LAW SOCIETY
OF SOUTH AFRICA

SUBMISSIONS TO THE DEPARTMENT OF JUSTICE
IN RE: FIRST WORKING DRAFT
LEGAL PRACTICE BILL

(A) BACKGROUND

1. The evolution and development of the Legal Practice Bill has been a long, drawn out process. After a period of inaction, the negotiations in regards to the Bill resumed towards the end of 2008, which culminated to an inconclusive Memorandum of Understanding. The MOU, although not agreed upon by all the parties, was the closest to which parties could come in respect of the foundational principles. The DOJ has now introduced a draft working bill for discussions and considerations by the stakeholders which was discussed with the legal profession on the 19th of September 2009.

2. Verbal submissions were made on behalf of the LSSA. In response to the DOJ's request for further written submissions, we are responding accordingly, confident that our submissions shall assist the drafters in the Department in finalising the second draft.

3. Our submission constitutes a positive continuing engagement with the Department of Justice and if needs be we shall further supplement these submissions as there are ongoing engagements within various constituencies of the LSSA .

(B) REGULATION OF THE PROFESSION

2. The original dispute between the LSSA and the departmental draft related to whether the bill should regulate legal services or the legal practitioners. This matter is dealt with in the introduction of the draft bill, which specifically refers to the regulation of the legal practitioners. While the draft bill does deal with the regulation of practitioners the issue of the regulation of legal services is still added on – *see paragraph 59 below.*

3. The Bill must make it clear that it does not seek to regulate the legal services, thus, appropriating to the legal profession any further areas of practice beyond what currently obtains.

(C) UNITY OF THE PROFESSION

4. The draft recognised the need for a single unified and rationalised legal profession. This is set out in paragraph 3(a) of the draft. It continues to spell out the setting up of a National Legal Council in respect of all legal practitioners. The two distinct modes of trust account and referral practice are embedded in the Bill with a structure to enforce this far more effectively than did the *De Freitas* and other judgments. This closes off any fusion debate. Those who oppose unification should not be permitted to create confusion by propagating that the Bill brings about fusion – which it does not.

(D) THE NATIONAL BODY

5. This principle was agreed upon during the negotiations which recognised the setting up of the national body to regulate the profession, determine norms and standards for the profession, implement the Legal Services Charter,

promote and protect the public interest and access to civil and criminal justice. This is catered for in Chapter 2 of the draft wherein the issue of the Legal Practice Council is dealt with extensively. However, the starting point for the national body must be a National Legal Practice Society of which all practitioners are by stature members, and its elected council which is the national legal practice council.

6. The issue of the gravest possible concern to the LSSA and its constituents, BLA, NADEL and the Provincial Law Societies, is the summary abolition of the attorney's profession as a coherent, organized profession of some 25,000 attorneys and 4,000 candidates spread over the length and breadth of South Africa.

   This applies equally to the advocates profession as they are organized in various structures and groupings.

7. The Bill provides that the Law Societies shall "cease to exist" and that their assets and staff shall vest in the national council.

8. This leaves the attorneys in a total vacuum as isolated individuals with no interconnection and no corporate existence as a profession.

9. This seems to assume that attorneys, or those of them who may wish to do so, being stripped of assets and staff, will begin from nothing to form voluntary associations purely by way of contributions or subscriptions out of their own pockets, which will not happen.

10. The abolition of the corporate existence of the profession will negate its ability to fulfill its role to uphold the constitution and the administration of justice.

11. The aspects are more fully dealt with in Annexure "A" hereto, THE NATIONAL LEGAL PRACTICE SOCIETY.

12. The only issue in this chapter which needs further emphasis relates to the following sections:

(a) Section 5, correctly stipulates the object of the national body to be to *"promote and protect public interest".*

On reconsideration, we confirm that it is neither necessary nor desirable to include any reference to the interests of the profession, as any such inclusion would merely be to legislate conflict.

The standard throughout the statutory structure is the public interest – and that only, which excludes any potential for conflict. If practitioners of the profession have interests (whatever that may mean) they are at liberty to form voluntary associations to pursue or promote such interests.

This, further, militates against the delegation to voluntary associations of any statutory powers or functions. If public interest powers are delegated to member interest voluntary associations that is merely to create conflict of interest.

(b) Section 6, the role of the Minister in determining the powers of the Council is quite extensive and may simply undermine the very idea that Council's object is the preservation and upholding of the independence of the legal profession. Therefore, the role of the Minister herein needs to be revisited extensively and tested in each instance against the independence of the profession and the fact that legal practitioners are officers of the court, such that powers and discretions which the draft bill vests in the Minister may better be exercised by the CJ of the JP's.

We, therefore, propose amendments accordingly; this will dispel any perception or factual executive encroachment.

(E) COMPULSORY REGISTRATION OF PRACTITIONERS

13. The MOU dealt with the central roll of legal practitioners after compliance with:

(a) The requisite academic qualifications;

(b) The admission by the High Court;

14. The draft Bill, in Section 14, deals with the registration format and list in Section 14(2)(a) the categories of legal practitioners. Legal practitioners on admission by the court are enrolled as such and, if they come into serious difficulties, are then struck off the roll by the court; and the roll is kept by the national body where the question of practicing and non-practicing members can be further dealt with in the detail. In addition, practitioners are registered by the national body which registration will include aspects such as mode of practice; region in which practice is conducted; secondary registrations such as conveyancer, notary, trade mark, senior practitioner etc, etc.

15. The further debate, nevertheless, is therefore necessary with regard to the inclusion of a paralegal practitioner as a legal practitioner in terms of this registration. Legal practitioners are enrolled as such by the national body, and this does not include paralegals unless, as a result of further deliberations, it is decided to create another roll for paralegals; or whether they are just to be registered.

16. Section 16(1) deals with various titles and the new category set out in these titles is the one relating to senior legal practitioners. The proponents of this, within the attorney's profession, will be happy to note the inclusion of this

specific category. The advocates, on the other hand, will probably be very unhappy, as it does not distinguish whether the senior legal practitioner is an attorney or an advocate. One notes that there is no other provision for senior counsel in the authorised title. The concept of the State, by way of letters patent from the President, granting some sort of recognition to senior counsel (which does not apply to any other profession) is colonial and archaic and, to the extent to which such recognition is considered to be desirable, it should be on a peer basis common to all practitioners and determined by colleagues through the national body.

17. Section 17 also deals with the matter that we have previously debated extensively, being that of the conversion of registration which is an administrative issue done by the Council.

(F) COMPOSITION AND APPOINTMENT OF THE NATIONAL BODY

18. The general principles for the composition of the Council were the fact that the body must reflect, in large, the South African demographics, with particular reference to race, gender and regional interest, in addition to those members of the Council with Fidelity Fund Certificates, those without Fidelity Fund Certificates and paralegals.

19. There was no agreement as to the number of that Body, save to say that it must be cost efficient and manageable, but it must also include paralegals, law schools and public interest representatives.

20. The draft Bill proposed a Council of seventeen (17) members, twelve (12) of whom shall be legal practitioners, 8 being the legal practitioners with Fidelity Fund Certificates. The categories of representatives in this Council are substantially in line with those previously proposed by the LSSA in the 2002

draft, except for the inclusion of the Chairperson of the Board of Control of the Fidelity Fund, which is not included in the current draft. As has been indicated in previous discussions, and notwithstanding its original proposals, the LSSA is of the view that the Chair of the Fund should not be a member of the National Council; the President of the national society/council should not be a member of the Board of the Fund; and the Ombud should not be a member of either of such bodies.

21. The other distinguishing feature is the numbers that are substantially different. The LSSA previously proposed a 29 member Council.

22. We have to discuss the suitable number for the national council in which regard the proposed twelve is simply inadequate to achieve representivity; to handle the workload, and bring in to the deliberations of that council a wide range of insights and experience. The LSSA adheres to the proposal for 24 practitioners and 4 or 5 lay experts.

23. The MOU dealt with the methodology of the appointment of persons in the Council and indicated that the legal profession will be responsible for nomination of members and the role of the Minister shall only be limited and bounded only on grounds of lack of inclusivity based on race, gender and geographical spread. We note further that the current draft extend the inclusivity to incorporate people with disability as well.

24. The current draft once again makes the role of the Minister prominent in the appointment of the Council. It makes three proposals:

    (a) That the Minister, in consultation with the Council and Chief Justice, make regulations to determine the procedure for nomination of legal practitioners to serve on the Council;

(b) Alternatively, that the procedure be determined by the Council for approval of the Minister and be made a schedule to the Act;

(c) That the procedure for nomination be determined by the Minister, after considering the recommendations of the Council, and this be made by way of notice in the Government Gazette.

25. None of the aforementioned alternatives is acceptable or workable, and none of them have a democratic basis or establish accountability. The framework proposed by the LSSA, in summary is:

(a) Practitioners are admitted by the Court, enrolled as such by the national body and also registered as practicing in the region where they have their principal place of practice.

(b) All practitioners in a region by ballot elect the regional council in defined proportions of advocates and attorneys; with advocates electing advocate members and attorneys electing attorney members.

(c) The required criteria for representivity of regional councils are stated in the Act.

(d) The Judge President(s) for the region is(are) required to certify satisfactory compliance with the stated criteria, with power to give directions, if necessary, as to how satisfactory representivity is to be achieved.

(e) The Regional Councilors elect the members of the national council in defined proportions of advocates and attorneys, with advocates electing advocate members and attorneys electing attorney members.

(f) The criteria for representivity on the national council are set out in the Act.

(g) The CJ is required to certify representivity, with power, if necessary, to give directions as to how representivity is to be achieved.

26. We should also start thinking of the procedure henceforth, as the aforegoing is entirely capable of being expressed in legislative terms.

27. Section 8 of the draft deals with the qualification for membership of Council and it is submitted that the conditions set out therein is common cause. There is, nevertheless, a missing point, which we should incorporate, being that the membership to Council must be open to a member of the profession that is in good standing. It remains the responsibility of the Rules Committee to determine the actual definition of good standing. This is important so that the leadership in governance of the profession must not find itself mired in controversies because of the questionable character or reputation of its members.

(G) NO DOMINANCE PRINCIPLE

28. This principle was debated and discussed during the meetings with the department with a view to ensuring that the fear by the organised group of advocates of being dominated by attorneys, is dealt with. Representatives of advocates associations have never in previous discussions set out any comprehensive statement of what their "fears" may be or what it is that they apprehend an attorney majority on a council may inflict upon them. In previous discussions a number of mechanisms have been suggested to assuage what the attorneys sense may be the fears of the advocates, but this has been somewhat one sided as the advocate representatives have never clearly articulated what their fears are or why they should remain separate.

29. This principle is found in Section 20 of the draft Bill, dealing with the operations of Council. The provisions relating to the so-called dispute resolution of deadlock breaking mechanism seems convoluted and clumsy. It will be better if, during these negotiations, there is clarity on the affairs of practitioners practicing without Fidelity Fund Certificates and those that practice with Fidelity Fund Certificates. Unless such clarity exists a need for a provision of this nature, properly drafted, will not be justifiable, failing which the entire provision in Section 20 is obsolete. The draft provisions are all based on the assumption that councilors, just because they are advocates or attorneys, will always vote as solid "blocs" and create deadlocks. This simply disregards the integrity of councilors and their ability to reach their own decisions on the merits, and not just to function of one of a voting bloc.

30. There can hardly ever be a deadlock as there are other lay members of council as full members with voting rights who will also be taken into account.

31. The normal provision should apply, i.e. in the case of an equality of votes the chair shall have a deliberative vote and a casting vote.

(H) REGIONAL BODIES

32. The MOU recognised the need for the establishment for the regional councils along the line of the National Council.

33. We need to, similarly, determine whether the establishment of regional council/provincial structures is dealt with by way of negotiations at this level or, alternatively, is dealt with by the Council and further recommendations to the Minister, who shall make the final decision. Further detailed discussions is required on the role and powers of regional bodies and their definition. In principle, the LSSA sees these bodies as having certain original powers and not just delegated powers from the national body. Regional bodies are seen

as essential to the dynamic and functioning of the unified, national profession; particularly in regard to the role of their elected councils, in turn, to elect the national council.

(I) VOLUNTARY ASSOCIATIONS

34. The dispute existed between ourselves and the departmental representatives on the inclusion of this specific head, not so much for non-recognition of the voluntary association as that is simply guaranteed by the Constitution, but to the extent that there will be a devolution of power from the National Council to these structures. The point has previously been well made that the recognition of these and its entrenchment in the legislation creates the logical expectation that they will have some regulatory powers. This, as previously stated, shall lead to further fragmentation of the legal profession as people will seek to be regulated by their own kind.

35. Our submission should simply be that there should be no inclusion of recognition of voluntary associations in this Act, as that it simply a constitutionally guaranteed right that doesn't have to be restated.

36. Delegation of any statutory powers and functions to voluntary associations, even if only in regard to discipline, is altogether unacceptable. In this regard reference is made to Annexure "C", DELEGATION OF STATUTORY POWERS.

(J) THE LEGAL PROTECTOR

37. This is one issue that has posed no controversy throughout the history of these discussions and it will not be necessary to rehearse the previous discussions.

38. The draft Bill settles two issues which are important in this respect, being:

(a) the funding for such an office should be from the State.

(b) the appointment of the legal protector by the Judicial Services Commission.

39. There shall be no difficulties with these proposals save that, in the event of the Ombud intending to launch a systemic investigation, such should be after consultation with the CJ as to the scope and terms of reference; and that a decision to set aside the ruling of a disciplinary tribunal and substitute her/his own decision should be taken by the Ombud or the Deputy Ombud, and not be a member of staff.

40. The Ombud should also have power to review a decision by the Fidelity Fund Board in regard to the rejection, in whole or in part, of a claim arising from the alleged theft of trust money. The aggrieved claimant should have recourse to the Ombud and not be limited to only as review or appeal to the High Court with all its attendant costs.

(K) DISCIPLINE

41. Discipline is at the core of the regulatory responsibilities of the National Council. It was previously agreed that it will be the national body that shall provide norms and standards, a code of conduct and disciplinary procedures to hear complaints against legal practitioners.

42. It was recognised that the national body would delegate the disciplinary responsibility to regional bodies or that this would be one of the original powers of the regional structure. At that stage the department still envisaged

that some of the disciplinary responsibilities shall be devolved to the voluntary associations, a point which we consistently disputed.

43. The MOU also dealt with the review processes by the Legal Services Ombud.

44. It is important to note that the disciplinary committees shall be established by the provincial original councils and will invariably not be the councilors, as we know them.

45. Further to the nature of the disciplinary committees, it is important that the disciplinary committees shall have a member of the public, who is not necessarily a legal practitioner, whilst the hearings are also open to the public. This should receive our support as it complies squarely with the principle of accountability.

(L) PARALEGALS

46. There have been a number of difficulties arising out of this specific topic during the negotiations of the MOU and those complexities are reflected in the current draft.

47. There is a general recognition of the role of paralegals in ensuring access to justice.

48. Nevertheless, there is also an acknowledgement that the current structures, services and *modus operandi* of various paralegal movements is not cohesive and may be very difficult to regulate under the current or proposed Act.

49. In view thereof it was proposed that the new National Council be given the responsibility of researching and providing specific areas and methods of operation for paralegals within a specified period of time.

50. The whole chapter, being Chapter 4, is dedicated to paralegals. The Council is enjoined to make proposals within the period of 12 months on how paralegals should be regulated.

51. This specific chapter encapsulates the issue dealing with paralegals properly.

52. In the final analysis it will depend on the decision and direction of the Councilors as to how paralegals are dealt with going forward.

(M) FIDELITY FUND

53. There is a consensus for the need for the continued existence of the Legal Practitioners Fidelity Fund. The issues arising out of the chapter on the Fidelity Fund, once again, relates to:

(a) The size of the Board of the Fidelity Fund;

(b) The process of nominations of the members of the Board of the Fidelity Fund;

54. The current draft, specifically Chapter 7, which has two parts, deals with the Legal Practitioners Fidelity Fund substantially in the same way as the current legislation and the LSSA's proposed draft.

55. The Constitution of the Board of the Fidelity Fund is made up of 9 members, who are appointed by the Minister. This is not acceptable and is, in any

event, a responsibility which we would not think that the Minister would be willing to assume.

56. This number seems to be quite low to have the necessary mix that is required for the governance of the Board. For a Fund of this size, a Board of 16 practitioners is considered a minimum plus 4 or 5 lay specialists in relation to insurance, asset management, ect. We can discuss how many of the 16 practitioner members are to be attorneys and how many advocated. As a starting point it seems that 12 and 4 would be a good balance.

57. The further difficulty is the proposal that all members of the Board be appointed by the Minister.

58. We should therefore review this number and propose a procedure for the appointment of Board members, substantially in line with the appointment of the National Council governing the profession. This is so in that the role of the Board remains very significant to the interest of the legal practitioners and to the members of the public. Basically, we are of the view that a number of the practitioner board members should be appointed by the Regional Councils with the balance being appointed by the National Council; with criteria for representivity as on the national council; and lay, specialist members being appointed by the Minister of Finance, who will also have the function to approve investment powers and certify actuarial soundness of the Fund.

59. These views relating to the AFF constitutes the preliminary views of the LSSA and are made without consultation with the AFF which is a different constitutional entity with and independent board that has a different mandate to the LSSA . The AFF therefore in all probabilities will make its own submissions relating to the nature and the manner of its future governance .

(N) PROHIBITION ON PERSONS OTHER THAN A LEGAL PRACTITIONER RENDERING LEGAL SERVICES TO THE PUBLIC FOR REWARD

59. This principle is specifically included in the draft Bill in Section 39, which makes it an offence for anybody who contravenes this provision, and requires that only a properly registered legal practitioner must engage in the practice of law for a reward, which latter term is not defined.

60. This will have the effect to outlaw the so-called rebel advocates and other so-called legal consultants, which latter have in no way been consulted as to the proposed proscription of their activities; nor as to whether the profession can take over all their work.

61. This obviously requires that the legal services must be specifically defined as it is in the definition sections and Section 42 of the draft. Nevertheless, the appearance in court on behalf of the member of the public is not included in this definition. This must be considered. The LSSA seeks nothing more than the reservation to legal practitioners of the basic court work and other specialist work which is at present reserved (excluding archaic references to partnership agreements, certain leases and company documents). The LSSA does not wish that the bill become suspect as an attempt by the profession to grab more work for itself. Reference is made to Annexure "D", PROVISION OF LEGAL SERVICES.

(O) FUNDING OF GOVERNANCE STRUCTURES

62. This matter was discussed in an open-ended fashion during the negotiations about the MOU.

63. Nevertheless, the provisions for funding are fully set out in the draft and appear satisfactory. This relates to:

(a) the funding of the Council, which is set out in Section 25 of the draft;

(b) the funding of the Legal Practice Fidelity Fund, which is set out in Section 75 of the draft;

(c) the funding of the office of the Legal Services Ombud, which is set out in Section 73 of the draft and, clearly, the Ombud will be funded from the State as there must be no room for any perception that the Ombud is funded directly or indirectly by or through the profession which may impugn the independence of the office.

64. It is important to note that the draft empowers the National Council to expropriate all the assets and liabilities of the existing Law Societies. This is totally unacceptable. The position of the LSSA has throughout been, and is, that, if an acceptable national structure is brought about, the existing Law Societies in terms of their rules will adopt a resolution in general meeting to dissolve and transfer their assets to the national society.

(P) MULTI-DISCIPLINARY PRACTICES

65. It was agreed that this matter be referred to the Law Commission for further referred and investigation. It may be a good idea for the profession to begin to commission research on the issue of limited liability practices and the limited involvement of non-legal practitioners in the ownership of law firms.

(Q) TRANSITIONAL NATIONAL BODY

66. It is common cause that, in view of the complexity of the transitional process to be undertaken in the effective implementation of the Bill, there has to be a transitional national body.

67. The transitional arrangements are set out fully in Chapter 12 of the draft.

68. The composition of the transitional council is substantially in line with the final council. This body also has to deal with the current assets and liabilities of the existing Law Society.

69. Further, it has to deal with the personnel of the existing Law Societies.

(R) GENERAL

70. Subject to resolution on the fundamental issues of a statutory legal practice society with an elected national council, the draft bill, although it has a number of shortcomings, as pointed out hereinbefore, forms a basis upon which the profession can engage the Department of Justice meaningfully.

71. It is quite clear that, from the correspondence received from the Leadership of the Bar, they reject this document in its totality and would want to reopen the debate on the principles, which debate they have previously rejected as well. We should in earnest proceed with these discussions. It is important that the following issues are determined:

    (a) Time frames for these negotiations, lest we, once again, be engaged in endless negotiations.

    (b) The parties must be able to distinguish between:

(i) The contentious issues which may be reserved for a specific committee to deal with;

(ii) The non-contentious issues which must be immediately settled; and

(iii) A drafting committee should therefore be appointed to deal with the contentious issues.

(S) SUBMISSIONS

72. The LSSA has six constituents who are engaged in continuing discussions on the Legal Practice Bill . These submissions donot bar any of the constituencies to make further submissions or the LSSA ,after further consultation, from making supplementary submissions .

73. These nevertheless constitute our submissions to the first working draft bill and our own team will be willing to meet yours to clarify any aspect of our submission. The LSSA, once again, confirm its commitment to working with the DOJ in finalising this matter, not only in the interest of the unity, strength and independence of the profession, but in the public interest and sustenance of constitutional democracy

PREPARED BY
MANAGEMENT COMMITTEE OF LSSA
NOVEMBER 2009
TEL: (021) 366 8800
email: rajdaya@lssa.org.za

Annexure "A"
The National Legal Practice Society

(A) Background

1. The Law Society of South Africa and its constituent members, BLA, NADEL and the Provincial Law Societies, has throughout adhered, and still adheres, to the principle and conviction that the starting point for a unified profession must and can only be a National Legal Practice Society (or Association) of which all legal practitioners, on enrolment as such, become members by statute. The members of that Society, through an appropriate mechanism, elect its Council, which is the National Legal Practice Council. This position should also suite the referral component.

2. The alternative model has been, and is, to have a National Council appointed by some nomination and selection process, with no corporate structure and all practitioners just being left as isolated individuals who may form and join whatever voluntary associations they may wish, or may join nothing if they so wish. These points are argued fully hereinafter.

3. In any comparison of these two models it must become clear that:

   3.1 the statutory society promotes the public interest, while *per contra* the voluntary association model is inimical to the public interest; and

   3.2 the voluntary association model will simply not work for the rest of the legal practice profession but will only lead to fragmentation and the effective collapse of an organised profession.

(B) The Public Interest

4. The legal profession is an indispensable component of the judicial branch of the State and primarily promotes and protects the public interest by:

4.1 protecting and defending the rights of the citizen under the Constitution; and

4.2 curbing any action or tendency on the part of the legislative or executive branches to ignore/evade/subvert/ the Constitution or subject the citizenry to arbitrary or unconstitutional legislative, executive or administrative actions, and

4.3 bringing the cases of infringement of constitutional rights before the courts in order that the courts may grant the appropriate remedy.

5. The legal practitioner (**"LP"**), in fulfilling the above role, does so more effectively and better protects the public interest where she or he, although handling a particular case alone, still does so in the context of membership of a national statutory body from which the practitioner derives the status to act more effectively and with the support of the whole profession and its institutions.

Per contra

The LP who is detached, acting in isolation and not part of a corporate profession (or, at best, only a member of some voluntary association) is diminished in status, less resourced and less well placed to act as a guardian of the rights of the citizen under the Constitution.

6. The national statutory body draws on the skills, talents, expertise and resources of all practitioners which, in the work and activity of that body, inure for the greater benefit of the profession as a whole and of the public.
7. In and through the national statutory body all practitioners who become active in the multitudinous aspects of the service of that body are acting and contributing towards the whole of the profession, and thereby promoting the public good.

8. The LSSA strives to articulate its vision of what a unified legal practice profession – bringing together in one national regulatory and governance structure the different, and presently existing, branches of the profession – can mean and achieve in our constitutional dispensation, and the extent to which it will best promote the public interest and, in particular, the contribution which the

undoubted skills, insights and abilities of the advocate members can make towards enhancing the standards, ethics, conduct and regulation of the whole profession to the public good.

Per contra

In the case of a voluntary association (**"VA"**), however, the work and efforts of the members are primarily directed towards promoting only the particular common interests of the VA and its own members; which may be sectoral and will not be directed primarily towards the wider public interest or the good of the profession as a whole.

9. If there were to be any attempt by the legislative or executive branches to subvert the Constitution, the legal profession is better heard and more effectively protects the public interest where it speaks with one voice through the membership and structures of one body which represents the whole of the LP profession.

Per contra

The National Council, under the voluntary association model, will not be the guardian of the Constitution nor representative of the profession. It will be a mere regulatory body appointed by the Minister on the basis of her or his selected nominees. If the profession is to speak out against constitutional infringements it will be able to do so only through the voices of a possible plethora of VA's, less likely to be heard and representing only the views of their particular members; with no one body left to rise up and speak out in the public interest in the name of the whole LP profession.

10. The work of the courts is enhanced to the public benefit where the Bench is able to work with a single body representing all LPs as officers of the court; undertaking court work in terms of the same ethical rules and standards, and subject to discipline by one common body – which is also the one body to which the judges may refer and speak on all issues relating to standards, practice and the conduct of all LPs who are undertaking court work.

11. Clearly, the courts, which function on the basis of divisions in the case of the High Court or on the basis of regions in the case of the Magistrates' Courts, do

require to have, within their divisions or regions, a single body with which they can deal in relation to the workings of the court or matters pertaining to the conduct or practice of LP's generally; and to be able to know that they are dealing with a body (the regional structure of the national society) which represents all the LP's of the division/region and which can communicate the rulings or requirements of the court to all such LP's.

Per contra

If there are to be a number of VA's, to whom are the courts to refer? Is the functioning of the courts not prejudiced and the public interest thereby compromised if the courts are expected to flounder around trying to deal with possibly a number of VA's, as well as whatever other structures may represent or regulate LP's who do not join VA's?

(C) <u>Fragmentation of the Profession</u>

12. The VA model will bring about the fragmentation of the profession into those who join VA's and those who prefer to join nothing, or who can not afford to pay VA subscriptions in addition to National Council levies.

13. The driving force of the profession is the statutory society of all practitioners in and through which members give of their time, talents and energies voluntarily and without remuneration, except purely nominal honoraria in some instances.

14. The regulation and governance of the profession requires the dedication of literally thousands of practitioners to serve on councils and their committees; to act on disciplinary tribunals dealing with often complex and time-consuming complaints; to lecture at schools for legal practice; to set and mark examination papers; to conduct oral examinations; to participate in mentorship programmes for new or previously disadvantaged practitioners; to serve on specialist committees submitting researched and often lengthy representations to Parliament or Government on policy or on proposed legislation or regulations; to serve as representatives of the profession on numerous bodies; and to undertake a host of other activities that make up the life and work of an independent, self-regulating profession.

15. The motivation and driving force for all of this is that it is our society; of which we are all members; to which we belong; which engenders our sense of commitment as we collectively all take ownership of our profession through our own society.

16. That is the SARS relationship. The taxpayer is certainly subject to SARS; but has no membership of or collegial loyalty or other motivation towards SARS. The objective is to pay only the minimum that the law requires, and to have no further dealings with SARS. That will define the relationship between practitioners and the National Council without the Legal Practice Society.

Annexure "B"
Regional Structures and Councils

To initiate the debate on the role and functions of the Regional Structures and Regional Councils we set out below the relevant provisions of the draft LSSA Bill, which provisions require to be reviewed and updated by the LSSA and be the subject of further discussions with the Department and other roleplayers.

For this purpose purely formal or administrative provisions are excluded from the sections quoted below, e.g. the provision that the funds of a Regional Chapter must be deposited in a bank account and be duly accounted for.

A. Establishment, geographic scope and composition of Regional Chapters

(1) The National Council must establish as many Regional Chapters of the Society as it considers necessary so as to cover the entire Republic and determine the geographic scope of such Regional Chapters.

(2) The National Council may at its discretion dissolve any Regional Chapter, amalgamate Regional Chapters, or amend the geographic scope of the Regional Chapter concerned.

B. Funds of a Regional Chapter

(1) The funds of a Regional Chapter consists of –

(a) annual membership subscription fees as may be determined by the National Council payable by enrolled legal practitioners ordinarily practising within the geographic scope of the Regional Chapter concerned;

(b) annual regional levies payable by enrolled legal practitioners ordinarily practising within the geographic scope of the Regional Chapter concerned as may be determined by the Regional Council; and

c) allocations made to it by the National Council.

(2) ***(Formal provisions regarding bank account etc)***

C. Objectives of Regional Chapters

The object of a Regional Chapter is to give effect to and serve as the operating arm of the Society in the region concerned in the interests of the members of the Society.

D. Establishment and powers of Regional Councils

(1) A Regional Council is hereby established in respect of each Regional Chapter.

(2) A Regional Council may establish Sectoral Chambers in accordance with the Practice and Procedure Code of the National Council and has such other powers as may be delegated to it by the National Council.

(2) The National Council may delegate different powers to different Regional

Councils in terms of section 62(2)(q).

(3) The National Council may at its discretion withdraw whether conditionally or unconditionally, in whole or in part, any power delegated to a Regional Council.

E. Composition of the Regional Councils

(1) Subject to subsection (2), the Regional Council consists of such number of persons as may be determined by the National Council to be elected by the members of the Sectoral Chambers of the Regional Chapter concerned, in accordance with the Code of Practice and Procedure of the National Council.

(2) As regards the persons to be elected

(a) the number of legal practitioners practising with Fidelity Fund certificates as compared with the number of practitioners without Fidelity Fund certificates must reflect the ratio envisaged in section 63(1)(a); ***(2/3 and 1/3)***

(c) regard must be had for the need of the Regional Council representative, including in respect of regional distribution, race and gender.

F. Term of office in Regional Council, vacancies and filling of vacancies
(Formal, administrative provisions)

G. Administration and provision of resources to Regional Council and its sectoral chambers

The National Council may acquire personnel, financial and administrative infra-structural services and resources necessary to enable the Regional

Council and its Sectoral Chambers effectively to perform its functions in terms of this Act.

H. Remuneration and allowances to members of the Regional Council and its Sectoral Chambers

(Formal provisions regarding payment of honoraria and reimbursement of expenses)

I. Indemnification of members of the Regional Council and its Sectoral Chambers

(Formal provisions)

……. (End of Part 3 of Chapter 6 dealing with Regional Chapters and Councils)……

Annexure "C"
Delegation of Disciplinary Powers

(A) Background and General Principle

1. Section 28 of the draft Bill deals with the recognition of Voluntary Associations without giving any indication of what is the purpose or what are the consequences of such recognition.

2. Section 64 of the draft Bill deals with the disciplinary procedures of voluntary associations in what appears to be a narrow context.

3. If those sections imply, or give rise to some expectation, that disciplinary powers and functions of the statutory structure may be delegated to voluntary associations, or certain voluntary associations; or in the event that the debate on "accredited voluntary associations" is reopened, the Law Society of South Africa again wishes to make it clear that as a fundamental principle any delegation of any disciplinary powers to any voluntary association is entirely unacceptable.

4. The public interest is protected where, in the case of any complaints regarding trust monies or the conduct of an LP, there is one national body having regional structures in all the major centres throughout the country to which the citizen can readily and easily resort to have the complaint dealt with by the same procedures and standards.

(B) Shortcomings of Delegation to Voluntary Associations

5. The public interest is prejudiced where, if a complaint is to be made, the citizen first has to find out of which (if any) VA having delegated disciplinary powers the LP in question is a member; where that VA is based, and what its complaints procedure may be – and then have to deal with that VA wherever it

may be – or have to identify, locate and deal with some other structure if the LP turns out not to be a member of such a VA.

6. What if a LP who practises in Cape Town joins the Polokwane VA? Must the member of the public in Cape Town who wishes to lodge a complaint then deal with and work through Polokwane?

7. What if the rules of the Polokwane VA require that the complainant (in regard to a Cape Town member) must appear before their committee in Polokwane in person?

8. What if the member, on learning that a complaint is to be or has been lodged, resigns from the Polokwane VA and joins another VA or joins nothing – who has jurisdiction?

9. The above are merely illustrative. The permutations are almost endless. The rules required to deal with all these situations will need to be comprehensive and extremely detailed.

10. The citizens could be faced with such complexities and be given such a run around that, effectively, they will never be able to pursue a complaint at all; and that is certainly not in the public interest.

11. If there are to be VA's exercising disciplinary functions over their own members, there will always and inevitably be variations and differences of emphasis, even where the different bodies are ostensibly acting under uniform rules and codes of conduct.

12. What thought has been given to the review and/or appeal structures which might have to be set up. Is that not a further duplication of costs?

13. If a VA, in order to maintain itself and derive its income from subscriptions, must attract members and build up its numbers, will it do so by building a reputation of being strict on the disciplinary side or will it be tempted to be a bit more easygoing and not risk losing membership?

14. On the other hand, will a practitioner who wishes to join a VA seek out the one which has a reputation of being strict or will she/he rather join a VA which is seen as a bit more flexible and easygoing?

15. A model which allows for any VA to have any delegated disciplinary powers can only, and certainly will, lead to the erosion of disciplinary standards to the public prejudice.

16. We submit therefore, with respect, that any contemplation of delegatory disciplinary should not be considered.

Annexure "D"
Regulation of Legal Services Reserved Work

1. It is convenient to note here that Sections 25(1)(b), (c) and (d) of the LSSA Bill in relation to company documents, partnership agreements and certain leases of immovable property are only a carry forward from existing and earlier legislation which is now archaic and should be taken as being deleted.

2. The only work that needs to be referred to in a legal practice bill is court work, pleadings and appearances, and the specialised work of notaries public, conveyancers, patent attorneys and trade mark attorneys.

3. The LSSA looks to retain only such work as is at present required to be done by an attorney or an advocate, and does not seek that any further or other work be reserved to LP's.

4. The LSSA again stresses that the object of LPB should be to regulate legal practitioners; not to regulate the provision of legal services.

5. In the view of the LSSA it is premature to endeavour to introduce a definition of "legal services" and then, at one stroke, to impose a blanket provision to the effect that only LP's may render legal services for reward; and that for others to do so is a criminal offence.

6. It is also noted that while previous drafts included a definition of “remuneration” there is no definition of “reward” in the present draft Bill.

7. The definition of legal services in the draft Bill is very widely framed and, as it stands, could well be the source of conflict of interpretation, and of litigation – particularly in regard to what is or is not “… purely incidentally to the provision of other advice or assistance.”

8. There are a host of advice givers whose activities would fall within the definition of legal services for remuneration in terms of the draft Bill.

9. Accountants, labour law consultants, insurance brokers and many others come to mind as falling within the prohibition which the draft Bill endeavours to impose.

10. None of those advice givers have been consulted regarding the proposed proscription of their activities.

11. If, as a matter of public policy, Government decides that legal services for reward do require to be regulated and restricted to only LP’s, that can only be done under specific, separate legislation which must also create a body to administer and enforce such legislation. All of that cannot be tagged on to a LPB and the regulatory responsibility lumbered onto the National Council.

12. The National Council should not be the body to police the provision of legal services for reward or be given the function to identify, interdict or prosecute those who are rendering legal services in contravention of a statute.

13. If the National Council were to be given such a policing function

13.1 significant additional resources and infrastructure would be required, and

13.2 more importantly, it would diminish the status of the National Council as a body whose objective is to promote the public interest by causing it to be seen by the public as a mere self-interest body operating to prohibit the work of others and grab that work exclusively for its own LP members.

14. The prohibition, it is submitted, must be restricted to court work, pleadings and appearances, and the specialised work of notaries public, conveyancers, patent attorneys and trademark attorneys.