

28 July 2017

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Attention: Mr Ramaano
Per email: vramaano@parliament.gov.za

Dear Sir,

Banking Association South Africa (BASA) comments on the Legal Practice Amendment Bill, 2017 (the "Bill")

BASA appreciates the opportunity to submit comments on the Bill.

Our submission deals with two parts: 1) General comments and 2) Specific comments.

1. General comments

Inclusion of corporate counsel within the ambit of the Bill

It is our understanding and view that the purpose of the Legal Practice Act, 2014 (the "Act") was not to include the regulation of the affairs of corporate counsel. Our view is supported by various examples in the Act itself, discussed below.

1.1 The use of the term "*legal practitioner*" as defined, seems to apply to practicing attorneys and advocates, and not to corporate counsel.

For example, section 33(2), says that no person other than a legal practitioner may hold himself or herself out as a legal practitioner.

Also, section 24(1) states that "*a person may only practice as a legal practitioner if he or she is admitted and enrolled to practice as such in terms of this Act*". Many corporate counsel do not qualify as "*legal practitioners*", as they may not have been admitted to practice.

1.2 Section 118 (*Interpretation of certain references in laws*) does not make any mention of corporate counsel.

1.3 Section 23(7) read with subsection (6) only applies to the attorneys' or advocates' professions. No provision is made for committees dealing with the corporate counsel profession.

1.4 Sections 30(1)(a) and 30(b)(ii) only provide for applicants intending to practice as an attorney or as an advocate.

- 1.5 Section 34 (*Forms of legal practice*) makes no mention of corporate counsel, including and in particular section 34(9), which empowers the South African Legal Practice Council (the "Council") to make recommendations to the Minister on other forms of "legal practice".
- 1.6 Although section 36 (*Code of conduct*) makes provision for the publication of a code of conduct, it is clear that chapter 4 (*Professional conduct and the establishment of disciplinary bodies*) of the Act was written to regulate the affairs of practising attorneys and advocates. See for example section 37(5)(e) and section 41(2)(b), which only makes provision for attorneys or advocates to be represented on disciplinary committees and appeal tribunals.
- 1.7 The jurisdiction of the Legal Services Ombud established in terms of section 45 of the Act is unclear insofar as it may affect the affairs of corporate counsel.
- 1.8 The composition of the Council (see section 7 of the Act) and the National Forum on the Legal profession (see section 96) does not include corporate counsel. In fact, it is our view that the use of the term "*legal practitioners*" in these sections confirms that it refers to practising advocates and attorneys.
- 1.9 Corporate counsel represents a material constituency of the legal profession. Despite this, the Act makes no mention of corporate counsel, does not grant any representation of corporate counsel on statutory bodies, and does not address any of the nuances pertaining to the position or powers corporate counsel's employers.
- 1.10 Considering the above, our view is that the proposed amendments in section 3 of the Bill –
 - i. demonstrates and confirms that the meaning of "legal practitioner" in the Act was never intended to include corporate counsel;
 - ii. now, for the first time, seeks to draw a distinction between "legal practitioners" referred to throughout the Act, which would then purport to include corporate counsel, and "practicing legal practitioners" which would only include attorneys and advocates in private practice; and
 - iii. would have the effect of amending the scope and application of the whole Act as far as the meaning of "legal practitioners" is concerned, despite the flaws in the Act referred to above in relation to its application to corporate counsel.
- 1.11 Assuming for the moment that the purpose of the Act was to regulate the conduct and affairs of corporate counsel and that the term "legal practitioner" does include corporate counsel (which is questioned), the proposed amendments in section 3 of the Bill have the potential to deprive corporate counsel of legislative competencies to render certain legal services it has in terms of the current section 33 of the Act. This, in turn, has the potential to have a major impact on the employment and professional security of corporate counsel.
- 1.12 The proposed amendments in section 3 of the Bill (whether "legal practitioner" includes or excludes corporate counsel) are made without any known consultation with the corporate counsel profession, and without any known assessment on the impact on the corporate counsel profession or their employers. Paragraph 5 of the Memorandum on the Objects of the Legal Practice Bill, 2017 indicates that

only the National Forum was consulted. Please note that the corporate counsel profession is not represented on the National Forum.

2. Specific comments

- 2.1 We note the suggested inclusion of the word "practicing" in section 33(1) and (3) and we suggest that the word "practicing" also be included in other provisions, *inter alia* -
- i. Section 33(1)(a), prior to the words 'legal practitioners', so as to read as follows 'appear in any court of law or before any board, tribunal or similar institution in which only practicing legal practitioners are entitled to appear';
 - ii. Section 34(1): is to be amended to commence with 'A practicing attorney may....'
 - iii. Section 34(2)(a): is to be amended to commence with 'A practicing advocate may...';
 - iv. Section 34(c): is to be amended to commence with 'A practicing advocate may...'
 - v. Section 34(5): is to be amended to commence with 'Practicing attorneys may'
 - vi. Section 34(6): is to be amended to commence with 'Practicing advocates may'
 - vii. Section 34(8)(b)(i) is to be amended to read 'may only render legal services if those services are rendered by or under the supervision of practicing attorneys'.

BASA is at your disposal for discussions on our comments and any other aspects of the proposed amendments to the Bill.

Yours faithfully



Adri Grobler
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