

Johannesburg Bar Council Meeting 30 September 2014**PROFESSIONAL CHAIR REPORT****RECOMMENDATION ON PERMANENT APPOINTMENT FOR DISCIPLINING FUNCTIONS*****A. Introducing the Problem – relying fully on practising members***

1. This recommendation has spent a long time in gestation. It is the product of my experience of the challenges faced by the chair of the professional committee and by the committee itself. It is a function of realising what is required for the most effective discharge of the disciplining function of the Johannesburg Bar Council (the BC) and what is required of the chair of the professional committee (PC) to strive towards this goal. It is, mainly, born of my realisation that the task requires more time, effort and application from the chair of the professional committee than can reasonably be expected of a member with a busy practice.
2. I have, since January 2014, apart from times when I was away, spent *on average* easily 10-12 hours per week on BC and PC commitments. It is very difficult to be accurate in this regard, as I did not keep score. Some weeks have entailed more hours than that (20 or even 30). I do not think a single week entailed fewer than 5 full hours. Even while on holiday, some matters required immediate and ongoing attention. A relatively conservative estimate of hours spent on PC and BC matters (far more than 90% of which related to PC matters, even counting the time spent on the silks committee), would yield well in excess of 400 hours up to the end of October. That's 40 days of fees. I need not belabour the effect this has on practice, family life and leisure time. This leaves out of account time spent as deputy editor of *Advocate* and any advocacy training time. These, especially with the Wallenberg and Drakensberg courses, add up to further weeks' worth of time.

3. It is true that I could have spent less, perhaps considerably less, time on PC matters. But I do work relatively quickly, and make decisions relatively quickly. My problem was taking responsibility for what was happening, deciding what was to be done in relation to each query and response, and vetting letters and responses from the PC in a way a different chair might have decided not to. I do not see a way of responsibly chairing the disciplining functions of the BC without doing what I did. And this, simply put, consumes too much time and energy, which no member with a busy practice can be expected to give to the society.
4. The purpose of the above exposition is not to complain (or boast) about this personal question. The purpose is to make it serve as the foundation of identifying the problem: **what is required for a proper job to be done is more than what can be asked of any member with a practice.**
5. What this means is that one cannot (I certainly cannot) perform this function for more than one year. This means that a churn of chairs results, with the concomitant lack in continuity and disruption this causes in the functioning of the committee.
6. There is an aligned problem: the extent to which the BC and PC rely on currently practising members (of the PC or of the Bar), assisting on a voluntary and commandeered basis, to discharge the disciplining functions of the BC, is such as perennially to tend towards delay and neglect in the finalization of complaints.
7. The chair of the PC can adopt one of two approaches to this: resign to the fact that the process is far from ideal and entails unacceptably extended backlogs and delays, and get on with prioritising practice, or try to keep tabs on the processes and move things along when they

appear not to be moving, and in the process end up surrendering unacceptably large parts of the week to PC issues.

B. 2014 and steps to address problem areas

8. For many varied reasons, there was a large backlog of matters and implementation of decisions covering especially the period 2011-2013. Several non-member matters, either pending as complaints or having been the subject of a resolution to bring court proceedings, stretched back to 2010 or 2011. A number of inquiries had been pending for a few years. Several reports were outstanding for several months, a number for more than a year. Some complaints had been stuck in the responses phase for several months on end. There was no system in place to keep track of all of this, save for a hard copy Excel spreadsheet spanning about 40 pages of small print that was tabled at each PC meeting. Institutional memory in relation to pending matters was sporadic and at times non-existent, and it was often impossible to know where in the process any particular complaint found itself.

9. The following main steps were taken to address these issues:

10. Keeping track of matters and following up

10.1. It was clear that there was a great need for an electronic and live database of all complaints, accessible to the chair and PC members at all times. I asked for a software solution to be developed in this regard, and we have now moved towards getting such a solution started. I hope and trust this project will be successful. In the meantime, the Excel schedule was made "live" on Google Drive, with access to the chair and PC members, to update from their computers over the internet. This has improved tracking

of the status of matters immeasurably. There is some potential problem with confidentiality and control over access, especially with the churn of members on the committee. Also, if a step is not updated immediately on the live schedule the moment it is taken, the accuracy of the live schedule suffers as a result. But this is a big improvement for the time being.

- 10.2. The disciplining function was divided into its most important stages, and a PC member given a portfolio for each stage. The portfolios were – **fees, responses, reports, enquiries, court proceedings and non-member complaints.**
- 10.3. The idea was for the PC member that was the portfolio holder to take charge of the portfolio (and nothing else), keep track of all matters within that stage of the process, and report back formally to the PC at meetings on progress and steps taken.
- 10.4. This has met with mixed success. Some portfolios suffered from resignations (non-members) and various sometimes successive deemed resignations (court proceedings, reports and responses). Others were handled effectively and conscientiously from the start (Estelle Kilian's inquiries and Andy Bester's fees).
- 10.5. It was also imperative for an administrative staff member to be appointed full-time to the PC. Pam Irvine, who had been handling the PC matters as part of her other administrative functions for a number of years, decided not to be that person, and a new appointment was made in Berlina Chautsane. There have been teething problems in getting Ms Chautsane up to speed, some members of the PC were unable to work with her, and the dynamics in the administrative staff office were at times quite problematic. It is hoped that this situation will improve. It is already showing signs of improvement.

11. Specific concern areas addressed

11.1 Responses

This portfolio suffered from an unfortunate succession of resignations due to the unavailability of the members concerned. Eventually, responsibility for dealing with responses became a matter of co-operation between the chair and Ms Chautsane.

After the schedule was trawled, first by the chair and then periodically by Ms Chautsane, for all matters entailing outstanding responses, this has now become the area in relation to which Ms Chautsane has apparently achieved the most important progress, and it seems to be relatively well under control with regular and tight following up – and moving on to the next stage when responses or replies remain outstanding after reminders. It is still necessary, however, for the chair to consider every response and reply, to advise on whether the matter should now go to a report, or an extension be given, or new matter is introduced, and often the chair is required to draft appropriately tailored letters to be sent in this regard.

11.2 Reports

I reported on the problems experienced in relation to this stage of the process to earlier BC meetings. Since I compiled a list of members of the Bar to whom reports could be allocated and re-allocated, and Edmund Wessels took charge of the portfolio, significant progress has been made on this score. A separate live schedule of outstanding reports is kept on Google Drive, and this helps with the reporting and monitoring of progress on this front.

Nevertheless, reports still tend to remain outstanding for several weeks and often months after reminders, and re-allocations still end up being required. The problem of long-outstanding reports and endless re-allocations will remain for as long as the BC and PC rely on members with practices to take care of this important function. Reports also differ starkly in their helpfulness and comprehensiveness. There is much fluctuation in standard of strictness and understanding of the Rules too. When reports are done by Bar members who are not PC members, the reporting member is not present at the PC meeting to explain aspects.

11.3 Inquiries

Estelle Kilian has been effective in setting up inquiries, appointing prosecutors, reporting on progress and liaising with the panels and the prosecutors. But the syndrome of inquiries getting bogged down and not proceeding for very long periods, dragging on over years, continues. This is one of the biggest problems facing the disciplining functions of the BC.

11.4 Court Proceedings

This area had suffered serious neglect over the last few years. It appeared to be a combination mainly of complete inactivity on the part of the attorneys handling the matters resolved for strike off or suspension applications, after counsel had raised queries and left them in the attorneys' court (sometimes for years), and no prompting and following up from the PC side. The first important step in this regard was to resolve to engage attorneys professionally (albeit on a reduced fee basis). This has yielded immediately apparent improvement in the attention given to the matters, but is something that requires ongoing treasury monitoring as the extent of future exposure to these fees is unknown, and such fees can mount quite quickly. The

portfolio suffered from neglect and deemed resignation in the first half of the year. Thereafter, Caroline Dreyer, who was PC secretary, took some significant steps in getting the matters moving, as her last act before resigning from the PC. Ros Stevenson, the replacement secretary, is currently handling the applications and this portfolio appears to be well managed. There is still the problem that most court applications relate to non-members, and counsel dealing with the matters will often have them low on their priorities list. It will be very important for the PC and BC in future to keep tabs on the spending and the relative success of the spending on different attorneys within this portfolio.

11.5 Non-members

As reported earlier in the year, Brahm du Plessis SC inherited a non-member portfolio that had apparently been suffering under a mountain of neglect. Du Plessis SC was in the process of setting up a system to deal effectively with non-member complaints, until he resigned his portfolio. Currently, new non-member complaints are now dealt with together with member complaints as part of one system, and Reg Willis and James Magodi have been clearing the backlog of non-member complaints and are reporting on these. The idea is to retain only those that appear to require applications to court to strike or to suspend. The progress made in this regard creates some room for optimism. The Bar Council's responsibility for non-member complaints remains a burden. We have no disciplining jurisdiction over non-members, but are relied on by the courts to bring applications to strike or suspend non-member advocates from practice when appropriate. This means we need to investigate these complaints where it appears they may lead to such applications. The chair often needs to consider these complaints carefully to decide what precise issue is to be referred for a response from the non-member concerned. Often the complaints emanate from judges.

11.6. Informal Rulings

There appeared to be no system in place to record the informal rulings the chair is asked to make, almost invariably on an urgent basis, and often entailing very difficult questions in relation to which some PC or BC precedent or practice would of course be very helpful. I reported back to the PC in writing on all rulings given this year, and eventually anonymised them for reporting and recording purposes. I have kept a separate file of all these rulings, of which there are now 48 (as at 23 September 2014). I believe it important for this to be kept up in future, so that the PC and the PC chair can monitor the rulings given, consider them and debate them where necessary, and build up a sense of precedent and uniformity within the year, and from one year to the next. I shall, at the end of the tenure of this Bar Council, report back to the BC and attach all these rulings, including the rulings made by other PC members and the formal rulings given this year, so that these are all formally reported to the BC.

C. The Need For a Permanent Appointment

12. The disciplinary process is cumbersome. It is also time consuming. Cutting through it, omitting a step in the process (a process approved by the Bar Council) entails upsetting legitimate expectations of fairness on the part of members. Maintaining it requires constant following up at every step, and persistent prodding, to avoid having matters fall into a quagmire of delay and stagnation. It is this that is the main problem.

13. Many matters entail personal or political difficulties for the members relied upon to report on, prosecute or determine the matters. This is a dimension that combines readily with the low

priority members often give to disciplining duties, arising out of the fact that these duties compete heavily with the demands of practice and require a great degree of conscientious application and sacrifice to discharge conscientiously. The respondent member often does his or her best to delay progress in a matter, and finds a ready ally in the inertia and reluctance he or she relatively often tends to encounter on the disciplining side.

14. The above phenomenon manifests itself most starkly in the inquiry process, and less so in the reporting stage.

15. For a serious matter to be prosecuted effectively, the following needs to happen:

15.1. The chair needs to consider the complaint quickly and to decide it merits a response. To do this properly, he or she must give anxious consideration to it, and often formulate a letter calling for a particular response or identifying what it is that ought to be responded to.

15.2. The respondent must respond. The ideal is two weeks. Often this does not happen, and a reminder is issued, with the notification that a failure would be taken into account when the matter is reported on without the benefit of a response. It is, however, clearly preferable to have a response, as it is difficult to report on a matter without one.

15.3. The complainant must reply. Again this should happen in two weeks, but often a reminder is necessary.

15.4. If the reply contains new matter (which the chair must consider), the respondent ought to be given a chance to respond to this.

- 15.5. The matter must then be allocated for a report. Assuming it is immediately allocated, the report is to be compiled in two weeks. This ideal is almost never met. After a few reminders, the report must get re-allocated. This is the only (and not particularly foolproof) way of trying to get the complaint out of being stuck in the reporting stage for months or years on end. Often the report requires further inquiries to be directed by the person doing the report, and this takes time to finalise.
- 15.6. The report must then serve before the PC. If the PC decides to recommend an inquiry (assuming the conduct to be serious), a panel and prosecutor must be appointed. Charge sheets are drawn. This can take a very long time if the prosecutor is even half reluctant to prosecute with vigour, or the panel members busy and relieved if others are not available on suggested dates. Pre-inquiry meetings are called, and the process of setting dates and taking further such steps ends up approximating a slow-moving private arbitration. The panellists tend not to act inquisitorially, wishing to act with maximum fairness.
- 15.7. Assuming the inquiry to result in a finding, if this is serious (such as requiring court proceedings), this needs approval by the BC. The BC often allows the respondent to address it on the sanction if it is serious enough (like entailing court proceedings). This can take further weeks or months to get finalised.
- 15.8. Once there is a resolution that court proceedings are indeed required, attorneys and counsel need to be appointed. The energy and vigour from the attorneys and counsel may also be affected by the fact that the work competes with more lucrative work for the attorneys, and is voluntary on the part of counsel (and there are often also incentives

that prod away from vigour, such as political or personal feelings in relation to colleagues).

16. It is manifest from the above that such processes will result in acceptable timeframes only if rigorously followed up every step along the way. Even rigorous following up has its limits – one can ask a horse many times when it is going to drink, but cannot make it drink. New PC chairs and members in new years lose track of what was happening in old matters, and matters lose momentum when they are inherited. Current PCs often ask why certain matters are still being prosecuted, and the reasons that animated the original decision (which often differ from the reasons contained in the report) are lost or forgotten.
17. I believe it is necessary for the most important disciplining functions of the BC to be delegated to a permanent appointment, who is remunerated by way of meaningful honorarium for the appointment. If this person is a member of the Society, there is no need to change the constitution (see section 22(a)). But this person cannot, in my view, be a member with an existing practice.
18. Ideally, the permanent appointment should comprise a panel of three. This would make legitimacy more likely, and avoid the dangers of a single personality taking care of discipline. But it may be difficult to budget for meaningful remuneration for such a panel.
19. **My preferred solution at this stage is a hybrid. One person is to be appointed as the Executive Chair of Discipline (ECD). That person essentially fulfils the role played by the chair of the PC. But he or she also chairs panels and prepares reports. The BC then also appoints a chosen standing panel of 6 chosen persons, to serve for a period of three years. The ECD appoints panels from these panellists, as and when they are available,**

to serve on inquiries, and they get remunerated per inquiry day, or even per inquiry. The ECD remuneration need not be a full-time salary. It ought to be what would be a decent honorarium for a position that requires about 15 hours per week of work (bearing in mind that the ECD will do the bulk of the reports, perhaps asking juniors or members to assist on researching certain issues).

20. I think that the BC should make funds available for these functions. If it is necessary to approach the general membership for this, so be it.

21. The question is who such people should be. This is a difficult question, especially since section 22(a) appears to require even the panellists also to be members. What one needs are members to whom the BC is confident to entrust the disciplining functions, but who for some reason do not have current practices. It may be very difficult to find such persons.

22. Going to the general membership to amend Rule 22(a) must be seriously considered. Some may feel this will affect the principle of self-regulation. It is also to be considered that we are now facing the new world of the Legal Practice Act, so whatever is done may end up being an interim position anyway.

23. We nevertheless have to regulate discipline as effectively as possible for however long we are still entitled to do so ourselves.

24. I think careful consideration ought to be given to amending Rule 22(a) to cater for the identity of the permanent panels (if not of the ECD, but in principle of this person too). As long as the BC is in control of the appointments, and always makes the ultimate decisions after considering the recommendations of the panels and ECD as the case

may be, through its PC and as currently done, there is no real interference with self-regulation.

25. This will allow the ECD and/or the panellists to be retired judges (or even other persons known to have the interests of the Bar at heart). One may even have the standing panel members appointed in consultation with the JP every three years, as one member suggested to me when I discussed this with him. This may be an important way of aligning the bench and the bar in the disciplining function which, after all, intimately touches both.

26. A disciplining process run in this way would address many of the problems encountered with the current system. The ECD and panel members could act more inquisitorially than panels have done to date, and the reporting will occur on an ongoing and expeditious basis. There will be a sense of continuity and a growing uniformity of precedent in the disciplining process. These persons will also be free of the political and collegial incentives that sometimes add further pressure on the low degree of prioritisation that practising members assigned disciplining functions tend to give to these functions, relative to the demands of their practices.

27. No doubt the devil will be in the detail. The number of standing panel members, the tenure of each standing panel, and the tenure of the ECD, are matters that must be considered. My current proposal is 6, three years and five years respectively. The identity of the persons in question will be very important.

28. But I think it important for the BC to decide **whether in principle to accept the notion of a permanent ECD to take over the functions of the PC chair and of reporting, and of chairing inquiry panels, and a standing panel to people inquiry panels with the ECD.** The other thing to decide is whether to approach the membership on amending section 22(a) to

allow for these persons to be appointed from the ranks of retired judges or other persons and not necessarily from the ranks of members.

29.I therefore propose that the BC accept in principle:

- 29.1. The appointment of a remunerated Executive Chair of Discipline (ECD), to perform the current functions of the chair of the professional committee, the reporting function, and acting as chair of disciplinary inquiries, remunerated on an honorarium basis for 15 hours per week, with a tenure of five years, renewable by the Bar Council.
- 29.2. The appointment of a standing panel of 6 inquiry panellists, from whom the ECD chooses panel members to serve on inquiries with him or her to comprise panels of three, these to be remunerated on a per day basis for the inquiries they conduct, with a tenure of three years.
- 29.3. Making the necessary funds available for this function, if necessary by approaching the general membership for the necessary funds.
- 29.4. Approaching the general membership for approval to amend section 22(a) of the constitution to allow for the disciplining and inquiring functions to be performed by the ECD and standing panel members, even if these are not members of the society.

Frank Snyckers SC

Chair: Professional Committee

23 September 2014