The Law Society of South Africa

The Committee Secretary
Portfolio Committee: Justice and Constitutional Development
Cape Town

Attention: [●]

Via e-mail to [●]

Date [●]

Dear Sir

Legal Practice Bill`

1. The Law Society of South Africa (LSSA) welcomes the opportunity to provide comments on the Legal Practice Bill.

2. **Introduction**

2.1 We write in our capacities as the joint co-chairpersons of the LSSA. The LSSA is a voluntary association the members of which are the four provincial law societies, the Black Lawyers Association (BLA) and the National Association of Democratic Lawyers (Nadel). The LSSA represents the practising attorneys profession in South Africa, which comprises approximately 21 000 attorneys and approximately 5 000 candidate attorneys.

2.2 We have had a number of discussions over the past few months with representatives of the General Council of the Bar (GCB) to seek to resolve issues of disagreement. Except where indicated to the contrary the GCB is in agreement with the issues raised in this letter, which represents the comments of both the LSSA and the GCB on the Bill.

3. **Positive developments since the previous Bill**

We regard as positive the fact that the following changes have been made to the previous version of the Bill:

3.1 there will no longer be any ministerial appointment to the Legal Practice Council (LPC or the Council) in respect of the legal practitioners' component, and the profession will now appoint its own representatives;

3.2 the provision relating to the accreditation of voluntary associations having regulatory functions has been deleted;

3.3 the Bill does not provide for the regulation of paralegals;

3.4 the definitions of "conveyancer" and "notary" make it clear that these practitioners will be practising attorneys;

3.5 provision is made for easy conversion by a legal practitioner from registration as an attorney to that of an advocate, and *vice versa;*

3.6 codes of conduct and rules will be drafted;

3.7 provision is made for the investment of trust monies for the benefit of clients (but in this connection see our comments under paragraph 8.40 below);

3.8 the majority of the board of control of the Attorneys Fidelity Fund (the Fund) will be nominated by the Council;

3.9 the investigation of complaints against legal practitioners will be conducted by regional councils in terms of powers delegated to them by the Council;

3.10 the law societies of Bophuthatswana and Venda will be dissolved;

3.11 provision is made for competency-based assessment and mandatory continuing professional development;

3.12 the Council will play a role in relation to the requirements for academic qualifications of legal practitioners.

These are the principal positive developments that we have identified, but there are concerns in relation to the details of some of these matters which we will address elsewhere in this document.

4. Independence of the profession

There are a number of provisions in the Bill which affect the independence of the profession. They are the following:

4.1 **section 7: composition of the Council**

(Note: although it is customary, when referring to parliamentary Bills, to refer to clauses of the Bill, we propose to refer to the clauses as sections as that is consistent with the text of the Bill).

4.1.1 The council of the LSSA suggests that only two persons be appointed by the Minister, of whom one should be appointed by the Minister after consultation with the National Consumer Commissioner. The Council is aware, however, that there are differing views within the legal profession on this issue - for example:

- the statutory component of the Cape Law Society believes that there should be no members of the Council appointed by the Minister, a view which, we understand, is shared by the GCB and by the statutory components of other Law Societies;
- the BLA considers that the Minister should be entitled to appoint three members of the Council.

One or more of these bodies may make separate representations to you on this issue.

In respect of the members of Council who are elected by legal practitioners, we propose that there be a common register of all legal practitioners constituting a single voters' roll, but that the voting procedure be established in such a way as to ensure that the prescribed number of attorneys and advocates are elected. However, for practical reasons voting for membership of the first Council, and the first regional councils, would of necessity require there to be separate ballots by attorneys and advocates.

4.1.2 Section 7(1)(b) provides for the appointment of "*one teacher of law or legal academic nominated by law teachers, legal academics or organisations representing law teachers or legal* academics". However, there is no clarity as to exactly who may nominate the individual. We suggest that it be the body known as the South African Law Deans Association.

4.2 **section 14: Minister's power to dissolve the Council**

The power given to the Minister to dissolve the Council is inconsistent with the independence of the profession and with the implied provision that the Council has perpetual succession. Section 14 should be deleted in its entirety.

4.3 **Section 17: decisions of Council**

The GCB, in its discussions with the LSSA, has indicated that it requires that the core values of the advocates' profession be entrenched. The effect will be that the elected representatives of the advocates' profession will have a veto right on any issues which affect the advocates' profession peculiarly as regards its core values. Those core values are set out in attachment 1 to this letter, and the effect of what the GCB proposes is that any decision from the Council which affects these core values will require the positive vote of the majority of the advocates' representatives on the Council. The LSSA supports this proposal.

4.4 **Section 23: jurisdiction of regional councils**

4.4.1 We agree that regional councils should be established and that they should operate under powers delegated to them by the Council. However, the regulatory functions relative to the attorneys' profession and the advocates' profession are significantly different and we believe that, at regional level, there need to be separate regulatory bodies for each profession. Moreover, the geographic spread of advocates practising in chambers is such that effective regulation can take place only if there are regional councils where there is a concentration of practitioners.

We accordingly propose that each regional council should comprise separate chambers for attorneys and advocates, each operating under delegated powers, and each chamber having the power to sub-delegate its powers to committees established where there is a concentration of legal practitioners.

The consequence of this structure is that there might be an advocate's chamber and an attorney's chamber at every centre where a regional council has been established, but only a committee of an advocate's chamber where there is an established bar. Because of the much greater workload involved in the regulation of attorneys' practices it will not be

economically feasible to establish regional councils, or even a branch, in all larger centres of the country.

4.4.2 Section 23(2) provides that the areas of jurisdiction of regional councils must be prescribed by the Minister after consultation with the Council. In the view of the LSSA the Council is in the best position to determine the areas of jurisdiction of the regional councils, since it has first-hand knowledge of the needs for legal services in regions, and it is proposed that the Council should determine the jurisdiction or, alternatively, that the Minister must prescribe those areas in consultation with the Council.

4.4.3 **Section 23(4): election of regional councils**

We support the principle that regional councils be elected, as this will promote and encourage regional involvement by legal practitioners.

4.5 **section 24(3)(a) and (b): Minister's powers to make regulations in respect of foreign legal practitioners**

4.5.1 Provision should be made for a panel of experts to determine, in conjunction with the Council, the quality of foreign qualifications, training and experience.

4.5.2 Any action taken by the Minister in terms of section 24(3) should be taken only in consultation with the Council. There are far-reaching implications arising from the exercise of the Minister of his powers under this section which affect the public interest and the Council needs to be involved in the decision.

4.6 **section 24(3)(c): Minister's powers to permit a person or category of persons to practise**

We do not know the reason for the inclusion of this section but it is not supported. It may open the way for persons to gain rights of practice without having to comply with normal admission criteria and procedures. This is not in the public interest and the section should be deleted.

4.7 **section 35: fee structures**

4.7.1 We seek clarity on what is intended by the reference to "*fee structures*", which is unusual phraseology. The same phrase appears in sections 94(1)(i) and 97(1)(a)(vi).

4.7.2 In relation to the regulation of fees we point out that in respect of litigation matters fees are prescribed in terms of the magistrate's court rules and the High Court rules. These fees are determined by the Rules Board for Courts of Law and are promulgated by the Minister. A dissatisfied client is entitled to have these fees taxed by the taxing master of the court.

4.7.3 In respect of non-litigious matters the existing councils have the power to assess fees in terms of the rules of the law societies, and that power should be carried forward into the rules of the Council. A client who is dissatisfied with the decision of an assessment committee will have recourse to the Ombud.

4.7.4 Any regulations regarding fees should be made by the Council, approved by the Chief Justice and published in the Government Gazette. The Minister should not be involved in the process, which is an unwarranted interference in the fee-setting procedure.

4.7.5 While the LSSA shares the Minister's concerns regarding high legal fees, every legal practitioner has the constitutional right of freedom of economic activity. To the extent that access to legal services is impeded, we deal in paragraph 6 with the steps currently taken by the attorneys profession to promote access to justice by persons who cannot otherwise afford legal services.

4.8 **section 48: appointment of Legal Services Ombud**

The independence of the Ombud is compromised by the fact that he or she is appointed by the President. It is in the public interest that the Ombud be independent and be seen to be independent, and the LSSA recommends that the Ombud be appointed by the Chief Justice.

4.9 **Minister's power to make regulations in general**

Wherever the Minister is given the power to make regulations it should be done in consultation with the Council. The LSSA recommends that there to be a blanket provision to this effect, with an exception being made in those circumstances where it is appropriate for the Minister to act after consultation with the Council, as indicated in this letter.

4.10 **section 45(2): application to High Court for relief**

This section gives (amongst others) a complainant in relation to the conduct of a legal practitioner the right to apply to the High Court for relief. The section should provide that an application to court under this section can be made only after the disciplinary processes of the Council have been exhausted. The Council as regulator has the right and duty to make such an application and it is only if the Council fails to do so that a complainant should be entitled to make an application.

5. **Representative body**

We are of the opinion that one of the objects of the Council, as set out in section 5, should be to promote the interests of the legal profession. Consideration of the interests of the profession already appears in section 23(l) dealing with regional councils, and we think that it is important for the cohesion of the profession that its members believe that their interests are taken into account. It is manifestly in the public interest and in the interests of the administration of justice that there should be a strong, cohesive and independent legal profession.

6. **Access to justice**

The Bill rightly places emphasis on improving access to justice by the citizens of this country. This is an ideal to which the attorneys' profession strives, and the following should be taken into consideration when reviewing whether the objectives of the Bill are being or will be achieved:

6.1 the attorneys' profession has introduced a compulsory *pro bono* scheme, which requires approximately 21 000 attorneys to render 24 hours of *pro bono* services per year each. This is over and above legal services provided voluntarily by attorneys, free of charge or at low rates, to persons who would not otherwise be

able to afford them. Many large law firms have established dedicated *pro bono* and public interest law departments to provide *pro bono* services;

6.2 the attorneys' profession is in the process of establishing a community service forum, in conjunction with other stakeholders; a conference on community service is being facilitated by the profession;

6.3 there are other initiatives established by the profession to promote access to justice, including the first interview scheme, the application of contingency fees and the Wills Week;

6.4 through the medium of the Attorneys Fidelity Fund (the Fund) the attorneys profession provides funding for university law clinics;

6.5 fees charged in litigation matters are subject to oversight by the taxing masters of the courts, and in non-litigious matters by fee assessment committees of the law societies;

6.6 although access to justice for everyone is an ideal to which every society should aspire, experience throughout the world has shown that it is an ideal which is impossible to achieve. While Legal Aid South Africa is able to provide legal services of a high standard to a small segment of the population there will inevitably be a substantial number of people in need of legal services who do not qualify for legal aid.

7. Transitional provisions

7.1 Transitional Council

7.1.1 In principle we do not believe that it is necessary that a transitional council be appointed to implement the transition from the current regulatory regime to the new regulatory regime. In our view it is preferable that the coming into effect of the Bill, when passed, be deferred for a period of, say, 18 months, during which period the matters dealt with in section 97 can be determined by the Department of Justice and Constitution Development in conjunction with the LSSA and the GCB.

7.1.2 If, despite these representations, it is decided that a transitional council is to be established, then the further matters dealt with in this paragraph 7 need to be taken into account.

7.2 **section 97: terms of reference of the transitional council**

7.2.1 Having regard to the LSSA's views on regional councils, once the regional councils have been established questions relating to their areas of jurisdiction and their powers and functions should be left to the Council.

7.2.2 The reference to recommendations on fee structures is unclear - see our comments in paragraph 4.7.1 above,

7.2.3 Section 97(2) should define more clearly what is meant by "*the attorneys' and advocates' professions*". The section should refer specifically to the four law societies and to the LSSA, but there needs to be clarity on what structures represent the advocates' profession, all of which, we understand, are voluntary associations.

7.2.4 In relation to the acquisition of assets of the existing structures we point out that it is not permissible to take over the assets of any person or entity without their agreement, and no entity can be forced to enter into negotiations against its will.

7.3 **section 98(2)(b): staff of transitional council**

Section 98(2)(b) provides for the secondment of staff from existing structures within the legal profession. The resources of the law societies are severely stretched and the LSSA proposes that whatever additional staff are required are employed at the cost of the department in terms of section 107(2)(a).

7.4 **transitional issues: general**

There should be a general provision that, subject to the provisions of the Bill, on and after the commencement date of the Bill anything which was done under a provision of a law repealed by the Bill and which could be done under a corresponding provision of the Bill is deemed to have been done under that corresponding provision.

8. Other issues

8.1 Preamble to the Bill

The reference to removal of barriers for entry into the legal profession should refer to the removal of any *unnecessary* barriers. There must of necessity be barriers for entry into a profession.

8.2 Definitions: "advocate", "attorney" and "conveyancer"

Not every attorney requires a fidelity fund certificate; it is only attorneys who practise in partnership or for their own account or as members of professional companies who require such certificates, and professional assistants, associates and consultants do not require certificates. We suggest that the definitions be amended to read as follows:

"'advocate' means a legal practitioner who was duly admitted and enrolled as an advocate in terms of the Admission of Advocates Act, 1964, or who is admitted, enrolled and registered as such under this Act".

"*'attorney'" means a legal practitioner who was duly admitted and enrolled as an attorney in terms of the Attorneys Act, 1979, or who is admitted, enrolled and registered as such under this Act".*

"*Conveyancer"* is defined as included a person referred to in the definition of "conveyancer" in the Deeds Registries Act, 1937. It is undesirable that there be a cross reference to other Acts, and the definition currently in the Deeds Registries Act should be incorporated into the Bill. The regulation of conveyancers should be governed by the Bill and not by the provisions of any other Act. (There should be a corresponding amendment of the Deeds Registries Act to bring it into conformity with the Bill).

8.3 section 6(1)(s): payment of expenses

The subsection provides only for the payment of out-of-pocket expenses for Council members. It should provide also for the payment of honoraria, as is currently the position: compare section 6(2)(e).

8.4 **section 6(5)(a): visits to educational institutions**

The subsection authorises the Council to conduct visits to educational institutions. The purpose of the visits is not stated. We recommend that the section be amended to provide that the Council may conduct visits to evaluate the training or the curriculum offered by the institution concerned.

8.5 **section 6(5)(h): report to Minister**

This section provides that the Council must report annually to the Minister on the number of new law graduates registered with the Council. Not all law graduates are registered with the Council: it is only those law graduates who are registered as candidate attorneys or pupils who are required to register. The Council is not able to comply with this requirement.

8.6 **section 6(5)(i): multi-disciplinary legal practices**

Any decisions by the Minister with regard to multi-disciplinary practices should be taken in consultation with the Council.

8.7 **section 7: composition of the Council**

See our comments in paragraph 4.1.1 above.

8.8 **section 10: term of office**

8.8.1 The section should refer to re-election as well as re-appointment, since some of the members of the Council are elected.

8.8.2 It is too prescriptive to permit a member of the Council to serve only two terms. The persons who have a right to elect members of the Council may wish councillors to serve for longer periods.

8.9 **section 12(1)(d): vacation of office**

Once a person has been appointed or elected to office that person should be entitled to serve out the term for which he or she was appointed or elected. The provision allowing for an appointed or elected member to be required to vacate office is inconsistent with the duty of that person to act independently as a councillor.

8.10 **section 14: dissolution of the Council**

We refer to our comments in paragraph 4.2 above. It is inconsistent with the independence of the legal profession that the Minister may dissolve the Council.

8.11 **section 18(1)(a): committees of the Council**

In section 18(1)(a)(ii) the word "*other*" should be deleted, as it suggests that a committee may consist only of councillors, or only of non-councillors. In reality committees are likely to consist of both councillors and non-councillors.

8.12 **section 20(2): executive committee**

Apart from the chairperson and deputy chairperson, the Council should have the authority to determine the size and composition of the executive committee. The size of the executive committee will depend on a number of factors, including workload and geographical considerations, and the Council is in the best position to determine these issues.

8.13 **section 20(7): executive committee**

The chairperson of the Council should be chairperson of the executive committee.

8.14 **section 21: delegation of powers**

8.14.1 The power of the Council to delegate its powers to apply for the suspension or removal from the roll of a legal practitioner should be restricted to a delegation to regional councils.

8.14.2 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. In this connection we refer to what we have said in paragraph 4.4.1 regarding the power of regional councils to sub-delegate certain of their powers to committees.

8.14.3 We also propose that the Council be empowered to delegate appropriate powers to the executive officer or employees of the Council. This is particularly important in relation to the disciplinary powers and functions of the Council, where the volume of complaints makes it impractical for matters to be dealt with by the Council or a committee of the Council. In

this connection we draw your attention to section 19 of the Auditing Profession Act, 26 of 2005, which permits wider powers of delegation to the Independent Regulatory Board for Auditors, which is faced with similar issues.

8.15 **section 23(2): establishment of regional councils**

We refer to what is said in paragraph 4.4 above. The area of jurisdiction of a regional council should be determined by the Council. It is anomalous that the Council delegates functions to the regional councils, but that the Minister determines the jurisdiction.

8.16 **section 24(3): regulations in respect of foreign legal practitioners**

We refer to our comments in paragraph 4.5 above. Any decision should be made in consultation with the Council.

8.17 **section 23(4): election of regional councils**

We refer to what is said in paragraph 4.4 above.

8.18 **section 26(1)(a): minimum legal qualifications**

8.18.1 There has been widespread criticism of the value of the current four year LLB degree. In our view the degree should be a postgraduate degree and the profession should work towards that goal. Provision should also be made for the Council to play a role in the accreditation of law faculties at universities to ensure that proper standards are maintained.

8.18.2 Any decision concerning minimum legal qualifications should be made in consultation with the attorney and advocate members of the Council.

8.18.3 The foreign law degree must be certified by a South African university in the manner provided for in the current Attorneys Act: i.e. "*in respect of which a university in the Republic with a faculty of law has certified that the syllabus of instruction and the standard of training thereof ……are equivalent or superior to those required for the degree referred to in …..,*

8.19 **section 26(1)(b): practical vocational training**

8.19.1 The training requirements should be as determined by the rules, and not as prescribed by the Minister: compare in this regard the provisions of section 26(2) in respect of conveyancers.

8.19.2 There should be uniform standards with regard to legal qualifications and training for all legal practitioners, which will be determined and provided at a national level. However, this requirement should not inhibit the attorneys' sector or the advocates' sector from requiring further training in specific skills.

8.20 **sections 29(1)(a) and (b): community service**

8.20.1 These subsections, together with a number of other sections or subsections of the Bill, deal with community service. This would appear to be intended in part to give substance to one of the objects of the Bill, which is to promote access to affordable legal services in South Africa.

8.20.2 The provisions of the Bill relating to community service are, however, unclear, in that it is uncertain whether the emphasis is on vocational training, or the provision of services to parastatals or government institutions, or to promote access to justice. None of the relevant provisions appears to relate to *pro bono* services, which are provided on a compulsory basis by attorneys - see paragraph 6.1 above. There is no provision in the Bill which requires the Council to establish *pro bono* structures. We do not believe that community service, in the context in which it is referred to in the Bill, would have the effect of providing legal services to indigent persons.

8.20.3 The provisions of the Bill which relate to community service are also vague in a number of other respects. In this regard we refer to the following:

section 29(1)(a)

This subsection refers to community service as a component of practical vocational training by candidate legal practitioners; however, there needs to be clarity on the following issues:

- will community service be during, or after, or part of, articles or pupillage?

- what will be the period of community service?
- will candidate legal practitioners be remunerated? If so, by whom?
- to whom will candidate legal practitioners be responsible while undergoing practical vocational training?

section 29(1)(b)

This subsection refers to recurring community service by legal practitioners. Again, the following questions arise:

- what will the period be? Will it refer to a number of hours, or be for a specific period?
- will the requirement for community service recur annually?
- who will monitor these services, since it forms part of the requirements for continued registration?

section 29(2)(a)

This subsection refers to community service with a community-based organisation, trade union or non-governmental organisation

- is it intended that there will be an accreditation process for those organisations before community service can be rendered there?

8.20.4 The experience of the provincial law societies is that candidate attorneys do not have sufficient skill, knowledge or experience to be able effectively to provide *pro bono* services. It is accordingly our proposal that community service be distinguished from *pro bono* work, and that the obligation to provide *pro bono* services (for which there should be a specific requirement in the Act) should be restricted to legal practitioners, and community service should be provided by candidate legal practitioners.

8.21 **Section 29(2)(g): community service**

In section 29(2)(g) the words "*after consultation with the Council*: should be inserted after "Minister"

8.22 **section 31(2): cancellation and suspension of registration**

Before the court has granted an order for suspension or striking off a process will have been followed during the course of which the legal practitioner will have been given notice of the application. There is therefore no reason why the Council must again notify the legal practitioner and give him or her an opportunity to be heard before it implements the order of the court. Section 31(2) is unnecessary.

8.23 **section 33(3): practising legal practitioners**

8.23.1 The reference to a fee, commission, gain or reward should be followed by the words "*direct or indirect*".

8.23.2 A practitioner who renders legal services for reward must be a practising advocate, attorney, conveyancer or notary: in the case of an attorney practising for his or her own account or in partnership or as a member of a professional company that means that he or she must have a fidelity fund certificate.

8.24 **section 34(2) advocates taking instructions directly from the public**

If the advocates' profession is to be a referral profession then advocates should not take instructions from the public, save with the approval of the Council. Section 34(2) should be deleted.

8.25 **section 34(6): commercial juristic entities**

The provisions of the section should be brought into line with the existing section 23 of the Attorneys Act, 1979. In particular, the reference to joint and several liability for theft should be deleted, since this would place the directors of the juristic person in a disadvantageous position as compared with attorneys practising in partnership.

8.26 **section 34(7): non-profit juristic entity**

8.26.1 This section permits practice by a non-profit juristic person, but there is no provision that it may not charge fees. The charging of fees should not be permitted.

8.26.2 There is no provision for accreditation of non-profit juristic entities. This should be provided for.

8.27 **section 35(8): law clinics**

No provision is made for accreditation of law clinics, as is currently required. This should be a requirement, since law clinics are entitled to employ candidate attorneys.

8.28 **section 35: fee structures**

Legal Aid South Africa should be entitled to charge for its disbursements only, and not charge fees.

8.29 **sections 37 to 40: disciplinary procedures**

8.29.1 It is our strong recommendation that the provisions of the Bill relating to the disciplinary process be removed from the Bill and be incorporated in the rules, in which constitutional values, including transparency of the proceedings, will be taken into account. The process contained in these sections is inflexible and does not allow for abbreviated proceedings where practitioners plead guilty to charges of misconduct which is less serious. If the process outlined in these sections is to be applied the resources of the Council and of the regional councils will need to be bolstered, and the disciplinary process will take significantly more time and involve considerably more expense.

8.29.2 The LSSA is in the process of drafting uniform rules for all of the provincial law societies, which include detailed provisions encompassing the disciplinary process. These rules have been designed to reflect the experience of the law societies over many years. Despite what we have said in paragraph 8.29.1, if it is felt that the disciplinary process should be contained in the Bill we recommend that the provisions in the current draft uniform rules be incorporated into the Bill.

8.29.3 We have the following specific comments in relation to the sections relating to the disciplinary process which now appear in the Bill:

- Section 37(1) and (2): these sections provide that every complaint of misconduct must be investigated by an investigating committee.

Because of the adversarial nature of legal practice there tend to be many complaints against attorneys, some of them of a trivial nature, and to require an investigation committee to investigate every such complaint would seriously impede the disciplinary process. We recommend that the Council be entitled to delegate the power to investigate minor complaints to designated legal officials.

- Section 37(4)(c): it will be difficult to comply with this section. Disciplinary committees and investigating committees generally consist of only two or three persons, and the desired representivity will be impossible to achieve. Moreover, we think it will be impractical, and will impede the process, if it is necessary to involve members of the public. Where complainants are dissatisfied with the outcome of a complaint they have the right to have the matter reviewed by the Ombud, thereby satisfying the need for public scrutiny of the profession's disciplinary processes.

- Section 37(5): this section should be made subject to section 44 dealing with urgent matters: a practitioner who is aggrieved by the outcome of a disciplinary hearing where serious misconduct is involved should not be entitled to frustrate the process by making use of the appeal procedure.

- Section 39(3)(b)(ii): it is impractical for a subpoena to be signed by the chairperson or a member of a disciplinary committee, since those individuals are not always readily available. The signing and issuing of subpoenas should be an administrative function with employees of the Council having delegated authority to deal with those issues.

- Section 39(6)(a)(ii): the person charged should be able to be assisted or represented by a legal practitioner (not "*another person"*).

- Section 39(9): we do not understand the reference to "*the commission*" where that word appears in the section. Was the word "*committee"* intended?

- Section 40(3)(a)(i): disciplinary committees should not have the power to order the illegal practitioner to pay compensation to a complainant. The payment of compensation is a matter for decision

by the courts. Disciplinary proceedings are neither civil proceedings nor criminal proceedings but are *sui generis,* and a hearing to determine whether or not a legal practitioner has been guilty of improper conduct is not concerned with the question of compensation or damages.

- Section 40(3)(a)(iii): the disciplinary committee should not have the right to suspend a legal practitioner from practice: that right should be reserved to the Council or to the regional council.

- Section 40(3)(a)(vi): the disciplinary committee should not have the right to require that a fidelity fund certificate be withdrawn: that right should also reside with the Council or with the regional council.

- Section 40(3)(c)(i): the power to cancel or suspend the practical vocational training of a candidate legal practitioner should vest in the Council or the regional council and not the disciplinary committee.

- Section 40(8): the requirement that every finding of misconduct must be published in the Government Gazette is unnecessary. Many offences are of a trivial nature and the deterrent effect of publication is diluted by the publication of all findings of misconduct. We recommend that the requirement of publication be left to the discretion of the disciplinary committee, which will order publication only where the conduct reflects negatively on the image of the profession.

- *Prima facie* evidence: sections 37(1) and 38(1) suggest that every complaint of misconduct must be investigated. This is impractical and does not deal with frivolous complaints or complaints of no substance. Only complaints where there is *prima facie* evidence of misconduct need go through the disciplinary process.

8.30 **section 48(2): legal services Ombud:**

We refer to our comments in paragraph 4.8 above.

8.31 **section 49(1)(f): Ombud's right to review decision of board of control of Fund**

8.31.1 The Ombud should not have the right to review a decision of the board of control of the Fund if the board of control rejects a claim. In such an event the courts have jurisdiction to deal with the matter and we believe that that is the appropriate course of action to be followed by a dissatisfied claimant, since the issues to be dealt with are legal or factual.

8.31.2 In any event, what is intended to be encompassed by the Ombud's right to "review" a decision of the board of control - is it a review in the strict legal sense, or is it intended to be some sort of appeal process? This requires clarification. The role of the Ombud should be to ensure that the board of control has followed a fair process in considering claims against the Fund, not that the Ombud should become involved in the merits or otherwise of a claim, which is a matter for the courts.

8.32 **section 50(4): term of office of Ombud**

We suggest, for the sake of continuity and certainty, that the term of office of the Ombud be set at five years, with the right to have the appointment extended for a further period of up to five years.

8.33 **section 51: removal from office and filling of vacancy**

The removal of the Ombud and the filling of a vacancy should be left in the hands of the Chief Justice.

8.34 **section 57(1)(a): limitation of liability of the Fund**

8.34.1 Section 57(l)(a) excludes from liability by the Fund a claim from a *family member* or *a member of the household* of an attorney found guilty of theft. The corresponding section in the Attorneys Act provides that the *wife* of a practitioner may not claim compensation for theft committed by that practitioner (presumably "wife" should read "spouse").

8.34.2 The terms "family member" and "members of the household" are not defined and are vague. We recommend that these expressions be defined as otherwise this is likely to give rise to litigation.

8.34.3 The reference to the attorney's having to have been found guilty of theft if the Fund is to avoid liability should be deleted. If trust funds have been stolen the family member should not be entitled to claim against the Fund, whether or not the attorney concerned has been found guilty of theft by a court. In many instances attorneys are not prosecuted for various reasons, or are no longer alive, and family members should not be entitled to benefit thereby.

8.35 **section 57(1)(e): theft of money held for investment**

8.35.1 Attorneys hold two categories of moneys for investment purposes. The first category relates to funds held on a temporary basis as part of a transaction (for example, a deposit on a property which is invested pending transfer of the property). The second category concerns funds held purely for investment purposes to earn a return for the investor.

8.35.2 The Attorneys Act currently excludes liability of the Fund for the theft of money placed with an attorney purely for investment purposes, that is, the second category described in paragraph 8.35.1. The reason for this is that the experience of the Fund over many years has been that claims against the Fund arising from the theft of money placed with an attorney purely for investment have been very large and have threatened the existence of the Fund. This has also been the experience in overseas jurisdictions. If monies so invested with an attorney are protected against theft that would place the investor in a better position than he or she would be if the money were invested through normal channels, where there would be no similar protection.

8.35.3 Section 57(1)(e) excludes the Fund from liability as a result of theft of money which an attorney has been instructed to invest on behalf of a person contemplated in section 57(1)(d). That section in turn refers to a person who has received notice in writing from the Council or the board of control of the Fund warning against the use or continued use of the legal services of the practice concerned. Although there is a similar provision in the Attorneys Act, this is in reality no protection for the Fund at all because the warning is likely to come only after the Council or the board of control have determined that there has been an irregularity in the practice of the attorney concerned.

8.35.4 The LSSA is firmly of the view that the exclusion of liability in section 57(1)(e) should not be restricted in the manner set out in the section, but that the Fund should not be liable for the theft of any money placed with an attorney purely for investment purposes. The provisions of section 47(1)(g) of the Attorneys Act, should accordingly be reinstated in the Bill.

8.36 **section 64(1)(e): inspection of accounting records**

This section gives the board of control of the Fund the right to inspect the accounting records of any attorney. While it is understandable that the Fund would wish to safeguard its position by conducting inspections of attorneys' accounting records, it is the Council which is the regulator and we think it is inappropriate that two entities should have the same regulatory powers in respect of attorneys' firms. The power of inspection should lie with the Council, but the objective of the section can be achieved by providing that the Fund may request the Council to conduct the inspection, and the Council must do so on receipt of such a request. The Fund itself can conduct the inspection, but it must be under the authority of the Council. Similar considerations apply in relation to section 87(2)(a).

8.37 **section 84(1): fidelity fund certificates**

The section provides that every attorney practising for his own account or in partnership, or as a director of a juristic person, *and who receives trust money or property,* must be in possession of a fidelity fund certificate. In terms of the current Attorneys Act, every practitioner who practises for his or her own account, or in partnership, or as a member of a professional company (whether or not he or she holds trust money or trust property), is required to have a fidelity fund certificate.

The change introduced in the Bill introduces uncertainty into the requirement for holding fidelity fund certificates, and will lead to the mingling of business funds and trust funds. We recommend that every attorney who practises for his or her own account, or in partnership, or as a member of a juristic entity, be required to hold a fidelity fund certificate, whether or not he or she holds trust money or trust property at any particular time.

8.38 **section 84(6): fidelity fund certificate**

The section provides that an attorney who transfers from one form of practice to another must give notice of that fact to the Council and must comply with the requirements concerning attorneys' trust accounts. It should be noted that employed attorneys (professional assistants and associates) do not have trust accounts. The requirements should accordingly apply only to the attorneys referred to in section 84(1).

8.39 **section 85: application for fidelity fund certificate**

In terms of section 13B of the Attorneys Act, 1979 every attorney who, for the first time, practises as a partner in a firm of attorneys who or practises on his own account must, within a period of one year, complete a course in legal practice management approved by the council of the law society in which he or she practises. A similar provision should be incorporated into the Bill.

8.40 **section 86(5)(b): interest on trust money**

8.40.1 This section provides that interest accrued on money held in an attorney's trust account for investment purposes on behalf of a client is to be paid over to the client. However, this is contradicted by section 64(1)(g)(i), which provides that the board of control of the Fund may make arrangements with a bank for the payment of interest to the Fund on the whole *or any part*, *inter alia,* of the money invested in terms of section 86(4). This will apply to the interest earned on the first category of investments referred to in paragraph 8.35.1 above, which is part of the core function of an attorney's practice.

8.40.2 The effect of these two sections, read together, is that the Fund may claim part of the interest on money invested on behalf of a client on a temporary basis and as part of a transaction. This is contrary to the current position and amounts to the expropriation of part of the interest belonging to the client. Section 64(1)(g)(i) should be amended to make it clear that the interest under section 86(5)(b) accrues to the client.

8.40.3 Despite what we have said in the previous paragraph, we recognise that the Fund is at risk if the funds invested on behalf of a client were to be stolen. The LSSA would support a proposal that part of the interest

accruing on the invested funds were to be paid over to the Fund, provided the portion paid over is limited to 5% of the interest .

8.41 **section 87(2)(a): inspection of accounting records**

We refer to paragraph 8.36 above dealing with conflict between the powers of the Council and those of the board of control.

8.42 **section 87(5): inspection of accounting records**

We refer to what we have said in paragraph 8.36 above in relation to the authority of both the Council and the board to inspect records.

8.43 **section 87(5)(a): inspection of records**

This section falls within the chapter dealing with accounting issues. The rights of inspection are therefore limited to inspections concerned with the handling of trust money and accounting matters generally, and are not sufficiently wide to enable the Council to inspect a practice for another reason - for example, to investigate allegations of improper conduct. We recommend that a section be introduced into the Bill giving the Council the power to inspect the affairs of any firm for purposes of an investigation into allegations of improper conduct.

8.44 **section 89: application to court by Council or the board**

8.44.1 We refer to what we have said in paragraph 8.36 above concerning the granting of the power to both the Council and the board of control to exercise regulatory control over attorneys. The power to apply to court should be that of the Council (or a regional council where that power is delegated to it).

8.44.2 The reference in section 89 to a trust account practice is incorrect and should be a reference to an attorney.

8.45 **section 90(1): curatorship**

8.45.1 This section is similar to section 78(9) of the Attorneys Act, which provides that the Master of the High Court may, on application by the Law Society or by any person having an interest, appoint a *curator bonis* to control and administer a trust account with such rights, duties and powers as the Master may deem fit.

8.45.2 Section 78(9) of the Attorneys Act is to be read with section 81(1)(e) of that Act, in terms of which the Minister may make regulations determining the rights, duties and powers of a curator appointed under section 78(9).

8.45.3 Although the Bill to a large extent provides the same procedures in terms of which the Master may make an appointment, there is no provision similar to section 81(1)(e) in the Bill.

8.45.4 The experience of the law societies is that the Master refuses to make appointments under section 78(9), on the grounds that the regulations referred to in section 81(1)(e) have never been promulgated. We suggest that the section be amended to incorporate the procedure which is currently adopted by the law societies, namely, that the rights and duties of the curator be incorporated in a court order, with the Master's office not being involved. This means that the Council retains control over the appointment of a curator and the manner in which the curatorship is exercised. This will also avoid delays which occur in the appointment of a curator and enables the accounting records of attorneys to be taken over without delay by the curator.

8.46 **section 90(3): appointment of *curator bonis***

This section still refers to *judicial management,* which no longer exists.

8.47 **section 94(1)(g): transformational legal education**

We do not understand what is meant by "*transformational legal education and training".* This should be clarified. In any event any regulations made in terms of section 94(1) should be made in consultation with the Council.

8.48 **section 95(1)(m): rules regarding level of competence for admission and enrolment**

The expression "*level of competence"* needs to be clarified.

8.49 **Section 95(1(q): rules relating to instruction of attorneys and advocates**

It is not clear why there need to be rules regarding the instruction of attorneys and instruction of advocates by attorneys. These remain matters covered by the law of contract or the common law.

8.50 **section 95(2): publication of rules in the Gazette**

Any amendments to the rules should also be published for comment.

8.51 **section 96(l): transitional legal practice council**

If a transitional legal practice council is to be appointed, section 96(l)(a)(i) should make it clear that four of the eight attorneys nominated by the LSSA should not be members of or representatives of the Black Lawyers Association or the National Association of Democratic Lawyers.

8.52 **section 97: terms of reference of transitional council**

We refer to what we have said in paragraph 7.2 above.

8.53 **section 98: powers and functions of transitional counsel**

We refer to what we have said in paragraph 7.2 above.

8.54 **section 98(2)(b): secondment of staff to transitional council**

We refer to what we have said in paragraph 7.3 above.

8.55 **section 111(1)(a)(i): qualifications**

The words "*for purposes of the Attorneys Act, 1979"* should be added to this subsection. In addition, *all* courses presented at the Practical Legal Training School (and not only '*the training course*") should be provided for.

8.56 **section 111(2): transitional provisions in relation to degrees**

The date 1 January 1999 should be changed to 31 December 2004, and the words "*and if all other requirements are met in terms of the Attorneys Act, 1979"* should be added at the end of the section..

8.57 **section 116: transitional provisions relating to law societies and voluntary associations of advocates**

We refer you to what we said in paragraph 7.4 above.

8.58 **section 118(l): repeal of laws**

The schedule of laws to be repealed should include the Attorneys Act, 42 of 1987 (Venda), which appears still to be in force although the Venda Law Society is defunct.

9. We trust that these comments are helpful but will be happy to amplify what we have said if you require us to do so. We would welcome an opportunity to make oral representations to the portfolio committee.

Yours faithfully

_____ _____

Jan Stemmett
Co-Chairperson
Law Society of South Africa

Krish Govender
Co-Chairperson
Law Society of South Africa

Attachment 1 to letter to Portfolio Committee: Justice and Constitutional Development (paragraph 4.3)

Core values of advocates

1. A referral profession.

2. Single practitioners.

3. The duty to accept briefs: cab rank rule.

4. Briefing

4.1 precedence of briefs;

4.2 rules against double or multiple briefing;

4.3 how briefs should be handled: rule 5.1;

4.4 marking of briefs;

4.5 keeping of fee books;

4.6 recovery of fees.

5. Pupillage

5.1 content of practical training;

5.2 examinations.

6. No right to participate in other callings while in practice at the Bar

7. Rules on advertising

8. Counsel giving evidence or making affidavits

9. Relationship between counsel

9.1 General

9.2 Senior/junior.