

South African Attorneys Association

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REPRESENTATIONS TO THE NATIONAL COUNCIL OF PROVINCES ON THE LEGAL PRACTICE BILL

FEBRUARY 2014

1. INTRODUCTION

The South African Attorneys Association (SAAA) was founded in 2012 as a voluntary non-political association of attorneys and candidate attorneys. Our members are regulated by the existing four Law Societies which will be replaced by the new governing structures to be established in terms of the Legal Practice Bill (LPB).

The SAAA was formed out of the needs of the very large number of attorneys who do not belong to other voluntary organisations and who need to have a voice in matters affecting their profession. When the Law Societies are dissolved in terms of the LPB, only voluntary associations will be able to represent the views of the members of the profession. The SAAA is non-political and has the interests of the attorneys profession as its main objective.

2. SUPPORT FOR THE LSSA's REPRESENTATIONS

Since the existing Law Societies are constituent members of the Law Society of South Africa (LSSA) and many of our members also serve as Councilors of the Law Societies and the LSSA, with considerable practical experience amongst them of the administration of the profession, it is understandable that most the views and recommendations of the SAAA will be on par with those of the LSSA.

The SAAA fully supports those proposals of the LSSA which are of a technical nature and it is not necessary to repeat them here.

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The issues of principle on which the SAAA differ from the LSSA, or where additional emphasis or motivation is required, are set out below.

3. INDEPENDENCE OF THE LEGAL PROFESSION

The SAAA recognizes the need for the transformation of the legal profession and welcomes the progress made with the LPB in this regard. It also welcomes the provision for the election of legal practitioners to the Legal Practice Council and Provincial Councils without political interference. It is essential that these elections should be democratic and that the composition of the governing structures should reflect the demographics of the profession, in order that these structures be supported by practitioners.

The SAAA is also grateful that many of the recommendations of the organised attorneys' profession have been accepted and included in the final Bill. However, it remains concerned about aspects of the Bill that affect the independence of the legal profession. The SAAA supports the principle that an independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary, which is a vital requirement of our Constitution. It is regrettable that some of the provisions of the Bill will make inroads into the profession's ability to remain effective, competent and independent, the latter being the cornerstone of a democracy.

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The undesirable provisions include:

- The abolition of Law Societies which are accountable to their members. Instead, the profession will be regulated by a statutory body, the Legal Practice Council (LPC), which will be accountable to the Minister of Justice and Constitutional Development. Although the LPC will consist of a majority of practitioners, the Minister will also appoint some of its members (section 7).
- In terms of the objects of the LPC (section 5), it will not be obliged to take into account the interests of practitioners, who will be compelled to form or join voluntary associations for this purpose.
- The Minister will have wide regulatory powers, previously held by the Law Societies, including the determination of fees for legal services (section 35), the issuing of regulations regarding community service (section 29) and the power to appoint an interim Council after dissolving the LPC pursuant to a court order (section 14).
- Until such time as the Minister determines the fees pursuant to an investigation and report by the South African Law Reform Commission, the Rules Board for Courts of Law will prescribe the tariffs for all fees (section 35)(1)).
- The Minister will also prescribe the areas of jurisdiction of Provincial Councils, the procedures for their election and several matters regarding their operation (section 23).
- There are concerns that measures to ensure a transformed legal profession that reflects the demographics of the Republic (preamble of the Bill), may be used to restrict entry into the profession.
- The Minister will have the power, in consultation with the Minister of Trade and Industry, to make regulations in respect of the admission and enrolment of foreign legal practitioners (section 24(3)).

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- The Legal Services Ombud will be appointed by the President at his sole discretion (section 47). The legal profession's recommendation that the Ombud be appointed by the Chief Justice, was rejected.

4. FUNDING MODEL

The funding model contained in the Bill is expected to place a high financial burden on individual practitioners, because the governing structures will no longer receive a commission on the interest on trust accounts paid over to the Legal Practitioners Fidelity Fund (LPFF). In order for the new governing structures to be viable and cost-effective, the fees payable by attorneys to the LPC (section 6(4)) will be much higher than the membership fees they currently pay to the Law Societies. In addition, the LPFF will also be able to impose levies on practitioners (sections 63(1) and 77(4)).

The higher fees and levies payable by practitioners, will have an adverse effect on their ability to enter into the profession and to remain in the profession. Those practitioners who will be able to absorb the higher fees, will inevitably pass them on to their clients, thereby restricting access to legal services.

5.

6. ATTORNEYS AND ADVOCATES

The SAAA welcomes the fact that the distinction between the attorneys and advocates practice will be retained. However, the new provision that will allow advocates to accept briefs directly from members of the public (section 34) subject thereto that – like attorneys - they too comply with requirements regarding the keeping of trust accounts, not only erodes that distinction, but will cause considerable administrative problems for the governing structures and will confuse the public. The SAAA is of the view that an

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advocate who wants to receive direct briefs, should convert his/her registration to that of an attorney.

7. LEGAL FEES

While the SAAA shares the concern about the impact of high legal fees on access to justice, it is not in favour of the determination of non-litigious fees by the Rules Board (section 35). The Rules Board should only determine litigious fees. The SAAA is of the view that it will be extremely difficult to determine fixed fees for non-litigious matters, that will rigidly apply to all practitioners, due to the different cost structures applicable to different sizes of practices, urban and rural practices and many other factors.

The SAAA therefore proposes that only fee **guidelines** be issued, to be determined by the LPC. The LPC, consisting of legal practitioners as well as Ministerial appointees including representatives of consumer organisations, will be in the best position to determine the fee guidelines, taking into account the different cost structures and public interests. This will also underscore the independence of the profession. The requirement 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, will go a long way to avoid overreaching and disputes about fees. Furthermore, the public will be protected against unreasonable application of the fee guidelines, by having recourse to the disciplinary structures of the LPC and the Ombud.

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Should section 35 be retained in its present form, it needs to be pointed out that the following provisions will render the section cumbersome and unworkable:

- Section 35(2) – Determining of non-litigious fees by the Rules Board: this subsection sets out the criteria to be considered when the Rules Board determines the fees. It will prove to be a very complex exercise, if not impossible, to determine fees in non-litigious matters, taking into account every single permutation set out in section 35(2)(a) to (d).
- Section 35 (3) – Variation from prescribed fees: this provision is inadequate, because only the client will be able to request the variation, on his/her own initiative. The practitioner cannot offer to charge a lower fee or to render the service on a *pro bono* basis. The phrase “on his/her own initiative” should be deleted, to make this provision effective.
- Section 35 (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.
- Section 35 (8) – Verbal explanation of every aspect of the cost estimate notice: This cannot be a requirement in all cases. It will be time-consuming and unnecessary in cases where there is an established relationship between the practitioner and the client. Clients should be allowed to waive this requirement in writing.

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8. CONCLUSION

The SAAA pledges its commitment to co-operate with all stakeholders to co-operate in a constructive manner, to achieve the objectives of the Bill and to establish a new governing structure for the legal profession, that will be workable, cost-effective and will serve the country, the profession and the consumers of legal services.