



**SUBMISSIONS BY THE LAW SOCIETY OF SOUTH AFRICA
ON THE LEGAL PRACTICE BILL, 2012
TO THE NATIONAL COUNCIL OF PROVINCES**

EXECUTIVE SUMMARY

The Law Society of South Africa (LSSA) brings together its six constituent members – the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces, the Black Lawyers Association and the National Association of Democratic Lawyers – in representing the 22 253 practising attorneys and 5 781 candidate attorneys in South Africa. Conscious of its public obligation, the LSSA constitutes the collective voice of the attorneys' profession.

This submission is the collective position of all its constituent members.

The LSSA has participated in the negotiations in respect of the Legal Practice Bill for the past 13 years and has made contribution to each serious attempt to make this Bill a reality. The LSSA's approach to this matter has been one of constructive engagement. It has embraced the progressive aspects of the Bill, and made its opposition clear on those aspects that it considers to be regressive and neither in the public nor the profession's interest.

As background information, we provide an overview of the attorneys' profession covering the current demographics for practising and candidate attorneys. We also provide historical data starting from first year law students and law graduates – which indicates the candidates which seek to join the profession, to demographics on candidate attorney registrations and attorneys admitted to practise. This is the landscape which the Legal Practice Bill seeks to shape, guide and regulate in the public interest.

In our substantive submissions, among other issues, we deal with

- The fact that the objects of the Legal Practice Council should also strive to protect the interests of the legal profession to promote a profession that serves the public with integrity, the highest standard of service delivery and ethics;
- The imperative that independence of the legal profession be protected at all times by ensuring that the majority of the members of the interim National Forum are legal practitioners;
- The fact that, in opening the practice of law to foreign legal practitioners, the Minister should be cognisant of the saturation of the market in South Africa and the need to protect the interest of the South African practitioner, while at the same time protecting the public;
- The issue of fees against the context of access to justice; the commitment by the attorneys' profession to engage fully in investigations by the South African Law Reform Commission, and that in the interim, the National Forum possesses sufficient expertise and practical experience to design fair, just and equitable fee guidelines.

In general, where reference is made to Ministerial actions after consultation with the Legal Practice Council, we submit that this be replaced with the provision that such decisions be taken by the Minister in consultation with the Council. This gives the Council a greater role in decision making, which should be the case as the profession would be directly affected by such decisions.

In the section dealing with 'technical' provisions, we deal with various clauses that we believe need to be drafted differently to give them proper meaning and effect, or where we believe there have been drafting mistakes.

In conclusion, we express our appreciation to the NCOP for considering the LSSA's submission. In view of its vast expertise as well as its access to information on governance and regulation of the profession, the LSSA offers its support in particular to the National Forum in respect of such expertise and human resources as it may require to facilitate a smooth transition to the new dispensation.

INTRODUCTION

The Law Society of South Africa (LSSA) is the umbrella body for attorneys in the Republic of South Africa. Its six constituent members are the Cape Law Society (CLS), the KwaZulu-Natal Law Society (KZNLS), the Law Society of the Free State (LSFS), the Law Society of the Northern Provinces (LSNP), the Black Lawyers Association (BLA) and the National Association of Democratic Lawyers (NADEL). Conscious of its public obligation, the LSSA constitutes the collective voice of the approximately 22 000 attorneys within the Republic.

The LSSA has brought together all attorneys in a deliberate act of working towards a unified, transformed and accessible legal profession in South Africa. The Legal Practice Bill, therefore, resonates with the LSSA's key objectives. There are nevertheless issues, both of substance and of a technical nature, that the LSSA wishes to bring to the attention of the National Council of Provinces for consideration and intervention. We believe that these aspects have far-reaching implications to the practice of law in the country, hence this further submission.

BACKGROUND

The LSSA has participated in the negotiations in respect of the Legal Practice Bill for the past 13 years and has made substantial contributions to each serious attempt to make this Bill a reality. The LSSA's approach has been one of constructive engagement. It has embraced the progressive aspects of the Bill, while making its opposition clear on those aspects that it considers to be regressive and neither in the public nor the profession's interest.

In its previous submissions to the Portfolio Committee on Justice and Constitutional Development, the LSSA made comments on behalf of its constituents and, where there were points of divergence among them, those were raised independently by such constituent members. The current submission is, however, the collective position of all the LSSA constituent members.

THE NATURE OF THE LEGAL PROFESSION

To put these submissions into perspective, the following information is provided with regard to the progress made in respect of changing demographics of the legal profession and the nature of legal practice in South Africa.

An overview of the attorneys' profession

As background information, we provide an overview of the attorneys' profession starting from first-year law students to demographics on practising attorneys.

As at January 2014, there are 22 253 practising attorneys and 5 781 candidate attorneys.

63% of the practising attorneys are white and 37% black. As regards candidate attorneys, 42% of those currently doing articles of clerkship are white, and 58% black.

It is important to note that, of the 11 153 attorneys' firms in South Africa, 73% of these (8 161) are sole practitioners. 26% of the firms have between 2 and 19 attorneys and only 26 firms (less than 1%) have more than 50 attorneys.

The graphical representation of the current statistics on attorneys in practice can be compared to the historical data to show the changing landscape of the attorneys' profession. The LSSA has made active interventions to accelerate the movement of historically disadvantaged practitioners into the profession through various initiatives, including its nine centres of the School for Legal Practice throughout where some 1 000 candidate attorneys – the majority of whom are historically disadvantaged – receive vocational training. We align ourselves with the transformational objectives of the Legal Practice Bill.

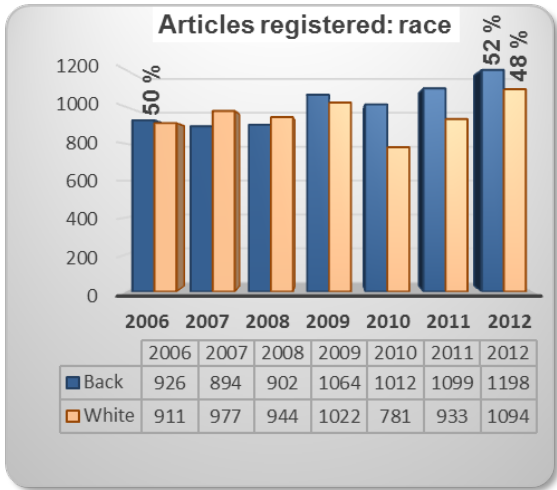
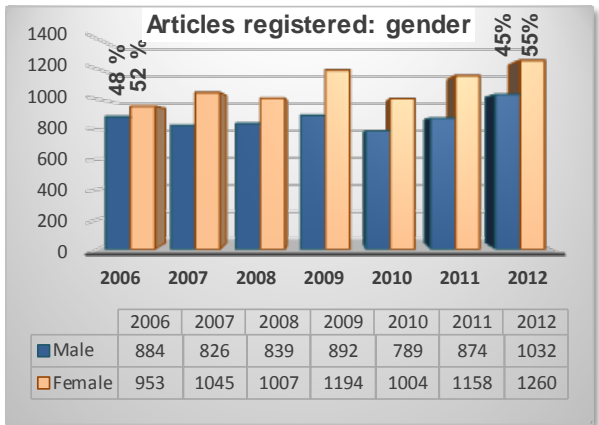
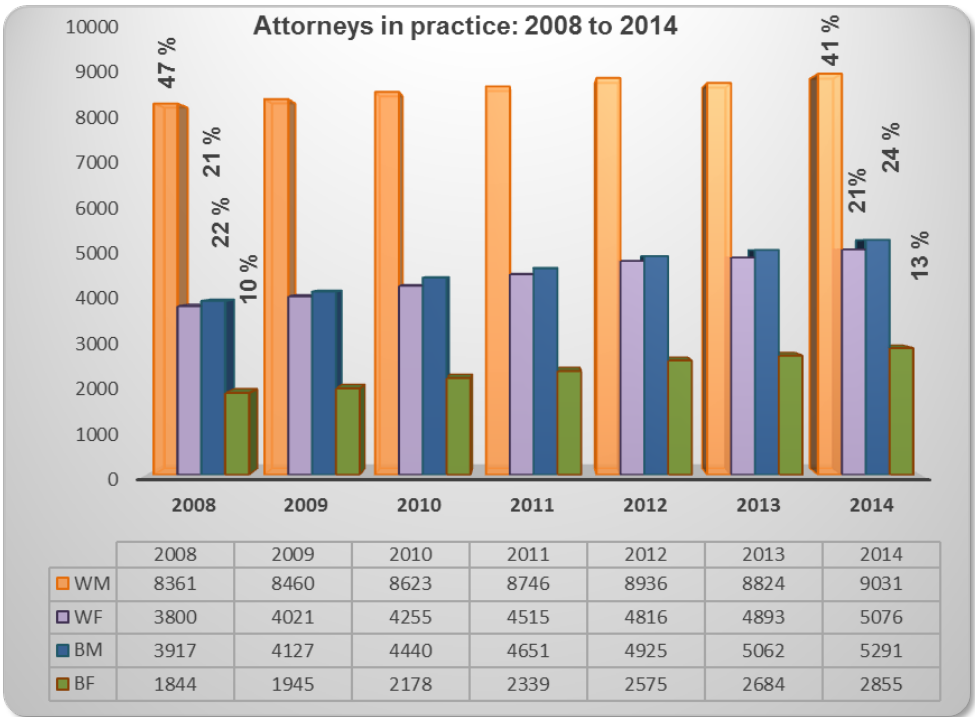
We acknowledge that more is required to ensure that young practitioners are supported and retained in the profession to prosper as attorneys. We have included demographics relating to first-year law students and law graduates, as these are the new candidates moving into the profession.

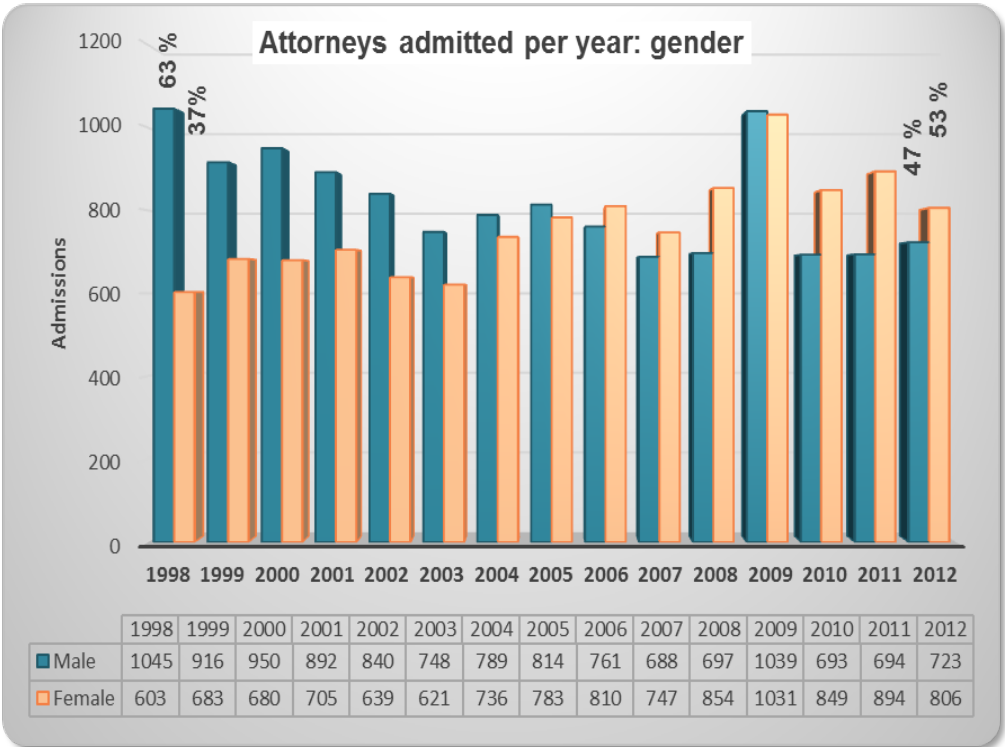
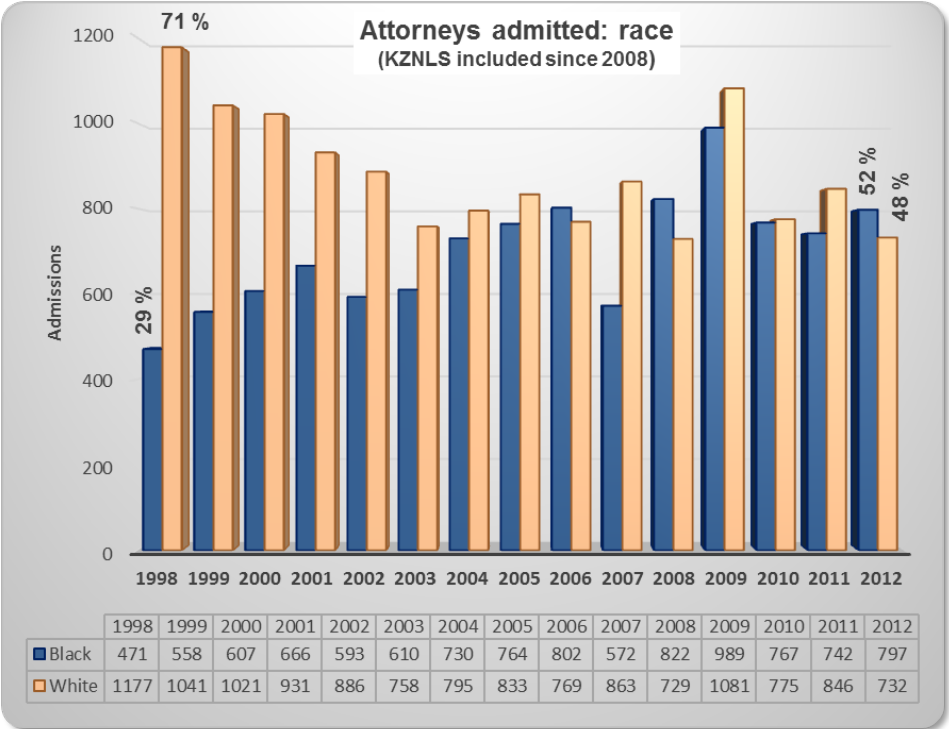
We also provide statistics on candidates registering articles of clerkship, as well as historical data on the numbers of attorneys.

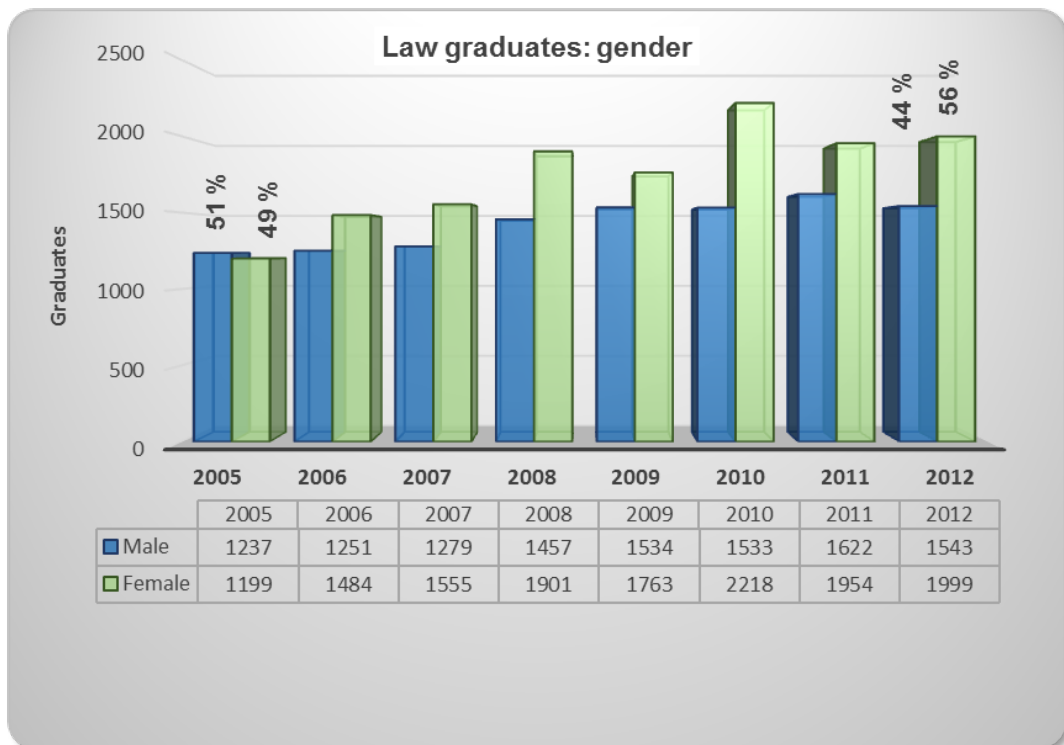
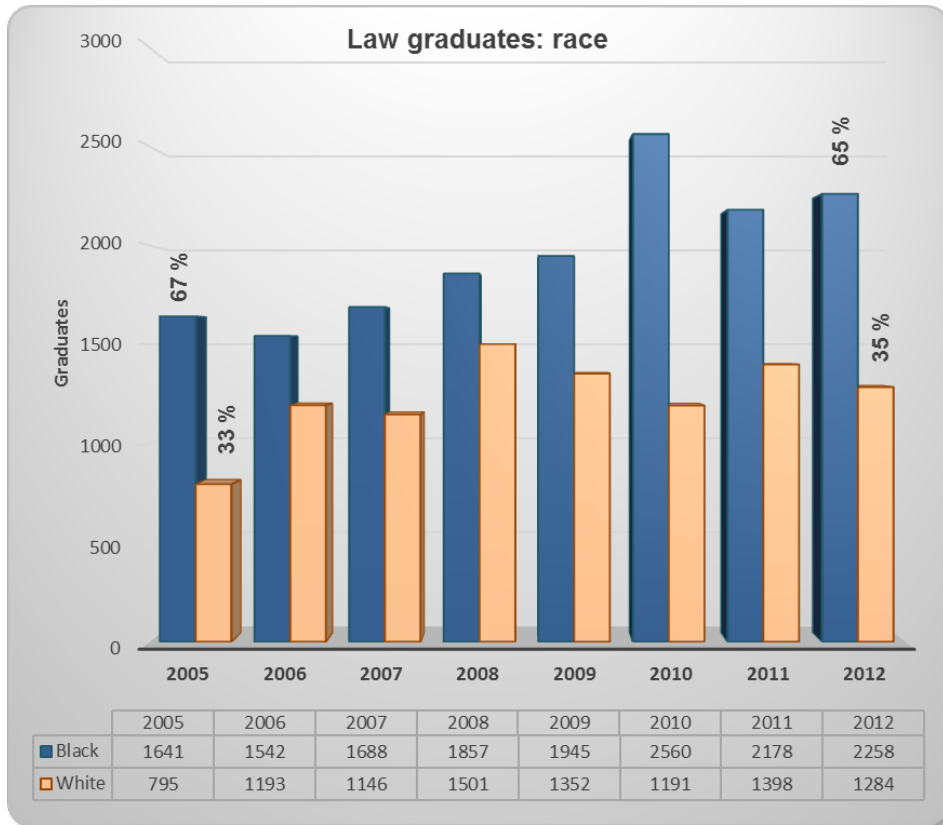
Attorneys and candidate attorneys as at January 2014

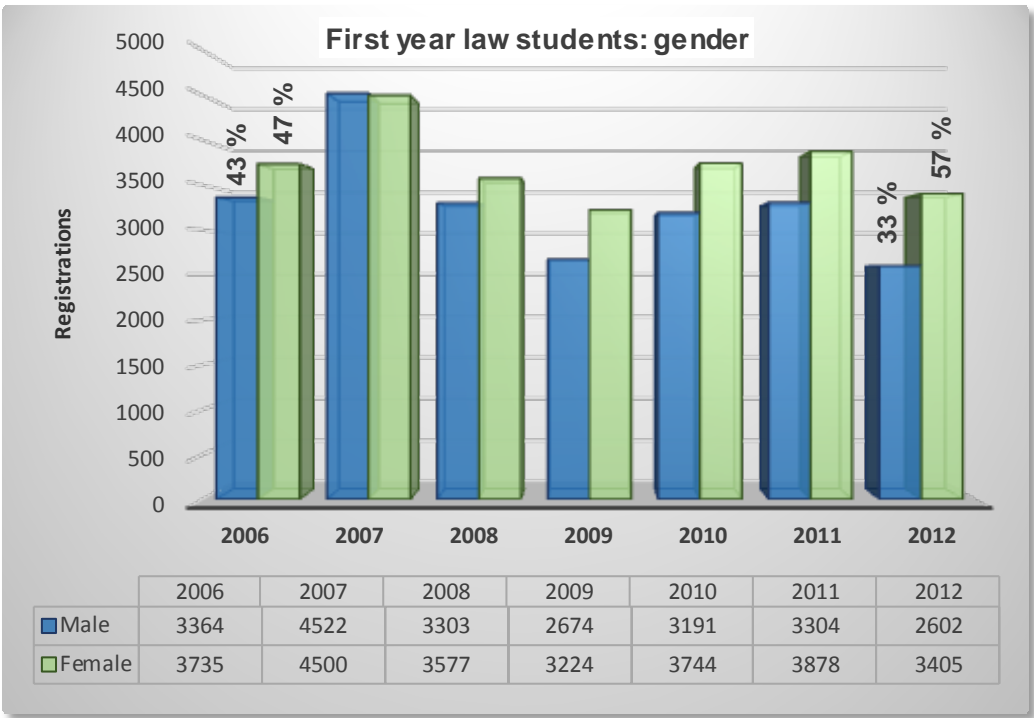
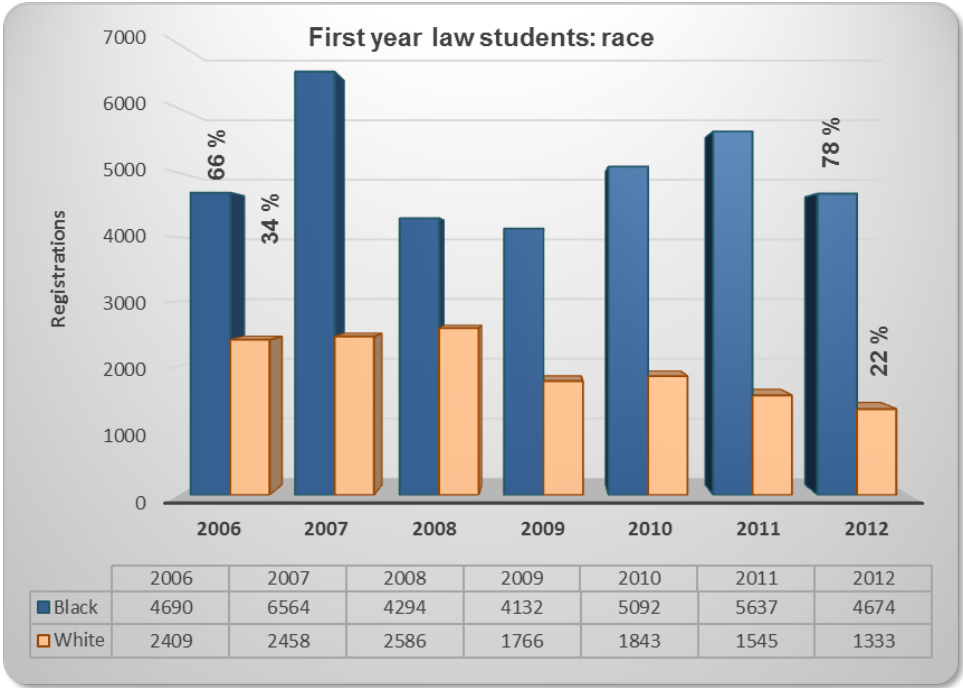
Attorneys as at January 2014		
Total	22 253	
White attorneys	14 107	63%
Black attorneys	8 146	37%
White males	9 031	40%
Black males	5 291	24%
White females	5 076	23%
Black females	2 855	13%

Candidate attorneys as at January 2014		
Total	5 781	
White c/attorneys	2 418	42%
Black c/attorneys	3 363	58%
White males	999	17%
Black males	1 558	27%
White females	1 419	25%
Black females	1 805	31%









SUBMISSIONS

During the public hearing process conducted by the Parliamentary Portfolio Committee on Justice and Constitutional Development, the LSSA made comprehensive written submissions, as well as oral presentations. For purposes of clarity, background and completeness, a copy of these submissions is enclosed herewith. It is, therefore, not our intention to repeat these comments, a fair number of which had been adopted in the Bill.

Over and above these submissions, the LSSA has encouraged its constituents and attorneys to make direct submission to the Portfolio Committee, and even at this stage, attorneys have been encouraged to make further submissions directly to the National Council of Provinces. Literature on the Bill is available on the LSSA's website (www.LSSA.org.za).

In these submissions, the issues are categorised into those of a substantive nature and those of a technical nature. The LSSA submits that the latter can be dealt with by drafting the sections differently to give them proper meaning and effect. These will not change the content and meaning of the provision, but its form.

For ease of reference, we have adopted the same numbering as in the Bill.

1. SUBSTANTIVE ISSUES

1.1 Section 5: Objects of the Bill

Inasmuch as it is a stated object of the Bill that it seeks to promote the public interest, we submit that the Bill must also promote the interest of the profession. The interest of the public is integral to that of the profession and *vice versa*. The promotion of the interest of the legal profession will promote a profession that has integrity, subscribing to the highest standard of service delivery and ethics. All of these are not only beneficial to the legal profession, but will promote the public interest.

1.2 Section 6(5)(i): Multidisciplinary practices (MDPs)

We submit that the Minister's decision must be made in consultation with the Legal Practice Council (LPC) and must give regard to the views of the Competition Commission and the professional bodies of other professions, if the MDP is to involve another profession.

1.3 Section 14(4) to (7): Interim Council

This provision has caused great anxiety to the legal profession. Although it has since been scaled down in relation to the role of the Minister, it is important that the Interim Council, which will be appointed by the Minister, has the following features:

- the majority of those appointed should be legal practitioners; and
- the time span of the Interim Council should be limited.

The importance of these features is that, even if this is an interim arrangement, the principle of the independence of the legal profession must be maintained at all times.

1.4 Section 24(3): Admission and enrolment of foreign legal practitioners

In making this determination, the Minister of Justice and Constitutional Development, in consultation with the Legal Practice Council, must take the following matters into account:

- the reciprocity between South Africa and the respective country;
- the over-saturation of the market in South Africa and the need to protect the interest of South African practitioners; and
- the need to protect the interest of the public, for example in cases of theft of trust funds.

The Minister's determination should also be done in consultation with the LPC, rather than after consultation.

Furthermore, the regulations should be published in the *Government Gazette*.

1.5 Section 35: Fees

The issue of fees must be understood in the context of access to justice. It is important that, whatever is done in this respect must also assist in creating certainty in the minds of the public and to build public confidence in the profession.

There are three phases that the Bill seeks to address:

(a) The transitional phase:

The LSSA believes that the profession, in the form of the National Forum, possesses sufficient expertise and practical experience to be able to create and design fair, just and equitable guidelines based on the principles set out in Section 35(2) of the Bill. The role of the Rules Board must not extend to determining non-litigious guidelines.

(b) The investigative phase:

The LSSA shall co-operate fully with the South African Law Reform Commission (SALRC) in its investigations into finding the best model to determine fee guidelines. To this extent, the LSSA will provide valuable industry experience and research work by its various committees dealing with this subject.

(c) The post-transitional phase:

Although the LSSA's preferred view is that the LPC must determine the fees and assess the reasonableness of fees in the case of a complaint by a client, it will be guided by the findings of the SALRC.

It is important that the application of this section be done in a manner that is clear and unambiguous.

Although we fully support the concept 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, in this regard we wish to point out some anomalies that may be impractical in practice:

- S35 (3) – Variation from prescribed fees: the provision that only the client can request the variation on his/her own initiative is inadequate. The practitioner cannot offer to charge a lower fee or *pro bono*. The phrase “on his/her own initiative” should be deleted.
- S35 (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.

- S35 (8) – Verbal explanation of every aspect of the cost estimate notice: This cannot be a requirement in all cases. Clients should be allowed to waive this requirement in writing.

1.6 Section 32(4): Conversion of enrolment

In order to protect members of the public, there must be a reasonable notice / display in the office of the legal practitioner concerned to identify himself or herself as a legal practitioner with or without a Fidelity Fund certificate. This will avoid confusion. It is important for the client to know whether or not the practitioner concerned has a Fidelity Fund certificate or not.

1.7 Sections 47, 49 and 50: The Ombud

The Acting Ombud must be a former judge and possess the same qualifications and competencies as the Ombud, as he or she will be exercising the same powers as the Ombud.

1.8 Section 55: Liability of the Legal Practitioners Fidelity Fund

The Fund should also reimburse persons who suffer pecuniary loss as a result of theft should the theft be committed by an attorney or person employed by that attorney, who acted as estate agent, if the work is performed in the course of his / her practice and in the name of his/her practice as an attorney.

This is important in order to protect the public, particularly in the rural areas, where attorneys often perform estate agency work in the course of their practices.

The Estate Agency Affairs Act, 1976, exempts an attorney from the definition of "estate agent" in respect of his activities as estate agent if the work is done in the name of and from the premises of his / her practice. Thus, the public will not be covered by the Estate Agency Affairs Act in these circumstances.

1.9 Section 60: Tax and insurance laws

We submit that, as a body created by Statute to protect the interest of the public, it is imperative that the Legal Practice Council be exempt from the provisions of any law relating to the payment of income tax or any other tax or levy by the State. This will also align the position of the LPC regarding exemption with the provisions of Section 60 in respect of the Legal Practitioners Fidelity Fund.

1.10 Section 63(1)(e): Power of inspection of the Board of Control of the Fund

Inspections by the Board of the Fund should be done in consultation with the Legal Practice Council to prevent unnecessary duplication of costs.

1.11 Section 64(2)(e): Disqualification of members of the Board of Control of the Fund

Section 64(2)(e) provides that a member of the Council or any of its committees may not be a member of the Board. There is no rational basis to exclude committee members. The LSSA submits that a committee member should be allowed to be a member of the Board of the Fund.

1.12 Section 40(3): Sanctions by disciplinary committee

Temporary suspension from practice, withdrawal of a Fidelity Fund certificate or cancellation / suspension of vocational training are drastic steps. These should not fall in the power of the disciplinary committee, but should be reserved to the Legal Practice Council.

1.13 Section 79(1): Actions against the Fund

This provision has caused untold difficulties to those who are victims of theft. In practical terms the money – invariably the last savings of a client – is stolen by an attorney, in many instances leaving the client almost bankrupt. The Fund will not assist the client because it requires that the client must first claim against the attorney and only if he / she can prove that the attorney cannot pay, then the Fund will step in.

Many clients are in no position to do this and no help is received from the Fund. This provision is outdated, ill-informed and inconsistent with the Fund's obligations. The Fund should, where circumstances permit, take over the claim from the client and stand in the position of the client.

It is, therefore, submitted that provision should be made that the Fund may waive this requirement on good cause shown, failing which the entire provision is about the Fund's preservation rather than protection of members of the public.

1.14 Section 100: Chairperson and Deputy Chairperson of the National Forum

The Chairperson and Deputy Chairperson of the National Forum should be legal practitioners. Included in the functions of the National Forum are aspects that have a particular reference to the practical aspects of legal

practice, such as the examination and assessment of practitioners, and the procedure for complaints. The Chairperson and Deputy Chairperson will be required to guide the National Forum members and the committees.

1.15 General: Consultation

There is reference throughout the Bill to ministerial action after consultation with the Legal Practice Council. An important example is Section 94, where the Minister has the power to make regulations and rules of great consequence to the profession and the public. These provisions leave the entire decision exclusively with the Minister. The LSSA submits that, wherever these provisions appear, they be replaced with a provision that such actions / decisions should be taken in consultation with the Legal Practice Council or the National Forum, as the case may be. These sections include, but are not limited to Section 5(e) (determining conditions relating to legal education); Section 29(1) (requirements for community service); Section 100(1) and (6) (designation of chairperson and deputy chairperson) and Section 109(1)(b) (making of regulations).

A role in the decision making process will encourage greater commitment on the part of the profession. It is in the interest of the public that misunderstandings between the Minister and the profession should be minimised.

Similarly, we suggest that, wherever the Board is empowered to take actions that have a direct impact on legal practitioners, these actions be taken *in* consultation with the LPC. Examples include Section 22(1)(b) dealing with the annual appropriation to the LPC; Section 87(2) and (5) relating to the inspection of accounting records of practitioners and Section 89, which gives the Board the power to approach the court to prohibit a practitioner from operating a trust account and appoint a *curator bonis*.

2. TECHNICAL ISSUES

2.1 Section 6(1)(b)(iv): Payment of expenses

Section 6(2)(e) provides that the Council may pay an honorarium or allowance to any person in connection with an act performed at the request or direction of the Council. Although Section 6(1)(b)(iv) makes provision for payment of out of pocket expenses to Council members, there is no provision for payment of an honorarium or allowance to them. This appears to be an oversight and we suggest that Section 6(1)(b)(iv) be aligned with Section 6(2)(e).

2.2 Section 6(4)(b): Costs of Fidelity Fund certificates

There appears to be a conflict between Section 6(4)(b), which provides for the Council to *inter alia* determine the fees for Fidelity Fund certificates and Section 63(1)(f)(i), which provides for the Fidelity Fund Board to make rules relating to the costs of Fidelity Fund certificates. It is suggested that the Council should determine the costs of Fidelity Fund certificates in consultation with the Board.

2.3 Section 6(5)(a): Visits to educational institution

The section does not state the purpose of the visits and we suggest that it be amplified to specify that visits could be conducted to *inter alia* evaluate training and the LLB curriculum.

2.4 Section 7(1)(b): Composition of Council

The LSSA does not see the need for two law teachers to serve on the Council and believes that one is sufficient. It is accordingly recommended that the section be amended to refer to "one teacher of law or legal academic designated by teachers of law at South African universities" (see Section 178(1)(g) of the Constitution).

2.5 Section 17(1): Decisions of Council

It is suggested that this section be amended to read: "A majority of the members present at a meeting of the Council constitutes a decision of the Council." This amendment will also be in alignment with Section 20(9)(d).

2.6 Section 20(2): Composition of executive committee

We submit that the Council will be in the best position to determine the size and composition of the executive committee, taking into account factors such as workload and geographical considerations.

2.7 Section 23: Sub-delegation of power to committees

The section should provide specifically that the Council may permit a person or committee to whom or to which a power has been delegated to sub-delegate that power in appropriate circumstances.

2.8 Section 25(3) and (4): Recognition of existing certificates of attorneys to appear in High Court

Specific provision should be made for the recognition of existing certificates to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court.

2.9 Section 26(1)(b): Law degree from foreign country

In terms of this section a law degree obtained in a foreign country qualifies a person to be admitted as a legal practitioner, if it is equivalent to an LLB degree and recognized by the SA Qualifications Authority (SAQA). We believe that a South African university should certify the law degree as equivalent to the LLB degree, in consultation with SAQA. The syllabus of instruction and the standard of training thereof fall peculiarly within the knowledge and experience of universities.

2.10 Section 29(2)(f): Community service

The discretion of the Minister to approve as community service *any other service* which the candidate legal practitioner or legal practitioner *may want to perform* is very wide. We suggest that such discretion be exercised in consultation with the Council.

2.10 Section 33: Authority to render legal services

This section does not require a legal practitioner to be practicing in order for him / her to be entitled to render legal services for reward. It is suggested that this provision be clarified to include the word "practicing", which will mean that he / she must have a Fidelity Fund certificate.

2.11 Section 36(4): Publication of code of conduct

This section is unclear and should be clarified.

2.12 Section 37: Investigating committees

The Bill provides for the establishment of investigating committees. Because of the adversarial nature of legal practice, there tend to be many complaints against attorneys, some of them of a trivial nature and many of no substance at all. To require an investigation committee to investigate every such complaint will seriously impede the disciplinary process. We recommend that the Council be entitled to delegate the power to investigate minor complaints to designated legal officials.

2.13 Section 39(3)(b): Disciplinary hearings

We submit that the signing of a subpoena should be an administrative function. As it is currently framed, the provision is impractical and can lead to delays, as the chairperson or members of the disciplinary committee are not always readily available. The chairperson should be able to delegate the signing of the subpoena.

2.14 Section 39(9): Setting aside conviction

Reference to the “superior court” in Section 39(9) should be reference to the “High Court” to correspond with the definitions.

2.15 Section 40(3)(a)(i): Compensation

It is impractical that the order to pay compensation must always be subject to confirmation. This will have drastic consequences on the operating cost of the Council. People must be able to approach the Council and receive speedy relief without having to go to court. However, in some cases it may be necessary to resort to the courts. We suggest that the section be amended to provide for confirmation by the court only in circumstances where the Council may deem it necessary.

An order for compensation made by the disciplinary committee must always be subject to ratification by the Council.

2.16 Sections 56(1) and (9): Limitation of liability: Family member

This section is vague and it is suggested that “member of the household” be defined.

2.17 Section 62: Composition of the Board of the Fidelity Fund

This provision is unclear and we suggest that the section be amended to read: “5 legal practitioners ... elected by the Council in accordance with the procedure determined in the rules, and in consultation with the Board”.

2.18 Section 63(1)(f): Power of Board to make rules

Regarding the power to determine costs of Fidelity Fund certificates, see paragraph 2.2 above.

2.19 Section 63(1)(g): Power to make arrangements with the banks

The section makes provision for the Board of Control to make arrangements with any bank for the keeping of trust accounts, which include *the payment of interest to the Fund on the whole or in part*. This relate to interest accrued to the Fund in terms of Section 86(2) and (3) as well as interest belonging to the client in terms of Section 86(4) (a separate trust savings or other interest bearing account opened on the instruction of the client). Although Section 86(5)(b) provides for 5% of the interest on accounts opened in terms of Section 86(4) to accrue to the Fund, we are of the view that a clear distinction should be made between the different categories of investments. It should be clearly stated that the portion that may be paid over to the Fund in the second category investments is limited to 5%.

Although we support the Fund's arrangements with banks to get the best possible interest income, we are concerned that this provision limits a client's right to instruct the practitioner to negotiate with a bank of his/her choice.

2.20 Section 93: Offences and penalties

We are of the opinion that the option of imprisonment is unnecessarily harsh for some administrative contraventions. For example, although it is understandable that the Ombud must have teeth, the option of imprisonment for failing to appear or producing documents appears to be harsh (Section 93(5)). The same applies to the possibility of two years' imprisonment for failing to advise the client *prior to receipt of the money* of the Fund's limitation of liability (Section 56(7)). We suggest that the list of penalties be reconsidered.

2.21 Section 98(2)(b): Secondment

The resources of the law societies are already stretched and staff seconded must be for the cost the Department of Justice.

2.22 Section 103(1)(d): Removal from office

The Bill provides that the National Forum may remove a member at the request of the body which designated or elected him / her *on good cause shown and upon confirmation by the High Court*. It is impractical to require High Court confirmation for the removal of a member of the National Forum.

2.23 Section 112: Transitional provisions regarding qualifications

Any person upon whom the B Proc degree was conferred and who had registered for the degree before 1 January 1999, is regarded as having the required academic qualification. This date should be changed to coincide with the phasing out of the B.Proc degree.

2.24 Section 114(2): Roll of legal practitioners

It is unclear why provision is made for the registrars as well as the law societies to furnish the Council with the roll of attorneys, conveyancers and notaries, while, in the case of advocates, only the Director-General is tasked with this. The registrars also keep the roll of advocates, and it is suggested that Section 114(2)(a) be changed to include advocates.

3. CONCLUSION

The LSSA wishes to express its appreciation to the NCOP for considering its submission. In view of its vast expertise, as well as its access to information on governance and regulation of the profession, the LSSA offers its support, in particular to the National Forum, in respect of such expertise and human resources as it may require to facilitate a smooth transition to the new dispensation.

3 February 2014