

The cost of regulation

In the heat and dust of debating future regulation of the legal profession, two questions are rarely asked. One is how things work at present. The other is how much will it cost to introduce the new model.

The *De Freitas* decision by the Supreme Court of Appeal has reaffirmed the principle that advocates are ultimately answerable to the court for all matters concerning their conduct. The court, in exercising that function, takes cognisance of the rules of conduct laid down by the Bar. Discipline at first instance has almost always been a matter for local Bar councils, and the cost has been met by the Bar.

Has this worked? A few recent statistics suggest an answer. The Johannesburg Bar currently has 606 members. In 2000 66 disciplinary matters were reported; 41 were disposed of within that year. (The figures for 2001 are 68 and 43 respectively.) In Pretoria (409 members), 54 complaints were laid in 2000, which after preliminary investigations gave rise to ten formal enquiries, with four convictions and one appeal to the GCB's appeal tribunal (with much the same figures last year).

The Cape Bar (303 members) saw 33 complaints in 2000, with 27 investigations leading to three formal inquiries (with convictions ensuing in all three matters). All complaints were dealt with within the year.

The Society of Advocates of KwaZulu-Natal (228 members) has had to deal with 19 complaints during the period 1999-2001, with disciplinary proceedings against four members ensuing.

One member was expelled, one fined, one severely reprimanded and one matter is still pending. During the same period five striking off applications have been brought, three against non-members.

The Cape Bar has brought three striking off applications since 1999, Pretoria one, the Eastern Cape two, and Johannesburg one. These have often related to non-members, following complaints by judicial officers or the public. Even in relation to non-members, Bars have considered this to be their duty to the courts and the public.

Since 1999 the cost of these proceedings has been borne by the GCB to ensure that the smaller Bars are not prevented from moving to strike off practitioners.

The GCB has received two complaints from the public in three years about the handling of disciplinary matters by Bar councils. Both were immediately addressed. No complaint has been received from a judge, magistrate or attorneys about the efficiency of a Bar disciplinary tribunal.

Regulation encompasses much more than discipline. Since 1999, 111 pupils have undergone pupillage in KwaZulu-Natal alone, 172 in Pretoria, 129 in Cape Town and exactly 300 in Johannesburg.

The smaller Bars make an important contribution in all these respects.

The statistics relating to advocacy training and the functioning of the National Bar Examination Board are too considerable to tabulate here: the tally of trainees trained, the number of sessions, the setting and marking of


examination papers, their moderation by judges, the conducting of oral examinations across the country.

What about attorneys? The current expenditure of the law societies and LSSA is (LSSA sources estimate) some R40 million per annum. As with the Bar, the law societies depend heavily on the voluntary services of members on a myriad of committees, inquiries and tribunals. If those services are costed at just R450,00 per hour, then an additional R130 million would be required annually to regulate the attorneys' profession.

The Bar's regulation is cheap because it is simpler – the Bar is usually spared the trauma of forensic audits because our members do not handle the public's money – and because it draws almost entirely on the unpaid services of colleagues.

How much will the substitute regulatory regime contemplated by the Bill cost? We still do not know; no attempt has been made to work it out in the two years the Bill has been under discussion. Two things however are clear: it will cost more, much more (a large national Council with its administrative staff, and new agencies in the form of the Legal Services Protector, the Panel for the Recognition of Foreign Qualifications and the Paralegal Committee), and that the Fidelity Fund will not be able to fund all of it.

It was US President Theodore Roosevelt who said: "If it ain't broke, don't fix it", and Mr Justice Astbury of the Chancery Division to whom is attributed* the cry: "Reform? Reform? Aren't things bad enough already?"

* By Lord Hailsham, LC in *A Sparrow's Flight: The Memoirs of Lord Hailsham of St Marylebone* (1990) 421. 

Measuring transformation

The GCB and its Bars are committed to redressing the race and gender imbalance in the advocates' profession. The process is not easy. Members may however be interested in one benchmark: the racial balance at the biggest Bar.

In 1984 the Johannesburg Bar numbered 278 advocates. Just five were black. Three years later the Bar had grown considerably – a total of 355 – but only 14 were black.

Immediately before the transition to a constitutional democracy the Johannesburg Bar stood at 510. 42 were black. Seven years later, the total has increased to 597. 107 are black.