Completing the draft Bill

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A year ago South African lawyers faced a draft Legal Practice Bill in terms which spelt the end of professional independence. This was especially so for the Bar.

Seventeen out of 20 members of a national regulatory council would be appointed by the Minister of Justice; there was no express recognition of a right to continue to practise on a referral basis only; the Bar's prohibition on its members practising in partnerships would not be legal.

The course of events since then is outlined by Chris Loxton in his contribution to this issue of *Advocate* (see page 5). It has been a stressful round of meetings since the beginning of last year – first exploring common ground with the LSSA and AFT and then the intensive sequence of plenary and drafting team meetings of the Ministerial Task Team.

The Bar should know that it owes much to Chris Loxton who represented the GCB on the drafting committee. Chris and I – and latterly Willem van der Linde – worked on the plenary committee of the Task Team. We in turn have reported back to a full GCB Committee (comprising the three of us, Patric Mtshaulana (as GCB secretary), Fayeeza Kathree (GCB assistant secretary) and G M Malindi). All of us attended summit meetings with the LSSA, AFT and a national colloquium with the Minister. Andrew Breitenbach gave great assistance to me in the preparation of the GCB draft Bill tabled in April last year, its revision through six drafts, and in drafting meetings during December of the Task Team.

The leadership of the ten constituent Bars has also given constant support. The Bill has dominated our national executive meetings over the past year too.

Where do we stand now? I hope this issue will help answer that. My own overview is this. The draft prepared by the Task Team – it is still being finalised at the time of writing – accepts the "accredited organisation" model proposed by the GCB. It accepts the right to choose to practise as advocates on a referral basis only. It recognises the GCB moreover as a deemed accredited organisation for the first three years. It provides for a future accreditation process by a national council – now to comprise a majority of legal practitioners – according to criteria which measure regulatory capacity of organisations. These include the existence of a disciplinary code, operational structures to enforce it, capacity to offer adequate vocational training, and an examination system.

The Bill also provides for an ombud (a judge or retired judge) to address public complaints of dereliction or failure by the accredited organisations.

The draft is not perfect. Recently I wrote as follows to the chairman of the Task Team, Geoff Budlender, summarising the Bar's overall position in these terms:

"It may be helpful if the final position of the GCB in relation to the draft be summarised:

1 In view of the time limit imposed in relation to the draft, it has not been possible for the text to be circulated to the full GCB executive or the Councils of the GCB's ten constituent Bars for comment. The draft was only circulated four days in advance of the final meeting of the Task Team, and includes a number of proposed provisions which are new and not previously discussed.

2 The GCB believes that fundamental to any legislation regulating the legal profession must be the recognition that independent courts are essential to a constitutional democracy, and that an independent legal profession is in turn essential to the independence of the courts. Regulation accordingly may not attenuate the core independence of the profession.

3 An independent Bar – practitioners who choose to take work on a referral basis only – is established in South Africa, as it is in a number of Commonwealth countries. The case for its continued existence in our own society is compelling, and appears moreover not now to be a matter of particular contention.

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4 The legislative model reflected in the GCB draft tabled prior to the gathering convened by the Minister on 20 April 2001 sought to build on these two postulates. Its accompanying memorandum amplifies this.

5 That model, in outline, proposed grassroots regulation of the whole legal profession by professional bodies accredited for that purpose by a national council, independent of State control and broadly representative of the wider profession. The bodies would be accountable to the Council in certain respects and to an ombudsman in others.

6 The GCB (and its constituent Bars) together with the LSSA (and its constituent law societies) would, by virtue of their existing capacity in terms of constitutions, ethical and disciplinary codes, disciplinary bodies, vocational training, schemes and examination bodies, achieve – on a

transitional basis, subject to a future accreditation process – immediate accreditation. Nothing however would prevent other organisations from also applying for accreditation, if able to demonstrate the capacity to regulate members.

7 The GCB believes that the draft now produced reflects important components of that model. The LSSA however has at present chosen not to seek accreditation for itself and the existing law societies. The GCB believes this to be unfortunate: the law societies currently play a vital role in legal regulation, drawing on the commitment and skills of practitioners and administrative staff. In terms of the draft Bill, the law societies will cease to exist and their functions pass to the Council.

8 The GCB does not support the basic model proposed in the draft Bill produced by the LSSA first in October last year, and briefly outlined (in its current revised form) to the Task Team on Saturday. It however notes some positive features which may merit incorporation in the Task Team draft (such as the clearer definition of legal practitioners to be found in cl.26).

The GCB has indicated to the LSSA that it would wish to explore ways of continuing both to improve the text of the Task Team draft and extending common grounds related especially to the independence of the wider profession.

9 The GCB reiterates what it has often publicly stated: that the consequences of any new legislation to regulate the profession must be costed to establish whether it is affordable. It stated this at the UNISA colloquium in November 1999, in its responses to the first drafts of the LPB, at the meeting with the Minister on 20 April 2001 and (often) during the Task Team process. The draft Bill contemplates a number of substantial bodies (the proposed council is comparable in size with the JSC, but has more functions, would have to meet more frequently and employ more staff) its regional bodies and offices, the new office (again with supporting staff) of a Legal Services Protector, and the Panel for the Recognition of Foreign Legal Qualifications. Some13 000 attorneys, 3000 candidate attorneys, and an unknown number of independent advocates will fall under the direct regulation of these bodies, while the 1 698 number of members of Bars and approximately 244 number of pupils will be regulated by then to the degree and in the respects reflected in the draft.

The Bill still has not been costed.

The GCB (like other professional bodies) is both concerned about and strongly opposed to, any regulatory model which is not properly costed before it is finally adopted. New practitioners bear heavy burdens as it is. Efforts to encourage in particular more black and female practitioners will be directly undermined by additional costs.

The profession can continue to pay for the costs of regulation only if it is able to continue to perform this as it does now, substantially itself, through the unpaid and voluntary efforts of its members.

10 The Department of Justice has many urgent priorities, and is experiencing a crisis in funding. If there is no realistic funding of the proposed model, a more affordable approach must be found. This will have to grapple with the reality that to be effective, regulation must be substantially carried out by the profession itself through its greatest resource – the unpaid and committed services of its members with a Council with reduced functions and an ombudsman with the role of institutional watchdog.

11 The GCB is likewise concerned that the judiciary has not yet been consulted in relation to the draft Bill. We take it that this will be remedied before the draft proceeds further. This is not a matter of form: the regulation of the profession is fundamental to the proper functioning of the courts. Many provisions in the draft Bill concern the judiciary directly.

It remains for us to record our appreciation for your leadership of a difficult and often stressful process. Your fairness as a chair deserves particular mention."

The process is not over. Ahead lies the referral by the Minister of a draft Bill to Cabinet, and the parliamentary process. The GCB continues to seek to find common ground with the LSSA. A sticking point has been the view advanced on the LSSA's behalf that it accepts (as its predecessor, the Association of Law Societies, did before the Milne Commission) that fusion is not right for South Africa – but it wants "unification" of the profession. This would entail the Bar functioning on a daily basis as it does now, but with a compulsory membership by advocates of regional law societies. Discipline, training etc would be dealt with "jointly" in committees in which advocates would be in a minority.

We have indicated that this is not acceptable. This "unification" **is** regulatory fusion. It is also inconsistent with the acceptance that the referral profession is – functionally and the way it operates – a thing apart from the attorneys' profession. The bright line for regulatory purposes is the taking of money directly from the public. Those who do, necessarily involve themselves in a different manner of practice and attract heightened regulatory scrutiny.

Recently I was invited to address a BLA-Nadel workshop on the Bill. The debate was frank but very cordial. In that spirit I was asked: do advocates think they are **better** than other lawyers? Not better, I said – many of South Africa's best lawyers in several fields are doubtless to be found in attorneys' firms – but **different**. We freely chose that different mode of practice, as others have done so before us in this country (at least since 1688) and elsewhere in the world. We do not seek to impose it on anyone else.

There is reason to hope that the LSSA and GCB may yet resolve or at least narrow their differences. We, for our part shall certainly try to do so. We believe that we have many commitments in common. We know from our daily contact with attorneys that few can understand a desire to procure involvement in the governance of the Bar.

Attorneys and advocates surely need to respect differences born of free choice and to form a co-operative partnership in serving the administration of justice.

It's time to move on.