LAW SOCIETY
OF SOUTH AFRICA

OFFICE OF THE CHIEF EXECUTIVE OFFICER

16 May 2013

Via e-mail llanders@parliament.gov.za ; vramaano@parliament.gov.za

The Honourable Chairperson
Mr Luwellyn Landers M P
Portfolio Committee: Justice and Constitutional Development
P.O. Box 15
Cape Town
8000

Dear Mr Landers

FURTHER SUBMISSIONS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE LEGAL PRACTICE BILL

As undertaken at the hearings of the Portfolio Committee on Justice and Constitutional Development in February 2013, I attach further submissions by the Law Society of South Africa (LSSA) on the Legal Practice Bill, 2012. These include an Annexure A, which deals specifically with the oral and written submissions made by the Attorneys Fidelity Fund on 20 February 2013.

In these submissions we have endeavoured to respond fully to all the issues raised by your Committee at the hearings in February 2013.

Should you require further information, please contact me.

Yours faithfully

Nic Swart
Chief Executive Officer
Tel: (012) 366 8800
Fax: 086 677 8419
nic@lssalead.org.za

LAW SOCIETY
OF SOUTH AFRICA

FURTHER SUBMISSIONS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT IN RESPECT OF THE LEGAL PRACTICE BILL, 2012

A. INTRODUCTION

1. The Law Society of South Africa (LSSA) furnished its written submissions to the Parliamentary Portfolio Committee on Justice and Constitutional Development on 12 February 2013 and made oral submissions on 19 February 2013.

2. The submissions dealt with a number of substantive issues and major issues of principle in particular, but not limited to access to the legal profession, access to justice, the need for self-regulation, the management of disciplinary matters and, most importantly, the funding of the legal profession. The Committee requested further supporting information in relation to the above.

3. What is contained in this submission is, therefore, a direct response to the questions raised by the honourable members of the Committee. On the same day that the LSSA made its submissions to the Committee, an oral submission was made by the Chief Executive Officer of the Attorneys Fidelity Fund (AFF) to the Committee. It is important to note that, despite the LSSA being the key stakeholder of the AFF, it had no opportunity to study the Fund's submission as this was only received at the hearing. Furthermore, although the Fund's submission contained much valuable information for the Committee, there were also a great number of inaccuracies. It is, therefore, appropriate for the LSSA to respond to it. Consequently, part of our submission relates to the latter.

B. GENERAL COMMENTS

4. The LSSA was conceptualised in 1996 and formally constituted in 1998, with the main objective of transforming the legal profession in South Africa. Therefore, from the beginning, the LSSA was tasked with ensuring the ushering in of the new Legal Practice Bill. This process took longer than anticipated, but in the meantime the LSSA undertook a number of positions and actions that are in line with a united and transformed legal profession.

5. The LSSA sought to co-ordinate the affairs of the various provincial law societies, created uniform standards and developed a set of uniform national rules, spoke with one voice on behalf of the profession, standardised legal education and entry to the profession, etc.

6. This submission outlines the work done since 1998 and is an indication of our readiness – or lack thereof – to play a central role in the implementation of the Legal Practice Bill (LPB).

7. The following chapters are contained in this submission:

(i) Access to the Profession

We provide a statistical progression of entry to the profession since 1998, as well as initiatives taken to break barriers of entry, especially for black and women attorneys. We explain these statistics factually, without providing any interpretation, and the challenges become clear. The role of Government and its agencies is placed in perspective in this regard.

(ii) Access to Justice

We give an explanation of the role of attorneys in this respect. It is of particular importance for us to distinguish very clearly between large and small law firms in 2008 and currently, as well as to show their role in advancing this very

important principle. In this chapter, we touch on the issue of fees as a barrier to access to justice.

(iii) Fee Structures as a barrier to Access to Justice and the Impact of the Divided Profession on Fees

The question was raised, and we submit correctly, as to why a litigant or client is made to pay twice for a single assignment. A case in point was the example of an opinion given by counsel who has to be paid, while at the same time the instructing attorney is also paid. We explain this point beyond its superficial appearance.

(iv) Uniform Rules in the quest for Unity

The Committee may well be aware that currently the attorneys' profession is divided into four statutory provincial law societies' jurisdictions, with different rules of conduct. This is compounded when one takes into account the position of the advocates' profession, which has its own rules of ethical conduct. The LSSA has embarked on an initiative to develop uniform rules for the attorneys' profession. The process is near completion, subject to comment by the Competition Commission.

(v) The Funding of the National Legal Practice Council

If, on the one hand, the National Legal Practice Council is the body that governs the South African National Bar / Law Society – as is the case in other countries, especially in the SADC region – the profession has a responsibility to fund it. On the other hand, if the Council is a stand-alone statutory body with no recognisable constituency – as is the case of the Independent Communications Authority of South Africa (ICASA), the SABC Board, etc – then Government will have the responsibility to fund it.

We nevertheless give an indication of the funding of the current structure, so as to put this aspect into perspective.

(vi) Disciplinary Matters and Self-regulation

This issue was specifically raised by the Committee. It was indicated that there is a perception that the law societies are "soft" on their members. The analysis provided below indicates the type of offences that typically come before the law societies' disciplinary committees. It is, however, important to note that the percentage of attorneys that are offenders is minuscule compared to the number of ethical and law-abiding attorneys. This is an important indicator for self-regulation.

(vii) The Attorneys Fidelity Fund (AFF)

The LSSA took a view that it would not make specific comments on the future of the AFF and defer to the Board of Control of the AFF to do so. This was done by the CEO of the AFF. For purposes of completion and clarity, we are recording the position of the LSSA on this matter briefly.

C. FINAL SUBMISSION

8. The Committee will note that the previous presentation made on behalf of the LSSA covered mostly principled issues of governance and regulation.

9. As indicated in our submission of February 2013, the LSSA is of the view that self-regulation is not negotiable, taking into account the requirement of independence of the legal profession. This submission should be read against that background.

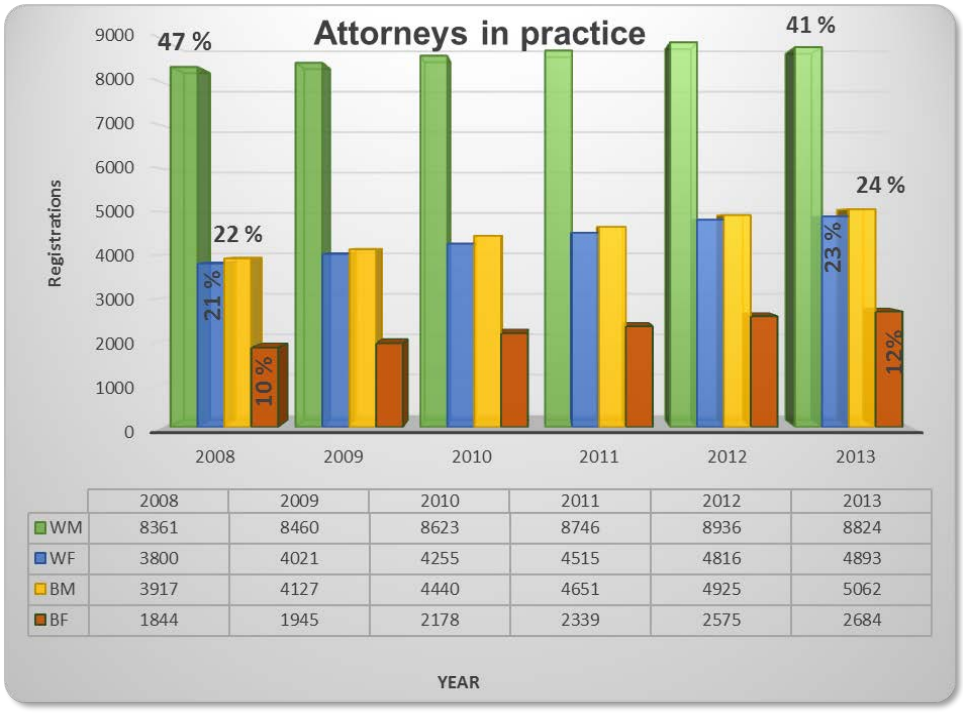
10. This submission focuses on some of the practical matters that will confront the governance of the profession in future. In this respect we remain committed to engaging with the Committee, not only to share the experience gathered and the results of much research conducted, but also to explore the best possible methods that will suit a constitutional democratic South Africa.

CHAPTER 1

D. ACCESS TO THE PROFESSION

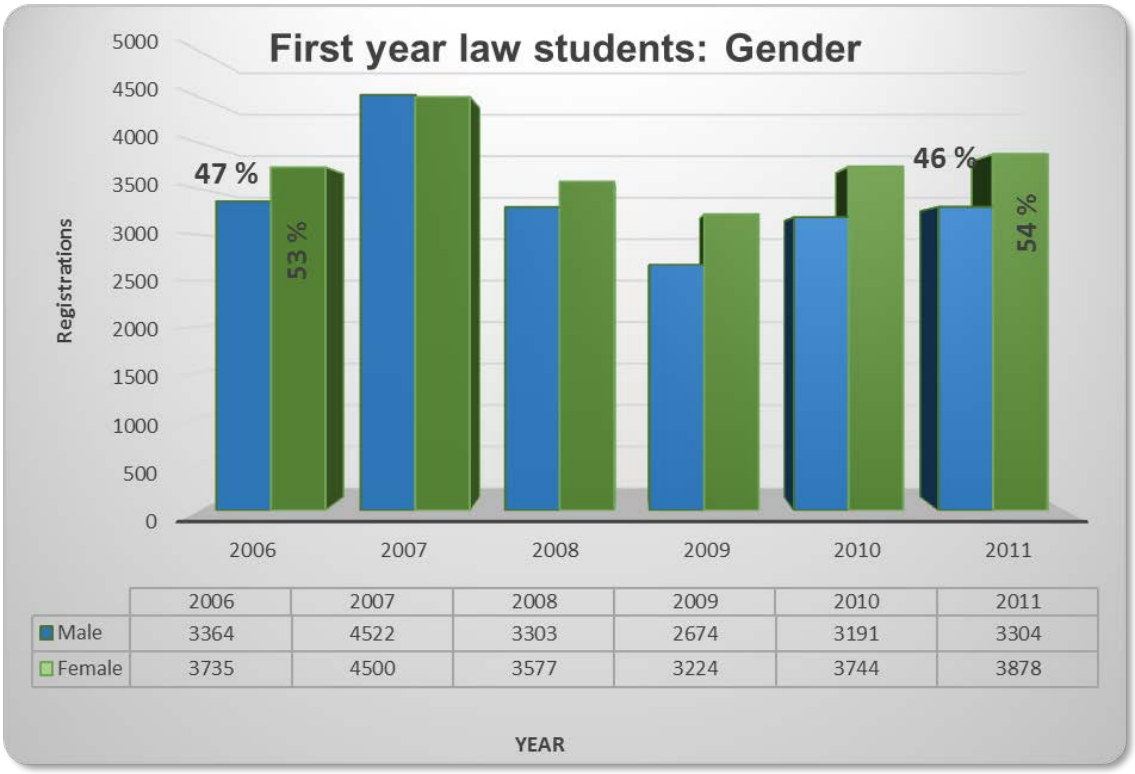
11. One of the key principles of the LPB is that there should be no unnecessary barrier to entry to the profession. The only way that the profession can be strong, sustained and independent, is to ensure that access to it is made possible.

12. Access to the profession has been made more complex by racial and gender differentiation. The statistics in this chapter reflect the relative successes that the legal profession has had since 1998. The first graph indicates the number of attorneys in practice and the further graphs indicate law student numbers and entrants to the attorneys' profession:

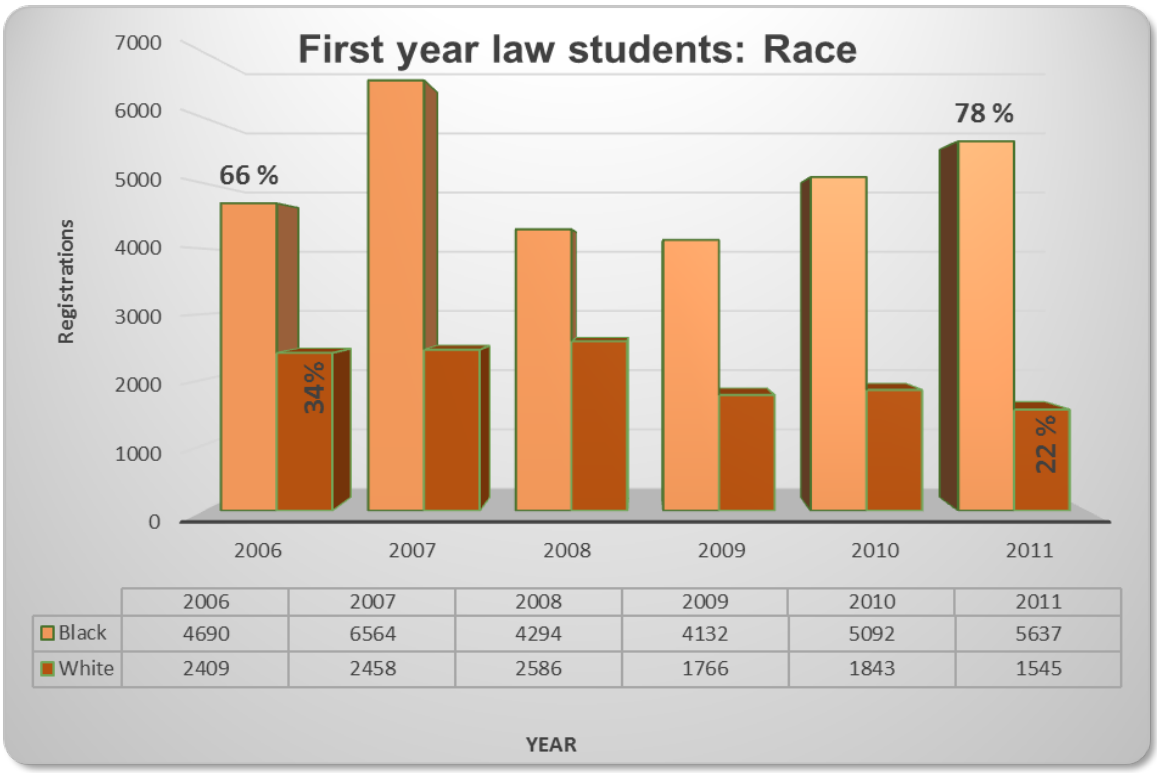


	2008	2009	2010	2011	2012	2013
WM	8361	8460	8623	8746	8936	8824
WF	3800	4021	4255	4515	4816	4893
BM	3917	4127	4440	4651	4925	5062
BF	1844	1945	2178	2339	2575	2684

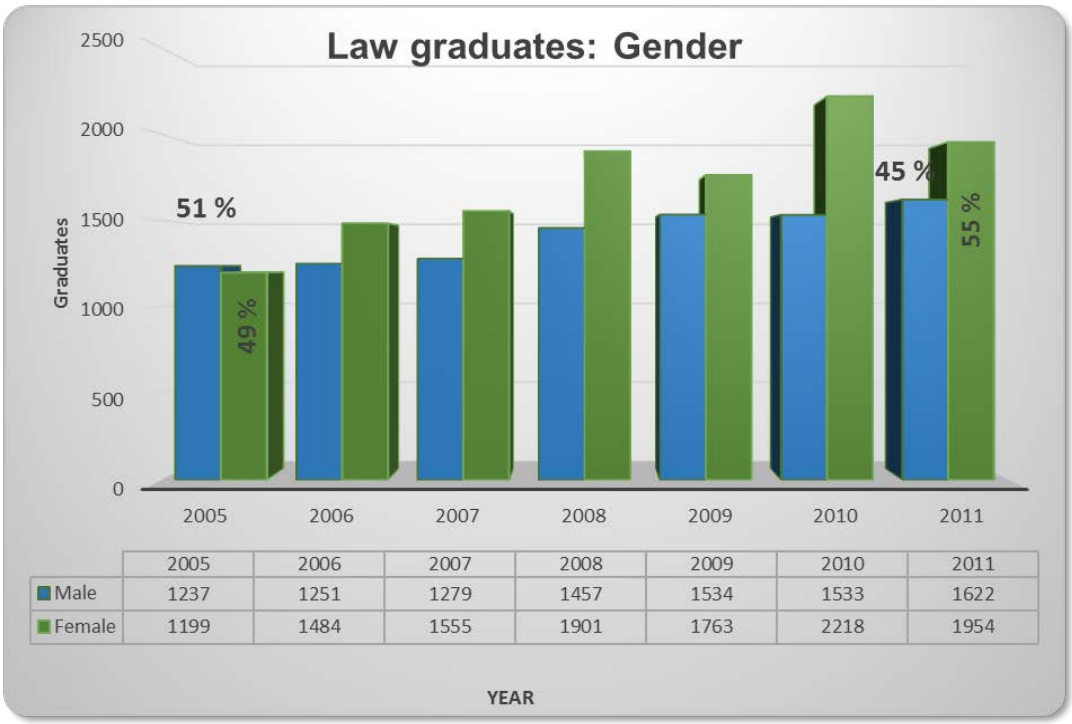
Total as at March 2013	21 463	100%
White attorneys	13 717	64%
Black attorneys	7 746	36%
White males	8 824	41%
Black males	5 062	24%
White females	4 893	23%
Black females	2 684	12%



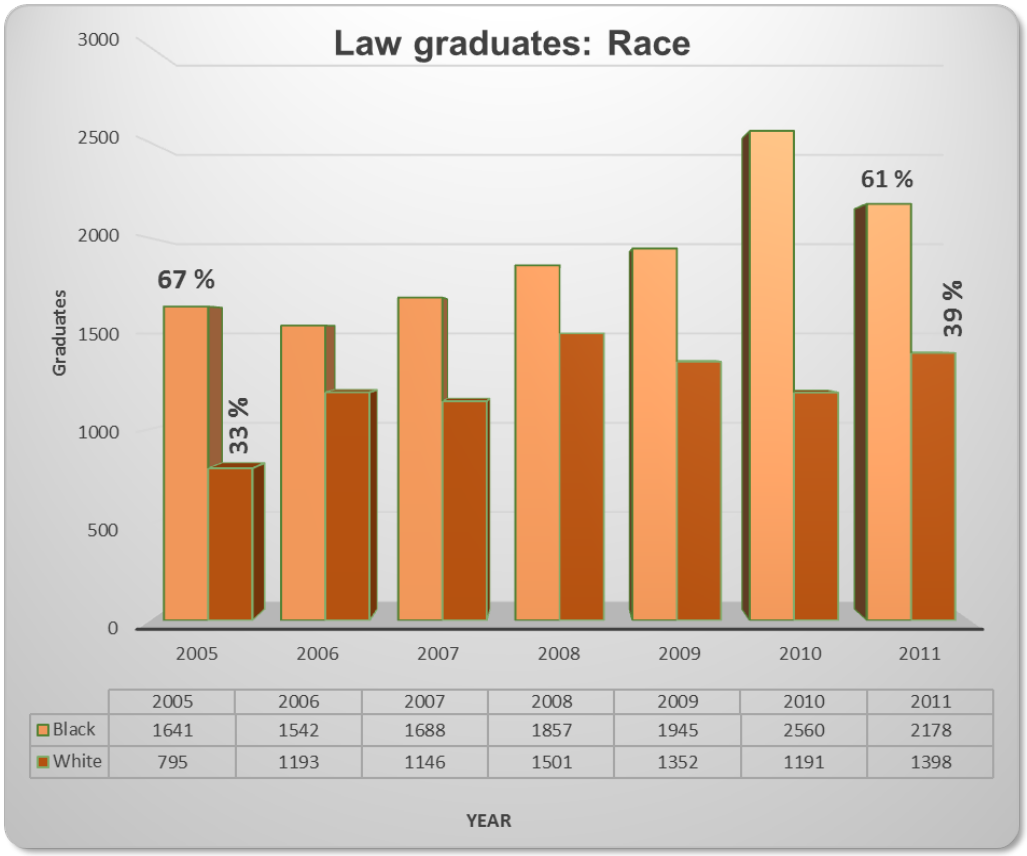
	2006	2007	2008	2009	2010	2011
Male	3364	4522	3303	2674	3191	3304
Female	3735	4500	3577	3224	3744	3878



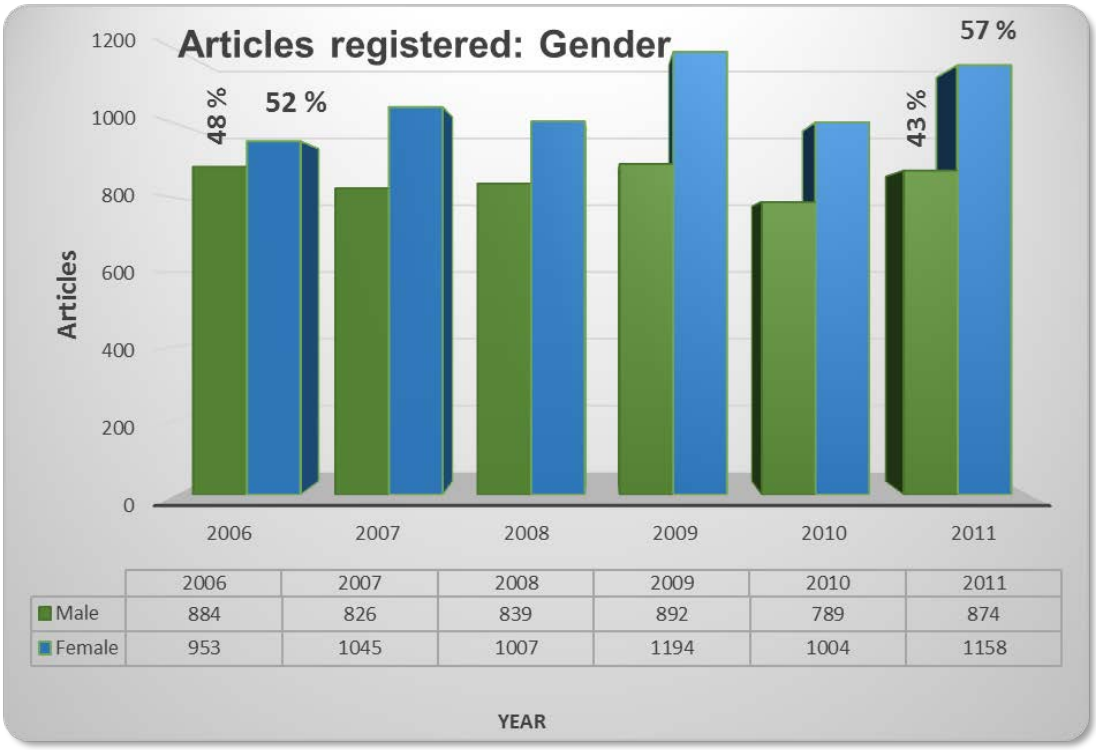
	2006	2007	2008	2009	2010	2011
Black	4690	6564	4294	4132	5092	5637
White	2409	2458	2586	1766	1843	1545



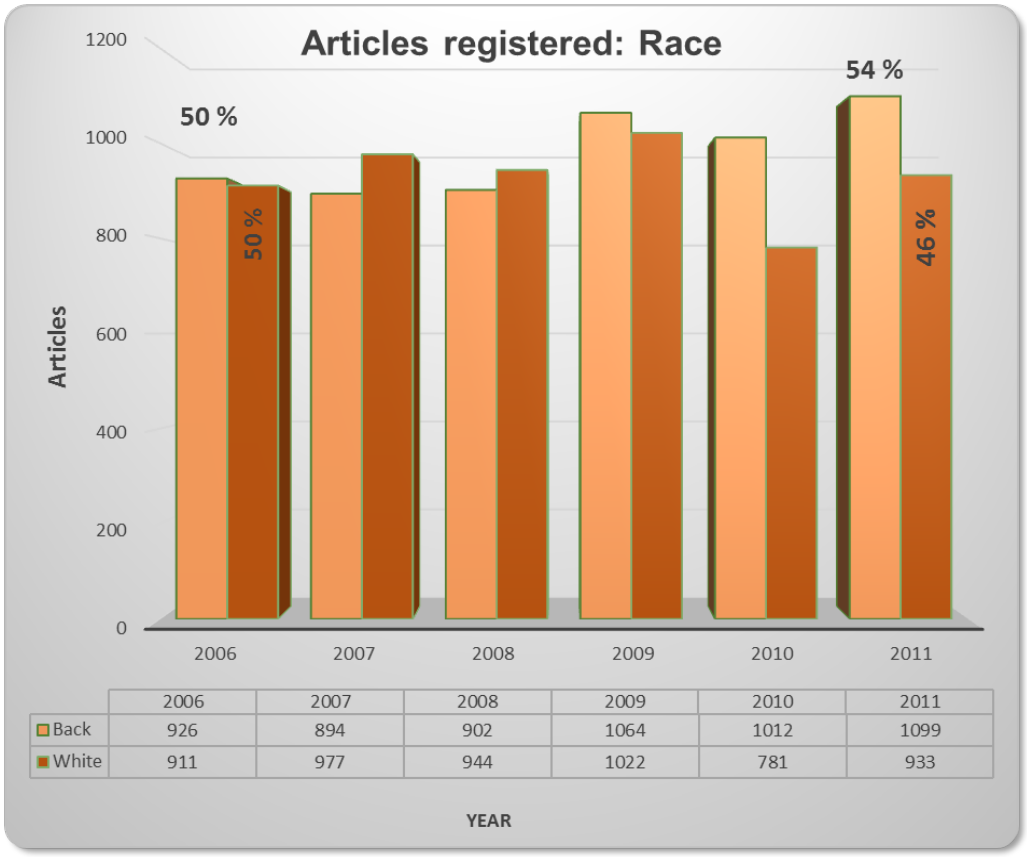
	2005	2006	2007	2008	2009	2010	2011
Male	1237	1251	1279	1457	1534	1533	1622
Female	1199	1484	1555	1901	1763	2218	1954



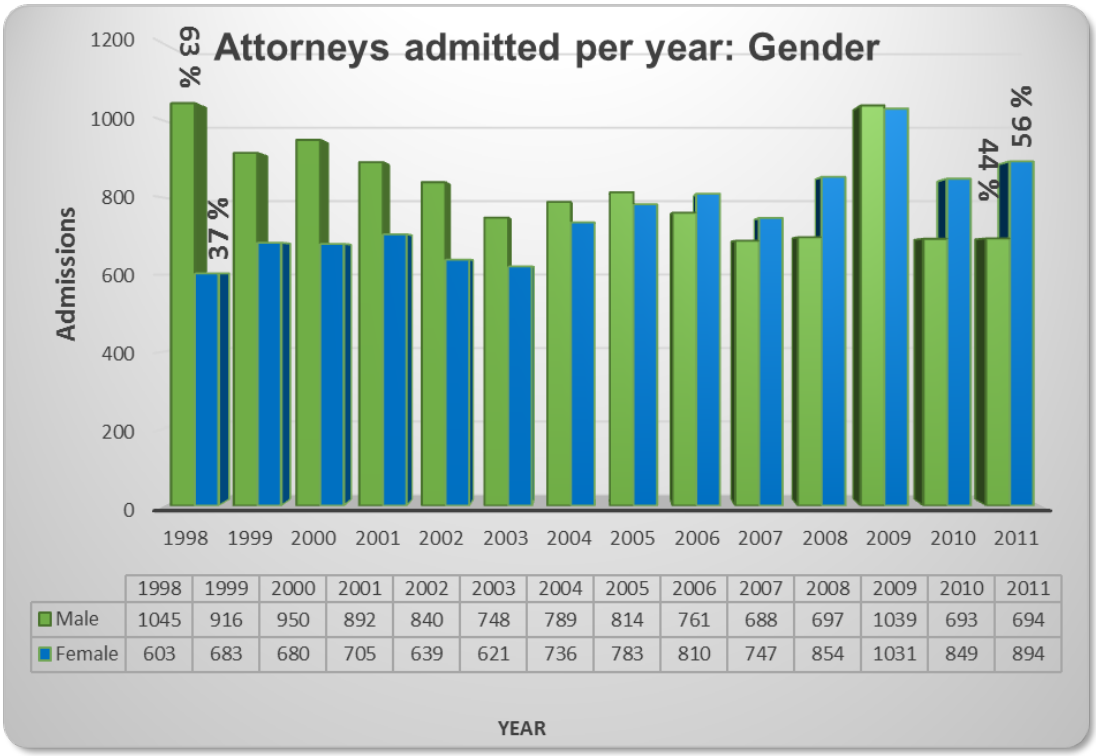
	2005	2006	2007	2008	2009	2010	2011
Black	1641	1542	1688	1857	1945	2560	2178
White	795	1193	1146	1501	1352	1191	1398



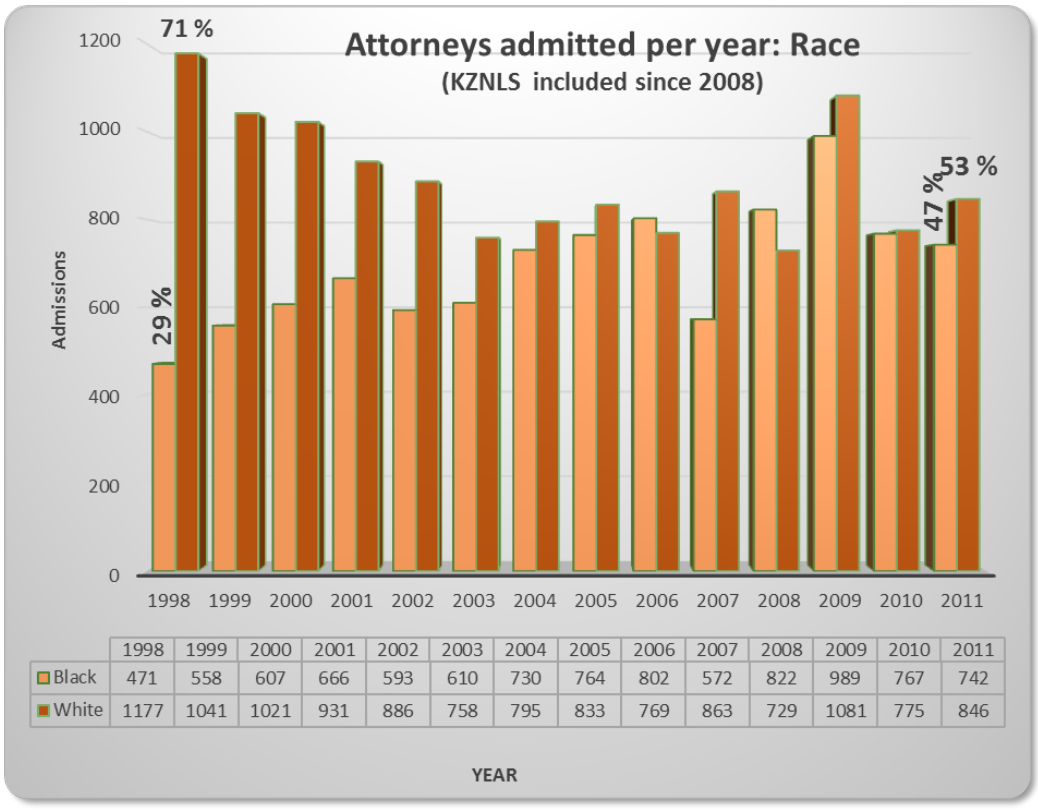
	2006	2007	2008	2009	2010	2011
Male	884	826	839	892	789	874
Female	953	1045	1007	1194	1004	1158



	2006	2007	2008	2009	2010	2011
Back	926	894	902	1064	1012	1099
White	911	977	944	1022	781	933



	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Male	1045	916	950	892	840	748	789	814	761	688	697	1039	693	694
Female	603	683	680	705	639	621	736	783	810	747	854	1031	849	894



	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Black	471	558	607	666	593	610	730	764	802	572	822	989	767	742
White	1177	1041	1021	931	886	758	795	833	769	863	729	1081	775	846

13. New entrants to the attorneys' profession between 1998 and 2011 ranged between 1 300 and 2 000 candidates.

14. It is of significance that since 2006, more women candidates have been admitted to the profession, except in 2009, where the gender ratio was almost equal.

15. On the other hand, it is notable that there has been a significant improvement of historically disadvantaged candidates entering the profession from 2006 until 2011; only in two years, has the number of white candidates slightly exceeded that of black candidates.

16. This is significant in the South African context, but many challenges still exist to improve this growth further. It is important to note some of the contributing factors to these changes, as set out below, in no particular order of importance:

- In certain circumstances, the reduction of the two years' articles of clerkship to one year.

- The introduction and promotion of the LSSA's School for Legal Practice (See graphs below).

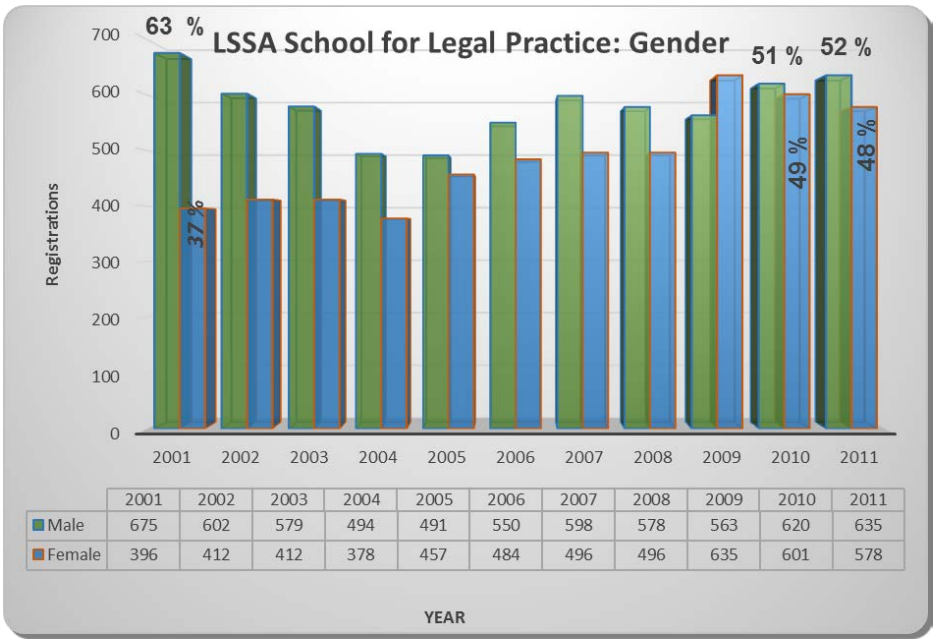
- Provisions of bursaries to law graduates to attend the School for Legal Practice.

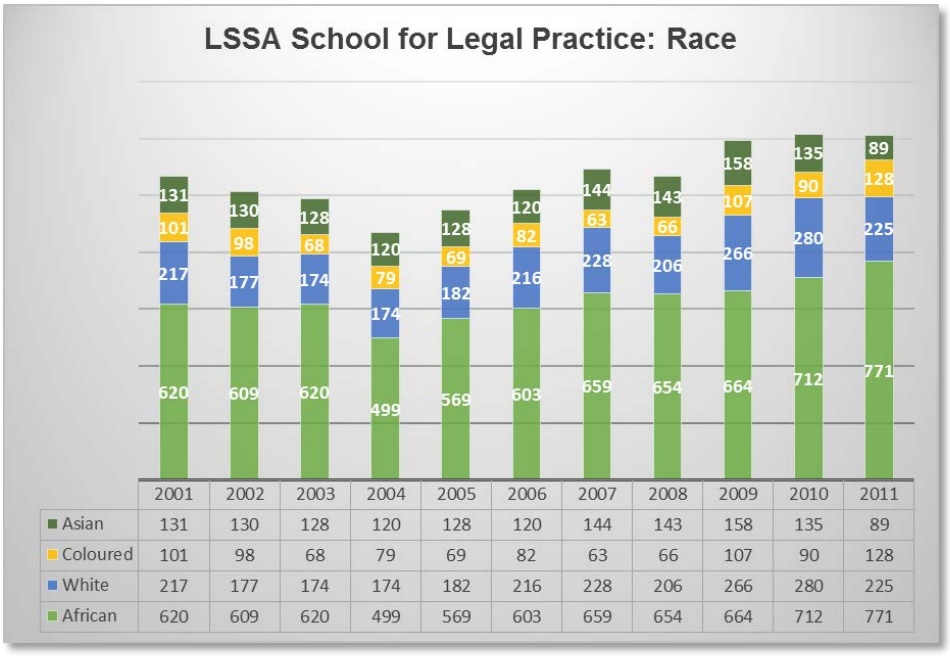
- Various placement schemes promoted by the provincial law societies.

- Increased intake of candidates by Legal Aid South Africa.

- The support provided to the profession by the SASSETA.

- The changing nature of briefing patterns.





17. In order to stay on this course, the incoming Legal Practice Council will be hard-pressed to continue and improve on some or all of these initiatives.

18. The following challenges remain:

- The quality of graduates that enter the profession, which is the subject of discussion in the upcoming LLB Summit on 29 May 2013.

- The inability of many of the graduates to remain in the profession, in particular, black and female candidates. There is a need for strong participation by Government in directing the briefing patterns.

- The inability of the Department of Justice and Constitutional Development and the profession to implement the Legal Services Sector Charter.

19. The LSSA is cooperating with the Cyrus Vance Institute at the New York Bar and Wits Law School in their research on demographic representation (race, gender and disability) in the major commercial law firms in South Africa. The results of this may be useful for future planning.

The rest of the statistical information included in this chapter is self-explanatory

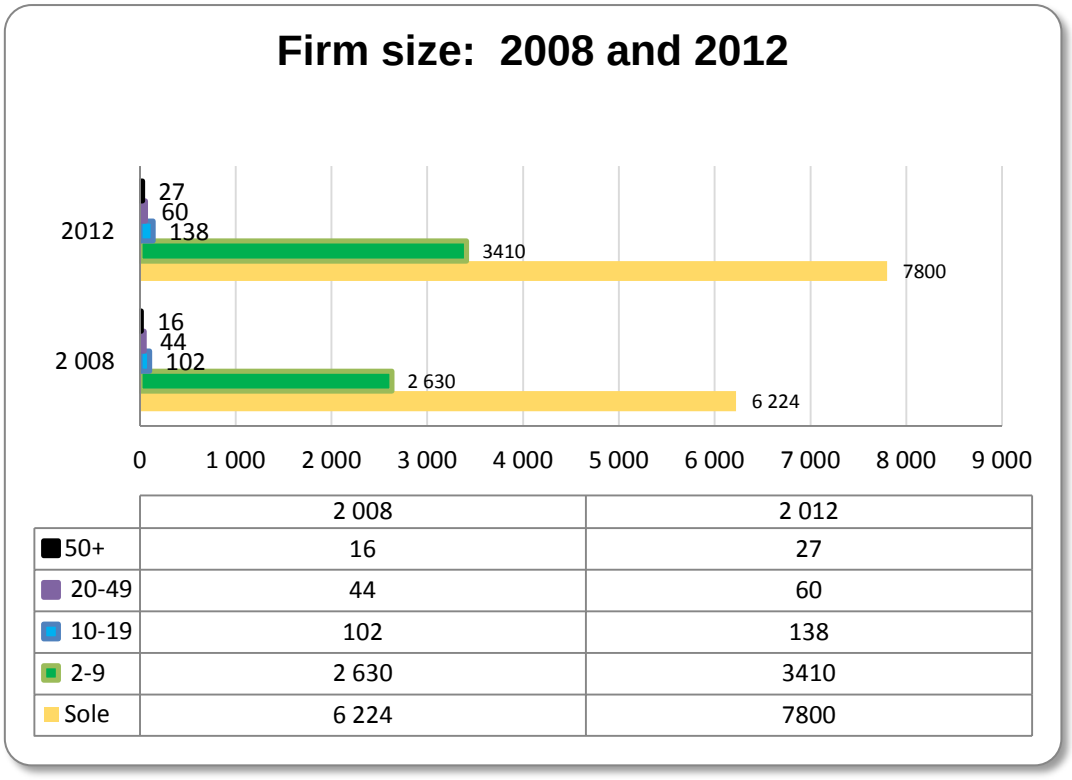
CHAPTER 2

E. ACCESS TO JUSTICE

20. This is a principle upon which a transformed legal profession rests. The nature of law firms, fees charged and the geographical spread of law firms have a direct impact on the issue of access to justice.

21. The Honourable Committee requested an update on the demographics of law firms in the country. In this regard, statistics regarding law firm size for 2008 and 2012 appear below.

22. It is important to note that the so-called large law firms (more than 50 attorneys), constitute less than 10% of the law firms in the country.



	2 008	2 012
50+	16	27
20-49	44	60
10-19	102	138
2-9	2 630	3410
Sole	6 224	7800

23. The smaller firms constitute the bulk of practising attorneys in South Africa - in excess of 75%. This is important for access to justice.

- Many litigants approach smaller firms for advice, which is often provided free of charge or for an insignificant amount of money. Indications are that almost 60% of the members of the public who visit smaller law firms do not have the means to pay, but are able to get assistance.

- On the other hand, most big law firms, which take matters that are different to those that small firms accept, have *pro bono* initiatives to provide legal services to indigent litigants at no cost and undertake public interest litigation.

- Moreover, in terms of the rules of the provincial law societies, it is compulsory for all attorneys to provide at least 24 hours per year of free legal service to the poor. In March 2013 there were 21 463 admitted attorneys, the vast majority of whom are not exempted from mandatory *pro bono* service. This translates to some 515 000 hours of free work per year. In monetary terms, at an average fee of R675 per hour, this translates to approximately R347 625 000 worth of free legal services per year.

24. The law societies have undertaken various further initiatives to encourage access to justice, including:

- Co-operation with university law clinics;
- First Free Interview schemes;
- Prisons visits;
- National Wills week project.

25. It is important to further acknowledge the role played by Legal Aid South Africa (LASA) in this regard. Currently there is almost universal access to lawyers in criminal matters.

26. It remains a challenge to the profession to ensure:
- a proper coordination of these activities;
- support for new initiatives;
- the mainstreaming of the Small Claims Courts;

- the extension of the mandate of LASA in respect of civil matters;
- that a method be found to take care of not-so-poor persons who fall "within the gap", i.e. are unable to afford attorneys' fees, but do not meet LASA's means test or the *pro bono* means test; and
- the practical implementation of the community service model which will ensure quality legal service is provided to the poor.

27. The issue of fees is dealt with in the following chapter.

CHAPTER 3

F. FEE STRUCTURES AS A BARRIER TO ACCESS TO JUSTICE AND THE IMPACT OF A DIVIDED PROFESSION ON FEES

28. The issue of fees has correctly been a subject of extensive discussions. In certain instances, the charges are indeed very high. However, fee structures are primarily based on the clients that a particular law firm assists. Larger law firms generally service corporate clients, where the exposure of the legal practitioner is substantial. High tariffs are therefore not disproportionate to the complexity of the work.

29. The law societies regard overreaching by attorneys as serious misconduct, as is evident by a number of court judgments. The relevant disciplinary action is taken, even to the level of applications to the High Court for striking.

30. The following are the available instruments to assess and manage the reasonableness of fees:

- Tariffs, which are set by statute;
- Fee guidelines to avoid overreaching;
- Taxing committees to assess reasonableness of fees in cases of complaints.

31. The Competition Commission has raised objections with regard to fee guidelines, which is unfortunate, since this is a key measure for the reasonableness of fees.

32. It is important that attorneys' fee structures are well-publicised and that members of the public are educated about their right to negotiate fees or "shop around".

33. The Honourable Committee pointed out that in many instances, but more so in respect to opinions from counsel, clients are forced to pay two persons for a single service, and that this surely impacts on the issue of access to justice. There are many facets to the response to this question, which is dealt with fully below.

34. Firstly, the LSSA supports the continued existence of the advocates' profession within a single, unified regulatory structure because of the level of support that advocates provide to attorneys, especially those from smaller practices. In this regard, even a small firm is able to take on big and complex matters, knowing full well that they can rely on the readily available skills of advocates.

35. The relationship between an attorney and an advocate is that the latter is a service provider to the former. The obligation to ensure the correctness of the advice vests with the attorney. The assurance that the work has been carried out diligently and without negligence is the responsibility of the attorney. The indemnity for anything that may go wrong in respect of the matter, including an opinion, is the sole responsibility of the attorney. Thus, the attorney acts as an insurer in matters of this nature.

36. On a practical level, an attorney receives instructions, makes the initial assessment, narrows issues for consideration by counsel and then scrutinises the completed opinion in the interest of the client. Both parties, therefore, have a critical role to play, albeit the same matter. Furthermore, it is the attorney that carries the indemnity cover for possible negligent advice leading to a loss by the client. This is singularly important for the protection of the public.

37. The client, therefore, is provided with all the necessary protection by the attorney, while having access to the expertise of counsel. Essentially what is paid for a comprehensive service, not a duplication of services. In the majority of instances, attorneys are providing the necessary legal advice without recourse to counsel. It is when the matter is fairly complex, time consuming and/ or at the specific request of a client that counsel is used.

38. We trust that this clarifies the position, which would prevail as long as there is a recognition of both the referral and non-referral arm of the profession as envisaged in the Legal Practice Bill.

CHAPTER 4

G. UNIFORM RULES IN THE QUEST FOR UNITY

39. The LSSA's objective is to ensure uniformity in respect of the practice of law in the entire Republic. There are two initiatives that the LSSA has undertaken in pursuance of this objective – an application for exemption to the Competition Commission and the drafting of Uniform Rules.

- In 2004, the LSSA launched an application with the Competition Commission for exemption of the Rules of Professional Conduct of the provincial law societies. These rules relate to

  - the reservation of work, in particular conveyancing work;
  - the forms of business practice, i.e., multidisciplinary practices;
  - the setting of fee guidelines; and
  - marketing, advertising and touting.

  The Competition Commission rejected the LSSA's application on the basis that the ways the rules are formulated offend the Competition Act. The LSSA has been engaging the Competition Commission to reformulate the offending rules and these are now being incorporated in the draft Uniform Rules.

- Preparation, research and drafting of Uniform Rules.

  This process is almost complete and a copy was recently handed to the Competition Commission.

40. As stated in the introduction, the next step is to accommodate the peculiarities to ensure uniformity.

41. This is raised consciously, as the new Legal Practice Council will have to deal with the rules almost from its inception, this being core to the regulation of the profession.

42. The draft Rules are available from the LSSA on request.

CHAPTER 5

H. THE FUNDING OF THE NATIONAL LEGAL PRACTICE COUNCIL

43. The current funding of the attorneys' profession is based on the revenue generated by commission earnings, Section 46(b) appropriations from the Attorneys Fidelity Fund to the LSSA, members' subscriptions, interest on investments, fines and other income.

44. The following table reflects the expenditure for running the attorneys' profession in 2013:

Cost of Organised Profession

1. Provincial society costs 2013 (forecast): Total Expenditure R 000s

	2013
LSNP	R 61,922
FSLS	R 6,691
CLS	R 24,398
KZNLS	R 15,295
Total	R 108,306

2. LSSA costs 2013 (budget): Total Expenditure R 000s

	2013
LEAD	R 73,350
De Rebus	R 10,761
LSSA	R 22,444
Total	R 106,555

TOTAL (I & 2) R 214,861

Provincial analysis

Total Expenditure R 000s

Expenditure Item	BUDGET 2013			
	LSNP	FSLS	CLS	KZNLS
Staff costs	R 30,705	2,825	11,540	6,263
Admin Allocation	R 11,280	1,509	5,113	2,671
Council	R 7,039	875	4,362	1,666
Committees	R 1,919	598	420	364
LSSA Costs	R 4,450	381	2,060	1,080
Circles	R 2,525	37	136	28
Members Interest	R 1,867	129	364	2,542
Exam costs	R 1,389	85	403	40
Other	R 748	252	00	641
Total	R 61,922	6,691	24,398	15,295

45. It is important to note that a similar trend will continue in the new dispensation.

CHAPTER 6

I. DISCIPLINARY MATTERS AND SELF-REGULATION

46. The Honourable Committee raised a concern about the law societies' perceived soft stance towards recalcitrant attorneys. This, in our view, is an understandable concern, as in many instances members of the public come into contact with law societies only through their disciplinary processes.

47. Law societies are sometimes accused of delaying the disciplinary process. It is, however, important to have an understanding of the process to be followed for a disciplinary enquiry. It has been held that the disciplinary process is a hybrid (*sui generis*) one, drawing in part from criminal and in part from civil procedure.[1] The rules of natural justice must, however, be adhered to. No law society will ignore a complaint or "squash" it. However, processes need to be followed to ensure that any action is not set aside by a High Court when the application for striking reaches the court. Where a law society may refuse to investigate a complaint, it can be called upon by the courts to investigate. The latter is a costly process and the law societies are motivated by such a possibility not to refuse to prosecute unnecessarily. It should be remembered that the persons being disciplined know procedure and will test the process to the extreme. This sometimes causes caution in the actions of the relevant law society. It is also possible that, from time to time, an error may be made or the courts may differ from the law societies.

48. Below are the available statistics of complaints received by the provincial law societies for the period 1 January 2012 to 31 December 2012. Some of these complaints may, after investigation, be found to be without substance, but are nevertheless being dealt with by the law societies and the complainants are advised accordingly. Some of these complaints may eventually lead to a court imposed sanction, such as a suspension of the attorney or striking of his/her name from the roll of attorneys.

[1] *Law Society of the Cape of Good Hope v Nel* (054/11) [2011] ZASCA 200

49. It is important to note that there are various categories of complaints against attorneys, which the law societies deal with on a daily basis. For purposes of this submission, we categorise them under the following headings:

- Complaints regarding unworthy and unbecoming conduct.
- Complaints regarding unprofessional conduct.

50. It is also important to note that the disciplinary procedure of the various law societies may differ in some respects. This explains the disparity in the statistics reflected in this chapter. The disparity may create the impression that certain offences do not take place in some jurisdictions, when in actual fact they do. However they are categorised differently.

J. DISCIPLINARY STATISTICS

Complaint Category		CLS	KZNLS	FSLS	LSNP
A) Unworthy and unbecoming conduct for an attorney	Personal conduct / bringing the profession into disrepute	205	2	52	200
	Conflict of interest	9	3		29
	Failure to attend to matters diligently (failure to appear in court, shoddy work, failure to carry out mandate, etc.)	433	42	89	1354
	Failure to honour undertaking	5	7		15
	Ethical misconduct		12	3	218
	Harassment: Letter of demand (debt collection)		1		50
	Deceased estates and Master's complaints		3		137
	RAF matters	157	19		683
	Judges' complaints		3		51
B) Unprofessional conduct	Trust deficit / misappropriation	1		2	3
	Failure to respond to correspondence / complaints	200	67	14	297
	Touting				15
	Failure to pay correspondent/professional service (other practitioner, experts)	34	7	1	293
	Inspection of accounting records		29		179
	Complaints regarding fees being unreasonably high / overreaching / failure to	130	21	141	425

	account				
	Complaints relating to financial matters (failure to tax account, delay payment of trust money, non-accounting etc)				416
	Failure to submit audit certificate/accountant's report[2]	8	115	15	725
	Practising without a Fidelity Fund certificate[3]		11	22	17
	Outstanding subscription fees			11	3
	Failure to pay over trust interest	5		2	1
Interdicts[4]		16		1	2
Strikings		6	4	4	60
Suspensions[5]			40	1	45

51. The Committee also requested information regarding penalties and fines against errant attorneys. This is dependent on the type of contravention, and penalties can range from a reprimand to a fine of up to R100 000. The cap is set by legislation. Each matter is treated on its own merits. However, generally, again depending on the seriousness of the matter, fines range from R2 000 to R50 000. If it appears that a matter justifies the maximum fine, there is a likelihood that it is escalated to the Council for consideration of an application to the Court for striking or suspension. Costs orders are also given by disciplinary committees when an attorney is found guilty.

52. In the final analysis, attorneys are officers of the Court and can be removed by the High Court in cases of transgression. They can also be charged criminally when available evidence dictates that.

53. The law societies are committed to working closely with the SA Police Service and the National Prosecuting Authority to ensure that those that are involved in criminal activities are prosecuted successfully.

[2] In respect of the KZNLS and LSNP, many of these complaints relate to audit certificates and accountants reports being submitted after the due date, by which time disciplinary proceedings have already been instituted. The procedure in the CLS is to charge and administrative levy for late filing of the audit certificates. The figure indicated in the table represents those members who have been found guilty of not submitting the certificate.

[3] See footnote 4.

[4] The practice in the CLS regarding Fidelity Fund certificates is to interdict those members who practice without qualifying for a certificate for that year, pending compliance with the requirements for the issue of a Fidelity Fund certificate. These interdict applications are included in this number.

[5] Some suspensions are as a result of the late filing of an audit report / accountants report. After receipt of the report, the suspension is uplifted. See also footnote 2 above.

CHAPTER 7

K. COMMENTS ON THE FUTURE OF THE ATTORNEYS FIDELITY FUND

(i) Introduction

54. The LSSA has prepared a comprehensive document on this subject, which is also made available to the Honourable Committee as Annexure "A" to this document. The LSSA does not wish to take over the role of the Board of Control of the Fund to explain itself. Nevertheless, there are salient facts that need to be placed on record for the benefit of the Honourable Committee.

(ii) History and relevance of the Attorneys Fidelity Fund (AFF)

55. The history of the AFF is intrinsically linked to that of the profession. Almost 70 years ago, the legal profession lobbied Parliament for the setting up of the Fund in order to ensure protection for members of the public against theft by attorneys. To date, this objective remains key to the existence of the profession and its credibility in the eyes of the public.

56. The role of the AFF has developed with time to include funding for indemnity in cases of negligence, but also in terms of Section 46(b) of the Act, i.e., funding of programmes that enhance the standards of practice.

57. Moreover, all provincial law societies have agency agreements with the AFF, in terms of which they ensure maximum collection of trust interest by attorneys, from which agency fees they are able to run administration, education and other programmes that enhance access to the profession. This is critical in the South African context in that, if it were not for the support from these initiatives, many practitioners – many from poor backgrounds – would not be able to afford to practise and to pay membership fees. In order to advance this objective, the LSSA has created an Attorneys Development Fund, with the main objective of ensuring sustainability particularly of new law firms, which are struggling financially during the early years in practice.

(iii) Relations between the LSSA and the AFF

58. The relations between the two bodies over years have been extremely well, as they draw their leadership from the same constituencies. This has been fortified by the presence of BLA and NADEL members, who serve on the Board of Control of the Fund.

59. Attorneys have always been able to manage the conflict – real or perceived – that members of the Board may, from time to time, experience. This has not deterred them from being able to increase the asset base of the AFF from a few hundred thousand in the recent past to in excess of R3 billion, while attaining the AFF's objectives of meeting claims for theft, negligence and supporting the profession.

60. Therefore, it is important to note that the profession gave birth to the AFF and continues to breathe life into it. The symbiotic relationship is inherent, and to try and separate the two would simply be artificial.

61. In order to deal further with the perceived conflict of interest, the LSSA has always held a view that:

- The funds received by the AFF must be divided at source after actuarial determination, i.e., there must be prioritisation of the AFF's needs, including contingencies and an appropriation should be made to the profession based on a joint determination by the AFF and the profession.

- Although the majority of Board members should be attorneys, there should also be independent Board members not drawn from the profession, but invited to serve on the Board because of peculiar skills and expertise, including consumers' representatives.

- The LSSA has fully supported the notion that the AFF's Board Committees may, as they currently do, in certain instances include industry experts, such as actuaries, corporate governance specialists, accountants, etc.

Any notion that the LSSA is resistant to these changes is devoid of truth.

(iv) Powers and Functions of the Board

62. The LSSA is fully supportive of the powers of the Board, including inspection of accounts. The inclusion of the latter is that such must be done either in consultation with the relevant Council or at the instance of the Council. It is important that it be recorded firmly that the Council is responsible for regulation, whereas the Board has a responsibility to manage its risk. This, the LSSA submits, can be done responsibly

63. Further, with regard to the issue of inspection of accounts, we wish to point out that it is compulsory for attorneys to have their trust accounting records audited on an annual basis by an external accountant, in accordance with generally accepted accounting practice (GAAP). The audit certificate is to be submitted to the relevant law society within six months of the firm's financial year end. This procedure serves as a compliance review and risk management tool. The law societies therefore do not rely only on case-driven inspections in terms of Section 70 of the Attorneys Act (Council's power of inspection).

(v) Commitment by the LSSA

64. The LSSA is committed to working with the AFF now and in the future to ensure:

- good governance not only of the AFF, but of the entire legal profession, including guarding the conflict of interest;

- that the collection of trust interest is maximised to assist with increasing the asset-base of the AFF;

- that the Fund is made known and accessible to the public, and streamlining the processing of claims, to avoid hardship for the public;

- the sharing of information that may impact on the other body in a responsible and professional manner; and

- the strengthening of the regulatory aspect of the profession and enhancing the AFF's risk management strategy to curb theft and other activities that may needlessly cause loss of the AFF's assets.

65. This hopefully clarifies the LSSA's position on these and other misconceptions that may have been created. As previously stated, the full version of the LSSA's response is attached to this document as Annexure "A".

L. CLOSING

66. We believe that we have demonstrated in our original submission the LSSA's appreciation of the needs of the profession based on our own context, national interest and international experience.

67. This further submission demonstrates, in practical terms, some of the work that the law societies are dealing with in pursuance of transformation and self-regulation.

68. There is no doubt that it is a constitutional imperative to ensure that the profession governs itself in line with international standards.

69. We remain committed to a process of ensuring an independent, united and transformed legal profession.

ANNEXURE "A"

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE SUBMISSIONS BY THE ATTORNEYS FIDELITY FUND

INTRODUCTION

The representation of the Board of Control (Board) of the Attorneys Fidelity Fund (AFF) to the Portfolio Committee on 19 February 2013 is encouraging in that it indicates that the Board has a strong will to protect the funds of the AFF as one enters the new dispensation. To this extent, the intentions of the AFF and the Law Society of South Africa (LSSA) are aligned.

In the process of formulating the LSSA's comments to the Portfolio Committee over many months, the AFF was always invited to participate in the deliberations, and its CEO and Chairman of the Board (and others from management) in fact sat in on the LSSA Council meetings as well as special meetings held to discuss the Bill specifically. The process evolved over several drafts, which were for the most part made available to the AFF as and when the draft submissions were formulated. However, the submissions by the AFF were not made available to the LSSA before they were presented to the Portfolio Committee and it was thus not possible for the LSSA to deal with the content before the hearing. As a result, some misconceptions and inaccuracies occur, for example, the following:

In paragraph 2.0 and 8.0 of the AFF's written submission, reference is made to an actuarial report commissioned by the AFF and which was attached to the submission. In paragraph 5.1 of the report, it is stated by the actuary that the data considered reflected one significant negative trust balance of R2.6 million (Berlowitz Attorneys) from the Law Society of the Northern Provinces (LSNP). The LSNP Council has subsequently investigated the finding made and received confirmation from the bank that *the inference of the actuary was incorrect* in light of the amounts reflected in brackets, and that the trust funds have been available in the trust accounts. The LSNP was not previously alerted to this so that it could confirm the correct position.

We note that the Portfolio Committee has requested suggestions for legislative amendments from the AFF. The current draft of the Bill has been debated by the profession and others over an extended period of time. We trust that further amendments will be made available to the profession and other stakeholders to comment on, as the attorneys' profession, individual practitioners and the new regulator will be intimately affected by fund-related amendments.

THE DEVELOPMENT OF THE ATTORNEYS FIDELITY FUND

Over 70 years ago, the attorneys' profession lobbied Parliament for the creation of the AFF because attorneys realized and acknowledged that there were – and will always be – dishonest practitioners among them. [6]

Thus the AFF was created to ensure that the public had confidence in using the services provided by attorneys. If one attorney steals from his trust account, the other members of the profession guarantee that the client is not out of pocket.

Attorneys initially made annual contributions to the AFF. When the AFF was strong enough so as not to require these contributions (because the income from interest was sufficient for its purposes), attorneys made – and continue to make –token contributions in order to practise as a sole practitioners, partners or directors. The reason was simple: the interest income of the AFF was so substantial that it simply did not need annual contributions from attorneys. If ever funds from trust interest become insufficient, attorneys themselves can be held liable to boost it again via annual contributions.[7]

In order to protect the public and particularly trust monies of the public held by an attorney, the law societies started the scheme which became the Attorneys Fidelity Fund. The scheme is referred to in the debates which led to the statutory fund being created. It was noted in Parliament that:

> "Unfortunately there have been cases where money has been misappropriated, but this bill aims at putting that sort of thing right... We are asked to contribute to a fidelity fund which will comprise a large sum of money. That money is not contributed by the public, but the scheme was started by the law societies themselves..."[8]

The creation of the AFF was also in line with what was happening internationally in other Commonwealth jurisdictions. New Zealand was first when, in 1927, the Council of the Wellington District Law Society proposed that a fund be established to provide for monetary losses incurred by clients of defaulting solicitors. That Law Society drafted a bill which was passed by the New Zealand Parliament. This created the first trust fund, the Solicitors Fidelity Guarantee Fund.[9] Australia followed in 1930, Canada in 1939, England in 1941, Scotland in 1949 and Ireland in 1954 and in the USA, the Vermont Bar Association created the first American fund in 1959.[10]

---

[6] The majority of attorneys do not and did not steal. When attorneys steal, they are struck from the roll by the High Court, as our many law reports indicate.

[7] Section 36 of the Attorneys Act 53 of 1979 provides that: "Revenue of the fund - The fund shall consist of – (a) the annual contributions by practitioners and interest paid to the fund in terms of this Act; (b) the revenue obtained from time to time from the investment of the fund; (c) money given or advanced to the fund by any society; (d) money recovered by the fund in terms of this Act; (e) money received on behalf of the fund from any insurance company; (f) other money lawfully paid into the fund."

[8] MP Mr GP Steyn as quoted in Hansard of 11 March 1941 at 4270

[9] Centre For Client Protection Rules, American Bar Association, A History Of The Client Protection Rules 2007 at 1

[10] Centre For Client Protection Rules, American Bar Association, A History Of The Client Protection Rules 2007 at 2

It is important to note that, in South Africa, the law societies started the scheme and also pressed for the fund to become a statutory fund. In opposing an amendment which had been tabled by another Member of Parliament, Mr Nel (the then MP for Newcastle) who had introduced the Attorneys Admission Amendment and Legal Practitioners Fidelity Fund Bill in 1940, said:

> "I think it is going very far and I do not think the promoters of the bill, the four law societies, would support the amendment. Unfortunately I have not been able to get into touch with them, but I am certain they would not accept it. The select committee gave this careful consideration and it would be a mistake at this stage to accept this amendment." [11]

This respect for the position of the law societies in promoting the interests of the attorneys' profession and the public was also clear from an earlier statement of Mr Nel in noting approval for another amendment:

> "I should like to say that I have submitted this amendment to the four councils of the law societies of South Africa, that is of the Cape, Transvaal, Free State and Natal – who are at present in Cape Town, and they have agreed to accept this amendment, so there is a complete consensus of agreement between these various interests, and I hope therefore that we shall not have any discussion on this point..." [12]

It was also pointed out that:

> "… by establishing this fund the attorneys are proving their *bona fides* to the public. The attorneys want to guarantee the public against losses." [13]

THE NATURE OF THE FUNDS HELD BY THE ATTORNEYS FIDELITY FUND

As to whether or not the monies are "public funds", the fund was initially one to which attorneys contributed. Later, when trust fund interest was used in South Africa to boost the AFF, such interest was and still is derived from deposits by the clients of attorneys. While such clients are members of the public, any view that such interest is "public money" is misdirected. The legislation intended that such interest should vest in the AFF. The AFF's Board has, in the past, been at pains to make it quite clear that such interest paid over to the AFF, belongs to it. Also see footnote 5 above.

We submit that it is not essential for members of the public to be party to decisions relating to these funds. Those members of the public enjoy cover in the event of their money being stolen by delinquent attorneys. Similarly, they enjoy professional indemnity insurance cover by reason of the AFF being able to utilise such funds for losses suffered by clients resulting from professional negligence on the part of

[11] Hansard of 11 March 1941 at 4268
[12] Hansard of 21 February 1941 at 3396
[13] Geldenhuys, Hansard of 11 March 1941 at 4287

attorneys. In a nutshell, therefore, both the AFF and the Attorneys Insurance Indemnity Fund (AIIF) are able to provide client protection to members of the public.

The wellbeing of the AFF was and is in the interest of the profession as much as the public. The AFF was created by the profession in order to refund the public against thieving attorneys. Part of the protection of the public is vested in the law societies, which are duty-bound to regulate the profession in the interests of the public, a function which justifies financing by the AFF.

The AFF was created for clearly defined purposes and the Board members are the trustees who carry out that mandate. The law societies are required to furnish properly motivated requests for funding to be considered by the entire Board. The Board consists of well balanced, honest and objective attorneys.

THE GOVERNING STRUCTURE OF THE AFF

In terms of Section 28 of the Attorneys Act 53 of 1979, the Board of Control of the AFF shall consist of: (1)(a) the serving presidents of all societies; and (b) three members of each society elected annually by the council of the society. (2) The council of a society may in respect of each member elected by it under subsection (1) appoint an alternate member from among the members of the society.

As part of the profession's commitment to transformation, the membership of the governing structure of the Fund has been expanded to include representatives of the BLA and NADEL.

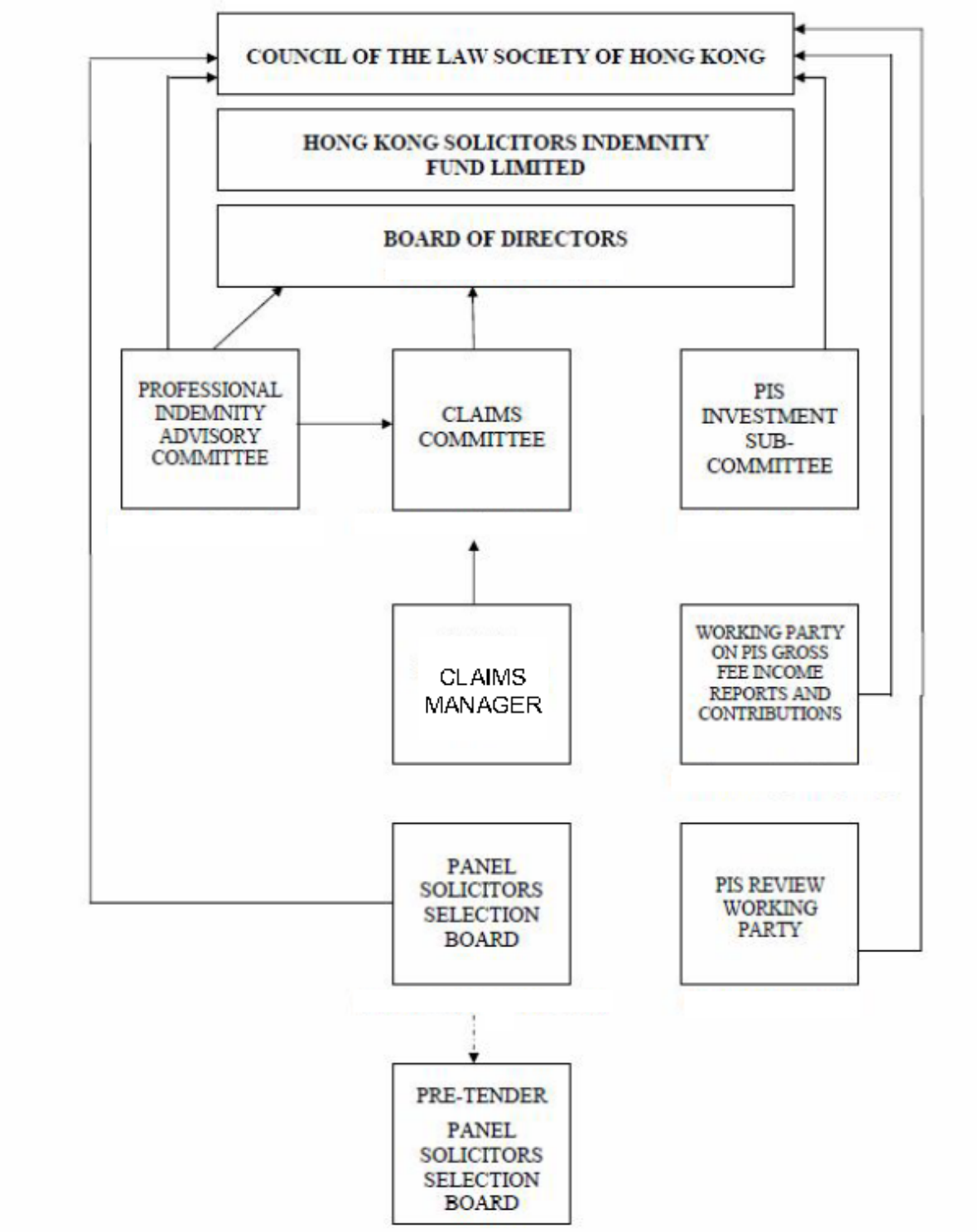
The AFF has grown exponentially under its current governance structure, after handling decades of claims by the public. This speaks of diligent work by the Board. It is an accepted principle of business that where one might lack skills, one appoints experts. To this end, under the control of the Board, experts such as actuaries, investments consultants, as well as experts in the field of risk analysis and risk management have been and are still used by the AFF. It is reiterated that good governance of the AFF is in the interests of the Board, the attorneys' profession and the public.

Internationally, the independence of the legal profession is placed at a premium. This is one of the factors recognised by the International Bar Association and evaluated by the World Justice Project.[14] The independence is also reflected in many countries in that the law societies similarly make a substantial input in the affairs of the fund that strives to safeguard the public against unscrupulous lawyers. Pursuant to a recent enquiry to members of The International Institute of Law Association Chief Executives, the following was established:

1. To qualify to practise as a solicitor in Hong Kong, one must comply with the indemnity rules made by the Council of the Law Society of Hong Kong. The Solicitors (Professional Indemnity) Rules provide that the Law Society is authorised to establish and maintain a fund to provide the indemnity. This fund is known as the Hong Kong Solicitors Indemnity Fund. The Fund is held and administered by the Hong Kong Solicitors Indemnity Fund Ltd. (the Company) which

[14] WJP Rule of Law Index, Country Profile: South Africa, 2012 accessible at http://worldjusticeproject.org/country/south-africa

company is limited by guarantee. The directors of the Company are appointed by the Council. The terms and conditions of indemnity, the method of calculation of deductibles, exclusions and the formulae for calculating the contributions to the Fund applicable to all solicitors are set out in the Rules. The Law Society acting in Council retains the power to give directions to the Company. The Company has appointed a Corporate Manager to carry out some aspects of the management and administration of the Fund, including managing claims. A committee of solicitors called the Claims Committee, whose members may be appointed by either the Company or the Council, determine the manner in which claims will be handled. The Claims Committee is empowered to settle or defend claims as they think appropriate. The Assistant Director of the Professional Indemnity Scheme (PIS) at the Law Society is responsible for all matters relating to the Company and reports directly to the Board of Directors of the Company and the Council. To simplify, the administration of the Fund can be presented by way of the chart as below:



2. In the South Carolina Bar jurisdiction in the United States, the Bar President appoints committee members of the compensation fund (covering the misappropriation of trust funds by lawyers). The membership is staggered, with the Court approving those appointments. The Bar staff administers the committee work. The first $2000 of direct (non-staff) costs is covered by the Bar and the rest of the direct costs, if any, come from the Fund.

3. In Wisconsin, USA, the Client Protection Fund is a fund of last resort. The Fund is overseen by a committee appointed by the President of the State Bar of Wisconsin. Each of the five members of the committee serves five years, so each President can appoint only one member of the committee. The committee makes all decisions as regards compensating persons who have filed claims against the Fund. The monies are managed by the State Bar of Wisconsin, but are separately audited by a certified public accountant and a report submitted to the Supreme Court. All costs related to the management of the Fund, including staff time, are paid for by the Fund.

4. In Zimbabwe the compensation fund is a semi- independent entity in that, as a body corporate, it has a separate legal identity; but operationally it does not act independently of the Law Society. It remains answerable to the Law Society membership at the Society's annual general meeting. The compensation fund is funded by lawyers through the remission of 25% of all interest earned by lawyers on investments of trust funds, and by direct contributions from lawyers. The amount of the individual contribution of lawyers is determined by the annual general meeting. This contribution is in terms of the regulations. In addition, the fund is supposed to invest any excess funds in interest bearing accounts. It is run by a board of trustees. While the trustees are elected annually by members at an annual general meeting, they are not part of the Law Society Council and they operate independently of Council. The board is currently serviced by the Law Society secretariat.

5. In Scotland the fund is a separate entity from the Law Society of Scotland. The fund is governed by the Society's Guarantee Fund Sub-Committee (GFSC) which is made up of seven solicitors and seven non-solicitors. The GFSC reports to the Society's Regulatory Committee. The Society's staff administers the fund with a share of the cost being allocated to the fund to cover the work done for the fund.

6. In Kenya a proposal to set up a compensation fund by the Law Society was rejected at the annual general meeting in 2008. Lawyers are, therefore, required to take insurance indemnity cover of at least US$11,765 per year.

7. In Canada there are different jurisdictions, but the Nova Scotia Barristers' Society operates the fund. Although there is a committee that addresses claims, the oversight and governance of the funds rest with the council of the Society. There is an insurance policy that backs the programme. That policy is provided by the Canadian Lawyers Insurance Association, which is a reciprocal insurance exchange owned by the member law societies. In this way the entire program is kept within the organized legal profession itself.

The attorneys in South Africa have, in the past, been called upon to contribute to the AFF, and they may in future be called upon to do so again, should there be a shortfall. The profession has a vested interest in ensuring that the AFF is safeguarded for its clients and that is why there needs to be a majority of attorneys on the Board.

THE PERCEPTION OF A CONFLICT OF INTEREST[15]

With regard to the perception of a conflict of interest by attorneys serving on the AFF Board, the following is noteworthy:

In most companies, the major shareholders are directors of that very same company. That does not result in the shareholding directors depleting the company. Attorneys practising in incorporated companies find themselves in the same position.

Attorneys, by the nature of their work, have an inherent ability to wear separate hats. The nature of the profession is one that takes care of the interests and assets of others. That is why the profession takes its own governance and that of the AFF so seriously.

We wish to point out that the AFF does not make allocations to the provincial law societies. Allocations are made to the LSSA, NADEL and the BLA for their activities in line with Section 46(b) of the current Attorneys Act, 1979 and pursuant to properly motivated requests. These motivations are considered by the whole Board, which comprises trusted attorneys nominated by the statutory law societies, the BLA and NADEL. Over the decades of the existence of the AFF, there has not been an instance of a Board member having been found guilty of misappropriation of clients' funds. The profession has acted responsibly in the governance of the AFF. It ensures that the persons elected or nominated to the Board are persons of integrity.

There is one allocation made to a provincial law society, and that is the grant to the KwaZulu-Natal Law Society (KZNLS) for its library services. However, this falls squarely within the provisions of Section 46(b). The library services are made available to the profession throughout the country and contribute to a better level of professional service rendered to the public, particularly to assist smaller firms that do not have ready access to law resources. Such funding in itself contributes to enhancing practice and countering professional malpractice.

The suggestion by the AFF that it should have the power to assert its institutional independence from the mainstream profession is acceptable. It is a separate entity, but there should always be recognition of the close relationship with the attorneys' profession. As the above international examples show, such an approach works in other jurisdictions.

SOLUTIONS TO POTENTIAL EXHAUSTING OF THE FUND

The AFF is in a sound financial position. In the past, contributions were made by attorneys until the funds reached a self-sustainable level. In addition to all the other risk aversion actions by the AFF and the law societies in fulfilling their statutory duties, a bottom threshold can be determined and an amount of contribution can be suggested by the law societies in consultation with the AFF.

[15] AFF oral submission to the Portfolio Committee on 19 February 2013 at 3

Allocation of funding to the profession is in terms of Section 46(b) of the current Attorneys Act, 1979. Such allocations may not exceed a predetermined actuarial calculation made by the AFF's own actuaries, which must ensure that a sufficient amount is first available to pay all claims. Even after such a calculation is made, the money is not available for the asking. A joint Section 46(b) committee first determines whether the funding falls within the ambit of what is permitted in terms of Section 46(b).

If the funding to the profession in term of s 46(b) is greater than the amount of the claims paid, it implies that the claims amounts were lower than had been anticipated by the AFF's actuaries.

THE APPROACH OF THE LAW SOCIETIES TOWARDS DISCIPLINE

In this regard, we refer to the Chapter on discipline.

We wish to reiterate that the AFF is an insurance scheme and should not assume a regulatory function. It should have a system in place to deal with enquiries and to refer them to the relevant law society and a suitable person at the law society. Not to do so is to undermine the regulator and unnecessarily belabour the AFF with non-core functions.

COMPARISON OF INVESTMENT STRATEGIES OF THE AFF AND THE PROVINCIAL LAW SOCIETIES

It must be noted that the very nature of AFF on the one hand, and the law societies on the other, is different. The AFF is more in the nature of an insurer for loss, whereas a law society is a regulator. It is conceivable that the insurer-type organisation follows a more aggressive type of investment strategy, whereas the focus of the regulator would be more on availability of reserves and conservative investments.

Two important points need to be underlined:

Firstly, it is the Board of Control of the AFF, consisting of attorneys (who have been nominated and appointed by the law societies, NADEL and the BLA) which has, in fact, tripled the AFF's assets.

Secondly, the law societies not only invest in call accounts[16] . As an example, the KZNLS has invested a portion of it funds in equities and has appointed investment advisors. The Cape Law Society (CLS) has a current investment strategy which entails placing funds in investments where there is a reasonable expectation that the capital amounts invested are safeguarded (to the extent that this is possible) and that a maximum return is received, given the CLS's conservative risk appetite. The CLS, therefore, applies a conservative strategy in relation to its investments. Despite this, the CLS has invested in various non-call account funds. It is assisted in managing its portfolio by consultants. Its

[16] AFF oral submission to the Portfolio Committee on 19 February 2013 at 10

investment portfolio alone stood at approximately R5,6 million in January 2002 and in January 2013 it stood at just under R30 million.[17]

It is so that the economic crunch has affected everyone, but despite numerous economic cycles over decades, the law societies and the AFF have survived and added value to the protection of the public.

THE APPLICATION OF FUNDS BY THE AFF

If one accepts the position that the profession has a vested interest in the AFF and its ability to indemnify the public against the theft by rogue attorneys (of whom the organised profession wants to rid itself), then one must accept that the governors of the regulatory structure who will comprise, among others, of a substantial number of attorneys, will have the preservation of the AFF at heart. This is all the more so, bearing in mind that it is they who effectively created the AFF in the first place, and maintained it to the position where it is today.

THE FUNDING MODEL OF THE NEW STRUCTURES

The concern of the AFF regarding the open-endedness of s 58(j)[18] in the Bill underlines the important question of how the new regulatory structures will be funded. This has not been properly debated. Proper regulation will require an enforcement mechanism and regional structures. The funding model needs to be clarified before the LPB becomes law. If this is not done, the structures might be unsustainable and such a situation is in nobody's interest. However, also refer to the comments on the AFF's written submissions below.

RISK MATRIX

The law societies, as the regulators of the profession, have their own risk management policies, which include a risk matrix. The comment by the AFF that "*only the party who is at risk is entitled to look after his risk"*[19]underlines why the regulators of the profession should be well represented on the Board. They need to ensure, through the Board, that the public is protected. The profession has much to lose by way of image, clients and excessive insurance premiums if the AFF is not maintained and grown.

[17] Flatwell G, *Memo: Guideline to the CLS investments*14 February 2013
[18] AFF oral submission to the Portfolio Committee on 19 February 2013 at 4 and 5
[19] AFF oral submission to the Portfolio Committee on 19 February 2013 at 8

CAPPING OF CLAIMS[20]

Some of the constituent members of the LSSA have agreed that claims should be capped. The representatives of the other constituents expect that their members will also accept this, but are going through the process of having the proposal approved. They have raised questions as to whether proper actuarial studies have been done on this aspect. If not, the question is whether trust investments will not diminish even further, placing further strain on the AFF.

RANDOM INSPECTIONS

The constitutionality of random inspections by the AFF will have to be ascertained. Innocent attorneys might object to the unexpected interference by the AFF and resort to litigation, which could become a costly burden on the AFF. See also Comments on the AFF's written submissions below.

COMMENTS ON AFF'S WRITTEN SUBMISSIONS

1. POWERS AND FUNCTIONS OF THE BOARD

Inspection of accounts

We concede that it is the primary function of the AFF to manage its claims. We submit that the profession has never interfered with the fiduciary function of the AFF and there is no intention to do so in the future. As alluded to in the AFF's executive summary, there should be a relationship of cooperation and there is nothing stopping the AFF from implementing measures to mitigate its risks.

However, the regulation of practitioners is the function of the profession and the power to inspect their records should remain with the regulator. As stated in the LSSA's submissions to Parliament, the Council should be authorised to delegate this function to the Board of Control, but such inspection would then be done under the authority of the Council.

Furthermore, provision is made for the Ombud to investigate any alleged failure by the regulator to deal promptly, effectively and fairly with a complaint. We feel that this provision sufficiently addresses the concerns of the Fund regarding possible negligence and tardiness by the regulator.

The allegation by the AFF that "… there has been a distinct refusal to do this (involve the Fund in inspections), preference being given to third parties …" is incorrect. In fact, the FSLS already outsource investigations to the AFF and the KZNLS agreed to the inclusion of a person from the Fund on its inspection teams. This trend might be extended to other law societies.

[20] AFF oral submission to the Portfolio Committee on 19 February 2013 at 6 and written submissions

With regard to the claims history against the Fund, we submit that claims histories are dynamic and cyclical. They relate to economic conditions and will be subject to change. Therefore, any assumptions in this regard cannot be taken as a fixed factor to influence legislation. As an example, a few years ago, the greatest number of claims against the Fund pertained to RAF matters, while they now relate to conveyancing matters.

With reference to the graph relating to agency fees paid over to the law societies, we wish to point out that the rate is by agreement between the parties and subject to review.

These agency fees are in respect of work done by the law societies on behalf of the AFF and not a subvention by the AFF. In fact, the fees paid to the law societies have dropped by 45%, due to declining interest rates.

We submit that the AFF's view that the powers of the Ombud provided for in Section 49(1)(f) of the Bill are very limited and that the Ombud should be able to entertain complaints about the apportionment of funds made by the AFF to the Legal Practice Council cannot be supported. It would be inappropriate to confer such power on the Ombud and would be inconsistent with the role of an Ombud.

The quantum and process of apportionment is a separate matter and should be considered separately.

2. POWERS AND FUNCTIONS OF THE COUNCIL

Section 6(4)(b) – Fees and charges payable to Council

The AFF's view is that fees and charges payable by practitioners to the Council should be agreed with the Fund. Reference is made to the fact that the fee in respect of newly admitted practitioners had not changed for many years. In its oral submissions, the AFF mentioned an amount of R50. This amount relates to the obtaining of a Fidelity Fund certificate, which is an administrative function. The AFF has not made any recommendations for an increase in this fee. A motivated request for an increase in the contributions by attorneys could and can still be made if the AFF is of the view that this is necessary.

3. PURPOSE AND APPLICATION OF THE FUND

Section 58(1) – Annual appropriation to the Council

The AFF contends that "This annual appropriation is not capped, nor defined in any form". We wish to point out that the annual appropriation is not open-ended, but is defined in Section 22(1)(b),

which states that "… an annual appropriation made by the Fund, the *amount of which is determined by the Board after consultation with the Council* …"

Obviously, the Board will prioritise its own fiduciary responsibilities set out in Section 58 before determining an appropriation to the Council.

However, also see the views under the heading "Funding model of new structures" above.

Section 69(d) – Vacation of office

The AFF raised concern that the body which nominated a member can recall him or her from office. We support the LPB provision that a member should vacate office pursuant to a request by the body which nominated him / her.

We feel that the Bill sufficiently deals with the concerns raised by the AFF.

4. POWERS AND FUNCTIONS OF THE BOARD

Section 64(1)(e) and (f) and Section 95(zE) – Rules concerning the Fund

The AFF raised concern that the Council determines rules without the involvement of the Fund. We suggest that provision be made that, should, in the view of the Council, rules *impact materially* on the operations of the AFF, such rules must be finalized after consultation with the AFF.

The issue of the AFF's right of inspection of records has already been addressed.

5. AUDIT

Section 75(3) – Report to the Council

The Fund feels that reports to the Council suggest control of the Board by the Council. We submit that reports are essential to allow the Council to report to different stakeholders. The Council will apply the information with regard to regulatory and other functions. Reports are not intended to establish control by the Council, but will allow it to take action, in cooperation with the Board, where necessary.

Furthermore, these reports will enhance the synergy between the Council and the Board and the Council will need the information to take action in order to enhance the risk aversion measures of the Fund.

Regulation 94 – Regulations and rules

It is suggested that, where regulations and rules *impact materially* on the operations of the AFF, such regulation and rules must be finalized after consultation with the AFF.

6. ACCOUNTING

Section 87(4)(a) – Unclaimed and unidentified trust monies

We agree that such monies should be paid over to the AFF, provided that they are held in trust.

7. AFF ENTITLEMENT TO INTERACT

Section 86 – Interest to vest in the Fund

The LSSA submission sufficiently deals with this issue.

COOPERATION

The AFF is currently under financial pressure as a result of the downturn of the economy. It is budgeting for losses. The indication by Mr Stansfield that it needs to find new revenue streams supports this.[21] The solution does not lie in further separating the law societies from the AFF. There is strength in working together. It would make sense to maintain the separate legal entity of the regulators on the one hand and the AFF on the other, but allowing the regulator to maintain a strong presence on the AFF Board in order to motivate the profession to work towards strengthening the AFF. This will also serve as a check-and-balance to keep a close watch on the funds and prevent a non-attorney governance structure from alienating the funds so that the AFF is no longer obliged to perform its core function as guaranteeing protection to clients of attorneys.

16 May 2013

[21] AFF oral submission to the Portfolio Committee on 19 February 2013 at 11