because it requires that the client must first claim against the attorney and only if he / she can prove that the attorney cannot pay, then the Fund will step in.

Many clients are in no position to do this and no help is received from the Fund. This provision is outdated, ill-informed and inconsistent with the Fund's obligations. ~~The Fund should, where circumstances permit, take over the claim from the client and stand in the position of the client.~~

It is, therefore, submitted that provision should be made that the Fund may waive this requirement on good cause shown, failing which the entire provision is about the Fund's preservation rather than protection of members of the public.

Section 100: Chairperson and Deputy Chairperson of the National Forum

The Chairperson and Deputy Chairperson of the National Forum should be legal practitioners. Included in the functions of the National Forum are aspects that have a particular reference to the practical

General: Consultation

There is reference throughout the Bill to ministerial action *after* consultation with the Legal Practice Council. An important example is Section 94, where the Minister has the power to make regulations and rules of great consequence to the profession and the public. These provisions leave the entire decision exclusively with the Minister. The LSSA submits that, wherever these provisions appear, they be replaced with a provision that such actions / decisions should be taken *in consultation* with the Legal Practice Council or the National Forum, as the case may be. These sections include, but are not limited to Section 5(e) (determining conditions relating to legal education); Section 29(1) (requirements for community service); Section 100(1) and (6) (designation of chairperson and deputy chairperson) and Section 109(1)(b) (making of regulations).

A role in the decision making process will encourage greater commitment on the part of the profession. It is in the interest of the public that misunderstandings between the Minister and the profession should be minimised.

Similarly, we suggest that, wherever the Board is empowered to take actions that have a direct impact on legal practitioners, these actions be taken *in consultation* with the LPC. Examples include Section 22(1)(b) dealing with the annual appropriation to the LPC; Section 87(2) and (5) relating to the inspection of accounting records of practitioners and Section 89, which gives the Board the power to approach the court to prohibit a practitioner from operating a trust account and appoint a *curator bonis*.

TECHNICAL ISSUES

Section 6(1)(b)(iv): Payment of expenses

Section 6(2)(e) provides that the Council may pay an honorarium or allowance to any person in connection with an act performed at the request or direction of the Council. Although Section 6(1)(b)(iv) makes provision for payment of out of pocket expenses to Council members, there is no provision for payment of an honorarium or allowance to them. This appears to be an oversight and we suggest that Section 6(1)(b)(iv) be aligned with Section 6(2)(e).¹⁵ National Forum members and the committees.

Section 6(4)(b): Costs of Fidelity Fund certificates

There appears to be a conflict between Section 6(4)(b), which provides for the Council to *inter alia* determine the fees for Fidelity Fund certificates and Section 63(1)(f)(i), which provides for the Fidelity Fund Board to make rules relating to the costs of Fidelity Fund certificates. It is suggested that the Council should determine the costs of Fidelity Fund certificates in consultation with the Board.

Section 6(5)(a): Visits to educational institution

The section does not state the purpose of the visits and we suggest that it be amplified to specify that visits could be conducted to *inter alia* evaluate training and the LLB curriculum.

Section 7(1)(b): Composition of Council

The LSSA does not see the need for two law teachers to serve on the Council and believes that one is sufficient. It is accordingly recommended that the section be amended to refer to "one teacher of law or legal academic designated by teachers of law at South African universities" (see Section 178(1)(g) of the Constitution).

Section 17(1): Decisions of Council

It is suggested that this section be amended to read: "A majority of the members present at a meeting of the Council constitutes a decision of the Council." This amendment will also be in alignment with Section 20(9)(d).

Section 20(2): Composition of executive committee

We submit that the Council will be in the best position to determine the size and composition of the executive committee, taking into account factors such as workload and geographical considerations.

Section 23: Sub-delegation of power to committees

The section should provide specifically that the Council may permit a person or committee to whom or to which a power has been delegated to sub-delegate that power in appropriate circumstances.¹⁶

Section 25(3) and (4): Recognition of existing certificates of attorneys to appear in High Court

Specific provision should be made for the recognition of existing certificates to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court.

Section 26(1)(b): Law degree from foreign country

In terms of this section a law degree obtained in a foreign country qualifies a person to be admitted as a legal practitioner, if it is equivalent to an LLB degree and recognized by the SA Qualifications Authority (SAQA). We believe that a South African university should certify the law degree as equivalent to the LLB degree, in

consultation with SAQA. The syllabus of instruction and the standard of training thereof fall peculiarly within the knowledge and experience of universities.

Section 29(2)(f): Community service

The discretion of the Minister to approve as community service *any other service* which the candidate legal practitioner or legal practitioner *may want to perform* is very wide. We suggest that such discretion be exercised in consultation with the Council.

Section 33: Authority to render legal services

This section does not require a legal practitioner to be practicing in order for him / her to be entitled to render legal services for reward. It is suggested that this provision be clarified to include the word "practicing", which will mean that he / she must have a Fidelity Fund certificate.

Section 36(4): Publication of code of conduct

This section is unclear and should be clarified.

Section 37: Investigating committees

The Bill provides for the establishment of investigating committees. Because of the adversarial nature of legal practice, there tend to be many complaints against attorneys, some of them of a trivial nature and many of no substance at all. To require an investigation committee to investigate every such complaint will seriously impede the disciplinary process. We recommend that the Council be entitled to delegate the power to investigate minor complaints to designated legal officials.¹⁷

Section 39(3)(b): Disciplinary hearings

We submit that the signing of a subpoena should be an administrative function. As it is currently framed, the provision is impractical and can lead to delays, as the chairperson or members of the disciplinary committee are not always readily available. The chairperson should be able to delegate the signing of the subpoena.

Section 39(9): Setting aside conviction

Reference to the "superior court" in Section 39(9) should be reference to the "High Court" to correspond with the definitions.

Section 40(3)(a)(i): Compensation

It is impractical that the order to pay compensation must always be subject to confirmation. This will have drastic consequences on the operating cost of the Council. People must be able to approach the Council and receive speedy relief without having to go to court. However, in some cases it may be necessary to resort to the courts. We suggest that the section be amended to provide for confirmation by the court only in circumstances where the Council may deem it necessary.

An order for compensation made by the disciplinary committee must always be subject to ratification by the Council.

Sections 56(1) and (9): Limitation of liability: Family member

This section is vague and it is suggested that "member of the household" be defined.

Section 62: Composition of the Board of the Fidelity Fund

This provision is unclear and we suggest that the section be amended to read: "5 legal practitioners ... elected by the Council in accordance with the procedure determined in the rules, and in consultation with the Board".

Section 63(1)(f): Power of Board to make rules

Regarding the power to determine costs of Fidelity Fund certificates, see paragraph 2.2 above.18

Section 63(1)(g): Power to make arrangements with the banks

The section makes provision for the Board of Control to make arrangements with any bank for the keeping of trust accounts, which include *the payment of interest to the Fund on the whole or in part*. This relate to interest accrued to the Fund in terms of Section 86(2) and (3) as well as interest belonging to the client in terms of Section 86(4) (a separate trust savings or other interest bearing account opened on the instruction of the client). Although Section 86(5)(b) provides for 5% of the interest on accounts opened in terms of Section 86(4) to accrue to the Fund, we are of the view that a clear distinction should be made between the different categories of investments. It should be clearly stated that the portion that may be paid over to the Fund in the second category investments is limited to 5%. Although we support the Fund's arrangements with banks to get the best possible interest income, we are concerned that this provision limits a client's right to instruct the practitioner to negotiate with a bank of his/ her choice.

Section 93: Offences and penalties

We are of the opinion that the option of imprisonment is unnecessarily harsh for some administrative contraventions. For example, although it is understandable that the Ombud must have teeth, the option of imprisonment for failing to appear or producing documents appears to be harsh (Section 93(5)). The same applies to the possibility of two years' imprisonment for failing to advise the client *prior to receipt of the money* of reconsidered.

Section 98(2)(b): Secondment

The resources of the law societies are already stretched and staff seconded must be for the cost the Department of Justice.

Section 103(1)(d): Removal from office

The Bill provides that the National Forum may remove a member at the request of the body which designated or elected him / her *on good cause shown and upon*

SUBMISSION BY BLACK LAWYERS ASSOCIATION

Recognition of and role to be played by the voluntary organisation within the framework of the LPB.

~~BLA recognizes that organizations like the Black Lawyers Association and the National Democratic Lawyers have played a pivotal role in bring changes to the structures and content of the Legal Profession. It is beyond any doubt that the LSSA came into being as a result of the efforts and participation of BLA and NADEL in the affairs of the Legal Profession. As an organisation we are of a strong belief that if the Legal Practice Act does not specifically recognize the voluntary association we run a risk that the gains made in the past years may be lost as the numbers in the Legal Profession are still skewed in favor of the white males, although in a reduced scale as compared to pre 1994. Under the circumstances we propose that the Bill should positively recognise the voluntary associations and also define their role and participation within the Legal Profession.~~

Funding of the Legal Practice Council

BLA is of the view that the funding of the Council should be subsidized by the Government. We believe that if not subsidized it will be carried by the members' subscriptions which may prove to be exorbitant to them to the extent that it may amount to bottle neck entry to the profession as members may find it impossible to join the profession due to high subscription costs.

Clause 23(2)(a) : Establishment of Provincial Councils

BLA does not agree that the Council must start with the establishment of four Provincial Councils at the commencement of Chapter 2. Instead, BLA is of the view that if the determination of when to establish the remaining 5 Provincial Councils is left in the hand of the LPC without a dead line to establish all the 9 Provincial Councils that may lead to undesirable delays in establishing the Provincial Councils. BLA believes that the Legal Profession is today ready to establish all 9 Provincial Councils. We are of strong belief that the profession was ready to establish the 9 Provincial Councils as early as the year 1998. Under clause 5.2.6 of the Constitution of the LSSA date the 16th day of March 1998 the following is recorded, namely:-

“ to ensure that the legislation will provide that the governing bodies as envisaged in paragraph 5.2.4 will consist of one national statutory body and nine provincial statutory bodies, which national body and provincial bodies will have powers and functions allocated to them as set out in paragraph 6.5 and 6.6; and”

BLA hereby submits that there is sufficient infrastructure to establish at once the nine Provincial Councils in a form of the current statutory law societies and their respective circles. For instance in the LSNP the Limpopo, Mpumalanga and North West Law/Attorneys Councils could be used as a point of departure in these three provinces. We also are of the view that as each and every Province will have its division of the High Court in line with the Superior Courts Act 12 Of 2013, it will only be appropriate that each division should have its own law society.

BLA finds clause 23(5) to be self defeating as it runs contrary to the letter and spirit of the entire Bill which is to comply with the Constitutionally mandate to transform the legal profession. We are of the view that representation in the Provincial Councils

"to ensure that the legislation will provide that the governing bodies as envisaged in paragraph 5.2.4 will consist of one national statutory body and nine provincial statutory bodies, which national body and provincial bodies will have powers and functions allocated to them as set-out in paragraph 6.5 and 6.6; and"

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Section 29(1)(b): Community Service

BLA agrees that there should be compulsory community service by candidate legal practitioners but find it to be unnecessary burdening of legal practitioners to impose on them compulsory community services. By nature of their work black practitioners, on daily basis, find themselves doing what qualifies to be referred to as community service. If continued enrolment as a legal practitioner is to be dependant on provision of the community service that will be untenable as it is only the court of law that should suspend a member from practising.

Section 35: Fees in respect of Legal Services

BLA is concerned that in terms of Clause 35(3) it is only the client who is in position to negotiate the legal fees. BLA suggests that this sub-clause should be rephrased in order also allow the legal practitioners to be in a position to negotiate fees with their clients.

Clause 35(7) requires the legal practitioner to give a written notice to client specifying all particulars practitioner is required to specify reasonable particulars relating to the envisaged costs, although same is unwarranted, to be at least bearable relating to the envisaged costs. We find this notice to be burdensome to our members. We believe that if in the notice the legal

Clause 35(8) requires that the legal practitioner should explain to client every aspect contained in the written cost notice. This sub-clause is not user friendly to our members. We also find it unfair that our members should be expected to endeavour to comply with this clause irrespective of who the client is and/or how sophisticated is the client. Our members will find it very difficult to profitably

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practice because they will take a lot of their time doing unremunerated administrative work. Further, whether the legal practitioner explained to the client or not will remain his or her word against that of the client. Worse still, if the client reports to the Council that the legal practitioner did not explain every aspect of the notice in terms of clause 35(10) constitutes a misconduct and whereas in terms of clause 35(11) that may justify a client to refuse to pay the legal costs (being legal fees and disbursements covered by the legal practitioner) until the Council gives its ruling.

Clause 35 as a whole will make the use of the Contingency Fees Act by the legal practitioners and clients less favourable because it will not guarantee that the legal practitioner will get his or her legal costs, which will result in frustrating access to justice by the marginalised and as a result, instead that this clause protects the poor clients it exposes them and leave the disgruntled without legal representation.

Under the circumstances we request the NCOP to revisit this clause before it is passed into law.

Clause 44(2): Powers of High Court

BLA believes that if, in terms of this clause, members of the public are given unqualified permission to bring applications to get legal practitioners suspended or struck from the roll that will cause huge troubles for the legal practitioners who will have to finish almost their time fighting capricious and or frivolous applications by members of the public. BLA urges that the powers to approach court for suspension and or striking of legal practitioners be left in the hands of the regulatory body or any other body but in consultation with the regulator.

Clause 55: Liability of Fund

BLA submits that the cover for the Fund's liability should not be limited. Because if limited it is the poor client who is going to suffer unbearable hardships. The illiterate clients from the rural areas stand to be victims of this capping of liability. This clause misses the point that the Legal Practitioners Fidelity Fund derives its funds from members of public and that it is intended to cover the members of public and not the legal practitioner.

Clause 65: Chairperson and deputy chairperson of Board

BLA submits that any member of the board may be appointed as a chairperson or deputy chairperson of the board saves for the ministerial appointees.

Clause 78: Procedure for instituting claims against Fund

The period within which the claimant can lodge his or her claim against the fund is too short. This period should be extended to be at least 12 months. The period of 3 months to lodge claim is at odds with the generally accepted period of prescriptions which are generally 3 years. The second part of the sub-clause which requires client "by the exercise of reasonable care, (to) have become aware of the theft" ignores the crystal reality that a number of black clients are illiterate

and unsophisticated to the extent that they can not be reasonably expected to exercise reasonable care as their urban counter part.

Clause 79: Actions against Fund

BLA submits that in order to fully protect the interests of the members of the public the Fund must be obliged to pay out the proven claim to the claimant irrespective of whether same can be recovered from someone else or not. Thereafter the Fund should have recourse against who ever could be found to be liable for the loss suffered by the Fund.

SUBMISSION BY SOUTH AFRICA ATTORNEYS ASSOCIATION

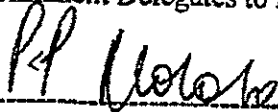
SAAA made the following independence of oral submitted that whilst the establishment of the Legal Service Ombud is supported, the appointment of the Ombud should be left to be the function Chief Justice and not the President.

LIMPOPO LAW COUNCIL

The Limpopo law Council submitted that large clients like banks and companies should exempted from the requirement contained in clause 35 (7) pertaining to the explanation of all particulars relating to the envisaged costs of legal services.

5. NEGOTIATING MANDATE

The Portfolio Committee having considered the Bill and taken into consideration the input and views of the stakeholders, hereby confer a negotiating mandate to our NCOP Permanent Delegates to negotiate in favor of the Bill with the afore-mentioned input.



HON P. MOLOTO

CHAIRPERSON: PORTFOLIO COMMITTEE ON SAFETY, SECURITY AND LIAISON