Regulation of the Legal Profession: Issues and Ideas

CHANGE Project

Desk Research by the Legal Assistance Centre for the Law Society of Namibia

August 2017

Regulation of the Legal Profession: Issues and Ideas

CHANGE Project

The overall objective of the CHANGE project is:

Through a credible and transparent process, and after obtaining sufficient stakeholder input and appropriate research, to design innovative, sustainable and practical recommendations for change and possible amendment of laws governing all aspects of the legal profession and operations of its regulator to ensure a proactive, trusted and relevant legal profession in Namibia.

INTRODUCTORY SECTIONS

PART A
REGULATION OF THE LEGAL PROFESSION

PART B
OUTREACH AND SERVICES TO THE PUBLIC

The primary author of this paper is **Dianne Hubbard**, who has been the Coordinator of the Gender Research and Advocacy Project at the Legal Assistance Centre since 1993. She holds degrees in English literature from the University of North Carolina (USA) and Stellenbosch University (South Africa), and a law degree from Harvard Law School (USA). She served as a part-time lecturer in the Law Faculty at the University of Namibia during 2001-2002 and as Deputy-Chairperson of the Law Reform and Development Commission for a three-year term ending in 2013. She has also served on the boards of Sister Namibia and Ombetja Yehinga Organisation. Assistance with research and writing was provided by Alisan Oliver-Li, Hannah Wirtz and Nicholas Lee-Wunderlich. Assistance was also provided by Yolande Engelbrecht, Toni Hancox, Perri Caplan and Ruth Murangi.

INTRODUCTORY SECTIONS

1. Introduction

This document is intended as a resource to guide reform of the regulatory environment for the legal profession in Namibia. It outlines the historical and current legal regulatory environment in Namibia. It does the same for South Africa, as a country with a similar legal history. It then provides information about ways other jurisdictions have addressed various components of regulation of the legal profession and commentary on how those features might translate to the Namibian context. However, this report does *not* present a comprehensive overview of regulatory systems in other jurisdictions. It focuses on common-law jurisdictions like Namibia (thus excluding civil law jurisdictions),[1] with a particular emphasis on other countries in Africa

The topics to be covered by this paper were agreed with the Law Society of Namibia, which commissioned the Legal Assistance Centre to carry out the research. In this regard, it was agreed at the outset that this paper would *not* cover contingency fees, class actions or legal aid (except in instances where legal aid is administered by a regulatory authority under discussion). It has also not addressed the issue of pre-paid legal insurance schemes, which is tangential to the topic of regulation of the legal profession.

This paper has proved to be difficult to organise, as so many of the topics are overlapping. For example, questions of independence from the control of Government and (in at least some respects) from the profession itself affect the structure of law societies. As another example, decisions about inclusion and/or regulation of legal service providers other than legal practitioners also impact structure and function in multiple ways. Thus, there is unavoidably some repetition and cross-referencing.[2]

1.1 Conceptual models

As a starting point, in terms of function, there are three possible models for a law society:

(1) a **voluntary private association** which members join because they perceive benefits to membership;
(2) a **public agency** with regulatory responsibility which entails some state oversight and accountability to the public; or
(3) a **professional trade union** which aims to advance the interests of its members, with mandatory membership justified by the fact that all practising lawyers can expect to benefit from the services provided.[3]

Most law societies, like Namibia's, combine aspects of more than one of these models.

Another way to conceptualise law societies is to contrast two different types of membership:

---

[1] In a civil law system, principles and rules are codified, with case law being subordinate to this civil code. In contrast, common law systems include judicial precedent as a source of law. France is an example of a civil-law system, while England is an example of a common-law system.

[2] Please note that the footnotes numbering begins afresh in each section to avoid the distraction of large footnote numbers.

[3] Bradley A Smith, "The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession", 22 (1) *Florida State University Law Review* 35, Summer 1994 at 36 (available at <http://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1485&context=lr>).

(1) **comprehensive associations,** which include a broad cross-section of lawyers and are concerned with the varied interests of this broad membership;
(2) **speciality associations**, which focus on a particular type of law practice (such as lawyers who work in family law, corporate law, patent law or criminal law) or a particular group of lawyers (such as women, young lawyers, minority groups, previously-disadvantaged groups.[4]

One article suggests that comprehensive associations typically seek to serve the needs of three main target groups – individual lawyers, the legal profession in general and the public at large:

> In general, the associations aim to benefit individual lawyers by providing them with opportunities to improve their professional skill and knowledge, to develop useful professional contacts, to expand their client base, and to increase their income. They aim to benefit the legal profession generally by helping to maintain a competent, respected, and ethically responsible body of lawyers and by protecting the profession from unqualified legal service competition. They aim to benefit the general public by protecting and strengthening the administration of justice, by enhancing public understanding of and respect for law and legal institutions, and by identifying and advocating needed changes in the law and opposing those they consider undesirable.[5]

Comprehensive bar associations also generally engage in encouraging and enforcing ethical and professional behaviour by members of the legal profession, and preventing the practise of law by unauthorised persons.[6] Because comprehensive associations are diverse by their very nature, specialty groups may be more interested and effective in advocacy around issues particular to their smaller and less diverse membership.[7]

Speciality associations would usually be more appropriate for representing the interests of their members than for playing a regulatory role, unless they covered an entire sector such as conveyancers or advocates.[8]

1.2 Terminology

In some countries, such as Namibia, the term "**Bar**" refers to an association of the portion of a split profession which specialises in litigation and drafting. However, in some other countries such as the United States, the term "Bar" refers to an association of lawyers without reference to a split profession. Accordingly, what Namibia and some other countries call a "**law society**" is a "**bar association**" in some other countries.

In countries with split professions, lawyers who play different roles may be referred to as "**attorneys and advocates**" or "**solicitors and barristers**". However, in countries without a split profession, the term "**attorney**" is often used as another term for what Namibia refers to a "**legal practitioner**". To add to the confusion, the terms "**integrated bar**" and "**unified bar**" used in the United States have no relationship to a split or fused legal profession, but refer to bar associations with mandatory membership (in contrast to groups where membership is voluntary). Discussions in this document of a fused versus a split legal profession will be explicit; no assumptions should be made based solely on the varying terminology used in different jurisdictions.

---

[4] See Quintin Johnstone, "Bar Associations: Policies and Performances", *Yale Law & Policy Review*, Vol. 15, Issue 1, Article 5 (1996) (available at: <http://digitalcommons.law.yale.edu/ylpr/vol15/iss1/5>).
[5] Id at 195-96.
[6] Id at 211, 218-ff.
[7] See id at 231.
[8] The article which cites this distinction focuses on comprehensive associations.

Please also note that the term "**Solicitor General"** refers to a legal officer who is the Government's chief representative in courtroom proceedings. Where there is an "**Attorney General**" (or equivalent position), the term Solicitor General usually refers to the deputy of the Attorney General. In some jurisdictions, an "Attorney General" has responsibility for criminal prosecutions in addition to other functions.

2. Overview of current situation in Namibia

2.1 Race and gender in the legal profession

The legal profession has grown in size since independence. It has also evolved to be more gender-balanced and to include more previously racially-disadvantaged practitioners. Please note that the discussion of the racial and gender composition of the legal profession is presented solely for the purpose of measuring transformation of the profession over time to overcome the impact of past discrimination, in order to assess whether any specific measures may be needed to encourage under-represented groups. As a backdrop, the overall Namibian population is about 94% previously racially-disadvantaged and 51% female.[1]

At the end of 1990, there were 107 admitted members in the Law Society of Namibia. Of those, 12 (11%) were previously racially-disadvantaged and 11 (10%) were women. As of 4 August 2017, there were 784 active admitted members, of whom 438 (56%) were previously racially-disadvantaged and 367 (47%) were women.[2] Interestingly, previously racially-disadvantaged women outnumber white women almost two to one, while previously racially-disadvantaged men and white men are present in roughly similar numbers. The current legislation requires that the Chairperson and Vice-Chairperson of the Council of the Law Society must be of different races. The composition of the legal profession is not yet reflective of the demographics of Namibia, but the current situation does show significant improvement over the situation at Independence.[3]

Race and gender in the membership of the Law Society of Namibia 1990 and 2017

YEAR	White		Previously racially-disadvantaged		TOTAL
	Males	Females	Males	Females	
1990	84	11	12	0	107
2017 (as of 4 August)	220 (28%)	126 (16%)	197 (25%)	241 (31%)	784

Source: Law Society of Namibia

Looking at advocates alone, the Society of Advocates shortly after independence (in 1991) was very small and almost entirely white. It had 12 members: 9 white males, 2 white females, 1 previously racially-disadvantaged male and no previously racially-disadvantaged females. In August 2017, the Society of Advocates had 33 members: 7 Senior Counsel (six men, one of whom was previously

[1] The Namibia Statistics Agency estimated in 2011 (on the basis of the 2011 census) that the population would be 51% female and 49% male in both 2015 and 2016. "Population Projections", Windhoek: National Planning Commission, 2011. The Namibian population was estimated by the UN as being 51.3% female and 48.7% male in 2015. *World Population Prospects: The 2015 Revision, Key Findings and Advance Tables*, New York: United Nations, Department of Economic and Social Affairs, Population Division, 2015 at 16.

The Namibian censuses do not collect information on race. The cited percentage of the previously racially-disadvantaged population which is the sum of the figures for the "black" and "mixed race" population percentages given in *The World Factbook,* Namibian page, United States Central Intelligence Agency (available at <www.cia.gov/library/publications/resources/the-world-factbook/geos/wa.html>, as updated on 12 January 2017).

[2] Personal communications from Law Society of Namibia, June and August 2017. The 2017 figure excludes judges, deceased practitioners and removed practitioners; however the 1990 figure does not reflect any such exclusions.

[3] No statistics on the race and gender composition of legal practitioners holding senior positions in government or private practice were located.

racially-disadvantaged and one previously racially-disadvantaged woman) and 26 Junior Counsel (6 women, 9 previously racially-disadvantaged), meaning that the Bar overall is 33% previously racially-disadvantaged and 21% female. Only two members are previously racially-disadvantaged women, making this the most under-represented demographic group at the Bar. As of August 2017, the President of the Bar Council was a previously racially-disadvantaged female and the Vice-President was a white male[4] - although the current race and gender diversity in these positions (in contrast to the Law Society) is not mandated by the Constitution of the Society of Advocates. While previously racially-disadvantaged men are present in similar proportions in the Law Society and the Bar, the low representation of women at the Bar relative to the Law Society, particularly previously racially–disadvantaged women, is a matter of concern.

Race and gender in the membership of the Society of Advocates 1980-2017					
YEAR	**White**		**Previously racially-disadvantaged**		**TOTAL**
	Males	**Females**	**Males**	**Females**	
1980	11	0	0	0	11
1982	11	0	1	0	12
1984	9	1	1	0	11
1989	12	1	1	0	14
1991	9 (75%)	2 (17%)	1 (8%)	0 (0%)	12
2002	19	2	1	1	23
2008	18	3	3	3	27
2017	17 (52%)	5 (15%)	9 (27%)	2 (6%)	33

***Source*:** Bar Council; figures reconstructed for various years from photographs.

The demographic changes in the legal profession are not fully mirrored in the composition of the judiciary, where previously racially-disadvantaged men are *more* well-represented than they are in the profession while women of any race are far *less* well-represented than in the profession. As of mid-2017, there were no women amongst the 5 permanently-appointed Supreme Court justices, 4 of whom were previously racially disadvantaged. Of the 15 permanently-appointed High Court judges in place as of August 2017, 8 were previously racially-disadvantaged men, 3 were white men, 3 were previously racially-disadvantaged women and 1 was a white woman.[5] Overall, the 20 persons who preside in the superior courts include 12 previously-racially disadvantaged men (60%), 3 previously racially-disadvantaged women (15%), 4 white men (20%) and 1 white woman (5%) - which makes the judiciary, as of mid-2017, 75% previously racially-disadvantaged and 20% female. Of course, the small number of permanently-appointed justices and judges means that the appointment or retirement of even one person affects these percentages substantially. In mid-2017, both the Chief Justice and the Judge President/Deputy Chief Justice were previously racially-disadvantaged men.

[4] Society of Advocates website: <www.namibianbar.org/members.htm>, as of 17 July 2017, as confirmed and updated by Bar Council member. (One person listed on the website is no longer a member of the Bar.)

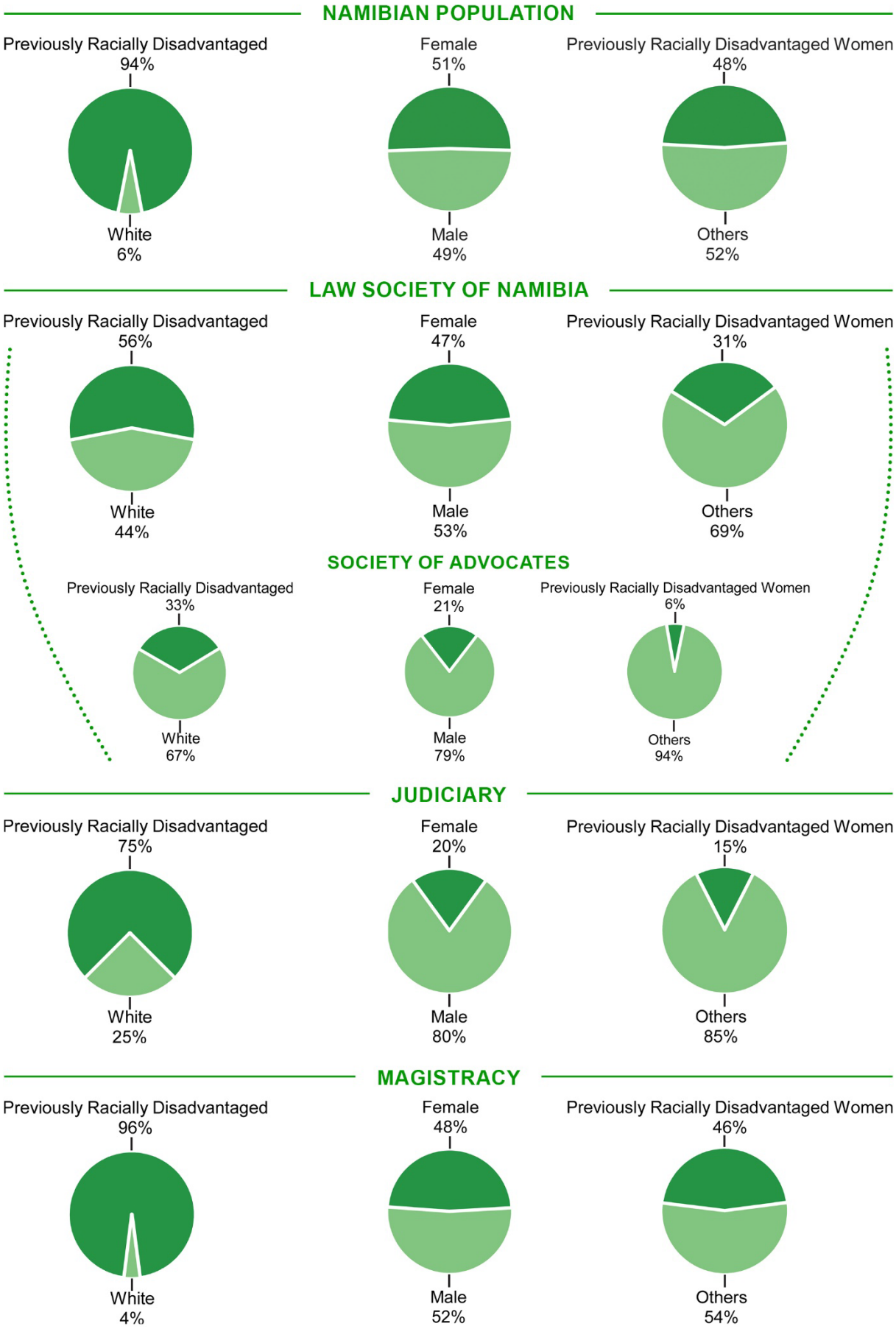
[5] List of judges provided by the Office of the Judiciary, 31 May 2017. The permanent appointments include one judge appointed for a five-year term. The permanent judicial appointments are supplemented with acting appointments, not included here. The Judge President of the High Court, as the Deputy Chief Justice, is counted with the Supreme Court rather than the High Court.

Magistrates have consistently had a much more even gender balance, with women comprising 48% of Namibia's 95 magistrates in August 2017 (49 males and 46 females),[6] compared to 45% in both 2012 and 2010.[7] In terms of race, 96% of the magistracy is made up of previously racially-disadvantaged persons as of August 2017, with only 2 of the 49 males and 2 of the 46 females being white. As of mid-2017, the Chief of the Lower Courts was a previously racially-disadvantaged woman.[8] Thus, the magistracy comes close to reflecting the demographics of the Namibian population in respect of both race and gender.

Attempts to get similar statistics for the student body in the Law Faculty, to assess the feed into the profession for purposes of future transformation, were unsuccessful; the request for this information was refused on the grounds that statistics on the student breakdown are confidential.[9]

The statistics discussed in this section are presented in pie charts on the following page.

[6] Personal communication, Magistrate's Commission, 31 May 2017.
[7] *SADC Gender and Development Monitor 2016*, Table 2.9 at 27.
[8] *Namibian Government Directory*, Government Information Bulletin 2017, Windhoek: Republic of Namibia, 2017 at 112.
[9] Personal communication, UNAM Law Faculty, August 2017. The Dean of the Faculty of Law stated that according to UNAM protocol, it was not possible to supply the requested information without clearance from the university research office.



2.2 Overview of legal framework

2.2.1 The position at Independence

At Independence, the legal profession in Namibia was governed by the following legislation:

- Attorneys Act 53 of 1979 (inherited from South Africa);
- Admission of Advocates Act 74 of 1964 (inherited from South Africa);[10]
- Legal Practitioners' Fidelity Fund Ordinance 28 of 1967, supplemented shortly after Independence by the Legal Practitioners' Fidelity Fund Act 22 of 1990.[11]

Under this legal framework, attorneys could appear only in the lower courts (magistrates' courts), while advocates could appear in both the lower courts and the Superior Courts (the High Court and the Supreme Court).[12]

The profession itself was responsible for practical training and entry requirements. Candidate attorneys were required to hold a four-year B Proc degree from a South African university and to complete two years as an articled clerk under the supervision of a principal who was a practising attorney. An aspiring attorney then had to pass an admissions examination which was set and moderated by the Law Society.[13] As aspiring advocate needed a five-year LLB degree from a South

---

[10] The Attorneys Act 53 of 1979 and the Admission of Advocates Act 74 of 1964 were both South African Acts. During the years 1977 to 1980, the administration of some South African statutes was transferred from South African government departments to the Administrator-General of South West Africa, mostly by means of "Transfer Proclamations" promulgated by the Administrator-General of South West Africa. The relevant Transfer Proclamation for these two laws was the Executive Powers Transfer (Justice) Proclamation, AG 33 of 1979 (Official Gazette 4038). If the administration of a statute was transferred to South West Africa, section 3(5) of the General Proclamation (the Executive Powers Transfer (General Provisions) Proclamation, AG 7 of 1977 (Official Gazette 3668), with reference to s. 3(5) as inserted by AG 10/ 1978 and amended by AG 20/1982) had the effect of "freezing" the statute as it stood at the date of transfer. However, both of these statutes were *excluded* from the operation of section 3(1) of the General Proclamation (see AG 33 of 1979, s. 3(1)(m) and (u)). This means that administration of these statutes was not transferred to South West Africa, and so amendments made to them in South Africa continued to apply to South West Africa until the date of Namibian independence. Section 85 of the **Attorneys Act 53 of 1979** originally stated:

> (1) This Act, any amendment thereof and any scale of fees, rule or regulation made under this Act or deemed to have been so made shall, ·subject to subsection (2), also apply in the Territory, including the Eastern Caprivi Zipfel.
>
> (2) Regulations made under section 81(1)(g) or deemed to have been so made under this Act, shall apply in the Territory, including the Eastern Capri vi Zipfel, only if the Minister by notice in the *Gazette* declares them to be so applicable, and such regulations shall in that event apply from a date specified or to be specified in the notice.

This Act defined Territory in s. 1 as "the territory of South West Africa". Section 12 of the **Admission of Advocates Act 74 of 1964** originally stated: "This Act and any amendment thereof shall apply also Application or in the territory." It defined Territory in s. 1 as "the territory of South-West Africa, including the area known as the Eastern Caprivi Zipfel and referred to in sub-section (3) of section three of the South-West Africa Affairs Amendment Act, 1951 (Act No. 55 of 1951), and that portion of the territory of South-West Africa known as the 'Rehoboth Gebiet' and defined in the First Schedule to Proclamation No. 28 of 1923 of the Administrator of that territory." Both statutes continued to apply to independent Namibia by virtue of Article 140 of the Namibian Constitution, which provided that the law in force at the date of Independence would remain in force until repealed or amended by Act of Parliament or declared unconstitutional by a competent Court.

[11] Legal Practitioners' Fidelity Fund Act 22 of 1990 (GG 117). This Act also made consequential amendments to the Attorneys Act 53 of 1979.

[12] Clive L Kavendjii & Nico Horn, "The Independence of the Legal Profession in Namibia" in Nico Horn and Anton Bösl (eds), *The Independence of the Judiciary in Namibia,* Windhoek: Konrad-Adenauer Stiftung, 2008 at 292 (available at <www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/kavendjii_horn.pdf>).

[13] Id at 292-293.

African university, and was required to complete four months of pupillage with a practising advocate and pass an examination set by the Bar.[14]

The Attorneys Amendment Act 17 of 1991 and the Admission of Advocates Amendment Act 19 of 1991 amended the legislation inherited from South Africa to make it appropriate for an independent Namibia.

Law graduates from foreign jurisdictions initially did not qualify to enter the legal profession in Namibia as attorneys or advocates. This became a particular problem when Namibians who had been in exile during the liberation struggle returned at Independence. This issue was addressed simultaneously by the Attorneys Amendment Act 17 of 1991[15] and the Admission of Advocates Amendment Act 19 of 1991,[16] which made it possible for Namibians who had completed LLB degrees, or been admitted to practice in other countries, to be admitted as attorneys or advocates in Namibia. Specific countries and qualifications had to be designated for these purposes by the Minister of Justice, on the recommendation of the Board for Legal Education.[17]

The Attorneys Act 53 of 1979 was also amended in Namibia by the Walvis Bay and Off-Shore Islands Act 1 of 1994, which addressed the Namibian enrolment of South African legal practitioners in Walvis Bay after the political reintegration of Walvis Bay into Namibia.[18]

2.2.2 Legal Practitioners Act 15 of 1995

The governance of the legal profession was substantially transformed by the Legal Practitioners Act 15 of 1995, which replaced all of the laws previously regulating the legal profession. The Act established a new statutory regulatory body, the Law Society of Namibia, to carry out the task of regulating the legal profession. The Act sets forth the Law Society's functions and the scope of its powers.[19]

The new Act ended the statutory distinction between attorneys and advocates, providing only for "legal practitioners". Any admitted legal practitioner has the right of audience in any court or tribunal where persons are entitled by law to legal representation,[20] but can appear in the Supreme Court only

---

[14] Id at 293; "A Short History of the Bar", compiled by LC Muller SC, Society of Advocates website: <www.namibianbar.org/About.htm>.
[15] Attorneys Amendment Act 17 of 1991 (GG 314).
[16] Admission of Advocates Amendment Act 19 of 1991 (GG 316).
[17] Sections 1A and 13A of the Attorneys Act 53 of 1979, as inserted by the Attorneys Amendment Act 17 of 1991; sections 3 and 4 of the Admission of Advocates Act 74 of 1964, as amended by the Admission of Advocates Amendment Act 19 of 1991. According to Kavendjii and Horn, this was limited to persons who had completed a LLB degree in a Commonwealth or other common law jurisdiction, and not allowed for graduates from civil law jurisdictions. (Clive L Kavendjii & Nico Horn, "The Independence of the Legal Profession in Namibia" in Nico Horn and Anton Bösl (eds), *The Independence of the Judiciary in Namibia,* Windhoek: Konrad-Adenauer Stiftung, 2008 at 264). This was not stipulated in the laws themselves, which left the choice of countries and qualifications to the Minister and the Board.
[18] Walvis Bay and Off-Shore Islands Act 1 of 1994, ss. 3-4. The Walvis Bay and Off-Shore Islands Act 1 of 1994 also included transitional provisions to address the treatment of articles of clerkship and practical examinations in respect of candidate legal practitioners in Walvis Bay who were in the process of fulfilling the South African requirements at the time of the reintegration.
[19] Legal Practitioners Act 15 of 1995, Part V.
[20] Legal Practitioners Act 15 of 1995, s. 17.

after the Council of the Law Society has certified that he or she has completed a year of legal practice.[21]

Membership in the Law Society is mandatory for all legal practitioners, including existing attorneys and advocates.[22] All legal practitioners are supposed to pay a one-time fee of N$20 to the Registrar of the High Court for a certificate of enrolment,[23] but this fee is not being levied in practice.[24] The Council of the Law Society is empowered to fix the subscriptions, fees, levies or other charges payable to the Law Society by its members.[25] As of 2017, legal practitioners who have been admitted for under three years must pay an annual membership fee of N$3002.60, while those admitted for over three years pay N$4300.95. There is also a fee in respect of the General Office for Service of Process fees which is N$725.65 per legal practitioner.[26]

The Act outlines the composition, duties and powers of the Council of the Law Society, which is the body that manages the Law Society. The Council was initially composed of nine members of the Law Society elected by its members at the annual general meeting, four of whom were required to be legal practitioners in private practice, with a Chairperson and Vice-Chairperson elected by the Council from amongst its members. The Act also allows the Council to create committees to assist in its functions.[27]

The Act created the Board for Legal Education which is tasked to oversee the education of aspiring legal practitioners.[28] The Act also created the Justice Training Centre (JTC) at the University of Namibia to provide a post-graduate training program for legal candidates.[29] After completing this course, the candidate legal practitioner must pass the LPQE administered by the JTC under the control of the Board.[30] There is no requirement that admitted legal practitioners engage in any form of continuing education.

The Act also established a Disciplinary Committee[31] to address and oversee allegations of "unprofessional or dishonourable or unworthy conduct" by legal practitioners. A person affected by the conduct of a legal practitioner may apply to the Disciplinary Committee for relief. If the Disciplinary Committee determines that the legal practitioner engaged in prohibited conduct, it may reprimand the practitioner or impose a fine. In more serious matters, the Disciplinary Committee can apply to the High Court of Namibia to suspend the offender from practice temporarily or even to strike the offender's name from the Roll entirely.[32]

---

[21] Legal Practitioners Act 15 of 1995, s. 18.
[22] Legal Practitioners Act 15 of 1995, s. 43.
[23] Legal Practitioners Act 15 of 1995, s. 2(3); Regulations relating to fee for certificate of enrolment as legal practitioner, Government Notice 201 of 1995 (GG 1183).
[24] Personal communication, Law Society of Namibia, October 2017.
[25] Legal Practitioners Act 15 of 1995, s. 48(b).
[26] Personal communication, Council of Law Society of Namibia, July 2017.
[27] Legal Practitioners Act 15 of 1995, ss. 45 (prior to its substitution by the Legal Practitioners Second Amendment Act 22 of 2002), 47, 48, 49.
[28] Legal Practitioners Act 15 of 1995, s. 8-11.
[29] This course currently takes place over a nine-month period which includes attachment to a practising legal practitioner over the entire period as well as three months of compulsory lectures at the JTC during this period. See section 2.10.3 below.
[30] Legal Practitioners Act 15 of 1995, s. 16. See also Esi Schimming-Chase, "The Fusion of the Legal Profession – A Namibian Perspective", *Advocate*, Vol 27, No 2, 44-47, August 2014 at 45.
[31] Legal Practitioners Act 15 of 1995, s. 34.
[32] Legal Practitioners Act 15 of 1995, s. 35.

The High Court of Namibia can also order that a legal practitioner be temporarily suspended from practice or struck from the Roll or if the practitioner is no longer a Namibian citizen or no longer has requisite work authorisation. The Law Society, rather than the Disciplinary Committee, is responsible for making applications to the High Court of Namibia in such cases.[33]

The Act also provides rules regarding financial accounting by legal practitioners and made new rules for the Legal Practitioners' Fidelity Fund which was already in existence.[34]

Both the Law Society of Namibia as a regulatory body and individual legal practitioners have a duty to report information relating to certain financial transactions in terms of the Financial Intelligence Act 13 of 2012, but this duty is made subject to professional legal privilege.[35]

In the 2005 case of *Law Society of Namibia v Kamwi & Another*,[36] the High Court found that the statutory requirements set down by the Legal Practitioners Act 15 of 1995 for the practise of law did not offend Art 21(1)(j) of the Namibian Constitution which protects the right to "practise any profession". The Court found that the very concept of profession presupposes that a person must possess the required qualifications before he or she is entitled to "practise the profession".[37] This holding was confirmed by the Supreme Court on appeal.[38]

2.2.3 Amendments to the Legal Practitioners Act 15 of 1995

The Legal Practitioners Act 15 of 1995 has been amended three times since 1995.

The **Legal Practitioners Amendment Act 4 of 1997**[39] made the following key changes:

- It made further provision concerning the documents to be taken into account by the Board for Legal Education when making recommendations to the Minister on prescribing a foreign degree or equivalent qualification which qualifies a person for admission to practice in Namibia.
- It provided for an exception to the rule prohibiting an unqualified person from representing another person in a court of law, allowing for this when it is authorised by another law.
- It empowered the Council to impose conditions when granting a legal practitioner exemption from the requirement to hold a fidelity fund certificate.

The **Legal Practitioners Amendment Act 10 of 2002**[40] added additional routes to admission.

- It provided for several ways in which a person who holds a suitable law degree may be admitted to practice without having to do the prescribed practical legal training or pass the LPQE. This exemption was made applicable to persons who have satisfactorily served for a continuous period of five years as a magistrate, Director of Legal Aid or legal aid counsel (on the basis of a

[33] Legal Practitioners Act 15 of 1995, s. 32.
[34] Legal Practitioners Act 15 of 1995, Parts III and VI.
[35] Financial Intelligence Act 13 of 2012, Schedule 1, para 1; Schedule 4, para 2 and s. 44 on professional privilege.
[36] *Law Society of Namibia v Kamwi & Another* 2005 NR 91 (HC).
[37] Id at 95-95.
[38] *Ex parte In re Kamwi v Law Society of Namibia* 2009 (2) NR 569 (SC).
[39] Legal Practitioners Amendment Act 4 of 1997 (GG 1586); amends sections 11, 21, 54, 67, 72, and 87 and substitutes section 22.
[40] Legal Practitioners Amendment Act 10 of 2002 (GG 2849); amends sections 5 and 18.

certificate issued by the Minister) or as a prosecutor (on the basis of a certificate issued by the Attorney-General).[41]

In the case of *Ekandjo-Imalwa v The Law Society of Namibia; The Law Society of Namibia v The Attorney-General of the Republic of Namibi*a, the High Court had to decide whether the Legal Practitioners Amendment Act 10 of 2002 was in line with Article 88 of the Constitution, which sets forth the qualifications and duties of the Prosecutor-General, and whether the Amendment Act constituted *ad hominem* legislation. The High Court ruled that there was no concrete evidence that the Legal Practitioners Amendment Act was introduced in order to qualify one particular person (Ms Ekandjo-Imalwa) for appointment as Prosecutor-General and thus did not constitute *ad hominem* legislation.[42] In respect of the independence of the Office of the Prosecutor-General, it was argued that giving the Attorney-General the power to issue exemption certificates to prosecutors would produce a situation where individual prosecutors would be inclined to please the Attorney-General rather than to perform their duties independently. The High Court concluded that the Amendment Act did not infringe upon the independence of the Prosecutor-General or of the Office of the Prosecutor-General, since the Prosecutor-General must be appointed by an independent body and individual prosecutors would still be required to perform their duties under the control and surveillance of the Prosecutor-General. Thus, the High Court held that the Legal Practitioners Amendment Act was in line with the Constitution.[43]

The **Legal Practitioners Second Amendment Act 22 of 2002**[44] made the following key changes:

- It amended the Act to prohibit candidate legal practitioners from accepting, receiving or holding funds for another person.
- It excluded liability of the Legal Practitioner's Fidelity Fund in the case of the theft of money entrusted to or controlled by a legal practitioner in the course of an investment practice.
- It provided for High Court orders for the temporary suspension of a legal practitioner pending the determination of a complaint of unprofessional or dishonourable or unworthy conduct.
- It repealed the legal provisions on the conferment of senior counsel status to legal practitioners (which had in any event been suspended since 1999).
- It extended the term of office of members of the Council of the Law Society from one year to two years.
- It required that at least four of the eight elected members on the Council be held by racially-disadvantaged legal practitioners, and that at least four seats must be held by legal practitioners in private practice (making it possible for these categories to overlap). Prior to the amendment, the Council had been composed of nine elected members, at least four of whom had to be legal practitioners in private practice. The amendment also required that the chairperson of the Council must rotate between a racially-disadvantaged legal practitioner and a racially-advantaged legal practitioner, with the vice-chairperson always being from the opposite category as the chairperson.[45] The Act as amended contains the following definition:

---

[41] Legal Practitioners Act 15 of 1995, s. 5(1)(cA).
[42] *Ekandjo-Imalwa v The Law Society of Namibia and Another; The Law Society of Namibia and Another v The Attorney-General of the Republic of Namibia and Others* 2003 NR 123 (HC) at 131. In terms of Art 88(1)(a), the Prosecutor-General must possess legal qualifications that would entitle him or her to practise in all the Courts of Namibia.
[43] Id at 132-133.
[44] Legal Practitioners Second Amendment Act 22 of 2002 (GG 2892), brought into force on 1 November 2005 by GN 139/2005 (GG 3529); amends sections 1, 21, 32, 52 and 72, substitutes section 45 and repeals section 79.
[45] Legal Practitioners Act 15 of 1995, s. 45.

> "racially advantaged legal practitioner" means a legal practitioner who belongs to a racial or ethnic group which was, or is, directly or indirectly, advantaged as a consequence of social, economic, or educational programmes implemented as the result of racially discriminatory laws or practices before the independence of Namibia; and "racially disadvantaged legal practitioner" has the opposite meaning.[46]

There was no provision for gender balance on the Council.

2.3 Attorneys and advocates

At Independence, advocates and attorneys were distinct in Namibia. Each was subject to a different regulatory body which was responsible for training aspiring practitioners. The Law Society governed practical training and set and moderated admissions exams for attorneys, while the Society of Advocates maintained a pupillage programme and governed admittance exams for advocates.[47]

The Legal Practitioners Act 15 of 1995 merged the two professions. At the time, the Law Society of Namibia and the Society of Advocates issued a joint statement criticizing the merger, but the government viewed it as a way to combat racial inequality within the legal profession.[48] By allowing attorneys to appear before the High Court, the Act attempted to change the inequality of an environment where the Bar was comprised predominantly of white men.[49]

Since the advent of the 1995 statute, the Society of Advocates has continued the Bar on a *de facto* basis. All of its members hold certificates exempting them from holding a fidelity fund certificate on the grounds that they accept briefs only from other legal practitioners who hold fidelity fund certificates and never receive instructions or money directly from clients. The Society of Advocates requires that legal practitioners who wish to become members of the Bar must complete a six-month period of pupillage, followed by a two-month period of assistance to a High Court judge, and write a Bar examination.[50]

Issues pertaining to a split versus a fused legal profession are discussed in more detail in section 10.2 below.

2.4 Notaries

Legal practitioners may apply for appointment by the Chief Justice as notaries public.[51] (Qualification as a notary public under the previous legislation carries forward under the 1995 Act.) The applicant must have been engaged in the practice of law in Namibia for at least five years, with no proceedings

---

[46] Legal Practitioners Act 15 of 1995, s. 1.
[47] Clive L Kavendjii & Nico Horn, "The Independence of the Legal Profession in Namibia" in Nico Horn and Anton Bösl (eds), *The Independence of the Judiciary in Namibia,* Windhoek: Konrad-Adenauer Stiftung, 2008 at 292–96.
[48] Id at 294-95.
[49] Esi Schimming-Chase, "The Fusion of the Legal Profession – A Namibian Perspective", *Advocate*, Vol 27, No 2, 44-47, August 2014 at 44.
[50] Society of Advocates website: <www.namibianbar.org/About.htm> and <www.namibianbar.org/NamLegal.htm>; as elaborated by Bar Council member.
[51] For persons not acquainted with the term, a notary public is a specialist in the drafting and certification of certain documents which are required by law to be notarially executed. This means that a notary has to draft the document, which must also be signed and witnessed before the notary. A notary is held to a higher standard of care in this regard than other legal practitioners. Notaries also play a role in the authentication of documents for use outside Namibia.

pending to strike his or her name from the roll or to suspend him or her from practice. The Chief Justice is empowered to make an exception to the requirement of five years' practice experience if he or she finds it fit and proper in a particular case. A person who has been appointed as a notary public may perform legal duties reserved to notaries public[52] such as executing certain legal instruments,[53] attesting antenuptial contracts prior to their registration,[54] approving certification of trust deeds,[55] certifying a company's pre-incorporation contracts,[56] executing a debenture which is to be registered,[57] and signing protests of bills of exchange.[58]

Tariffs for certain notarial services are set out in regulations issued in terms of the Deeds Registries Act 47 of 1937[59] and the Sectional Titles Act 2 of 2009 (replacing tariffs previously issued under the Sectional Titles Act 66 of 1971).[60]

2.5 Conveyancers

Only a legal practitioner with a certificate certifying that he or she has passed an examination in conveyancing set by the Board of Legal Education (or who was already qualified as a conveyancer under the previous legislation) may present a document for registration in a deeds registry or for attestation or execution by the registrar of deeds. (However, it is explicitly stated that this does not prevent a notary public from presenting a notarial deed for registration in a deeds registry or for attestation or execution by the registrar of deeds.[61])

Tariffs for conveyancing services are set in regulations issued in terms of the Deeds Registries Act 47 of 1937[62] and the Sectional Titles Act 2 of 2009 (replacing tariffs previously issued under the Sectional Titles Act 66 of 1971).[63] The Conveyancing Committee of the Law Society has also

---

[52] Legal Practitioners Act 15 of 1995, s. 86.
[53] See, eg, the Stamp Duties Act 15 of 1993 and the Deeds Registries Act 47 of 1937.
[54] Deeds Registries Act 47 of 1937, s. 87.
[55] Trust Moneys Protection Act 34 of 1934, s 2. The Master shares this power.
[56] Companies Act 28 of 2004, s. 42.
[57] Id, s. 126.
[58] Bills of Exchange Act 22 of 2003, s. 48.
[59] The tariffs are contained in Annexure II to the Deeds Registries Regulations 1996, made in terms of s 10(1)(c) of the Deeds Registries Act. These regulations were promulgated in GN 180/1996 (GG 1343), as corrected by GN 193/1996 (GG 1361) and by GN 312/1996 (GG 1457) and amended by GN 36/2004 (GG 3155), GN 77/2007 (GG 3824) and GN 137/2009 (GG 4278). The 2004 amendments substituted the tariffs.
[60] The Sectional Titles Act 2 of 2009 (GG 4259) replaced the *Sectional Titles Act 66 of 1971* when it was brought into force on 15 December 2014 by GN 252/2014 (GG 5633). Regulations made under the repealed Act originally survived in terms of the new Act. These regulations were contained in RSA GN R.475 of 30 March 1973, as amended by RSA GN R.2579 of 29 December 1978, AG GN 82/1982, GN 195/1996 (GG 1367), GN 76/2007 (GG 3824) and GN 229/2007 (GG 3960). However, new regulations issued under the 2009 Act and contained in GN 223/2014 (GG 5604) repealed all of the regulations made under the previous Act and their amendments.
[61] Legal Practitioners Act 15 of 1995, s. 87.
[62] The tariffs are contained in Annexure II to the Deeds Registries Regulations 1996, made in terms of s 10(1)(c) of the Deeds Registries Act. These regulations were promulgated in GN 180/1996 (GG 1343), as corrected by GN 193/1996 (GG 1361) and by GN 312/1996 (GG 1457) and amended by GN 36/2004 (GG 3155), GN 77/2007 (GG 3824) and GN 137/2009 (GG 4278). The 2004 amendments substituted the tariffs.
[63] The Sectional Titles Act 2 of 2009 (GG 4259) replaced the *Sectional Titles Act 66 of 1971* when it was brought into force on 15 December 2014 by GN 252/2014 (GG 5633). Regulations made under the repealed Act originally survived in terms of the new Act. These regulations were contained in RSA GN R.475 of 30 March 1973, as amended by RSA GN R.2579 of 29 December 1978, AG GN 82/1982, GN 195/1996 (GG 1367), GN 76/2007 (GG 3824) and GN 229/2007 (GG 3960). However, GN 223/2014 (GG 5604) - made in terms of the new Act - repealed all of the regulations made under the previous Act and their amendments.

published recommended minimum fees for the transfer of shares and interests in companies and close corporations.[64] The setting of tariffs for conveyancing services was challenged in the 2010 *Trustco* case[65] on the grounds that this was an infringement of Art 21 of the Namibian Constitution and also on the basis that they constitute an unreasonable administrative action in breach of Art 18. This challenge is discussed in some detail as it also gives guidance on the constitutional permissibility of regulation of the legal profession in general, and the setting of fees for legal services in particular.

The challenge was brought by Trustco Ltd (trading as Legal Shield), which had contracted with a partnership of legal practitioners to provide conveyancing services to Legal Shield customers at an hourly rate rather than according to the prescribed tariffs. The High Court dismissed the challenge on several grounds.[66] On appeal to the Supreme Court,[67] the first issue (after a determination that the appellants did have the necessary standing to challenge the tariffs) related to Art 21. Art 21(1)(j) protects the right of all persons to "practise any profession, or carry on any occupation, trade or business", while Art 21(2) provides:

> The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, insofar as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

The appellants asserted that Art 21(1)(j) protects the right to engage in free economic activity and thus incudes protection of the right to compete on price; since the prescribed tariffs prevented the partnership of legal practitioners in question from competing on price with other legal practitioners, they argued that the tariffs infringed Art 21(1)(j).[68] The respondents argued that the constitutional protection of the right to practise a profession does not prevent state regulation of professions.[69] The Supreme Court, after noting that Art 21(1)(j) does not protect professions, trades or businesses that involve the commission of common-law crimes,[70] set forth a three-step test to determine when regulation of a permitted profession is constitutionally acceptable. The first step is "to determine whether the challenged law constitutes a rational regulation" of the right to practise the profession in question. If so, the next question is whether, even though rational, the regulation is "so invasive of the right to practise that it constitutes a material barrier to the practice of a profession, trade or business". Thirdly, if the regulation does constitute a material barrier in this regard, then the government must show that the regulation is justifiable in terms of art 21(2).[71] Applying this test to the conveyancing tariffs, the Court reasoned as follows:

> The respondents argue that the tariffs constitute a rational regulation of the right to practise as a conveyancer. They argue that the purpose of providing fixed tariffs is to provide certainty as to the costs associated with property transfers and the registration of mortgage bonds. This, the government

---

[64] Law Society of Namibia, "Conveyancing Fees", undated, <http://lawsocietynamibia.org/content/tariffs/conveyancing-trademark-fees/conveyancing-fees>.
[65] *Trustco Ins Ltd t/a Legal Shield Namibia v Deeds Registries Regulation Board* 2010 (2) NR 565 (HC), reversed in part and confirmed in part on appeal in *Trustco Ltd t/a Legal Shield Namibia v Deeds Registries Regulation Board* 2011 (2) NR 726 (SC).
[66] *Trustco Ins Ltd t/a Legal Shield Namibia v Deeds Registries Regulation Board* 2010 (2) NR 565 (HC).
[67] *Trustco Ltd t/a Legal Shield Namibia v Deeds Registries Regulation Board* 2011 (2) NR 726 (SC).
[68] Id at para 20.
[69] Id at para 21.
[70] Id at para 22, citing *Hendricks and Others v Attorney-General, Namibia and Others* 2002 NR 353 (HC).
[71] Id at paras 25-27, following *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) and noting (at para 25) that this was "a slightly different approach" from that set out in *Namibia Insurance Association v Government of the Republic of Namibia and Others* 2001 NR 1 (HC).

> states, helps those engaged in the property market to determine what costs they will incur in advance. There is no doubt that the purpose identified by the respondents is a legitimate government purpose and that, by providing compulsory fees for conveyancing, the tariffs meet this purpose. The tariffs cannot therefore be said to be irrational. Do the tariffs nevertheless constitute a material barrier to the practice of the profession?
>
> There was no evidence on the record that the tariffs did constitute a barrier to the practice of the profession, such that legal practitioners withdrew from the practice of the profession because of the tariffs. What does appear from the record, is that the second appellant would like to increase their share of conveyancing work by competing with other legal practitioners in relation to the price they charge for performing conveyancing work. The inability to compete on price, however, has not been shown to be a material barrier to the right to practise. In the circumstances, the appellants have not established that the tariffs constitute an infringement of art 21(1)(j).[72]

The Supreme Court also considered the question of whether the challenged tariffs infringed Art 18 of the Constitution, which provides that administrative action must be fair and reasonable. The appellants argued that the fee tariffs were unreasonably high in certain circumstances, and that they were also unreasonable in that they did not necessarily have any correlation to the time spent on the work in question.[73] The Supreme Court found no unreasonableness, reasoning as follows:

> What will constitute reasonable administrative conduct for the purposes of art 18 will always be a contextual enquiry and will depend on the circumstances of each case. A court will need to consider a range of issues including the nature of the administrative conduct, the identity of the decision-maker, the range of factors relevant to the decision and the nature of any competing interests involved, as well as the impact of the relevant conduct on those affected. At the end of the day, the question will be whether, in the light of a careful analysis of the context of the conduct, it is the conduct of a reasonable decision-maker. The concept of reasonableness has at its core, the idea that where many considerations are at play, there will often be more than one course of conduct that is acceptable. It is not for judges to impose the course of conduct they would have chosen. It is for judges to decide whether the course of conduct selected by the decision-maker is one of the courses of conduct within the range of reasonable courses of conduct available.
>
> In determining whether the fixed sliding scale tariff for conveyancing fees is reasonable, I commence by observing that both tariffs were set after consideration by the Board: the Deeds Registries Tariff was made by the Board with the approval of the Minister and the Sectional Titles Tariff was made by the Minister after consultation with the Board. The Board is a specialist body with expertise in the field of conveyancing. Its members include the Chief Registrar of Deeds, another registrar of deeds, as well as two conveyancers. Quite clearly, there was a range of other options that the Board and the Minister could have chosen when they determined the tariffs. They could have set the rates differently, or they could have, as the appellants argue they should have, imposed a guideline or an hourly rate. That there is a range of other policy choices, however, does not mean that the route adopted is unreasonable.
>
> The question remains whether the sliding scale tariffs as adopted are unreasonable. In supporting the reasonableness of the tariffs, the respondents tendered evidence of two members of the Board who point to the fact that the sliding scale means that the lower the value of the property, the lower the cost of conveyancing. The respondents admit that expensive properties will attract high conveyancing fees but argue that this cannot be said to be either unfair or unreasonable, because purchasers of valuable properties are almost invariably those most able to cover conveyancing charges.
>
> The respondents admit that the effect of compulsory tariffs is to prevent conveyancers competing on price. This effect is inevitable if certainty as to conveyancing charges is to be achieved. Although there may be circumstances where preventing competition on price would be unreasonable, there are considerations relevant to this case that suggest the converse. These include the following. First, the effect of a fixed tariff has not been shown to be a material barrier to the practice of the profession of conveyancer. Secondly, the service performed by conveyancers is a service that must be used by all those who wish to own property, as it is only conveyancers who are permitted to arrange for the transfer of ownership of property and the registration of other rights against property in the deeds office. Accordingly, it is appropriate that the service be regulated in the public interest. Thirdly, although there may be other advantages were competition on price to be permitted, a fixed set of tariffs

[72] Id at paras 28-29.
[73] Id at para 30.

> also has advantages. It permits people who are calculating whether they can afford to buy a property to know at the outset what the conveyancing charges will be. The sliding scale fixed tariffs also ensure that those who buy properties of the lowest value have least to pay in conveyancing fees, whereas those who buy more expensive properties will pay more. Fourthly, the Board that sets the tariff in the case of the Deeds Registries Tariff and which is consulted by the Minister in respect of the Sectional Titles Tariff, is a committee of experts in conveyancing, well placed to make the decision as to the approach to be followed in setting the tariffs.
>
> In conclusion, then, while it may be that it would be reasonable to permit competition on price, it cannot be said that to prohibit it is, in the circumstances of this case, an unreasonable course. Accordingly, the appellants have not established that the tariffs constitute an infringement of art 18 of the Constitution.[74]

The Supreme Court additionally found that the fee scale in question was not *ultra vires* the authorising legislation, holding that the power to "prescribe" fees includes the discretion to set fixed rates or to determine an *ad valorum* rate (in this case, a fee based on the value of the property involved).[75]

2.6 Legal practitioners employed by the State

The Legal Practitioners Act 15 of 1995 allows legal practitioners employed by the State to practise without fidelity fund certificates.[76] The State has unique authority under the Act to arrange for admission to practise of legal practitioners from other countries who are present on work permits in order to be employed by the State, while in every other case legal practitioners can be admitted in Namibia only if they are Namibian citizens or permanent residents.[77]

The Government Attorney is regulated by the Government Attorney Proclamation R.161 of 1982 (RSA),[78] which appears to have replaced the State Attorney Act 56 of 1957 in South West Africa.[79] This Proclamation addresses the functions of the Government Attorney. It also converts the Windhoek branch of the Office of the State Attorney in Pretoria into the Government Attorney's Office for the Territory of South West Africa. This Proclamation provides that functions of the Government Attorney's office which "according to law, practice or custom" may be performed only by an attorney or a notary or conveyancer, must be performed only by a person who is admitted as such and entitled to practise in Namibia.[80] It also provides that fees and costs for the Government Attorney "may be taxed and recovered in the same manner as if such functions had been performed by a practitioner in

---

[74] Id at paras 31-35.
[75] Id at paras 36-41.
[76] Legal Practitioners Act 15 of 1995, s. 67(1).
[77] Legal Practitioners Act 15 of 1995, s. 4(1)(c)(iii).
Toni Hancox, Legal Assistance Centre, "Submission to the Law Society – Amendments to the Legal Practitioners Act 15 of 1995", September 2009, point 1.
[78] The Government Attorney Proclamation R.161 of 1982 can be found in RSA GG 8367. It was brought into force on 1 April 1984 by RSA Proc. 52 /1984 (RSA GG 9162). The Proclamation applied to South West Africa because it was issued in terms of section 38 of the *South-West Africa Constitution Act 39 of 1968*, which gave the State President of South Africa certain powers to make laws for South West Africa. Regulations were issued in terms of this proclamation in AG GN 61/1984 (OG 4895); these regulations concern amounts payable upon failure to complete articles in the Office of the Government Attorney.
[79] See, eg, *Eimbeck v Inspector-General of the Namibian Police & Another* 1995 NR 13 (HC) at 18 and *Minister of Health and Social Services v Medical Association of Namibia* 2012 (2) NR 566 (SC) at para 28. The latter case states that Proclamation R.161 of 1982 did not repeal the State Attorney Act 56 of 1957. This is correct. However, the *State Attorney Act 56 of 1957* was made applicable to South West Africa by sections 6 and 7 of the State Attorney Amendment Act 7 of 1966 (RSA GG 1380) - and both of these provisions were repealed by Proclamation R.161 of 1982.
[80] Government Attorney Proclamation R.161 of 1982, s. 6.

private practice",[81] and authorises the Government Attorney to instruct and employ correspondent attorneys in the same way as an attorney in private practice.[82]

2.7 Public interest law centres

The Legal Practitioners Act 15 of 1995 includes service for a law centre as one form of legal practise.[83] It defines a "law centre" as –

(a) a centre for clinical legal education in the Faculty of Law at the University of Namibia; or
(b) a centre controlled by a non-profit making organisation which provides legal services without charge.[84]

The law allows legal practitioners at law centres, like those employed by the State, to practise without fidelity fund certificates.[85]

One law centre exists in Namibia at present, the **Legal Assistance Centre** (LAC). It is constituted as a non-profit trust, the Legal Assistance Trust.

Prior to Independence, in 1989, the Legal Assistance Trust applied for a declaratory order confirming that admitted attorneys in its employ were entitled to sign process, as the Administrator-General of South West Africa and the South African Minister of Defence had taken the view that this was not permissible. The matter was settled during the course of oral argument, with the respondents undertaking that they would no longer object to the power of the attorneys employed by the LAC to sign process.[86]

After independence, in the 1996 *Hameva* case, the High Court ruled that the Legal Assistance Centre could not recover disbursements. The reasoning was that, because the LAC in terms of its Deed of Trust provided services "without charge" to its clients, disbursements were expenses incurred by the LAC and not by the client, regardless of whether the expense were incurred by lawyers employed by the LAC or by instructed counsel.[87] (In contrast, the 2007 *Nationwide Detectives* case, the High Court held that lay litigants *could* recover their disbursements (but not their own fees) in a successful order for costs, and that these disbursements could be taxed.[88])

---

[81] Government Attorney Proclamation R.161 of 1982, s. 7(1). The Government Attorney is exempt from stamp duties, but may include in fees and costs "the amount in respect of stamps, stamp duties and fees of office which would have been payable if a practitioner in private practice had performed the functions concerned for or on behalf of any party other than a department". Duties, fees of office or costs recovered accrue to the Central Revenue Fund (s. 7(2)-(4)).
[82] Government Attorney Proclamation R.161 of 1982, s. 9.
[83] Legal Practitioners Act 15 of 1995, s. 1, definition of "practise": "practise" means to practise as a legal practitioner, whether for personal gain or in the service of a law centre or the State, and "practice" shall be construed accordingly.
[84] Legal Practitioners Act 15 of 1995, s. 1.
[85] Legal Practitioners Act 15 of 1995, s. 67(1).
[86] *Legal Assistance Trust v Administrator-General for South West Africa & Another*, case no A 238/1989, 28 August 1989 (unreported), discussed in *Januarie v Registrar of High Court & Others* (I 396/2009) [2013] NAHCMD 170 (19 June 2013) at paras 36-38.
[87] *Hameva & Another v Minister of Home Affairs, Namibia* 1996 NR 380 (SC).
[88] *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2007 (2) NR 592 (HC).

The Legal Assistance Centre subsequently amended its Deed of Trust to provide that while "legal assistance will be given in the public interest and without charge to persons requiring such assistance", nevertheless -

> the Trust is authorised to recover costs in the form of disbursements, and insofar as it may be authorised to by the Law Society, to recover full legal costs, and further that the Centre may require prospective litigants to undertake to pay the actual disbursements paid by the Legal Assistance Centre in relation to any litigation.[89]

The LAC also proposed to the Law Society of Namibia in 2009 that the definition of "law centre" in the Act should be amended to specifically allow recovery of disbursements by a law centre provided that the law centre's founding instrument allowed this.[90]

The LAC further proposed in 2009 that the Legal Practitioners Act should be amended to allow for the admission to practice of legal practitioners from other countries in possession of valid employment permits for the purpose of employment at law centres, to extend an indulgence already provided for legal practitioners employed by the State.[91] The LAC's motivation was that law centres, like the State, need to recruit lawyers from outside Namibia when no qualified applicants are available or interested inside Namibia. As a law firm dealing primarily with constitutional and human rights issues, the LAC reported that it struggled to find lawyers with experience in these limited areas and to retain those who receive training in these specialities at the LAC.[92]

Neither of these proposed amendments to the Act was ever taken forward.

2.8 Paralegals

There is no official registration or regulation of paralegals in Namibia. In 1998, the Legal Assistance Centre (LAC) conducted a Community Paralegal Volunteer Project aimed at ensuring that communities had dedicated volunteers who were trained in common legal matters and who could advise others in their community about their legal rights. Almost 300 paralegals were trained under this programme during the period 1998-2001.[93] This initiative was intended to be a replacement for the LAC's advice offices in various parts of the country which had to be closed down for lack of funding. However, the initiative to deploy community paralegal volunteers was not completely successful. Many trainees who were unemployed at the time of the training, went on to obtain paid jobs which undermined their capacity to continue with paralegal work; in fact, their paralegal training may have made them more attractive as candidates for employment. Another drawback was the lack of a structure for ongoing supervision of the paralegal work by a qualified legal practitioner. Furthermore, some of these paralegals started charging for their services, which was not the intention of the programme.

As an outgrowth of this paralegal training initiative, the Namibia Paralegal Association was established in 2003. As of 2012, it had claimed a membership of some 200 paralegals in all 13 regions.

---

[89] Legal Assistance Trust, Deed of Trust 013/2012, para 2.1.
[90] Toni Hancox, Legal Assistance Centre, "Submission to the Law Society – Amendments to the Legal Practitioners Act 15 of 1995", September 2009, point 2.
[91] Id, point 1, proposing an amendment to the Legal Practitioners Act 15 of 1994, s. 4(1)(c)(iii).
[92] Id, point 1.
[93] *Access to Justice: Paralegal Manual,* Namibia Paralegal Association, 2012 at 1, available at <https://namati.org/wp-content/uploads/2012/05/npamanual.pdf>; "Namibia Paralegal Association", undated <http://access.educationdevelopment.org/?page=showcat&id=14&subid=N@8>

In 2012, it also launched a paralegal manual prepared with the assistance of DLA Piper LLP (a US-based law firm), New Perimeter LLC (a pro bono group established by DLA Piper) and the University of Maryland School of Law. It is not clear if this group is still operational.

The faculty of law of UNAM offers a Diploma in Paralegal Studies.[94] The Law Society of Namibia has established a non-legal practitioners committee which aims at encouraging the proper utilisation of paralegals. However, the role of paralegals in the legal system is not officially recognized or regulated. This means that there is no mechanism for supervision of paralegals or for sanction in cases of misconduct.

Although the Legal Practitioners Act 15 of 1995 makes no explicit reference to paralegals, it does restrict the law-related activities of unqualified persons. It is a criminal offence for a person who is not enrolled as a legal practitioner to practise law, hold himself or herself out as a legal practitioner, issue summons or process, or act on behalf of another person in court (except where this is specifically authorised by another law).[95]

It is also forbidden for an unqualified person to receive a fee for drawing up a will or other testamentary instrument; any contract, deed or instrument relating to the creation or dissolution of a partnership; any contract, deed or instrument relating to a right in immoveable property other than a lease for a period less than five years; or a memorandum, articles of association or prospectus of a company. There are exceptions for persons who do this in the course of employment with a legal practitioner, employees of the State or body corporates drawing up such documents in the course of their duties, persons carrying out statutory duties in connection with insolvency or the winding up of a company or close corporation and for registered accountants and auditors who are preparing documents relating to a company.[96]

The Act also makes it unprofessional or dishonourable conduct for a legal practitioner to enter into an arrangement with a person who is not a legal practitioner where the result is to enable that person to share in the fees of the legal practitioner.

In the 2005 case of *Law Society of Namibia v Kamwi & Another*[97] (discussed above), the High Court rejected the claim of a self-styled "paralegal practitioner" that he had a right to practise law without the statutory qualifications, adding a warning that he could be subject to criminal charges if he persisted in falsely claiming to be a legal practitioner. The Court suggest that, "as an interested member of the public", he could "approach members of the Legislature and lobby for the change in the law" which would allow paralegals to provide legal services.[98] This holding was upheld on appeal by the Supreme Court, but the Court added: "That there may be need for legislation in this country to enable paralegals to do what they are allowed by legislation to do in other countries is undoubted."[99]

A number of other court cases have considered section 21 of the Legal Practitioners Act 15 of 1995, which prohibits persons who are not enrolled as legal practitioners from certain actions – such as

[94] See section 2.10.2 below.
[95] Legal Practitioners Act 15 of 1995, s. 21.
[96] Legal Practitioners Act 15 of 1995, s. 22.
[97] *Law Society of Namibia v Kamwi & Another* 2005 NR 91 (HC).
[98] Id at 97-98.
[99] *Ex parte In re Kamwi v Law Society of Namibia* 2009 (2) NR 569 (SC), quote at para 22; see also *Kamwi v Law Society of Namibia* 2011 (1) NR 196 (SC).

issuing any summons or process; commencing, carrying on or defending any action; or practising or holding themselves out as, or pretending to be, legal practitioners. As outlined in a 2002 High Court case, the legislative purpose behind section 21 is to protect the public against charlatans masquerading as legal practitioners and to create an identifiable and regulated pool of fit, proper and qualified professionals to render services of a legal nature.[100] Thus, court processes issued by a person who held himself out as a legal practitioner without being one are considered to be void *ab initio*.[101] Furthermore, as held by the High Court in *Maletzky v Zaaluka*,[102] cession of a legal claim in an attempt to enable a plaintiff to circumvent the provisions of the Legal Practitioners Act will not be given effect by the court.[103]

Conversely, one case held that a paralegal involved in numerous cases before the Namibian courts could not be excused from compliance with the rules of court and practice directives on the grounds that he was a "layperson" since he did have a substantial amount of legal training despite not being admitted as a legal practitioner.[104]

The courts have experienced difficulties with a small number of "paralegals" who have violated section 21 of the Legal Practitioners Act[105] or, in one case, brought so many repeated and baseless proceedings that the High Court issued an order stating that no further legal proceedings of any nature could be instituted by one particular individual against a particular respondent without the prior leave of the High Court if the Court "is satisfied that the proceedings are not an abuse of the process of the court and that there is a *prima facie* ground for such proceeding".[106] In other instances, the Courts have found that non-qualified persons behaved inappropriately during the course of legal proceedings.[107]

However, it should also be noted that there are a number of statutes which provide for assistance or representation in certain contexts by persons who are not legal practitioners, to increase access to the

---

[100] *Compania Romana De Pescuit (SA) v Rosteve Fishing (Pty) Ltd and Tsasos Shipping Namibia (Pty) Ltd (Intervening): In Re Rosteve Fishing (Pty) Ltd v MFV 'Captain B1', Her Owners and All Others Interested in Her* 2002 NR 297 (HC) at 302. See also *Maletzky v Gaseb & Another* 2014 (3) NR 645 (HC).
[101] *Compania Romana De Pescuit (SA)* 2002 NR 297 (HC).
[102] *Maletzky v Zaaluka* 2013 (3) NR 649 (HC).
[103] See also *Maletzky v President of the Republic of Namibia & Others* 2016 (2) NR 420 (HC).
[104] *Maletzky v Minister of Justice* 2014 (4) NR 956 (HC) at para 26 ("He has chosen to play ignorant when it suits him. In other words, he deliberately indulges in ignorance for this purpose and this purpose alone. Justice cannot prevail under those circumstances.") See *also S v Undari* 2010 (2) NR 695 (HC)at para 6 ("It has been said on numerous occasions by this court that wilful disregard for the rules by laypersons in bringing their applications will not be condoned for the mere reason of their being laymen.")
[105] See, eg, *Maletzky v President of the Republic of Namibia & Others* 2016 (2) NR 420 (HC) at paras 4-5 ("…the submission the applicant began to bombard the court with, sought to cast aspersions on the reputation of a very senior member of the organised legal profession of the land without a phantom of justification… I conclude that applicant's submission on the point was meant to serve no purpose other than to insult, annoy and denigrate. And this the court could not countenance."); *Kalipi v Hochobeb and Another* 2014 (1) NR 90 (HC).
[106] *Namibia Financial Institutions Supervisory Authority v Christian* 2011 (2) NR 537 (HC) at para 104. The order also allowed a judge of the High Court to give the requisite permission for further legal proceedings between these parties.
[107] See, eg, *Christian t/a Hope Financial Services v Chairman of Namibia Financial Institutions Supervisory Authority and Others* (1) 2009 (1) NR 22 (HC) at para 23 ("I note that the applicant appears to be making it a habit of expressing himself in intemperate terms when drawing documents for consideration by the court, whether it be pleadings or papers in applications or heads of argument.") and *Christian v Metro Life Namibia Retirement Annuity Fund* 2008 (2) NR 753 (SC) at para 21 ("It is somewhat of an understatement to say that the applicant in argument seized upon every conceivable 'irregularity' in support of his grievances and used intemperate language in advancing submissions and prayers in his heads of argument.")
See also *Maletzky v Gaseb & Another* 2014 (3) NR 645 (HC), where the Court found that the plaintiff may have committed fraud.

courts. Examples include the Labour Act 11 of 2007 (conciliation and arbitration proceedings[108]) and the Combating of Domestic Violence Act 4 of 2003 (an enquiry concerning a protection order[109]).

Also, the Supreme Court held in the case of *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* that the common-law rule that juristic persons cannot be represented by persons other than legal practitioners no longer has absolute application; an exception has to be made for small, one-person corporations who either prefer to litigate without legal representation or are unable to engage a legal practitioner due to cost, since failure to make an exception would lead to an infringement of the appellant's constitutionally-guaranteed right of access to the court.[110]

The High Court held in the 2007 *Nationwide Detectives* case that a lay litigant may recover disbursements in a successful order for costs, which may be taxed, but that a person who is not an admitted legal practitioner is not entitled to recover fees for his or her labour through a costs order.[111]

2.9 Voluntary legal associations

It is relevant to note that there are two large voluntary groupings of lawyers which are active in Namibia.

(1) The **Namibia Law Association** was formed in 1995, re-launched in 2011 and revived at an event in February 2017 after a period of relative dormancy. In 2011, the group's

---

[108] Labour Act 11 of 2007, ss. 82(13)(b) and 86(13)(b).

[109] Combating of Domestic Violence Act 4 of 2003, s. 12(7) ("An applicant or a respondent may be represented at an enquiry by a legal practitioner or by any person duly authorised by such applicant or respondent, as the case may be.").

[110] *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2008 (1) NR 290 (SC).

[111] *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd* 2007 (2) NR 592 (HC). The Court summarised the positon in light of its holding at para 18:

> "When granting an order of costs in favour of a lay litigant, the court should not simply use the word 'costs', but should rather make an order in terms of which the lay litigant is awarded 'costs limited to actual disbursements reasonably incurred'. This is so because, per recognised definition, the concept of costs includes expenses for the labour of a qualified legal practitioner, which can never be applicable to a lay litigant.
>
> A lay litigant can indeed prepare a bill of costs and present it to the Registrar for taxation. Although there is no specific authorisation in Rule 70 for the Registrar to tax a lay-litigant's bill of costs, he may do so by virtue of the provisions of s 30(1) of the High Court Act, 1990.
>
> A lay litigant is not entitled to claim any fees for his labour, or loss of earning opportunity, in a bill of costs. He cannot take instructions, charge for drafting, perusal or any item in Schedule 6. (Those items can only be charged by virtue of the fact that someone is an admitted legal practitioner.)
>
> A lay litigant is only entitled to his actual disbursement reasonably incurred. Such a disbursement may or may not be the same as those prescribed where legal practitioners are involved. That is for the registrar to determine. The concept 'actual disbursement reasonably incurred' merely confirms that in some instances actual expenses may also be unreasonably incurred.
>
> The tariffs as determined in Schedule 6 of the Rules of Court in respect of reasonable disbursements were not promulgated for purposes of taxing a lay litigant's bill of costs. That is clear from the wording of rule 70 read with Schedule 6. What must guide the registrar is compensation for actual expenses or disbursements, reasonably incurred, and he may request proof that such expenses or disbursements were indeed incurred. In doing so he does not have a discretion as envisaged in rule 70(5). There is only one test, and that is, 'what is the actual disbursement'. If the answer is given and found to be reasonable, there is no basis upon which the registrar can allow an amount higher than the actual disbursement. However, if the actual disbursement is not reasonable, the registrar can and should decrease the amount.
>
> Lay litigants have every right to litigate in person. But under no circumstances should it be allowed for lay litigants to make a 'profit' on disbursements. The principle is simple; taxation of a bill of costs should allow the lay litigant to recoup his actual disbursements, reasonably incurred, and not to make a living, or profit, out of lay litigation."

See also *Kamwi v Standard Bank Namibia Ltd & Others* 2015 (3) NR 678 (HC).

president, Dirk Conradie, stated that its primary purpose was to ensure transformation in the legal profession and to advance the interests of law firms which were historically disadvantaged. The Association also aims to promote law as an instrument of social change.[112] It had 139 paid-up members as of August 2017.[113]

(2) The **Namibian Women Lawyers Association**, established in 2015, seeks to advance and promote women lawyers in Namibia by developing leadership skills through partnerships and committee work and by providing networking opportunities. It currently has a membership of over 300 female lawyers and law students.[114]

(3) The **Society of Advocates**, discussed above, is also a voluntary grouping of legal practitioners, with 33 members as of 2017.

2.10 Legal education and qualifying examination

2.10.1 Board of Legal Education

The Board for Legal Education is created by the Legal Practitioners Act 15 of 1995. It consists of:

- the Chief Justice, who shall be the chairperson of the Board;
- four persons appointed by the Minister, including one person connected to training at the JTC;
- one legal practitioner in the full-time service of the State appointed by the Attorney-General;
- the Prosecutor-General;
- the Dean of the Faculty of Law of the University of Namibia; and
- three legal practitioners appointed by the Council.[115]

This composition means that six of its 11 members are State-employed or State-appointed.

The Board's key functions are to register candidate legal practitioners for training at the JTC, to approve the JTC syllabus, to set guidelines for the practical training provided at the JTC and through attachments, to supervise the Legal Practitioners' Qualifying Examination (LPQE), to appoint examiners and moderators for each subject in the LPQE, to issue certificates to candidate legal practitioners who have passed the LPQE, to advise on issues relating to legal education and to collaborate with the Faculty of Law of the University of Namibia in designing the syllabus and determining the requirements of the course of undergraduate study needed to qualify as a legal practitioner.[116]

---

[112] Shasimana Uugulu and Tirivangani Masawi, "Black law firms form association", *The Villager,* 22 August 2011 (available at <www.thevillager.com.na/articles/109/Black-law-firms-form-association/>); NBC website: <www.nbc.na/namibian-law-association<; NBC website: <www.nbc.na/news/namibian-law-association-re-launched.2765>.

[113] Personal communication, President of Namibia Law Association, August 2017.

[114] See Namibian Women Lawyers Association website: <http://namibianwomenlawyers.com/>; Nomhle Kangootui, "Lawyers stand up for the vulnerable", *The Namibian*, 16 September 2016. The Association also provides free legal assistance for selected cases.

[115] Legal Practitioners Act 15 of 1995, s. 8.

[116] Legal Practitioners Act 15 of 1995, s. 11; Regulations relating to candidate legal practitioners, GN 228/1995 (GG 1207), as amended by GN 58/1997 (GG 1528), GN 67/1997 (GG 1537) and GN 8/1999 (GG 2025).

2.10.2 University of Namibia (UNAM)

The length and composition of the undergraduate course of study required for admission to the post-graduate training programme for legal practitioners is not specified by law. The Legal Practitioners Act 15 of 1995 refers merely to "a degree in law from the University of Namibia".[117] This is currently a four-year undergraduate LLB degree.

The Faculty of Law at the University of Namibia[118] currently consists of three departments: Commercial Law; Public Law and Jurisprudence; and Private and Procedural Law. It also includes the Human Rights and Documentation Centre and the Justice Training Centre (JTC) mandated by the Legal Practitioners Act 15 of 1995. The Faculty also runs a legal aid clinic with the goal of providing practical legal education to law students, while at the same time assisting the community by providing free legal services to those who cannot afford lawyers. One year of service in the legal aid clinic is compulsory for final year LLB students.

The Law Faculty currently offers two undergraduate diploma qualifications in legal subjects: a Diploma in Arbitration and Dispute Resolution and a Diploma in Paralegal Studies. It offers two postgraduate thesis programmes: Master of Laws (LLM) and Doctor of Philosophy in law (PhD). In addition, it offers certificates in three topics: Customary Law; Criminal Justice, Constitutionalism and Human Rights (offered only to members of law enforcement agencies); and Parliamentarian Practice and Conduct (offered only to Parliamentarians).

2.10.3 Justice Training Centre

In accordance with the Legal Practitioners Act 15 of 1995, the JTC provides a Legal Professional Training Programme to candidate legal practitioners who are in possession of an LLB degree (or an approved equivalent degree from another country). This course takes place over nine months, which includes 60 hours/month in attachment to a practising legal practitioner over the entire period as well as attendance at three months of compulsory full-time lectures at the JTC. (If the attachment is done after the completion of the course, it last for only 6 months.)

The JTC administers the Legal Practitioners' Qualifying Examination in accordance with regulations issued under the Legal Practitioners Act 15 of 1995 and instructions from the Board of Legal Education.

The JTC also offers induction courses for recently-employed magistrates and various public servants including prosecutors, court interpreters, court clerks, immigration officials and members of the correctional services. It also provides capacity-building courses of varying lengths for public servants whose duties have some connection with the law.[119]

---

[117] Legal Practitioners Act 15 of 1995, s. 5(1)(a).

[118] Information in this section was sourced from the University of Namibia website, Faculty of Law pages: <www.unam.edu.na/faculty-of-law> and <www.unam.edu.na/faculty-of-law/undergraduate-qualifications?qualificationid=3545>, and the *Faculty of Law Prospectus 2017*, Windhoek: University of Namibia (available at <www.unam.edu.na/sites/default/files/newsletter/law_prospectus_2017_print.pdf>).

[119] *Faculty of Law Prospectus 2017*, Windhoek: University of Namibia at 83-84 (available at <www.unam.edu.na/sites/default/files/newsletter/law_prospectus_2017_print.pdf>).

2.10.4 Namibia University of Science and Technology (NUST)

The Department of Social Sciences in the Faculty of Human Sciences at the Namibia University of Science and Technology (NUST) offers two three-year part-time programmes of study which lead to law-related undergraduate degrees: Bachelor of Criminal Justice in Policing and Bachelor of Criminal Justice in Correctional Management. It also offers a one-year part-time programme of post-graduate study for a Bachelor of Criminal Justice Honours.[120] These courses of study are not relevant for qualification as a legal practitioner.

More detailed aspects of the regulatory framework of the Namibian legal profession are discussed in the thematic sections below.

2.11 Statutory regulation of other professions in Namibia

As a point of comparison, in addition to the legal profession, other professions which are statutorily regulated in Namibia include accountants, architects and quantity surveyors, numerous health professions, land surveyors, property valuators, estate agents, geoscience professions and veterinarians. The following chart provides some comparisons.

Examples of regulation of professions in Namibia

Profession	Statutory membership body	Composition of governing body	Registration of professionals	Discipline	Ongoing education requirements
Accountants & auditors Public Accountants' and Auditors' Act 51 of 1951 (SA)	No, but professional body recognised; membership is voluntary	Board appointed by Minister: * Auditor-General * 4 officers in public service * 1 senior lecturer at UNAM * 4 persons nominated by Institute of Chartered Accountants	Registration by Board	Board handles disciplinary proceedings	No
Estate agents Estate Agents Act 112 of 1976 (RSA)	No	Board appointed by Cabinet: * 4 estate agents nominated by approved voluntary body representing profession * 3 other persons	Registration by Board; all estate agents must have fidelity fund certificates under Act to practise	3 Board members chosen by Board	No
Architects & quantity surveyors Architects' and Quantity Surveyors' Act 13 of 1979	No statutory bodies, but membership in voluntary associations required as condition of registration	Council appointed by Minister: * 4 persons nominated by voluntary professional body for architects * 4 persons who are nominated by voluntary professional body for quantity surveyors * 2 public service employees * 1 person to protect public interest	Registration by Council	Council handles disciplinary proceedings	No

[120] Namibia University of Science and Technology website, Faculty of Human Science, Department of Social Sciences pages: <http://fhs.nust.na/?q=department/social-sciences/programmes>; <http://fhs.nust.na/?q=course/bachelor-criminal-justice-policing>; <http://fhs.nust.na/?q=course/bachelor-criminal-justice-honours>.

Land surveyors Professional Land Surveyors', Technical Surveyors' and Survey Technicians' Act 32 of 1993	No, but only one society per profession may be approved by Council	Council appointed by Minister: * Surveyor-General * 1 land surveyor in full-time public service; * 2 persons nominated by approved society- land surveyors * 1 person nominated by approved society- technical surveyors * 1 person nominated by approved society- survey technicians	Registration by Council	Council handles disciplinary proceedings	No
Medical & dental professionals Medical and Dental Act 10 of 2004	No	Council: * Permanent Secretary * 3 persons appointed by Minister (doctor or dentists in public service, lawyer, one layperson to represent public) * 1 professional lecturer designated by Vice-Chancellor of UNAM * 10 elected persons (half chosen by medical and half by dental)	Registration by Council	Council handles disciplinary proceedings	Yes, as determined by Council

3. Overview of current situation in South Africa

South Africa provides a particularly useful point of comparison because it shares a common legal history with Namibia, including a common past regarding the regulation of the legal profession, and because some of the key issues of concern and debate about the future of the legal profession are similar in South Africa and Namibia. This overview is intended to set the scene for more detailed comparisons between Namibia and South Africa in respect of particular issues.

3.1 Current legal framework

The laws currently governing attorneys and advocates in South Africa are similar to those which applied in Namibia at Independence, although some amendments to these laws were made in South Africa after that date.

The South African Attorneys Act 53 of 1979 statutorily codifies the objects and powers of the various provincial law societies and requires that every attorney (or notary or conveyancer) be a member of the law society of his or her respective province.[1] There are currently four statutory provincial law societies[2] as well as several non-statutory, voluntary law societies. Two such societies are represented on the transitional body designated by the Legal Practice Act 28 of 2014 to prepare for the future implementation of that law: the Black Lawyers Association and the National Association of Democratic Lawyers.[3] Another voluntary society, the South African Attorneys Association, strives to unify practitioners across the various provincial bodies.[4] There is also a Law Society of South Africa, which is a national umbrella organization with a membership comprising the four provincial law societies and some voluntary law societies.[5]

Advocates are governed by the Admission of Advocates Act 74 of 1964. They are admitted to practise by the Supreme Court of South Africa. There is a non-statutory governing body, the General Council of the Bar, which has thirteen constituent societies of practising advocates ("Bars").[6] There is no legal requirement that advocates belong to any of the existing Bars.

Prior to 1997, there were different educational qualifications for attorneys and advocates. The Qualifications of Legal Practitioners Amendment Act 78 of 1997 amended both the Attorneys Act and the Admission of Advocates Act to make a four-year undergraduate LLB degree the minimum academic qualification in both cases and regardless of whether a legal practitioner intends to work in

---

[1] Attorneys Act 53 of 1979 (South Africa), ss. 1(xvi) , 56-59 (available at <www.gov.za/sites/www.gov.za/files/Act53of1979.pdf>); Law Society of South Africa, "History", undated, <www.lssa.org.za/about-us/history>; South African Attorneys Association, "Statutory Law Societies", undated, <www.saattorneysassociation.co.za/Statutory%20Bodies.htm>.

[2] Attorneys Act 53 of 1979, Chapter III. "Law Societies". These four bodies are the Cape Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces and the Kwazulu-Natal Law Society.

[3] Legal Practice Act 28 of 2014, s. 96(1)(a); Black Lawyers Association, "About Us", undated, <www.blaonline.org.za/aboutus>; National Association of Democratic Lawyers, home page: <www.nadel.co.za/>.

[4] The South African Attorneys Association is a voluntary organisation that seeks to unify practitioners nationally. South African Attorneys Association, "About Us", undated, <www.saattorneysassociation.co.za/about.htm>.

[5] Law Society of South Africa, "History", undated, <www.lssa.org.za/about-us/history>.

[6] "Transformation of the Legal Profession: Discussion Paper", Policy Unity of the Department of Justice and Constitutional Development, Republic of South Africa, [1999] (available at <www.gov.za/documents/transformation-legal-profession-discussion-paper>).

private practice or the public service. Attorneys are required to pass an exam to qualify for admission to practice, while advocates must pass a Bar exam only if they wish to join one of the Bar associations which is part of the General Council of the Bar.[7]

In terms of practical training, attorneys are statutorily required to a two-year practical attachment, or 18 months of training if they attend the Practical Training School. There is no statutory training requirement for advocates, although the various Bars generally require a period of pupillage as a condition of membership.[8]

3.2 Legal Practice Act 28 of 2014

South Africa is currently in the process of preparing to implement a new legislative framework for the legal profession, the Legal Practice Act 28 of 2014.[9]

The South African Government identified nine motivations for law reform in respect of the legal profession:

1. The legal profession does not represent the diversity of South African society. The number of black lawyers in private practice and in the public service sector is comparatively low, as is the number of women. Black people and women are almost entirely absent from the ranks of senior partners in large firms of attorneys and senior counsel at the Bar. They were, accordingly, also largely absent from the controlling bodies of the Bar Councils and Law Societies until recently, when steps were taken to make these bodies more representative.
2. The distribution of practising lawyers who deliver legal services to the public is skewed. Most lawyers practise in cities and they service corporations and relatively wealthy people. Rural attorneys tend to be white, male and Afrikaans speaking. They generally provide legal services to the white farmers and local businesses. There are very few lawyers who service the areas in which most black people live - the townships and rural settlements. The few that exist generally have poor resources.
3. Disadvantaged law graduates experience difficulty in entering the legal profession and establishing themselves as successful legal practitioners.
4. The broad middle class of South African society, although not indigent, is not able to afford the fees which practising lawyers charge.
5. Practising lawyers are not sufficiently involved in providing legal-aid services to indigent persons.
6. Paralegal practitioners are not recognised or regulated by statute, despite the fact that they have been rendering legal services to communities for many years.
7. Prosecutors, particularly those serving in the lower courts, are not recognised as a fully-fledged branch of the practising legal profession.
8. Lawyers employed by commercial corporations, governmental agencies and non-governmental organizations are not recognised or regulated by statute as members of the practising legal profession.
9. There is a lack of equality within the legal profession with regard to qualification requirements for admission to legal practice which leads to the undesirable perception that some lawyers have a higher status than others.[10]

The new law will replace the regulatory functions of the multiple law societies and bar associations with a single, statutorily-created legal regulatory body, the South African Legal Practice Council,

[7] Ibid.
[8] Ibid.
[9] As of August 2017, only the transitional provisions of this law have been brought into force. Proclamation R. 2 of 23 January 2015 (South African Government Gazette 38412) brought Parts 1 and 2 of chapter 10 into force with effect from 1 February 2015.
[10] "Transformation of the Legal Profession: Discussion Paper", Policy Unity of the Department of Justice and Constitutional Development, Republic of South Africa, [1999].

which will govern all legal practitioners in South Africa (including both advocates and attorneys).[11] The goal is for this single national body to progressively establish Provincial Councils until there is one in each province.[12] A transitional body, the National Forum on the Legal Profession, is currently working to compile recommendations for implementation of the Legal Practice Act 28 of 2014, including recommendations for the process for electing the members of the Legal Practice Council. That election is anticipated for February 2018.[13]

When the new law is fully operational, regulation of the legal profession will be primarily the province of the Council, which will consist of 23 members – 16 elected by the profession (10 attorneys and 6 advocates) and 7 appointed members (2 law teachers, 3 persons appointed by the Minister of Justice, Legal and Parliamentary Affairs, 1 person appointed by Legal Aid South Africa and 1 person appointed by the Legal Practitioners' Fidelity Fund Board).[14] Thus, it is likely to include some lay persons, although this is not required.[15] This is a change from the bill originally proposed by Government, which would have created a Council with all of the members appointed by the minister.[16] With respect to election procedure, the National Forum on the Legal Profession has recommended that advocates and attorneys should elect their representatives on the Council separately, and that the elected representatives must be of the following race and sex: for the 10 attorneys, 70% black and 30% white, and half women; for the 6 advocates, 3 women (2 black and 1 white) and 3 men (2 black and 1 white).[17]

The Legal Practice Council will regulate the entire profession, which will include attorneys, advocates who take instructions only from attorneys, advocates who will take instructions direct from the public, notaries and conveyancers. Academic qualifications are set by the statute (a four-year or five-year route to an LLB degree at a South African university, or a foreign equivalent), and candidate legal practitioners must also complete certain practical training requirements prescribed by the Minister from time to time and assessed in terms of rules set by the Council. This required practical training must include community service and, for those who intend to practise as attorneys or advocates, a legal practice management course. All legal practitioners must pass "a competency-based examination or assessment for candidate legal practitioners" as determined in rules set by the Council, and attorneys who wish to act as notaries or conveyancers must pass additional examinations or assessments as determined by the Council.[18] The Act does not prescribe any differences in examination or practical training for attorneys as opposed to advocates, but the details on these requirements are left to future rules and regulations.[19] Another question which has been left open is the

---

[11] Legal Practice Act 28 of 2014 (South Africa), s. 97(2)(a) and s. 1–2 (defining "legal practitioner" to include both advocates and attorneys and stating that the Act applies to all legal practitioners). This Act is available at <www.gov.za/sites/www.gov.za/files/38022_22-9_Act28of2014LegalPracticeAct_a.pdf>.
[12] Legal Practice Act 28 of 2014 (South Africa), s. 23.
[13] Law Society of South Africa, "Legal Practice Act latest", May 2017, <www.lssa.org.za/legal-practitioners/advisories/misc/legal-practice-act-28-of-2014/misc/legal-practice-act>.
[14] Legal Practice Act 28 of 2014 (South Africa), s. 7.
[15] Legal Practice Act 28 of 2014 (South Africa), ss. 7-8 (composition of Council and requirements for membership).
[16] Department of Justice and Constitutional Development, Republic of South Africa, "Legal Practice Bill to Open Doors to Advocates", 7 June 2012 (available at <www.sabinetlaw.co.za/justice-and-constitution/articles/legal-practice-bill-open-doors-advocates>).
[17] Law Society of South Africa, "Ninth meeting of the National Forum on the Legal Profession", 2 July 2017, <www.lssa.org.za/news-headlines/general-news/ninth-meeting-of-the-national-forum-on-the-legal-profession>.
[18] Legal Practice Act 28 of 2014 (South Africa), ss. 26-28.
[19] Legal Practice Act 28 of 2014 (South Africa), ss. 26-27. Practical vocational training requirements will be prescribed by the Minister and "minimum conditions and procedures for the registration and administration of

issue of compulsory post-qualification professional development; the Council is authorised to issue future rules requiring this.[20]

Admission to practice will remain the province of the High Court, but an admitted legal practitioner must also apply to the Council for enrolment on the Roll of legal practitioners, with the Roll indicating the category of practise for which they have been admitted.[21] Conversion between categories will be possible – such as conversion from an attorney to an advocate and vice versa, or conversion from a referral advocate to an advocate who takes instructions directly from the public and vice versa – subject to any rules, requirements and conditions set by the Council.[22] The purpose of such conversion is to make it easier for legal practitioners to change direction in their careers.[23]

All legal practitioners will be able obtain the right of appearance in any court, although a legal practitioner who wishes to appear in the High Court, the Supreme Court of Appeal or the Constitutional Court will have to be admitted by the High Court for this purpose, after showing that he or she is an admitted legal practitioner in good standing and either (a) has an LLB degree as well as having three years of practice experience *or* having completed a trial advocacy training programme approved by the Council; or (b) "has gained appropriate relevant experience, as may be prescribed by the Minister in consultation with the Council".[24] The ability of attorneys to appear in the superior courts is not new, having been in place under the previous framework since 1995 – but obtaining this right will be slightly easier under the new law.[25]

The Council will draw up a Code of Conduct applicable to all legal practitioners, which will be published in the *Government Gazette* for public comment before being finalised.[26] An initial Code of Conduct for legal practitioners, candidate legal practitioners and juristic entities has been prepared by the interim National Forum on the Legal Profession.[27] All of the currently-existing law societies will transfer their assets, rights, liabilities, obligations and staff, to the Council or Provincial Councils. [28]

The Council is authorised to establish investigating committees (consisting of one or more persons appointed by the Council) to look into complaints of misconduct against legal practitioners, candidate legal practitioners or "juristic entities". The investigating committee will decide whether to refer the case to a disciplinary committee. Disciplinary committees, which are constituted by the Council on an *ad hoc* basis, will normally include one advocate, one attorney and one lay person. Their proceedings must be open to the public (presumably including the possibility of media coverage) and the particulars of all disciplinary hearings are to be published on the Council's website.[29]

---

practical vocational training" will be set in rules issued by the Council. Aspiring legal practitioners must pass "a competency-based examination or assessment for candidate legal practitioners as may be determined in the rules".

[20] Legal Practice Act 28 of 2014 (South Africa), s. 6(5)(e).

[21] Legal Practice Act 28 of 2014 (South Africa), s. 30.

[22] Legal Practice Act 28 of 2014 (South Africa), s. 32.

[23] "The Legal Practice Bill: What will change for attorneys?", *De Rebus* 3 (July 2014).

[24] Legal Practice Act 28 of 2014 (South Africa), s. 25(3).

[25] John Jeffery, "The sky will not fall if the law is for all?", *Mail & Guardian,* 29 November 2013.

[26] Legal Practice Act 28 of 2014 (South Africa), s. 36. The rules for disciplinary proceedings must be similarly developed (s. 38(2)).

[27] Legal Practice Act 28 of 2014 (South Africa), s. 97(1)(b); this Code of Conduct is published in RSA *Government Gazette* 40610.

[28] Legal Practice Act 28 of 2014 (South Africa), s. 97(2)(a).

[29] Legal Practice Act 28 of 2014 (South Africa), ss. 37-38; "The Legal Practice Bill: What will change for attorneys?", *De Rebus* 3 (July 2014).

Aside from this complaints procedure (which all such regulatory systems have in some form), several new innovations are aimed at protecting the public interest. Firstly, the law establishes a Legal Services Ombud, a former judge appointed by the President who is tasked to deal with complaints from the public relating to legal services, and also empowered to investigate matters which "may affect the integrity and independence of the legal profession and public perceptions in respect thereof" on his or her own initiative.[30] It has been observed that the provisions on the oversight role of the Ombud "provide for greater accountability on the part of the legal profession to the public".[31]

In addition, the expected community service requirement for candidate legal practitioners and practising legal practitioners is designed to "broaden access to justice'.[32] This component will still be refined by the transitional National Forum on the Legal Profession. The Act requires the Minister, after consultation with the Council, to prescribe requirements for community service, and provides that such requirements *may* include "community service as a component of practical vocational training by candidate legal practitioners; or a minimum period of recurring community service by practising legal practitioners upon which continued enrolment as a legal practitioner is dependent".[33] Community service for this purpose may include, (without being limited to) the following:

- an approved form of service in the State;
- service at the South African Human Rights Commission;
- service without pay as a judicial officer, or (in the case of admitted legal practitioners) service as a commissioner in the small claims courts;
- the provision of legal education and training on behalf of the Council, an academic institution or a non-governmental organisation.[34]

The Council may issue rules regarding exemptions from the community service requirement "on application and on good cause shown".[35] This community service requirement has been described as "mandatory *pro bono"*.[36]

The new regime also attempts to protect the public by mandating future action on the issue of legal fees, as discussed in more detail in section 16.3 below.

In addition to regulating individual legal practitioners, the Act sets some conditions for the operation of commercial juristic entities established to conduct a legal practice.[37] It also provides for the operation of non-profit "law clinics" which may render services to the public free of charge, but may "recover any amounts actually disbursed on behalf of the recipient of the services".[38] The law provides that the Council must, within its first two years of operation, investigate and make recommendations to the Minister on the creation of other forms of legal practice, including limited liability legal practices and multi-disciplinary practices, and on the "statutory recognition of paralegals". The purpose of exploring ways to widen the ambit of legal services is "to improve access to the legal profession and access to justice generally.[39]

---

[30] Legal Practice Act 28 of 2014 (South Africa), s. 48.
[31] "The Legal Practice Bill: What will change for attorneys?", *De Rebus* 3 (July 2014).
[32] Legal Practice Act 28 of 2014 (South Africa), s. 3(b)(ii).
[33] Legal Practice Act 28 of 2014 (South Africa), s. 29(1).
[34] Legal Practice Act 28 of 2014 (South Africa), s. 29(2).
[35] Legal Practice Act 28 of 2014 (South Africa), s. 29(3).
[36] "The Legal Practice Bill: What will change for attorneys?", *De Rebus* 3 (July 2014).
[37] Legal Practice Act 28 of 2014 (South Africa), s. 34(7).
[38] Legal Practice Act 28 of 2014 (South Africa), s. 34(8).
[39] Legal Practice Act 28 of 2014 (South Africa), s. 34(9).

More generally, the Council is also charged to "develop programmes in order to empower historically disadvantaged legal practitioners, as well as candidate legal practitioners",[40] and it is required to report annually to the Minister on progress made in respect of such programmes and on measures adopted to enhance entry into the profession.[41]

The Legal Practice Act 28 of 2014, and its move away from self-regulation, was controversial amongst the South Africa legal profession. Critics of the legislation asserted that granting regulatory power to a statutory body challenged the independence of the legal profession and the judiciary.[42] For example, there was concern that it abolishes the law societies which were accountable to their members, and replaces them with a body which is accountable to the Minister and thus need not represent the views of members of the profession. Additionally, there were concerns that the law gives the Minister too many regulatory powers, and that the President appoints the Legal Services Ombud.[43]

However, on the other hand, the Deputy Minister of Justice and Constitutional Development noted:

> The Bill has taken more than 15 years to finalise. The main reason is that there are vested interests among certain sectors of the profession and therefore they will oppose it at all costs. Meanwhile, the majority of ordinary, middle and working-class South Africans cannot afford the services of a private lawyer. They feel alienated from the legal profession and are often let down when they complain about the unprofessional conduct of lawyers. We have a duty to address these issues and so make justice accessible to all.[44]

The new law is expected to undergo some further fine-tuning before it comes fully into force. A Legal Practice Amendment Bill was tabled in Parliament on 26 April 2017[45] and was still being considered by the Justice Portfolio Committee as of 4 August 2017.[46] Its stated objects are:

> to further regulate the prescription of the areas of jurisdiction of the Provincial Councils; to provide that only practising legal practitioners may perform certain acts or render certain services; to further regulate the duties of banks in respect of trust accounts; to further regulate the duration of the National Forum on the Legal Profession; to further provide for the functions of the National Forum on the Legal Profession; to further provide for the dissolution date of the law societies; and to provide for matters connected therewith.[47]

More detailed aspects of the regulatory framework of the South African legal profession are discussed in the thematic sections below.

---

[40] Legal Practice Act 28 of 2014 (South Africa), s. 6(1)(b)(v).
[41] Legal Practice Act 28 of 2014 (South Africa), s. 6(1)(h)(iii)-(iv).
[42] Andisiwe Makinana, "Controversial Bill ends legal fraternity's self-regulation", *Mail & Guardian*, 13 November 2013 (available at <www.mg.co.za/article/2013-11-12-national-assembly-passes-legal-practice-bill/>; Kim Hawkey, "Impact of the Legal Practice Bill" (a summary of a forum discussing the impact of the Legal Practice Bill (B20 of 2012), *De Rebus*, September 2012 at 7 (available at <www.saflii.org/za/journals/DEREBUS/2012/4.html>).
[43] "Representations to the National Council of Provinces on the Legal Practice Bill", South African Attorneys Association, 2014 at 3-4 (available at <http://saattorneysassociation.co.za/Library/PDFs/SAAA%20Representations%20to%20the%20NCOP%20on%20the%20LPB%20February%202014.pdf>).
[44] John Jeffery, "The sky will not fall if the law is for all?", *Mail & Guardian,* 29 November 2013.
[45] See the regularly-updated links on the Parliament of South Africa website to "Bills before Parliament" and "Proceedings on Bills" at <www.parliament.gov.za/legislation?sorts[date]=-1>.
[46] Legal Practice Amendment Bill [B 11 – 2017], available at <www.gov.za/documents/legal-practice-amendment-bill-b11-2017-27-apr-2017-0000> and <www.lssa.org.za/upload/Legal%20Practice%20Amendment%20Bill%20B011-2017.pdf>.
[47] Legal Practice Amendment Bill [B 11 – 2017], long title.

PART A - REGULATION OF THE LEGAL PROFESSION

4. The legal profession and the rule of law

The link between the legal profession, the independence of the judiciary and the rule of law places the legal profession in a unique position when it comes to questions of regulation.

The **United Nations Basic Principles on the Role of Lawyers** state that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled" requires "that all persons have effective access to legal services provided by an independent legal profession". Furthermore, these principles state that "professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest".[1] These principles further refer to lawyers as "essential agents of the administration of justice".[2]

The importance of the linkage between an independent judiciary and an independent legal profession is underscored by the fact that United Nations Commission on Human Rights[3] has appointed a **Special Rapporteur on the Independence of Judges and Lawyers** in 1994 and has extended the Special Rapporteur's mandate several times.[4] As the Special Rapporteur explains, in a democracy, "lawyers have a seminal role to play in ensuring that all citizens have adequate access to justice and reparations" and in "the efficient functioning of democracy and the enjoyment of human rights".[5] They can play this role only if their independence is safeguarded.[6] Furthermore, because lawyers are crucial to the realisation of the right to a fair trial and the presumption of innocence, "States should foster an enabling environment to ensure that they can carry out their work impartially, objectively and professionally, without any external pressure or identification with their client's behaviour, activities or opinions".[7]

The role of lawyers in maintaining the rule of law means that regulation of the legal profession raises special issues concerns. The sections that follow will review various components and models of regulation.

---

[1] United Nations Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, Preamble (available at <www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>).
[2] Id, Principle 12.
[3] Now the United Nations Human Rights Council.
[4] United Nations Human Rights Office of the High Commissioner, "Special Rapporteur on the Independence of Judges and Lawyers", undated, <www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>.
[5] "Report of the Special Rapporteur on the independence of judges and lawyers", Human Rights Council, A/HRC/35/31, 9 June 2017 (advance edited version) at para 87 (available at <www.ohchr.org/Documents/Issues/IJudiciary/A_HRC_35_31_EN.pdf>).
[6] Id at para 88.
[7] Id at para 88.

5. Approaches to regulation

This section considers fundamentally different approaches to regulation of the legal profession.

Namibia's current starting point is regulation by a statutory body in which membership and membership fees are mandatory for all legal practitioners enrolled to practise in Namibia.[1]

5.1 Issues to consider

Statutory versus non-statutory authority: It is possible for a statute to vest power in a regulatory body. That statute can either create a new organisation[2] or grant official power to an existing one.[3] Alternatively, a private professional organisation might play a regulatory role without statutory authority.

Mandatory versus voluntary membership: A statute can, though need not, mandate membership in the regulatory body. For example, **New Zealand** and **Zimbabwe** have statutory bodies in which membership is voluntary, but submission to the body's regulatory powers is not. A non-statutory body does not have power to mandate membership, and would normally not have power to regulate non-members. For example, some US states have voluntary bars with admission to practise and other key aspects of regulation handled by the judicial branch.

Mandatory membership and regulatory powers allow for a greater degree of coverage, which can encourage higher professional standards. Sanctions by a mandatory organisation have more bite than those of a voluntary organisation because they affect a larger percentage of practitioners.[4] Moreover, a regulatory regime is only effective to the extent that it can influence people to act in a certain way. A voluntary organisation must rely on its ability to garner membership and respect in order to have a meaningful effect on the conduct of a profession.[5] As one scholar explains, "[c]ensure by a bar association does not carry much of a social stigma when the bar itself is not viewed with respect."[6] Additionally, an organisation with mandatory membership and/or regulatory powers is able to dictate broader regulatory rules, such as the academic requirements one must complete in order to be admitted to practice. In contrast, a voluntary organisation would not be able to regulate entry into the profession.

According to one source, "[t]he theory of a mandatory bar is that combining the emphasis on professionalism and competence with the governmental regulation of attorneys can be a more efficient and effective way to serve the public purpose of regulating attorneys than the regulation used for other

---

[1] Legal Practitioners Act 15 of 1995, s. 43(1).
[2] For example, South Africa's Legal Practice Act 28 of 2014 established a new body, the South African Legal Practice Council to regulate the legal profession.
[3] For example, the Law Society of Namibia existed prior to the Act, but was re-established by the Legal Practitioners Act 15 of 1995 (s. 40) as the body to govern the newly-merged profession in Namibia. Clive L Kavendjii & Nico Horn, "The Independence of the Legal Profession in Namibia" in Nico Horn and Anton Bösl (eds), *The Independence of the Judiciary in Namibia,* Windhoek: Konrad-Adenauer Stiftung, 2008 at 294.
[4] Jonathan Macey, "Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession", *Fordham Law Review*, Vol 74, Issue 3, No 4, 2005 at 1094 (available at <http://ir.lawnet.fordham.edu/flr/vol74/iss3/4/>) (explaining that the effectiveness of a regulatory body depends on its monopoly over the profession).
[5] Ibid.
[6] Id at 1081.

professions and trades."[7] On the other hand, one issue which has arisen in the US (discussed in more detail below) is the need to restrict the work of a law society with mandatory membership and fees when it engages in advocacy on issues which not all of its membership supports.

In general, proponents of mandatory membership assert that this increases the financial resources and impact of the body, ensures a diverse membership, allows for setting of minimum fee schedules, eliminates control of legal bodies by small cliques, enables self-government and self-discipline of the legal profession, gives the profession a channel to speak with 'one voice' and encourages a degree of unity which nurtures professionalism and can assist in particular lawyers from disadvantaged or minority groups or those based in small towns.[8] In contrast, proponents of voluntary membership assert that voluntary groups may have access to more enthusiastic human resources, can raise funds from sources other than membership dues, have more motivation to provide services which genuinely benefit their members, remove the problem of tensions between members with opposing viewpoints on major issues and avoids the problem of forced association – and that regulatory functions might better be taken over by the state which is better-placed to focus on protecting members of the public instead of members of the profession.[9]

A statute making membership of the Puerto Rico Bar Association mandatory[10] was found to be an unconstitutional violation of the right to freedom of association by the Supreme Court of Puerto Rico in 2014 in the case *Rivera Schatz v Estado Libre Asociado.*[11] In contrast, the US Supreme Court has found that mandatory bar association membership does *not* violate the right of freedom of association in the US Constitution in the 1961 case of *Lathrop v Donohue*.[12]

Scope of power: A statute can mandate coverage for as broad a population as the legislature wishes, provided that this is consistent with the constitutional restrictions for regulation of the practise of a profession. Thus, a voluntary organisation must contend with its inability to regulate competition from outside the profession, such as by accountants or paralegals, whereas a statute can mandate consistent

---

[7] "Report to the Michigan Supreme Court", Task Force on the Role of the State Bar of Michigan (hereinafter "Michigan Task Force"), [2014] at 5 (available at <http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/comments%20new%202013/2014-07_2014-06-03_sbm%20task%20force%20report.pdf>).

[8] See, eg, Bradley A Smith, "The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession", 22 (1) *Florida State University Law Review* 35, Summer 1994 at 36, 66.

[9] Id at 58-72. The author of this article is a strong proponent of voluntary bar associations.

[10] The law in question was "la Ley Núm. 109-2014".

[11] *Rivera Schatz v Estado Libre Asociado,* 16 October 2014. The applicant argued that the law infringed his fundamental right of free association ("la libertad de asociacion") and his right of freedom of expression and constituted a violation of separation of powers. The Supreme Court agreed with the applicant and concluded that the statute constituted a violation of separation of powers and an infringement of its inherent power to regulate the legal profession. Furthermore, the Supreme Court held that a person ought to be free to choose whether to belong to an organisation or not. Thus, it found that the law making bar association membership mandatory violated the Puerto Rican Constitution. The case is available in Spanish at <www.ramajudicial.pr/ts/2014/2014tspr122.pdf>. See also Professional Responsibility Blog, "Puerto Rico Supreme Court invalidates statute that made Bar Association membership mandatory", 20 October 2014, <http://bernabepr.blogspot.com/2014/10/puerto-rico-supreme-court-invalidates.html>.

[12] *Lathrop v Donohue* 367 US 820 (1961). A plurality of justices found that the mandatory bar association furthered the State's legitimate interests in raising the quality of professional services, and that the State could therefor constitutionally require that the costs of achieving this end should be shared by the legal professionals who are the subjects and beneficiaries of the regulatory program. The plurality also found that mandatory membership does not violate freedom of association, following the Court's holding in *Railway Employees' Dept v Hanson* 351 U.S. 225 (1956) that a "union shop" agreement requiring union membership as a condition of employment was constitutionally permissible.

regulation of the entire industry and make it illegal for someone who is not governed by the regulatory body to carry out work reserved to registered professionals.[13]

Funding: A statutory organisation is likely to have a more reliable source of income than a voluntary one – either from Government funding or from mandated membership dues. In contrast, a private organisation would need to devote some of its resources to recruiting and fundraising, which may detract from its energy for regulation and representation of the profession. It would also need to be more careful to spend its dues income in ways that align with members' interests, which might defeat the larger goal of regulating and disciplining its members. However, as discussed below, Government funding may raise concerns regarding the body's independence from Government.

Independence from profession: As discussed in more detail below, one consideration for a regulatory body is its independence from the regulated profession. Such independence would be easier for a statutory body to achieve than a self-governing private organisation. A benefit of separation between the regulator and the profession might allow for more impartial disciplining of legal practitioners. However, it could also lead to governance of the profession by persons not well-acquainted with relevant issues.

Independence from Government: As discussed in more detail below, a statutory body's independence from the government is a widely agreed-upon ideal for the legal profession, linked to the rule of law and the independence of the courts as part of the separation of powers in a constitutional state. If a regulatory body traces its power to a statute, its independence from Government may be subject to question. Independence from government may also be compromised if the statutory body receives government funding.

Regulation versus governance: It would be possible for the legal profession to remain essentially self-governing, with government regulation focussing on issues relating to the protection of the public interest, such as access to justice and entry into the profession. Another possibility would be for government regulation to take the form of accrediting self-governing professional associations and monitoring them to ensure that they deserved to remain accredited.[14]

Responsiveness to needs of membership base: As a private organisation would have to build its membership base, it would necessarily have to focus on meeting its members' needs and building its reputation to survive. This has the positive effect of allowing the private organisation to advocate its members' views on questions of policy.

Productivity: In the absence of a requirement of mandatory membership, a private professional organisation must work to build and maintain its base. This feature acts to promote effectiveness and productivity, as members would leave the organisation if they do not view it as adding value to the profession. Also, where membership is voluntary, members may be more willing to work actively, thus making the group's human resources more effective.

---

[13] Jonathan Macey, "Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession", *Fordham Law Review*, Vol 74, Issue 3, No 4, 2005 at 1085–86.

[14] Oral submissions of General Council of the Bar and Adv Isak Smuts on the Legal Practice Bill, as summarised in Kim Hawkey, "A step closer: Oral hearings on the Legal Practice Bill", *De Rebus,* April 2013 at 30, 35 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).

Pro and cons of statutory bodies	
Pros	Cons
* allows for mandatory membership and guarantees monopoly over regulation of entire legal profession	*if membership is mandatory, advocacy unsupported by all members could implicate freedom of speech issues
* mandatory membership can provide reliable source of funding which prevents dependence on State funds	* if membership is mandatory, body can ignore needs of members
* may increase independence from profession	* requires increased attention to independence from government, including appearance of such independence

5.2 Examples from other jurisdictions

A few examples of different approaches are set out here in detail. Subsequent sections will consider aspects of the approaches taken in different jurisdictions more narrowly.

Examples of approaches to regulation of legal profession	Sample jurisdiction
Council: Statutory regulatory council + non-statutory law societies/associations	South Africa* Ghana✪
Council + law society: Statutory regulatory council + statutory law society	Uganda
Statutory mandatory law society (regulation + representation): Statutory law society with mandatory membership and regulatory powers	Ontario, Canada most US states
Statutory law society (voluntary representation, mandatory regulation): Statutory law society with voluntary membership and mandatory regulatory powers	New Zealand Zimbabwe Zambia✪
Statutory law society (regulation) + non-statutory law society (representation): Statutory mandatory bar association with regulatory powers + non-statutory voluntary bar association with representative functions	US state of North Carolina
Voluntary law society with regulation by judicial branch: Non-statutory voluntary law society + regulation of the legal profession by the judicial branch	some US states
Multi-tiered approach: Statutory scheme with multiple bodies and multi-tiered approach to regulation, separating regulation, representation and discipline	England & Wales

* new system described in detail in section 3 above
✪ discussed in section 8 below

Uganda: separate statutory regulatory body and statutory law society

In Uganda, the formerly split profession is now fused, with the terms "advocate" being used for all legal practitioners.[15] There are also two statutory bodies, the Law Council and the Uganda Law Society, which essentially separate regulatory and representative functions.

The Law Council is established by law as the body with power to certify candidates for enrolment as being fit and proper to be admitted to the roll by the Chief Justice, to exercise disciplinary control over advocates, and to supervise and control professional legal education in Uganda. It also supervises and controls the legal aid system.[16] The Law Council consists of a judge, appointed by the Attorney General after consultation with the Chief Justice, the president of the Uganda Law Society, the director of the Law Development Centre, (a statutory body which engages in professional legal training and facilitates access to justice), the head of the department of law of Makerere University, two practising advocates elected by the Uganda Law Society and one Government officer with legal qualifications appointed by the Attorney General.[17]

The Uganda Law Society is a statutory body with voluntary membership. Any person entitled to practise in accordance with the Advocates Act, can apply for membership, with the Attorney General and the Solicitor General being automatic *ex officio* members. The Law Society can also admit anyone as an honorary member, either for life or for a specified period.[18] The Council of the Law Society is composed of eight annually-elected members, plus the Attorney General and the Solicitor General.[19] The Law Society's key objects are to maintain and improve the standards of conduct and learning of the legal profession; to facilitate the acquisition of legal knowledge by members of the legal profession and others; to represent, protect and assist members of the legal profession; and to protect and assist the public in all matters pertaining to the law.[20]

Ontario, Canada: Self-governing statutory body with mandatory membership

The Law Society of Upper Canada is a statutorily-created body that governs lawyers in the Canadian province of Ontario. It was created by an act of the Legislative Assembly in 1797 and it currently operates under the Law Society Act of 1990.[21] It governs all persons who are licensed as lawyers or paralegals, and membership in the Law Society is mandatory for these persons.[22] This is an example of a statute vesting a professional body with the power to govern the broader legal profession, as in Namibia.

The structure of the Law Society of Upper Canada provides a few suggestions for promoting independence. Though it is a statutory body, it considers itself to be self-governing; the lawyers and paralegals oversee their own regulation, in accordance with the Law Society Act as passed by the

---

[15] See, eg, International Bar Association, Uganda page, undated, <www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_Uganda.aspx>; Nano Matlala, "Lay down the law on transformation", *Sunday Independent*, 1 November 2015. ("In East Africa, the economic powerhouses of Kenya, Tanzania and Uganda already have a fused legal profession. They choose to call themselves advocates rather than attorneys, the latter terminology being viewed as less elitist.")
[16] Advocates Act [chapter 267] (Uganda), ss. 2-5, 8.
[17] Advocates Act [chapter 267] (Uganda), s. s
[18] The Uganda Law Society Act [Chapter 276], ss. 4-5.
[19] The Uganda Law Society Act [Chapter 276], s. 9.
[20] The Uganda Law Society Act [Chapter 276], s. 3.
[21] The Law Society of Upper Canada, "About the Law Society", undated, <www.lsuc.on.ca/with.aspx?id=905>. The current version of Ontario's Law Society Act of 1990 is available at <www.ontario.ca/laws/statute/90l08>.
[22] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, Part I, s. 2(2).

Ontario government.[23] Its governing body includes some government officials as *ex officio* members of the governing body, but generally without giving them voting rights.

More specifically, the Law Society is governed by a board of directors known as "benchers". The benchers meet monthly in a meeting called "Convocation". The benchers include the following persons:

- 40 lawyers elected by Ontario's licensed lawyers, with 20 being from the capital city and 20 from other locations to ensure balanced regional representation;
- 5 paralegals elected by Ontario's licensed paralegals;
- 8 lay-persons (ie persons who do not provide legal services) appointed by the Lieutenant Governor-in-Council of the Ontario government;
- a variable number of mostly non-voting *ex officio* benchers, including several government officials (the Minister of Justice for Canada, the Attorney General for Canada, the Solicitor General for Canada, and the current and former Attorneys-General of Ontario) as well as several legal practitioners (anyone who held the office of elected bencher for at least 16 years, as well as former Treasurers of the Law Society). The Law Society website listed 37 *ex officio* benchers in mid-2017. *Ex officio* benchers do not vote in Convocation, with the sole exception of the Attorney-General of Ontario; former elected benchers and former Attorneys-General of Ontario may vote in committees but not in Convocation.[24]

This structure ensures that the voting benchers are predominantly legal practitioners. It thus provides a substantial degree of separation from the government (although still including some government representation), while the inclusion of lay persons generates at least some counter-balance to complete control by the profession.

There is also an annual meeting of an Advisory Council composed of certain members of the legal profession (the chair and the vice-chair of each standing committee of the Law Society, the president of each county or district law association or his or her nominee and a licenced legal practitioner who is a full-time teacher from each law school in Ontario appointed annually by each such school's law faculty). The purpose of this meeting is "to consider the manner in which the persons licensed to practise law in Ontario as barristers and solicitors are discharging their obligations to the public and generally matters affecting the practice of law as a whole".[25]

The Law Society makes decisions on applications for licences to provide legal services, but it has no discretion to refuse an application if all the legal requirements for that class of licence (including good character) are met.[26]

The Law Society also collects annual fees from all its members, with members paying 100%, 75% or 50% of the full fee amount depending on their working category;[27] the lowest fees are reserved for

[23] The Law Society of Upper Canada, "About the Law Society", undated, <www.lsuc.on.ca/with.aspx?id=905>.
[24] The Law Society of Upper Canada, "Benchers", undated, <www.lsuc.on.ca/with.aspx?id=1136>; Law Society Act, R.S.O. 1990, Chapter L.8, Part I, ss. 10-16, 22-25. The Law Society of Upper Canada states that it was the first professional body in the province to include public representation on its governing body.
[25] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, Part I, s. 26.
[26] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, Part I, s. 27.
[27] The Law Society of Upper Canada, "Paying Your Law Society Fees", 2017 Annual Fee, <www.lsuc.on.ca/For-Paralegals/About-Your-Licence/Paying-Your-Law-Society-Fees/>.

persons who are on pregnancy or parental leave, engaged in full-time study or otherwise unemployed.[28]

The Law Society also handles disciplinary proceedings through an elaborate, multi-step process which is controlled by the profession but includes some involvement of lay-persons approved by the Attorney-General of Ontario.[29]

New Zealand: Statutory body with voluntary membership but mandatory regulatory powers

The New Zealand Law Society (NZLS) was established by The New Zealand Law Society's Act 1869[30] and currently operates under the authority of the Lawyers and Conveyancers Act of 2006.[31] The NZLS is governed by a Council and managed by Executive Board.[32]

The NZLS's activities are split between regulatory functions and representative functions. Membership in the NZLS is optional, though the NZLS regulates all lawyers (barristers and solicitors), regardless of membership. However, only members have access to the NZLS's representative functions.[33]

The NZLS's regulatory functions (ie those that apply to all lawyers, regardless of membership) include, amongst other things, upholding the Act, issuing practising certificates to legal practitioners, maintaining the register of persons who hold practising certificates, managing the Lawyers Complaints Service and operating a Fidelity Fund.[34] Though the NZLS is responsible for issuing practising certificates, it is the Act itself that outlines admission and enrolment qualifications.[35] Additionally, though the NZLS maintains the register, it is the role of the Lawyers and Conveyancers Disciplinary Tribunal and the High Court (on appeal from the Lawyers and Conveyancers Disciplinary Tribunal) to order that a practitioner's name be struck from the roll.[36]

The NZLS performs representative functions for the benefit of its voluntary members. Such functions include the provision of continuing legal education, representative services and collegial activities.[37]

The NZLS derives its funding from the persons affected by its functions. To fund its regulatory functions, the NZLS receives an annual practising fee from every lawyer, and it has the power to impose additional levies on top of that fee. To fund its representative functions, it has the power to require that its voluntary members make subscription payments.[38]

---

[28] The Law Society of Upper Canada, "Fee Categories", undated, <www.lsuc.on.ca/For-Paralegals/About-Your-Licence/Fee-Categories/>.
[29] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, Part I, ss. 49.21(2)(b)(i) and (3)(c), 49.29(2)(b)(i) and (3)(c).
[30] Law Society's Act 1869 (New Zealand), para 2 (available at <www.nzlii.org/nz/legis/hist_act/nzlsa186932a33v1869n63392/>).
[31] Lawyers and Conveyancers Act 2006 (New Zealand), part 4 (available at <www.legislation.govt.nz/act/public/2006/0001/latest/DLM364939.html>). The Act also grants authority to a parallel body, The New Zealand Society of Conveyancers, to regulate the conveyancing industry. Id, part 5.
[32] New Zealand Law Society, "Governance", undated, <www.lawsociety.org.nz/about-nzls/governance>.
[33] Ibid.
[34] Lawyers and Conveyancers Act 2006 (New Zealand), part 4; New Zealand Law Society, "Governance", undated, <www.lawsociety.org.nz/about-nzls/governance>.
[35] Lawyers and Conveyancers Act 2006 (New Zealand), part 3.
[36] Lawyers and Conveyancers Act 2006 (New Zealand), part 3, s. 58.
[37] New Zealand Law Society, "Governance", undated, <www.lawsociety.org.nz/about-nzls/governance>.
[38] Lawyers and Conveyancers Act 2006 (New Zealand), part 3, s. 73-75.

Zimbabwe: Statutory body with voluntary membership but mandatory regulatory powers

Zimbabwe is another example of a statutory body without mandatory membership. The Legal Practitioners Act 1981 (as amended) provides that every registered legal practitioner residing in Zimbabwe has a right to be a member of the Law Society of Zimbabwe. Membership is automatic, but with an opt-out provision; legal practitioners have a fixed time period after their registration to give notice to the President of the Law Society that they do not wish to be members.[39]

The Council of the Law Society is made up of nine persons elected by the Society from amongst its members and two persons appointed by the Minister of Justice, Legal and Parliamentary Affairs; it has the power, with the Minister's approval, to co-opt two additional registered legal practitioners who need not be members of the Law Society.[40]

The Law Society carries out a mixture of representative and regulatory functions. Its primary duties are to promote the study of the law; undertake and make recommendations on legal training; control the admission of new members to the profession; maintain a register of members; regulate the profession in respect of continuing training, discipline and trust accounts; represent the profession and articulate its views on various issues; promote justice, defend human rights, rule of law and the independence of judiciary; and generally control and manage the legal profession.[41] By-laws adopted by the Law Society, which can address disciplinary matters and tariffs for legal services amongst other issues, can be made into statutory instruments once they have been approved by the Minister.[42]

The enabling statute prescribes certain instances of unprofessional, dishonourable or unworthy conduct, while authorising the Law Society to prescribe additional prohibitions.[43] Disciplinary control is exercised by a Disciplinary Tribunal composed of a chairperson and a deputy chairperson who shall be serving or retired judges appointed by the Chief Justice, and two other members selected from time to time as the occasion arises by the Tribunal chairperson from a list of ten registered legal practitioners submitted by the Council of the Law Society.[44] Decisions of the Disciplinary Tribunal can be appealed to the Supreme Court.[45]

The Council of the Law Society of Zimbabwe describes the country's legal framework as follows:

> Our structure is founded of an excellent and enabling legal framework that enables us to have full control of the profession from training, admission to regulation of the membership in terms of discipline, trust accounting transparency, quality of service and client compensation as well as independence of the profession.[46]

---

[39] Legal Practitioners Act [Chapter 27:07] (Zimbabwe), s. 52 (available at <www.parlzim.gov.zw/acts-list/legal-practitioners-act-27-07>).
[40] Legal Practitioners Act [Chapter 27:07] (Zimbabwe), s. 54(1).
[41] Legal Practitioners Act [Chapter 27:07] (Zimbabwe), s. 53; "Law Society of Zimbabwe, "About us", undated, <http://lawsociety.org.zw/AboutUs>.
[42] Legal Practitioners Act [Chapter 27:07] (Zimbabwe), s. 63.
[43] Legal Practitioners Act [Chapter 27:07] (Zimbabwe), s. 23.
[44] Legal Practitioners Act [Chapter 27:07] (Zimbabwe), s. 24.
[45] Legal Practitioners Act [Chapter 27:07] (Zimbabwe), s. 29.
[46] "Law Society of Zimbabwe, "Council", undated, <http://lawsociety.org.zw/AboutUs/Council>.

USA: Non-statutory voluntary federal body, with mixture of approaches at state level

In the United States, the American Bar Association (ABA) was created by a group of lawyers[47] who saw a need for a national organisation to represent the legal practice.[48] Accordingly, it is a voluntary association[49] funded by its members' dues.[50]

An example of how the ABA is able to exert regulatory influence without a statutory mandate is its Model Rules of Professional Conduct. Though the ABA itself cannot mandate that attorneys follow its rules, these model rules on lawyers' ethics and conduct have been adopted by 49 out of 50 US states, making the ABA's influence apparent.[51]

The ABA has been given certain regulatory functions by statute, even though it is not a statutory body itself. For example, the ABA is responsible for accrediting law schools on behalf of the United Stated Department of Education.[52]

It must be noted that the 50 US states have differing approaches to membership in *state* bar associations. Some states have mandatory state bar associations which licence and regulate lawyers. Others have voluntary bar associations which focus on advancing the interests of their members. Some states have both kinds of bar associations operating side-by-side.[53]

For example, in the state of **Alaska**, the Alaska Bar Association is a statutory body with mandatory membership for all lawyers admitted to practise. It admits and disciplines attorneys and provides continuing legal education and other member services. It is directed by a Board of Governors which is made up of nine elected lawyers and three public members appointed by the state governor. Similarly, the state of **California** has a statutory State Bar with mandatory membership which manages the

---

[47] American Bar Association, "History of the American Bar Association", undated, <www.americanbar.org/about_the_aba/history.html>.

[48] The Lecture Law Library, "Brief History of the American Bar Association", undated, <www.lectlaw.com/files/att05.htm>.

[49] American Bar Association, "Membership FAQ", undated, <www.americanbar.org/membership/faq.html>, explaining that membership is open to all and that one can join at any time.

[50] American Bar Association, "Dues & Eligibility", undated, <www.americanbar.org/membership/dues_eligibility.html>, outlining membership fees.

[51] The one state that has not adopted the Model Rules is California. American Bar Association, "State Adoption of the ABA Model Rules of Professional Conduct", undated, <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html>, listing the jurisdictions that have adopted the Model Rules.

[52] American Bar Association Section of Legal Education and Admissions to the Bar, *The Law School Accreditation Process*, 2016 at 3 (available at <www.americanbar.org/content/dam/aba/publications/misc/legal_education/2016_accreditation_brochure_final.pdf>).

The US Constitution is governed by a non-delegation principle, under which various branches of government should not delegate their powers across branches or to other entities. The reasoning is that the Constitution specifically delegates legislative, executive and judicial power in the various branches of government, and maintaining those distinctions is important to uphold a separation of powers. (See the US Constitution, Article I (1); Article II(1); Article III(1)). An assessment of what powers are covered by the non-delegation principle must determine what constitutes government power and consider which level of government is attempting to delegate – since non-delegation restrictions have historically been more limiting on state and local governments than on the federal government. The question of whether private professional organisations, such as the ABA, may participate in state licensing processes, such as determining which law schools' graduates are eligible to take the state bar exam, is one that might implicate such questions. However, past attempts to challenge the delegation to the ABA have failed. (See David M Lawrence, "Private Exercise of Government Power", 61 (4) *Indiana Law Journal* 647, 1986 at 647-649 (available at <www.repository.law.indiana.edu/ilj/vol61/iss4/3>).)

[53] "State Bar Associations", Lawyer Legion website, undated, <www.lawyerlegion.com/associations/state-bar/>.

admission of lawyers into practice and disciplines members of the profession through a State Bar Court which it operates specifically for this purpose. In the states of **Kentucky** and **New Mexico**, the mandatory state bars function as agencies of the State Supreme Court.

In contrast, in the state of **Arkansas**, the Arkansas Bar Association is a voluntary body which serves the profession by improving the administration of justice, providing continuing legal education for lawyers, and helping to educate the public. The licensing and regulation of law practice is carried out by the Supreme Court of Arkansas.

The state of **North Carolina** has both mandatory and voluntary state bar associations. The statutory North Carolina State Bar, in which membership is mandatory, regulates and disciplines the legal profession, as well as providing other services such as a continuing legal education programme and a paralegal certification programme. It sits alongside the North Carolina Bar Association, a voluntary organisation which provides programmes and services aimed at the professional needs of lawyers and also serves the public by providing legal information materials and supporting pro bono services.[54]

In the US, the terms "unified bar association" and "integrated bar" are used to designate a situation where membership in a bar association is a requirement in order to practice law in that jurisdiction. The opposite of a "unified" bar association in the US is a voluntary bar association, not a divided or split bar association. According to the ABA, 37 US states have unified bar associations.[55] The most extreme example comes from the state of California where the State Constitution creates the Bar Association and makes membership mandatory for all practising lawyers.[56]

In 1990, in the *Keller* case, the US Supreme Court held that, while it is constitutionally acceptable for membership in a state bar association to be mandatory, mandatory dues may be used only for certain purposes. This case involved the State Bar of California, a statutory body which made membership and the payment of dues a condition of practising law in the state. The Bar had a statutory purpose to "promote the improvement of the administration of justice". It applied membership dues for regulatory functions such as formulating rules of professional conduct and disciplining members for misconduct. It also used dues for lobbying and advocacy, preparation of *amicus curiae* briefs, an annual conference for the debate of current issues and the approval of resolutions on such issues, and educational programs.

Some Bar members brought a lawsuit on the basis that some of the Bar's activities applied mandatory dues payments to advance political and ideological causes to which they do not subscribe, asserting that this violated their constitutional rights to freedom of speech and association. The US Supreme Court held that it is fair that lawyers who benefit from being admitted to practise are required to pay dues to cover their fair share of the costs of regulating the legal profession, just as it is fair for trade unions to require that all employees who benefit from trade union negotiations with their employer must share the costs of that process. However, it found that the use of compulsory dues to finance political and ideological activities with which members disagree is a violation of their right of free

[54] Ibid.
[55] American Bar Association, "Resource pages", undated, <www.americanbar.org/groups/bar_services/resources/resourcepages/unifiedbars.html>.
[56] California Constitution Article VI-Judicial (ss. 1-22), s. 9 (available at <http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CONS&division=&title=&part=&chapter=&article=VI>) ("The State Bar of California is a public corporation. Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar except while holding office as a judge of a court of record.")

speech unless those expenditures were necessarily or reasonably related to the purpose of regulating the legal profession or improving the quality of legal services. The dividing line between permissible and impermissible expenditures will not always be clear. However, as examples, it would be impermissible to spend mandatory dues on advocacy around gun control or a nuclear weapons freeze, but permissible to spend them on disciplining Bar members or developing ethical codes for the profession. However, the Court also held that it would be impractical for the bar association to engage in complex analysis of the constitutional permissibility of each activity it proposed to undertake. As an alternative, an integrated bar association which charges mandatory fees must provide members who raise objections to specific advocacy with an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and an escrow account for the amounts reasonably in dispute while such challenges are pending.[57]

In the wake of the *Keller* case, mandatory state bar associations had to consider ways to comply with the Court's decision. In 2014, a Task Force considering recommendations for the Michigan Bar provided a useful survey of state approaches.[58] It found that a few state bar associations refrained from engaging in any advocacy activities, but this had the downside of depriving policy-makers of the perspective of a broad-based, state-wide, non-partisan voice on legal issues. Some bar associations, including Michigan's, operated subject to orders which limited the permissible areas of advocacy. (For instance, the Florida Supreme Court issued an order stating that the mandatory state bar association could engage in advocacy only on –

> (1) the regulation and discipline of attorneys; (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency; (3) increasing the availability of legal services to society; (4) regulation of attorneys' client trust fund accounts; and(5) the education, ethics, competence, integrity and regulation of the legal profession.[59]

Some bar associations dealt with the freedom of speech issue by maintaining a mandatory regulatory body alongside a non-statutory, voluntary professional association which could engage in unrestricted advocacy. Some state bar associations adopted strict cost-accounting procedures to ensure that advocacy activities are not financed by mandatory membership dues. The state of Nebraska decided to reduce mandatory fees to the bare minimum needed to finance regulatory activities, making additional annual fees voluntary, to ensure that no one is forced to fund advocacy activities with which they disagree. However, the Michigan Task Force noted that "the Nebraska model compounds First Amendment concerns rather than alleviates them, because Nebraska attorneys are forced to belong to an association that can take divisive, politically-based positions - but with no recourse for dissenting members".[60]

The Michigan Task Force recommended that, in order to fully respect the right of dissenting State Bar members, in addition to having general guideline on what advocacy was and was not permitted, the

---

[57] *Keller v State Bar of California* 496 US 1 (1990). The Court found it unnecessary in light of its holding on free speech to consider freedom of association.
[58] Michigan Task Force at 12-13. See Appendix VI of that report for more detailed descriptions of the approach of each state with a mandatory bar association.
[59] *The Florida Bar re Schwarz*, 552 So. 2d 1094, 1095 (Fla. 1989), cert. denied, 498 U.S. 951 (1990), as quoted in Bradley A Smith, "The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession", 22 (1) *Florida State University Law Review* 35, Summer 1994 at 51. The Michigan limitations in place at the time of the work of the Task Force were modelled on the Florida limitations. See Smith at 53 and State Bar of Michigan Activities, Administrative Order 1993-5 and Administrative Order 2004-1, reproduced in Michigan Task Force at Appendix IV.
[60] Michigan Task Force at 13.

Bar Association should "provide advance notice by email or text message to any member who requests it about an impending State Bar position on a particular issue, and post the dissenting statement of any member who so requests on the State Bar's public policy webpage".[61]

England and Wales: Statutory scheme with multi-tiered approach to regulation

The regulatory scheme for the legal profession in the UK and Wales is established by the Legal Services Act 2007 and has several components which operate independently of each other.[62] This multi-tiered approach fosters checks of power. However, a potential disadvantage of such an approach is its complexity, which might be inappropriate (even in a simplified form) for a country with a smaller population and legal profession such as Namibia.[63]

The **Legal Services Board (LSB)** is a body which is independent of both government and the legal profession. It has statutory oversight responsibility for eight separate "approved regulators".[64] It achieves independence from the profession while utilising professional expertise by having lay-persons (ie non-lawyers) as its Chairperson and a majority of its members.[65] While the Legal Services Board has a membership appointed by the Lord Chancellor (a senior government official appointed by the Sovereign on the advice of the Prime Minister), it operates independently of government.[66] It is funded by levies paid by the approved regulators that it governs;[67] the approved regulators, in turn, charge fees to the service providers whom they regulate.[68] The Legal Services Board also charges fees for such functions as responding to requests for information from the public.[69] This structure promotes the Board's independence by removing it from the direct control of the persons who ultimately provide its funds. The mandate of the Board is to ensure that regulation is carried out in the public

---

[61] Id at 12.

[62] Legal Services Act 2007 [chapter 29] (England and Wales) (available at <www.legislation.gov.uk/ukpga/2007/29/pdfs/ukpga_20070029_en.pdf>).

[63] In 2011, there were about 56.1 million people living in England and Wales in comparison to about 2.1 million people living in Namibia England and Wales: Office for National Statistics, *2011 Census: Population and Household Estimates for England and Wales, March 2011*, 2012 at 3 (available at <www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/2011censuspopulationandhouseholdestimatesforenglandandwales/2012-07-16>); Namibia: Government of Namibia, "Census Projected Population", undated, <www.gov.na/population>.

[64] Legal Services Board, *Overseeing regulation: The LSB's approach to its role,* 2013 at para 1 (available at <www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2013/20130611_LSB_Sets_Out_Its_Approach_To_Overseeing_Regulation.pdf>); Legal Services Board, "Frequently Asked Questions (FAQs)", "Is the LSB really independent?", undated, <www.legalservicesboard.org.uk/can_we_help/faqs/index.htm#lsbindependent>.

[65] Agreement between Ministry of Justice and Legal Services Board, *Framework document*, 2011 at para 3.3 (available at <www.legalservicesboard.org.uk/about_us/lsb_framework_document/pdf/moj_framework_agreement_june_2011.pdf>).

[66] Legal Services Act 2007 [chapter 29] (England and Wales), s. 2 and Schedule 1. See in particular para 26 of Schedule 1: "(1) The Board is not to be regarded - (a) as the servant or agent of the Crown, or (b) as enjoying any status, immunity or privilege of the Crown. (2) Accordingly- (a) the Board's property is not to be regarded as property of or held on behalf of the Crown, and (b) the Board's staff are not to be regarded as servants or agents of the Crown or as enjoying any status, immunity or privilege of the Crown."

[67] Legal Services Board, "Frequently Asked Questions (FAQs)", "How is the LSB paid for?", undated, <www.legalservicesboard.org.uk/can_we_help/faqs/index.htm#lsbpaidfor>.

[68] Legal Services Board, "Section 51 – practising fees", undated, <www.legalservicesboard.org.uk/Projects/statutory_decision_making/section_51_practising_fees.htm>. The fees that the approved regulators charge must be approved by the LSB, thus allowing the LSB to limit the fees that the regulatory bodies may exact from their members.

[69] Legal Services Board, "Freedom of information", "Fees", undated, <www.legalservicesboard.org.uk/can_we_help/lsb_policies_procedures/freedom_of_information/index.htm#Fees>.

interest, and that the interests of consumers remain at the heart of the regulatory system. To this end, it has set up a Consumer Panel which is independent from the Board, to advise the Board on the consumer perspective.[70]

The **Law Society of England and Wales** is the representative body for solicitors (analogous to attorneys under the previous Namibian system). The Society is the Approved Regulator for solicitors but - because the statute requires that regulation and representation must remain separate - the Law Society delegates its regulatory functions to an independent regulatory arm, the Solicitors Regulation Authority. The Law Society's focus is on advocacy, training and assistance in the interests of its members, and on steps aimed at encouraging public access to the profession.[71]

General regulation of solicitors is handled by the **Solicitors Regulation Authority** (previously known as the Law Society Regulation Board). Like the Legal Services Board, the Solicitors Regulation Authority Board is composed of a majority of lay-persons with a lay-person chair.[72] This body sets the standards for qualifying as a solicitor, monitors the performance of organisations that provide legal training, drafts the rules of professional conduct, provides authoritative guidance on ethical issues and on relevant laws and regulations affecting solicitors, administers the roll (register) of solicitors, provides information to the public about solicitors and the standards which apply to them, sets requirements for solicitors' continuing professional development and investigates complaints.[73]

Discipline of solicitors is handled by the **Solicitors Disciplinary Tribunal**, which is independent from all the underlying bodies. The Tribunal is composed of an unlimited number of members appointed by the Master of the Rolls who are either solicitors of not less than ten years' standing or lay persons. Disciplinary hearings in individual cases are handled by a Division composed of three Tribunal members: two solicitors and one layperson, with one of the solicitors acting as chair.[74]

Barristers (analogous to advocates under the Namibian system) are similarly represented by a **Bar Council**[75] and regulated by a **Bar Standards Board**, which is the approved regulator for barristers.[76] There are separate approved regulators for conveyancers, notaries, patent attorneys, trademark attorneys and other specialised branches of the profession.[77]

There is also an independent **Legal Ombudsman** which operates under the **Office for Legal Complaints**. The Office for Legal Complaints consists of a chairperson appointed by the Legal

---

[70] The Law Society of England and Wales, "Key facts - Regulatory regime in England and Wales", undated, <www.lawsociety.org.uk/support-services/risk-compliance/regulation/key-facts-regulatory-regime-england-wales/>.
[71] The Law Society of England and Wales, "Key facts - Regulatory regime in England and Wales", undated, <www.lawsociety.org.uk/support-services/risk-compliance/regulation/key-facts-regulatory-regime-england-wales/>; Legal Services Act 2007 [chapter 29] (England and Wales), s. 177 and Schedule 15.
[72] Solicitors Regulation Authority, "Our Board", undated, <www.sra.org.uk/sra/how-we-work/board.page>. The Board has 15 members, comprising seven solicitors and eight lay persons, one of whom chairs the Board.
[73] Solicitors Regulation Authority, "What we do", undated, <www.sra.org.uk/sra/how-we-work/what-we-do.page>.
[74] Solicitors Disciplinary Tribunal, "Constitution", undated, <www.solicitorstribunal.org.uk/constitutions-and-procedures/constitution>.
[75] The Bar Council, "About Us", undated, <www.barcouncil.org.uk/about-us/>.
[76] Legal Services Board, "Approved regulators", undated, <www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm>.
[77] Legal Services Board, "Approved regulators", undated, <www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm>.

Services Board with the approval of the Lord Chancellor, and 6 to 8 other persons appointed by the Board after consultation with the chairman. The chairpersons and a majority of the other members must be laypersons.[78] The Office for Legal Complaints in turn appoints a Chief Ombudsman, who must be a layperson, along with one or more assistant ombudsmen.[79] These officials, collectively referred to as the "Legal Ombudsman", investigate complaints from members of the public about the service received from a member of any regulated sector of the legal profession.[80] The Office for Legal Complaints and the Legal Ombudsman both operate independently of the representative bodies for legal professionals and the approved regulators, as well as independently from Government.[81] They are funded primarily by a levy on the legal profession.[82] In some circumstances, a case fee is charged to service providers investigated by the Legal Ombudsman.[83]

Looking at the system as a whole, it has been observed that the legislative framework provides a number of safeguards against government influence over the legal profession:

- professional bodies are responsible for appointing and resourcing the approved regulators;
- the public accountability of the approved regulators is to the LSB, not to government;
- the powers of the LSB are generally limited to oversight so as to secure performance of the regulatory objectives of the Act; and
- although members of the LSB are appointed by a minister, they are independent individuals.[84]

However, the same source goes on to suggest that a "more robust guarantee of the independence of LSB from Government might be secured if its members were to be appointed by an independent commission" composed of representatives of civil society, the judiciary and various sectors of the legal professions, as well as a minority of government officials – rather than directly by government.[85]

On this issue, as a point of comparison, a compromise between appointment by Government and appointment by an independent commission is in the process of being implemented in Ireland, where the Legal Services Regulation Act 2015 has created the Legal Services Regulatory Authority (LSRA)[86] with the goal of achieving independent regulation of the legal profession.[87] One way it

---

[78] Legal Services Act 2007 [chapter 29] (England and Wales), s. 114 and Schedule 15.
[79] Legal Services Act 2007 [chapter 29] (England and Wales), s. 122.
[80] See Legal Ombudsman, "Helping the public", undated, <www.legalombudsman.org.uk/helping-the-public/#what-problems-we-resolve>.
[81] See The Law Society of England and Wales, "Key facts - Regulatory regime in England and Wales", undated, <www.lawsociety.org.uk/support-services/risk-compliance/regulation/key-facts-regulatory-regime-england-wales/>.
[82] Ministry of Justice, "New ombudsman for complaints against lawyers", 7 October 2010, <http://webarchive.nationalarchives.gov.uk/20101013220519/http://www.justice.gov.uk/news/announcement071010a.htm>; Legal Ombudsman, "About us", undated, <www.legalombudsman.org.uk/page/2/?faqs-category=about-us>.
[83] Legal Ombudsman, "FAQs", undated,<www.legalombudsman.org.uk/faqs/>.
[84] John Wotton, "Fission or fusion, independence or constraint?", *The Law Society*, 25 January 2012.
[85] Ibid.
[86] Legal Services Regulation Act 65 of 2015 (Ireland), s. 8 (available at <www.irishstatutebook.ie/eli/2015/act/65/enacted/en/pdf>). The LSRA is not yet fully-functioning, though a partially-established body has met a few times to begin to put it in place. Its first meeting occurred in in October 2016. "Legal Services Regulatory Authority to be fully-functioning by Autumn", *Irish Legal News*, 19 January 2017 (available at <www.irishlegal.com/6395/legal-services-regulatory-authority-to-be-fully-functioning-by-autumn/#>). It also met on 19 January 2017. Colm Keena, "Time concerns raised with Tánaiste over proposed Legal Services Act", *The Irish Times*, 4 May 2017 (available at <www.irishtimes.com/news/crime-and-law/time-concerns-raised-with-t%C3%A1naiste-over-proposed-legal-services-act-1.3071582>).

strives to achieve this is by having a lay majority and a lay chair.[88] Government (ie the lower and upper legislative houses) is responsible for appointing all eleven members of the LSRA, but Government influence in these appointments is buffered to a degree by the requirement that these members be nominated by ten different bodies; for example, the Citizens Information Board, the Irish Human Rights and Equality Commission and the Bar Council each nominate one representative, and the Law Society nominates two.[89]

Tajikistan: a cautionary tale of fragmentation, unity and repression

In Tajikistan,[90] one route to the practice of law is to be a member of one of several non-statutory bar associations, with the basic qualifications for members being set by law and including passage of a qualifying examination administered by the bar association in question. It is also possible for lawyers to obtain a licence from the Ministry of Justice; this initially required passing a qualifying examination, but the entry requirement was later changed to one year's work experience without the need to pass any exam.[91] Discipline of members of the bar associations is carried out by the bar associations, which develop rules of professional conduct for their members, while the "solo" lawyers are disciplined by the Ministry of Justice which has no comparable ethical codes; there is thus no single consistent standard of professional conduct, although a few basic ethical norms are laid down by the relevant law. The bar associations were viewed as public entities, while the "solo" lawyers were considered to be entrepreneurs.

As of 2006, there were two independent, self-governing bar associations as well as some unattached "solo" lawyers (some of whom united themselves in a voluntary grouping of a different type in 2007). In theory, other bar associations could be established by any group of at least 40 lawyers. Neither of the two existing associations had sufficient financial resources to provide significant services to their members. A third organization, an NGO with voluntary membership, was set up in 2003 in an effort to unite the legal profession under a single professional organization; as of 2006 about half of the lawyers in Tajikistan were members of this umbrella body. However, critics claimed that the effectiveness of this body was undermined because by the differing interests and lack of coordination amongst the three groups of members (those from the two bar associations and the third group of unaffiliated lawyers).

By 2008 there were three bar associations in place, with unaffiliated "solo" lawyers still in place as well. The umbrella NGO was considered to have failed in its efforts to unite the different groups.

A law reform effort initiated in 2006 recommended the creation of a single unified bar association with mandatory membership for all lawyers to guarantee uniform standards of practice and ethical conduct, as well as to protect the rights and interests of lawyers and to represent their interests. The

---

[87] Department of Justice and Equality, "Minister Fitzgerald Welcomes the Completion of Passage of the Legal Services Regulation Bill", 15 December 2015, <www.justice.ie/en/JELR/Pages/PR15000646>.

[88] Legal Services Regulation Act 65 of 2015 (Ireland), s. 9; Department of Justice and Equality, "Tánaiste Welcomes the First Meeting of the New Legal Services Regulatory Authority", 26 October 2016, <www.justice.ie/en/JELR/Pages/PR16000322>.

[89] Legal Services Regulation Act 65 of 2015 (Ireland), s. 9.

[90] The information in this subsection is based primarily on Mahira Usmanova, "The Legal Profession in Tajikistan", [2008], <www.osce.org/odihr/36313?download=true>; "Recommendations on Reform of the Legal Profession in Tajikistan", Open Society Justice Initiative and American Bar Association Central European and Eurasian Law Initiative, July 2006, <www.opensocietyfoundations.org/sites/default/files/tajikstan_20060720.pdf>.

[91] There are other rules governing lawyers providing other specific types of legal services, such as those who work in non-governmental organisations.

fragmented system helped to ensure that ethnic and religious minorities, and men and women, were adequately represented in the profession, without any discrimination in respect of entry into the profession. However, it also resulted in a situation where many lawyers lacked proper access to legal information and other resources, fees paid to lawyers were sometimes inadequate, and the quality of legal services was uneven. It was asserted that mandatory membership is necessary to ensure proper control over entry into the profession, control over entry qualifications, enforcement of ethical norms and general disciplinary control, and continuing legal education.

The legal profession in Tajikistan was ultimately united in a single, independent, non-state, non-profit professional organization based on mandatory membership by legislation enacted in March 2015.[92] However, in November 2015, amendments to that law gave control over professional qualifying exams and the licensing of lawyers to Government; this was followed by a state crackdown on lawyers who opposed the state (by means such as punitive arrest and intimidation), and the number of lawyers in practise halved between 2015 and 2017.[93]

[92] Law of the Republic of Tajikistan of 18 March 2015 (No. 1182), registered on 20 March 2015 (No. 17) (available in English at <http://cis-legislation.com/document.fwx?rgn=74347>).
[93] "Tajikistani lawyers harassed, intimidated and imprisoned", Amnesty International, 24 May 2017, <www.amnesty.org/en/latest/news/2017/05/tajikistani-lawyers-harassed-intimidated-and-imprisoned/>.

6. Independence

It is important to maintain a regulatory body's independence, both from Government and from the profession. This is not inconsistent with regulation by means of a statutorily-created body, as has been well-stated by a former President of the Law Society of England and Wales:

> There is no doubt that, to sustain the rule of law in a democracy, there must be a strong and independent legal profession, specifically one which is independent of the State. It does not follow, though, that this independence overrides all other considerations, to the extent of preventing society from specifying, through legislation, the services and broad standards expected of its legal profession. Society must have means of holding the profession and its regulators to account for delivering those objectives.[1]

Broadly speaking, statutory bodies generally face more challenges in maintaining independence from Government while non-statutory bodies face more challenges in maintaining independence from the profession. One indication of a body's independence is its ability to act free from pressure by external parties. Independence is generally presumed to be higher when a body is self-governing rather than government-run, although this is not a hard and fast rule.[2]

Jurisdictions with statutory bodies may strive for independence from Government by means of professional self-regulation within the context of the underlying statute, as in **Ontario, Canada** (discussed above in section 5.2). Additionally, they may mandate levies or fees from practitioners or, in the case of a tiered system, from regulatory agencies. By having a funding source that is mandatory and outside Government, they may avoid pressures based on financial control.

Jurisdictions strive for independence from the profession in various ways, such as by appointing lay-persons to the oversight board. This could include a lay-majority and/or a lay-chair. Another method is to adopt a tiered model in which a separate entity oversees the regulatory agencies, as in **England and Wales** (discussed above in section 5.2).

6.1 Independence from Government

Independence from Government is important to support separation of powers, given that the legal profession is crucial to the functioning of the judicial branch and so should not be under the influence of the legislative or executive branches.[3] As stated in the **Commonwealth (Latimer House) Principles** adopted by Commonwealth Ministers of Justice at Abuja in 2003, "[a]n independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary."[4] The Preamble to the **International Bar Association's S*tandards for***

---

[1] John Wotton, "Fission or fusion, independence or constraint?", *The Law Society*, 25 January 2012, posting a speech made on 24 January 2012 when he was President of the Law Society (available at <www.lawsociety.org.uk/news/speeches/fission-or-fusion-independence-or-constraint>).

[2] IBA Presidential Task Force, *The Independence of the Legal Profession. Threats to the bastion of a free and democratic society*, 2016 at 8-9 (available at <www.ibanet.org/Document/Default.aspx?DocumentUid=6E688709-2CC3-4F2B-8C8B-3F341705E438>).

[3] Nicolee Dixon, *Legal Profession Reform in Queensland: Discipline and Complaints Handling Systems [Research Brief No. 2002/32]*, Queensland: Queensland Parliamentary Library, 2002 at 1 (available at <www.lsc.qld.gov.au/__data/assets/pdf_file/0012/260031/Legal-Profession-Reform-in-Queensland-Discipline-and-Complaints-Handling-Systems-Research-Brief-No-2002-32.pdf>).

[4] *Commonwealth (Latimer House) Principles on the Three Branches of Government*, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003 at Art IV (available at <http://thecommonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf>).

Independence of the Legal Profession opens with an acknowledgement of the importance of the independence of the legal profession:

> The independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights and is necessary for effective and adequate access to legal services.
> An equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restrictions, pressures or interference, direct or indirect is imperative for the establishment and maintenance of the rule of law.[5]

These standards state that self-governing lawyers' associations should be responsible for adopting and enforcing a code on the professional conduct of lawyers and for disciplinary proceedings in the first instance.[6]

The UN Basic Principles on the Role of Lawyers emphasises the duties of Governments to safeguard the legal profession's independence, by ensuring that they can carry out their professional functions without intimidation, hindrance, harassment or improper interference; that they are able to travel and to consult with their clients freely both within their own country and abroad; and that they must not suffer, or be threatened with, any form of sanction for acting in accordance with recognized professional duties, standards and ethics.[7] However it contemplates a wider range of options for regulation, stating that codes of professional conduct for lawyers may be established by the legal profession or by legislation, and that disciplinary proceedings against lawyers may be handled in the first instance by an impartial disciplinary committee established by the legal profession, by an independent statutory authority, or by a court – as long as they are subject to independent judicial review.[8]

The late **South African Justice Arthur Chaskelson**, one of the distinguished lawyers who took part in the drafting of the Namibian Constitution, emphasised the links between an independent legal profession and an independent judiciary, noting:

> It is lawyers who advise members of the public of their rights and who bring cases to the court on their behalf. Courts depend on the lawyers discharging this duty honestly and competently, and advancing the interest of their clients to the best of their ability. Without the assistance of lawyers judges would not be able to discharge their constitutional duty to uphold the law without fear or favour. It is in the public interest, and the interest of clients, that the culture of the legal profession should be rooted in the independence of the profession, and that lawyers should not be subject to outside influences or be concerned that if they take on a case for a particular client they will incur the hostility of the government or other powerful instances."[9]

A statutory regulatory body may need to contend with perceptions or realities (or both) that Government holds influence over it.[10] In contrast, a private organisation might be more insulated

---

[5] IBA S*tandards for Independence of the Legal Profession (adopted 1990),* International Bar Association, Preamble.
[6] Id at paras 17, 21, 24.
[7] *UN Basic Principles on the Role of Lawyers*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 at para 16 (available at <www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>).
[8] Id at paras 26, 28.
[9] "The Rule of Law: The importance of independent courts and legal professions", Former Chief Justice Arthur Chaskalson's address to the Cape Law Society on 9 November 2012 (available at <http://constitutionallyspeaking.co.za/arthur-chaskalson-on-independence-of-legal-profession/>).
[10] For example, when Ireland underwent an initiative to reform its legal regulation, Alan Shatter TD, the then-Minister for Justice, Equality & Defence, acknowledged the importance of maintaining the perception of independence in addition to actual independence. Alan Shatter TD, Speech at the "Conference on Regulatory Reform for a 21st Century Legal Profession", 2012 at "Towards the Committee Stage" (available at

against such contentions. Accordingly, international bodies, such as the UN and the Council of Europe, support the idea of some degree of self-regulation as opposed to government regulation.[11] For example, the UN Basic Principles on the Role of Lawyers states that lawyers must be entitled to "form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity",[12] noting further that the "executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference".[13] Such professional associations are expected to cooperate with Governments to promote effective and equal access to legal services and to ensure that lawyers are able to work without improper interference. On the other hand, Governments have a duty, not just to refrain from direct interference with the legal profession, but also to take positive action to help protect the profession's independence.[14]

Professional expertise: Members of the profession may be best equipped to set regulatory standards, such as what qualifications a candidate must demonstrate to be able to practise, due to their expertise in the field.[15] In contrast, government officials may lack the relevant experience to make such determinations.

Community building: A system of self-regulation may have the positive effect of engendering a collective sense of community and responsibility.[16]

<www.justice.ie/en/JELR/Pages/SP12000217>) ("I am actively considering amendments that will place the new regulatory and disciplinary architecture for the legal professions beyond any perception of undue interference by Minister or Government.").

[11] United Nations Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, art 24 (available at <www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>) ("Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.")

Committee of Ministers, 727th mtg, Recommendation on the Freedom of Exercise of the Profession of Lawyer (2000), Principle V.2 (25 Oct. 2000) ("Bar associations and other professional lawyers' associations should be self-governing bodies, independent of the authorities and the public."), as quoted in The Open Society Justice Initiative and the American Bar Association's Central European and Eurasian Law Initiative, "Recommendations on Reform of the Legal Profession in Tajikistan", July 2006 at 5.

See also Council of Europe, *Freedom of Exercise of the Profession of Lawyer: Recommendation Rec(2000)21 Adopted by the Committee of Ministers of the Council of Europe on 25 October 2000 and Explanatory Memorandum*, Strasbourg: Council of Europe Pub., 2001 (available at <www.worldcat.org/title/freedom-of-exercise-of-the-profession-of-lawyer-recommendation-rec200021-adopted-by-the-committee-of-ministers-of-the-council-of-europe-on-25-october-2000-and-explanatory-memorandum/oclc/46837553>).

[12] United Nations Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, Art 24.

[13] Id, Art 25.

[14] Id, Art 16 ("Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.").

[15] Nicolee Dixon, *Legal Profession Reform in Queensland: Discipline and Complaints Handling Systems [Research Brief No. 2002/32]*, Queensland: Queensland Parliamentary Library, 2002 at 1.

[16] Ibid.

6.2 Independence from profession

Many countries value another type of independence of the regulatory body: that from the members of the legal profession itself. The rationale for valuing independence from the profession is that self-regulation may lead to lowered transparency and accountability.[17] In a system of voluntary self-regulation, members have incentives to protect themselves rather than to protect the public. In contrast, a statutory regulatory system may be better able to position itself as a body that impartially holds members of the profession accountable for their actions.

Statutory authorisation as an expression of public will: Where a statute is involved in establishing a regulatory system, the statutory framework can be seen as a product of a democratic process which sets parameters for the legal profession's self-regulation.[18]

Strong disciplinary sanctions: In a system of self-regulation, lawyers have disincentives to lobby the organisation for strong disciplinary sanctions.[19] For example, in the **United States**, a lack of strong sanctions for unprofessional conduct has allowed for an apparent increase in instances of gender bias and threats of violence.[20] A statutory body might be better able than a private body to implement and enforce strong sanctions for unprofessional behaviour.

Discouraging protection of the established profession: Self-regulation can lead to policies – such as high costs to enter the profession and prohibitions on non-lawyers from conducting even rudimentary legal tasks – that benefit individual lawyers at the expense of the wider profession and the public.[21] A statutory body might be more well-disposed than a private body to adopt policies that increase access to the profession and to legal services.

6.3 Funding and independence

A regulatory body needs to be funded. This raises challenges for both statutory and private bodies.

Statutory body: A statutory body could derive its funds in several ways. Each presents complications. Reliance on government funding might contribute to perceptions or realities of compromised independence. If its funds come from membership dues, such a system might implicate questions of propriety, especially if membership is mandatory.[22] For example, one problem is the use of membership fees on advocacy that is not supported by all of the membership, which can be addressed by providing for waivers or refunds of the portion of fees used for advocacy on issues which are not supported by all members.[23] Another potential problem is the fairness of imposing uniform fees on legal practitioners who are differently-situated. However, mandatory fee systems can address such

---

[17] Ibid.
[18] See, eg, John Wotton, "Fission or fusion, independence or constraint?", *The Law Society*, 25 January 2012.
[19] Jonathan Macey, "Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession", *Fordham Law Review*, Vol 74, Issue 3, No 4, 2005 at 1085.
[20] Id at 1091-92.
[21] Id at 1096.
[22] For example, there has been litigation in the United States surrounding the constitutionality of compulsory dues and the use of such dues in states that have mandatory bars. American Bar Association (Jill M Kastner), "Mandatory vs. Voluntary: Which State Bar is Better?", undated, <www.americanbar.org/publications/affiliate_home/affiliate_index/yld_affiliate_septoct08_kastner.html>.
[23] See the discussion of the US *Keller* case and its aftermath in section 5.2 above.

problems or provisions for a sliding scale of fees or for fee waivers in appropriate circumstances.[24] If the statutory body must raise its own funds from other sources, it may be beholden to its donors – which could compromise its independence. This concern is discussed in more depth below, in the context of funding private bodies.

Private body: A private organisation is unlikely to receive a regular stream of government funds. It could generate its income stream by fundraising, by nurturing its membership base and collecting membership dues, or both. If an organisation relies on fundraising for its income, it is likely to be constrained by donor wishes (especially as donors are likely to be stakeholders in the industry rather than impartial philanthropists). This might lead to policy decisions that favour wealthy donors rather than the public. For example, if wealthy lawyers contribute the majority of the funds, policies that shield lawyers from malpractice actions might remain in force. If, alternatively, the body relies on membership dues, it will need to focus on maintaining and expanding its membership. Accordingly, it would have to cater to the wishes of its membership base. This situation risks promoting policies that favour the profession over the public, such as those that shield lawyers from sanctions or present barriers to entry into the profession, thereby reducing supply and accordingly allowing existing lawyers to charge higher fees.[25]

Funding is discussed in more detail in section 8.2 below.

6.4 Independence in Namibia

The Legal Practitioners Act 15 of 1995 restrains the Law Society's actions by dictating the functions of the Law Society and the procedures it must follow. Thus, this feature shows some degree of government control. However, this is a standard feature of statutory bodies; the founding statute will typically dictate the powers and functions of the body.[26]

The Law Society acts independently of the Government insofar as its affairs are managed by a Council of eight members, all of whom who are elected by the Law Society membership, subject to certain restraints set forth in the Legal Practitioners Act 15 of 1995 aimed at promoting diversity.[27] It is this Council which manages the affairs of the Law Society rather than government officials.

The Law Society's independence from the government is also bolstered by the Council's ability to set and collect fees from its membership base,[28] raise funds as it sees fit,[29] invest funds not immediately

---

[24] For example, consider the Law Society of Upper Canada's fee category approach. The Law Society of Upper Canada, "Fee Categories", undated, <www.lsuc.on.ca/For-Paralegals/About-Your-Licence/Fee-Categories/>.

In Botswana, legal practitioners employed by the State or by parastatals are exempted from paying annual subscription fees to the Law Society of Botswana. Legal Practitioners Act, 1996, s. 57 and First Schedule.

[25] For example, consider William H Simon, "Who Needs the Bar?: Professionalism Without Monopoly", *Florida State University Law Review*, Vol 30, No 4, Summer 2003, pages 639-658 (available at <www.law.fsu.edu/docs/default-source/journals/law-review/summer-2003.pdf?sfvrsn=4>) at 641-42 (explaining how, in the context of the United States, both restricting admission to the bar and imposing marketing requirements inhibit price and service competition among lawyers, creating a situation in which members of the bar have a conflict of interest with regard to practices regulating admission to the bar).

[26] Indeed, the Legal Practitioners Act 15 of 1995 states that the Law Society "shall . . ., subject to the provisions [sic] of this Act, do and suffer all such acts and things as bodies corporate may lawfully do and suffer" (s. 40). An example of one such provision is that the statute the existence, timing, and content of the Law Society's annual general meeting (s. 44).

[27] Legal Practitioners Act 15 of 1995, ss. 45-46.

[28] Legal Practitioners Act 15 of 1995, s. 48(b).

needed,[30] and draw on surpluses in the Legal Practitioners' Fidelity Fund to finance its activities,[31] rather than relying on government funding. The Law Society does not receive any state funding except in respect of the Disciplinary Committee established under the Act; Government acts as the secretariat of the Disciplinary Committee, pays the allowance and travel expenses of any member of the Disciplinary Committee who is not employed by the State and funds the work of the Disciplinary Committee out of money appropriated by Parliament for this purpose.[32]

In terms of independence from the profession, applications for enrolment as a legal practitioner are made to the High Court and certificates of enrolment are issued by the Registrar of the High Court rather than by the Council.[33] Only the Court can suspend a legal practitioner or strike a legal practitioner from the roll, upon application by the Law Society (if the grounds relate to citizenship or residency status) or the Disciplinary Committee (if the grounds relate to unprofessional or dishonourable or unworthy conduct).[34] The Disciplinary Committee is dominated by the profession (with four of its five members being legal practitioners appointed by the Council and one being a person appointed by the Minister); each member of this Committee holds office for a period of two years and is eligible for re-appointment.[35] The Act specifies certain instances of behaviour which would constitute unprofessional or dishonourable or unworthy conduct, but without making this list exhaustive.[36]

Admission to practise is subject to academic and professional qualifications set by statute.[37] Academic requirements are the province of the 11-member Board of Legal Education, in which members of the profession appointed by the Council of the Law Society are a three-person minority while six members are either State-employed or State-appointed.[38] The Justice Training Centre at the University of Namibia operates the requisite course of post-graduate study for the training of candidate legal practitioners, and conducts the Legal Practitioners' Qualifying Examination under the control of the Board.[39]

Thus, the regulation of entry into the profession and disciplinary procedures both evidence certain checks and balances in respect of the two aspects of independence – which is not to say that they have necessarily achieved the ideal balance.

6.5 Independence in South Africa

As a point of comparison, the new dispensation in South Africa, which is in the process of being implemented, evidences a greater degree of government control than Namibia's framework.

---

[29] Legal Practitioners Act 15 of 1995, ss. 42(f).
[30] Legal Practitioners Act 15 of 1995, s. 42(e).
[31] Legal Practitioners Act 15 of 1995, s. 71(c).
[32] Legal Practitioners Act 15 of 1995, s. 34.
[33] Legal Practitioners Act 15 of 1995, ss. 2-4.
[34] Legal Practitioners Act 15 of 1995, s. 32.
[35] Legal Practitioners Act 15 of 1995, s. 34(9)-(11).
[36] Legal Practitioners Act 15 of 1995, s. 33.
[37] Legal Practitioners Act 15 of 1995, ss. 5-6.
[38] Legal Practitioners Act 15 of 1995, she Council appoints only 3 of the 11 members, while the Minister appoints 4 members (one of whom must come from the Justice Training Centre). Two other members come from the State: the Prosecutor-General is a member *ex officio*, and one other member is a state-employed legal practitioner chosen by the Attorney-General. The other two members represent academia (the Dean of the Law Faculty) and the judiciary (the Chief Justice).
[39] Legal Practitioners Act 15 of 1995, s. 16.

South Africa's Legal Practice Act 28 of 2014 intends, amongst other things, "to facilitate and enhance an independent legal profession.[40] It reiterates the importance of promoting an independent legal profession by stating that one of the objects of the Legal Practice Council is to "facilitate the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent", while another is to "preserve and uphold the independence of the legal profession".[41]

However, despite these objectives, the legislation structures the Council to include some government-appointed members. The Minister of Justice and Constitutional Development selects 3 of the 23 members of the Council (none of whom may be politicians or public servants), while the profession elects 16 members – with the other 4 members representing academia (one law faculty and one law teacher), the Legal Aid Board (one member) and the Legal Practitioners' Fidelity Fund Board (one member).[42] Additionally, the Council must report annually to the Minister regarding its progress in advancing certain goals,[43] and it is generally charged to exercise its powers with due regard to the inputs of the Legal Services Ombud and Parliament.[44] Furthermore, if the Minister believes that the Council is ineffective, the Minister must initiate a process that may lead to the dissolution of the Council. The Minister may not act singlehandedly; the process is subject to various safeguards, such as the approval of the High Court.[45]

But the safeguards are insufficient, according to some; while it is true that the Minister must appoint a retired judge to conduct an investigation into the Council and present recommendations to him before dissolution can proceed, the Minister is not bound to follow these recommendations – and the mere fact that the Minister has the power to order an investigation and dissolve the Council creates a potential threat which is "inconsistent with the independence of the profession, and is calculated to secure compliance rather than resistance from it should differences on important issues ever surface between them".[46] On the other hand, some asserted that the checks and balances provided in respect of the Minister's powers were adequate, with the Black Lawyers Association for example stating: "As much as independence is valued and independence is necessary, political oversight with the view of regularising a society which is not perfect is instructive".[47]

With respect to funding, the idea was to fund the regulatory body from the annual fees levied on legal practitioners, while still keeping these levies affordable. The National Forum on the Legal Profession which is leading the transition has predicted a shortfall which would have to be made up from Parliamentary appropriations, which some fear would impact the independence of the profession, or else increasing the levies above the planned level, which could prove to be a barrier for entry or continuation in the profession.[48]

---

[40] Legal Practice Act 28 of 2014 (South Africa), long title.
[41] Legal Practice Act 28 of 2014 (South Africa), s. 5.
[42] Legal Practice Act 28 of 2014 (South Africa), s. 7.
[43] Legal Practice Act 28 of 2014 (South Africa), s. 6(5)(h).
[44] Legal Practice Act 28 of 2014 (South Africa), s. 6(1).
[45] Legal Practice Act 28 of 2014 (South Africa), s. 14.
[46] John Jeffery, "The sky will not fall if the law is for all?", *Mail & Guardian,* 29 November 2013.
[47] Oral submission of Black Lawyers Association on the Legal Practice Bill, as summarised in Kim Hawkey, "A step closer: Oral hearings on the Legal Practice Bill", *De Rebus,* April 2013 at 26 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).
[48] Law Society of South Africa, "Ninth meeting of the National Forum on the Legal Profession", 2 July 2017, <www.lssa.org.za/news-headlines/general-news/ninth-meeting-of-the-national-forum-on-the-legal-profession>.

In defence of charges that the new structure compromises independence, the Deputy Minister of Justice and Constitutional Development stated:

> It is difficult to see how less than one-seventh of its membership (in other words, the three appointed by the minister) can control the council. Incidentally, ministerial appointees sit on the equivalent councils of Ireland and Singapore.
>
> Another misrepresentation is that the minister can dissolve the board. This is not so. If the minister believes the board has become dysfunctional, the ombud must conduct an investigation. If the minister is still not satisfied, he or she must approach the court to get an order to dissolve the board. This dissolution clause is necessary because, as the council represents different components, it is not possible for the constituent members to dissolve the council.[49]

The late Justice Arthur Chaskalson, in contrast, raised objections to the new law, stating:

> The legal profession has a duty to itself and to the people of our country to do all that it can to protect its independence. That involves ensuring that its rules and practices are in the public interest and facilitate access to courts by the public and in particular by those whose need is the greatest, by promoting the culture of independence and professionalism in practitioners, by explaining to the general public the role of an independent legal profession in protecting democracy, and by raising its voice against measures calculated to erode that independence...[50]

The General Council of the Bar drew an interesting distinction between regulation and governance, asserting that the legal profession should govern itself, while it was acceptable for issues relating to the protection of the public interest, such as access to justice and entry into the profession, to be regulated by Government.[51] In the same vein, one individual advocate suggested that a good approach would be for Government to accredit self-governing professional associations, and monitor them to ensure that they deserved to remain accredited.[52]

Admission to practice under South Africa's new law will be determined by the High Court,[53] but the enrolment of attorneys and advocates will be a function of the Council.[54] Lawyers can be suspended from practise or struck from the roll only by means of a High Court order, applied for by the Council acting on the advice of a disciplinary committee which must be composed of at least two legal practitioners and one layperson.[55]

A new innovation, discussed in more detail below, is a Legal Services Ombud, a former judge who is appointed by the President but charged to deal with complaints relating to legal services with complete independence. The conditions of service of the Ombud are the same as for a judge. The Ombud employs a Director as the administrative head of the office as well as other staff, but the Minister of Justice and Constitutional Development determines the terms and conditions of these persons' employment. More positively, the budget of the office must be earmarked by Parliament and cannot be used for any other purpose without consultation with the Ombud and approval of the Treasury.[56]

---

[49] John Jeffery, "The sky will not fall if the law is for all?", *Mail & Guardian,* 29 November 2013.
[50] "The Rule of Law: The importance of independent courts and legal professions", Former Chief Justice Arthur Chaskalson's address to the Cape Law Society on 9 November 2012.
[51] Oral submission of General Council of the Bar on the Legal Practice Bill, as summarised in Kim Hawkey, "A step closer: Oral hearings on the Legal Practice Bill", *De Rebus,* April 2013 at 30 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).
[52] Oral Submission of Adv Isak Smuts, id at 35.
[53] Legal Practice Act 28 of 2014 (South Africa), s. 27.
[54] Legal Practice Act 28 of 2014 (South Africa), s. 30.
[55] Legal Practice Act 28 of 2014 (South Africa), s. 37.
[56] Legal Practice Act 28 of 2014 (South Africa), ss. 45-47, 51.

7. Regulatory objects and functions

The **American Bar Association** (ABA) adopted **Model Regulatory Objectives for the Provision of Legal Services** in 2016. The ABA's Commission on the Future of Legal Services recommended the adoption of regulatory objectives as a guide for supreme courts and bar authorities when they assess their existing regulatory framework, and as they consider the regulation of non-traditional forms of legal service provisions. The full text of the Model Regulatory Objectives in reproduced in the box below.[1] Part of their significance is that they were drafted with a view to providing for the possible regulation of non-traditional legal service providers as well as regulation of the legal profession, which made their adoption more controversial than one would expect from their content alone.[2]

ABA Model Regulatory Objectives for the Provision of Legal Services
(Resolution 105, adopted 9 February 2016)

A. Protection of the public
B. Advancement of the administration of justice and the rule of law
C. Meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems
D. Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
E. Delivery of affordable and accessible legal services
F. Efficient, competent, and ethical delivery of legal services
G. Protection of privileged and confidential information
H. Independence of professional judgment
I. Accessible civil remedies for negligence and breach of other duties owed, disciplinary sanctions for misconduct, and advancement of appropriate preventive or wellness programs
J. Diversity and inclusion among legal services providers and freedom from discrimination for those receiving legal services and in the justice system.

The **UN Special Rapporteur on the Independence of Judges and Lawyers** has the following to say regarding the role of bar associations (which are equivalent to law societies):

> **Role of bar associations**
>
> 90. According to principle 23 of the Basic Principles on the Role of Lawyers, as citizens, **lawyers are entitled to freedom of expression**, belief, association and assembly. Moreover, principle 24 expressly establishes that **lawyers are entitled to form and join self-governing professional associations** to represent their interests, promote their continuing education and training and protect their professional integrity.
>
> 91. Taking the Basic Principles as reference, **bar associations should assume the functions of upholding professional standards and ethics, protecting their members, providing legal services**

[1] <www.americanbar.org/content/dam/aba/images/office_president/final_regulatory_objectives_resolution_november_2015.pdf>.
[2] Ronald C Minkoff, "United States: ABA Model Regulatory Objectives: Why They Matter To You", 10 May 2016 (available at <www.mondaq.com/unitedstates/x/488032/Strategic+Planning/ABA+Model+Regulatory+Objectives+Why+They+Matter+To+You>).

and cooperating with governmental and other institutions in furthering the ends of justice and the public interest.

92. The Basic Principles also refer to the independence of the legal profession and disciplinary proceedings (see in particular principles 26-29) as basic elements of the role of lawyers. **Bar associations and lawyers' organizations provide the perfect platform for ensuring and defending the independence of lawyers and addressing allegations of interference through the collective action of its members**. They are also responsible for ensuring that the work conducted under their umbrella is performed in accordance with the professional and ethical standards established by the bar associations. Principle 23 of the Basic Principles stipulates that lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

93. **Professional organizations and/or bar associations are the institutions responsible for protecting professional integrity and enforcing disciplinary measures**. Such proceedings should be transparent, impartial, fair and objective. As the Special Rapporteur has stated, such an organization would not only provide a mechanism of protection for its members against undue interference in their legal work, but also monitor and report on their members' conduct, ensuring their accountability and applying disciplinary measures in a fair and consistent manner (see A/HRC/23/43/Add.3, para. 87).[3]

Most law societies and bar associations perform both regulatory and representational functions, but it is important not to blur the distinction between those dual roles – and equally important to strike a balance between public and professional interests.[4] Public confidence in the regulation of the profession may be undermined if it believes that standards are applied in a manner which serves the interests of members of the profession. On the other hand, self-regulation ensures independence from Government, thereby supporting the independence of the judiciary and the rule of law.

7.1 Objects

The differing roles which a law society can play are reflected in some examples of objectives from various jurisdictions.

For example, the **Mauritius Law Society,** a statutory body with mandatory membership, has objectives which centre around **the interests and self-regulation of its members**. The relevant statute states that its objects are to:

(a) safeguard and promote the interests of its members;
(b) uphold the honour, dignity, reputation and independence of its members;
(c) further the interests of its members in connection with the practice of their profession;
(d) regulate the profession of attorney and ensure compliance with the Code [of Ethics for Attorneys]; and

[3] "Report of the Special Rapporteur on the independence of judges and lawyers", Human Rights Council, A/HRC/35/31, 9 June 2017 (advance edited version) at para 87, emphasis added (available at <www.ohchr.org/Documents/Issues/IJudiciary/A_HRC_35_31_EN.pdf>).

[4] See, eg, Alan Shatter, Minister for Justice, Equality & Defence, "Regulation, Representation and the Future of the Legal Profession", speech presented at Law Society Annual Conference, Ireland, 14 April 2012, available at <www.justice.ie/en/JELR/Pages/SP12000102>. The Nigerian Bar Assocation has a Legal Profession Regulation 13Review Committee which has the following as one of its terms of reference: "To determine on whether the Nigerian Bar Association should retain both its regulatory and representative functions in the legal profession and if so, what necessary measures should be put in place to strengthen these roles and ensure that neither is compromised." Nigerian Bar Association, "Committees", undated, <www.nigerianbar.org.ng/index.php/opnba/committees>. This Committee began its work in January 2017. "The Inauguration of the NBA Legal Profession Regulation Review Committee", <www.nigerianbar.org.ng/index.php/news1/243-the-inauguration-of-the-nba-legal-profession-regulation-review-committee>.

(e) uphold standards for the education, continued education and professional responsibility of its members.[5]

South Africa takes a different approach, since its legal framework creates the South African Legal Practice Council as a regulatory body as opposed to a body with lawyers as members. (Membership bodies which represent the interests of the legal profession will in future be voluntary associations outside the statutory framework.) Thus, the statute emphasises **transformation of the legal profession and service to the public**. Because it does not create a law society, it does not encompass the function of representation of the interests of members of the profession.[6] The Act's purpose is to:

(a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld;
(b) broaden access to justice by putting in place -
  (i) a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry;
  (ii) measures to provide for the rendering of community service by candidate legal practitioners and practising legal practitioners; and
  (iii) measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic;
(c) create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession;
(d) protect and promote the public interest;
(e) provide for the establishment of an Office of Legal Services Ombud;
(f) provide a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners and candidate legal practitioners; and
(g) create a framework for the -
  (i) development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners;
  (ii) regulation of the admission and enrolment of legal practitioners; and
  (iii) development of adequate training programmes for legal practitioners and candidate legal practitioners.[7]

Similarly, the Council's objects are to:

(a) facilitate the realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent;
(b) ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice;
(c) promote and protect the public interest;
(d) regulate all legal practitioners and all candidate legal practitioners;
(e) preserve and uphold the independence of the legal profession;
(f) enhance and maintain the integrity and status of the legal profession;
(g) determine, enhance and maintain appropriate standards of professional practice and ethical conduct of all legal practitioners and all candidate legal practitioners;
(h) promote high standards of legal education and training, and compulsory post-qualification professional development;

---

[5] The Mauritius Law Society Act 33 of 2005, s. 5(1) (available at <www.mauritiuslawsociety.com/documents-of-mls/law-society-act-2005>).
[6] The Law Society of South Africa asserted that one of the objects of the Council should have been to promote the interests of the legal profession, subject to the overriding interests of the public. Submissions by the Law Society of South Africa on the Legal Practice Bill [B 20—2012], 12 February 2013 at para 5 (available at <www.lssa.org.za/upload/documents/Law%20Society%20of%20South%20Africa%20_%20Submissions%20on%20the%20Legal%20Practice%20Bill%2012%20February%202013.pdf>).
[7] Legal Practice Act 28 of 2014 (South Africa), s. 2.

(i) promote access to the legal profession, in pursuit of a legal profession that broadly reflects the demographics of the Republic;
(j) ensure accessible and sustainable training of law graduates aspiring to be admitted and enrolled as legal practitioners;
(k) uphold and advance the rule of law, the administration of justice, and the Constitution of the Republic; and
(l) give effect to the provisions of this Act in order to achieve the purpose of this Act, as set out in section 3.[8]

The **Law Society of Kenya,** a statutory body with mandatory membership, has a much broader list of objectives which emphasise **assistance to Government and service to the public as well as transformation of the legal profession**. The relevant statute states that its objects are to:

(a) assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya;
(b) uphold the Constitution of Kenya and advance the rule of law and the administration of justice;
(c) ensure that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide;
(d) protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law;
(e) set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya;
(f) determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya;
(g) facilitate the acquisition of legal knowledge by members of the Society and ancillary service providers, including paralegals through promotion of high standards of legal education and training;
(h) represent, protect and assist members of the legal profession in Kenya in matters relating to the conditions of practice and welfare;
(i) formulate policies that promote the restructuring of the legal profession in Kenya to embrace the spirit, principles, values and objects [of] the Constitution of Kenya;
(j) facilitate the realization of a transformed legal profession that is cohesive, accountable, efficient and independent;
(k) establish mechanisms necessary for the provision of equal opportunities for all legal practitioners in Kenya;
(l) protect and promote the interests of consumers of legal services and the public interest generally, by providing a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners;
(m) develop and facilitate adequate training programmes for legal practitioners; and
(n) do all such other things as are incidental or to the foregoing functions.[9]

Objects of Law Society of Namibia

The current objects of the **Law Society of Namibia** are also wide-ranging, touching on **the needs of the profession, Government and the general public**.

The objects of the Law Society shall be –
(a) to maintain and enhance the standards of conduct and integrity of all members of the legal profession;
(b) to present the views of the legal profession;
(c) to further the development of law as an instrument of social engineering and social justice;
(d) to encourage and promote efficiency in and responsibility in relation to the profession;
(e) to promote the education of lawyers at all stages and levels, with particular emphasis on the broadening of such education;

[8] Legal Practice Act 28 of 2014 (South Africa), s. 5.
[9] Law Society of Kenya Act, 2014, s. 4 (available at http://downloads.lsk.or.ke/downloads/downloads/the-law-society-of-kenya-act-2014.pdf>).

(f) to make recommendations to interested parties in relation to the training of lawyers;
(g) to define and enforce correct and uniform practice and discipline among members;
(h) to give all necessary assistance to the effective implementation of any legal aid scheme established and governed by or under any law;
(i) to promote social intercourse among members;
(j) to consider and deal with all matters affecting the professional interest of members;
(k) to co-operate with the representative bodies of other professional bodies;
(1) to promote applied research in the development of the law and participate in the reform of the law by the Government and other agencies;
(m) to seek the enhancement of the Rule of Law and promote the protection of human rights;
(n) to represent, protect and assist members with regard to their conditions of practice and related matters.[10]

7.2 Functions

Looking beyond general objects to more specific functions, there are several theoretical divisions which can be applied.

For example, functions can be classified as "input measures" or "output measures". Under this theory, input measures govern entry into the profession (eg educational requirements, practical experience) and output measures are those that govern practice (eg complaints, continuing education).[11]

Another theory classifies regulation systems as being complaint-based or compliance-based. Under a complaint-based system, regulatory agencies react to complaints against practitioners. Under a compliance-based system, regulatory agencies proactively regulate by giving practitioners affirmative duties, for example by requiring reporting or subjecting them to random audits.[12]

Some functions which are often carried out by law societies/bar associations are listed in the following table. The table indicates what structure carries out each function in Namibia, and also indicates alternative structures which perform the function in question in some jurisdictions.

REGULATORY AND REPRESENTATIVE FUNCTIONS		
Function	**Responsibility for this function in current Namibian system (Legal Practitioners Act 15 of 1995)**	**Alternative in other jurisdictions**
Act as a "trade union" for the legal profession		
Represent members' interests	Law Society of Namibia (s. 41(b)), supplemented by voluntary associations which represent specific segments of the profession	Voluntary associations formed for the legal profession as a whole or for subsets of the legal profession (South Africa)
Promote the study of law	Law Society of Namibia (s. 41(e))	Voluntary associations formed by for legal profession as a whole or for subsets of the legal profession (South Africa)

[10] Legal Practitioners Act 15 of 1995, s. 41.
[11] Adam M Dodek, "Regulating Law Firms in Canada", *La Revue du Barreau Canadien*, Vol 90, 2011 at 405 (available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1984635>), describing a theory advanced by Michael Trebilcock.
[12] Id at 405-06.

Advise and support members	Law Society of Namibia (s. 41(j), (n))	Statutory body with optional membership but mandatory regulatory powers (Zimbabwe)
Promote professional advancement of members	Society of Advocates	Law Society makes continued professional advancement a mandatory requirement (Ontario, Canada)
Promote transformation of the profession (eg to improve gender and racial balance)	Voluntary associations which represent specific segments of the profession	Representative body of solicitors which delegates regulatory functions to an independent regulatory arm (UK)
Promote networking by members with other law societies and relevant regional and international bodies	Law Society of Namibia (s. 41(k))	International Institute of Law Association Chief Executives - forum for chief executives of law societies and bar associations around the world to exchange views and information (International)
Regulate entry into profession		
Set academic qualifications for entry into profession	Academic and professional qualifications set by statute (ss. 3,5)	General Legal Council established by statute approves acceptable university degrees and can prescribe additional courses (Ghana)
Control or provide guidelines for legal education	Board of Legal Education approves syllabus of post-graduate study (s. 11)	Council of Legal Education established by statute sets syllabus and curriculum for law degree (Malawi)
Set and administer qualifying examination	Qualifying exam administered by and marked by JTC, moderators under control of Board of Legal Education, exam results approved by Board of Legal Education (ss. 11(d), 16(2))	Qualifying exam controlled by the Government, which is separate from the professional organization (Tajikistan)
Set other requirements for entry into profession, such as practical experience, pro bono requirements or community service	Board of Legal Education approves sets guidelines "in relation to the nature of the practical training" (s. 11)	Minister prescribes practical vocational training and community service requirements (South Africa)
Licence legal practitioners	High Court (s. 4)	Registrar of Court (Kenya) General Legal Council (Sierra Leone)
Maintain register of legal practitioners	Registrar of High Court (s. 2)	Solicitors Regulation Authority, which has a board composed of a majority of lay-persons with a lay-person chair (UK)
Determine qualifications for admission of foreign-trained or foreign-qualified legal practitioners	Acceptable foreign degrees determined by Minister on recommendation of Board of Legal Education (s. 5(4)) Countries from which admission is transferrable to Namibia set by statute; exemption from practical legal training and LPQE at discretion of Board of Legal Education (s. 5(1)(d); Schedule 3)	Foreign lawyers may perform occasional "fly in, fly out" services without registering, but may not appear in court (Mexico)

Set standards for profession		
Set standards for unprofessional conduct	Defined in statute supplemented by rules and guidelines issued by Council of the Law Society (s. 52(5)) Disciplinary Committee may make additional determinations (s. 33(2))	Legal Practice Council (with members from profession and government) to make Code of Conduct (South Africa) Council of Law Society makes rules on professional practice and conduct (Kenya)
Discipline members of profession		
Reactively receive and investigate complaints from members of public	Disciplinary Committee (s. 35(1))	Investigating Committee of Legal Practice Council OR Legal Services Ombud (South Africa)
Proactively audit or monitor profession	---	Legal Services Ombud (South Africa) Law Society conducts random compliance reviews (Ontario, Canada)
Hold disciplinary hearings	Disciplinary Committee	State Supreme Court (New York)
Impose sanctions on legal practitioners	Disciplinary Committee and High Court upon application by the Disciplinary Committee (ss. 35. 32)	Law Society Tribunal (Ontario, Canada) State Supreme Court (New York)
Decide on suspension of legal practitioners or removal of their right to practise	Disciplinary Committee applies to High Court for order to strike the legal practitioner's name from the Roll or to suspend him or her from practice (s. 32)	Law Society Tribunal (Ontario, Canada)
Regulate and administer Fiduciary Fund, trust accounts or similar		
No informative differences between countries identified		
Continuing education for members		
Set requirements for continuing education	---	Council of Law Society authorised to set requirements (Kenya) Statute sets minimum requirements (California)
Provide continuing education	---	Bar or Bar-approved provider (United States)
Advice and assistance to Government		
Make recommendations on Government policy and law reform	Included in objects of Law Society, but infrequent in practice (s. 41(l))	The Law Society of Zambia (Zambia)
Provide legislative drafting services	---	Estonia Bar Association (Estonia)
Service to public		
Assist members of public to locate appropriate lawyers	Law Society of Namibia provides a database of legal practitioners and law firms	Private online matching services funded by fees from participating lawyers (United States)
Provide public education materials	Occasionally Law Society of Namibia, but more frequently NGOs	New Zealand Law Society (New Zealand)
Conduct public programmes directly (eg resource centre, free legal services)	Law Society of Namibia hosts free legal advice days	Bar Association involved in pro bono internet service for public (Tennessee) New Zealand Law Society provides information for lawyers and non-lawyers on a weekly basis via e-mail (New Zealand)

Set requirements for pro bono work by members of legal profession	---	Law Society of South Africa now sets requirements; in future, Minister will have power to prescribe (South Africa) Required by law or regulation (Uganda, South Korea)
Provide, administer or participate in legal aid services for indigent members of the public	Faculty of Law at UNAM runs a legal aid clinic	Uganda Law Society involved in Legal Aid Project to supplement government's legal aid (Uganda)
Other functions		
Bestow professional honours/recognition on legal practitioners	Society of Advocates	President (South Africa)
Regulate other legal service providers, such as paralegals	No official registration or regulation of paralegals, but UNAM Faculty of Law offers a Diploma in Paralegal Studies	Law Society of Upper Canada (Ontario, Canada)
Carry out research on law-related issues	Law Society of Namibia, (occasionally); Law Reform and Development Commission; Legal Assistance Centre and other NGOs; Office of the Ombudsman; UNAM	Many law societies are active in this area.

8. Organisational structure

This section considers possible organisational structures for a regulatory body. The appropriate structure depends to a great extent on the decisions taken on issues pertaining to membership, independence and who will be covered by the regulatory body.

Most law societies examined still follow the basic approach described in a 1996 US law journal article:

> The major comprehensive bar associations typically follow a common organizational pattern, including membership-controlled governance, part-time unpaid members in leadership positions, and decentralized control over operations. The full membership elects officers and a legislative body to head the association, and occasionally elects an executive board as well. Significant control over association affairs, however, lies in semiautonomous subgroups of association members called sections and committees. These subgroups have their own officers, and usually operate free from interference by the top leadership of the associations. The leadership usually does, however, have the power to appoint section officers. Sections have their own meetings, frequently have their own publications, and often initiate their own law reform proposals.[1]

8.1 Issues to consider

Combined or separate roles of regulation and representation: The roles of representation and regulation may be combined or separated, which affects the structure of the regulatory body. While the discipline of individuals legal practitioners is often handled by a separate body or committee, many law societies both represent the interests of their members and have a degree of involvement in regulatory matters as in **Namibia**. In contrast, **South Africa** has created a statutory regulatory body which is accountable to the Minister of Justice and Constitutional Development. The regulatory body, the South African Legal Practice Council, is made up of a majority of practitioners, but includes members appointed by the Minister. Representation of the legal profession will in future be the province of non-statutory voluntary associations.[2]

Role of judiciary: In many jurisdictions, including Namibia, the courts and individual judicial officers already play a role in the regulation of the legal profession – particularly in areas such as admission to practice, disciplinary hearings and suspension or disbarment. Greater involvement by the judiciary could be an alternative to excessive interference by the executive branch, while still providing an external check on the profession. Involving the judiciary would also emphasise the role of lawyers as "officers of the court"[3] with a duty to promote justice and the effective operation of the judicial system.

Joint or separate regulation of split bar: Whether a jurisdiction has a split or fused bar can affect who is regulated, and by whom. When there is a split bar, separate entities may regulate the different professions. For example, in **England and Wales**, solicitors and barristers have separate representative bodies and separate regulators, although regulation of the entire legal profession is subject to the oversight of an apex body called the Legal Services Board. Alternatively, a single organisation may regulate the two professions, despite the existence of a split bar. For example, the

---

[1] Quintin Johnstone, "Bar Associations: Policies and Performances", *Yale Law & Policy Review*, Vol 15, Issue 1, Article 5 (1996).
[2] Legal Practice Act 28 of 2014 (South Africa), Chapter 2.
[3] Legal Practitioners Act 15 of 1995, s. 84 ("A person admitted to practise as a legal practitioner shall be an officer of the Court.")

relevant legislation in **Swaziland** distinguishes between attorney and advocates, but all legal practitioners are members of the Law Society of Swaziland.[4] In the new dispensation which is being put into place in South Africa, the distinction between advocates and attorneys is retained, but both are regulated by the statutory South Africa Legal Practice Council.

Regulation of legal service providers other than legal practitioners: Regulation of legal service providers other than legal practitioners (such as paralegals) may affect the structure of the regulatory body. For example, if a single regulatory body has authority over different legal service providers, each segment of the profession which is regulated should be represented on the governing body.

Council versus membership organisation headed by a Council: A regulatory body may consist only of a small Council or Board, or it may be a larger organisation headed by a Council. If the body is membership-based, it may encompass all members of the profession or only those who choose to join. An advantage of having a Council which is separate from the profession at large is that this may promote independence from the profession. This set-up may make it easier for the Council to manage its affairs, as it has fewer direct stakeholders to accommodate. A potential disadvantage of having a Council on its own is a possible disconnect between the Council and professional organisations that exist separately. For example, it might be harder to share information between the Council and the legal professionals in such a structure, where the profession is not unified in a single body with a single communication network. There also might be lost efficiencies if the Council and the professional organisations do not share resources. Separation between a regulatory Council and the profession may raise complicated issues about who is eligible to be on the Council and how members are selected. A Council which is created by statute and is separate from the profession may also allow for a higher degree of Government control. The new system in **South Africa**, discussed below, is an example of a regulatory Council which is separate from the profession, with a significant degree of Government control.

Tiered approach: Some regulatory systems utilise a tiered approach to maximise the independence of the regulators, and to institute checks and balances. As discussed above, in **England and Wales**, the Legal Services Board is part of such a tiered approach. It is not a regulatory agency or a professional association itself but instead an apex oversight body for different approved regulators and licensing authorities which regulate different sectors of the legal profession.[5] Potential disadvantages to tiered systems are that they are likely to require significant human resources, and that they may involve excessive complexity especially where the legal profession is small in numbers.

Elected versus appointed leadership: The method of selecting leadership has implications for the body's independence. If the leaders are elected by members of the professional body, that might indicate a lack of independence from the profession. If the leaders are appointed by the Government, that might signal lack of independence from the Government.

---

[4] Legal Practitioners Act, 1964 (Swaziland), ss. 5, 6, 35 (available at <http://lawsocietyofswaziland.co.sz/images/Legal%20Practitioners%20act%20of%201964.pdf>). See also Maxine Langwenya, *Swaziland Justice Sector and the Rule of Law*, Open Society Foundations, 2013 at 130 (available at <www.osisa.org/sites/default/files/afrimap_swz_justice_sector_main_text_web.pdf>). ("Attorneys and advocates undergo legal training at tertiary level. Attorneys are further required to write and pass a bar examination before they are allowed to practise. Both attorneys and advocates must be admitted to the bar by the High Court.")

[5] Legal Services Board, *Overseeing regulation: The LSB's approach to its role*, 2013 at para 11-14 (available at <www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2013/20130611_LSB_Sets_Out_Its_Approach_To_Overseeing_Regulation.pdf>).

A leadership elected by legal practitioners satisfies the principle that the legal profession should be self-regulating. The appointment of the leadership by a Minister or President may politicise the body and open the door to government control. Of course, there is always the danger in any elected body that voters may select leaders on the basis of politics or popularity rather than competence. An election of the leadership also requires sufficient interest and participation from the membership to give the elected leadership a sufficient mandate, and enough people available for election to provide some meaningful choice. This may be a particular challenge if there are quotas (such as requiring that at least four people on the elected body must have at least 10 years of practise experience). It may be easier to satisfy requirements aimed at diversity or experience through an appointed leadership, and this can also be a way to ensure that the leadership is well-qualified for the job. However, a major drawback to an appointment system is that it undermines self-regulations and independence. A possible way to mitigate such concerns is to establish a system in which appointments are made by various persons and/or bodies. For example, in **Ireland** (discussed above), various stakeholder organisations nominate persons to be members of the Legal Services Regulatory Authority, and the lower and upper houses of Parliament appoint persons from amongst these nominees.[6]

Leadership quotas: Quotas can be tailored to promote different types of diversity. Considerations could be experience, race, gender, citizenship, attorneys and advocates, or nomination by various stakeholder groups. Quotas to promote diversity or certain degrees of experience can also vary in strictness.

In **Namibia**, the Law Society currently mandates that four of its Council members must be racially disadvantaged. Namibian citizenship is not a requirement.[7] In **South Africa**, the 16 members of the South African Legal Practice Council elected by the profession must comprise 10 practising attorneys and 6 practising advocates. (There are seven additional appointed members.) The statute directs that "the racial and gender composition of South Africa" and "representation of persons with disabilities", amongst other factors, "must, as far as is practicable, be taken into account" when constituting the Council. No quotas are prescribed by statute in this regard, but as noted above the National Forum on the Legal Profession proposed a specific race and sex composition for the elected representatives.[8] All Council members must be South African citizens.[9]

Botswana prescribes that "at least" five of the seven members of its Council, all of whom are elected by the membership of the law society, must be citizens of Botswana, thus allowing for a maximum of two non-citizens.[10] Botswana's method of prescribing that "at least" a certain number of members must meet a certain criteria is more flexible than a system which prescribes certain requirements for each individual seat. However, Botswana at the same time requires that three of the seven Council members must have at least seven years of experience, while one must have no more than three years

[6] Legal Services Regulation Act 65 of 2015 (Ireland), s. 9 (available at <www.irishstatutebook.ie/eli/2015/act/65/enacted/en/pdf>).
[7] Legal Practitioners Act 15 of 1995, s. 45.
[8] For the 10 elected attorneys, 70% black and 30% white, and half women; for the 6 elected advocates, 3 women (2 black and 1 white) and 3 men (2 black and 1 white Law Society of South Africa, "Ninth meeting of the National Forum on the Legal Profession", 2 July 2017, <www.lssa.org.za/news-headlines/general-news/ninth-meeting-of-the-national-forum-on-the-legal-profession>.
[9] Legal Practice Act 28 of 2014 (South Africa), s. 7(1)(a).
[10] Legal Practitioners Act, 1996 (Botswana), s. 60 (available in cached form at <static1.1.sqspcdn.com/static/f/723732/.../ch61-01+LEGAL+PRACTITIONERS.pdf>).

of experience (ie must be a junior legal practitioner).[11] The idea of providing for varying years of experience adds another aspect of diversity, but it could be excessively limiting to prescribe multiple requirements for a small number of Council members.

Even versus odd members on decision-making body: If the regulatory body is run by a Council or Board, that body will need either an odd number of members or a chairperson with a casting vote to act as a tie-breaker. In **Namibia**, the Law Society currently has eight members and the chairperson elected by the Council has a casting vote.[12] A disadvantage of having a tie-breaking mechanism is that it might lead to dominance by a single point of view. For example, if there are ten persons on the governing body, but five (including the official with the casting vote) tend to vote consistently in a bloc, the use of this tie-breaking mechanism may diminish the influence of the dissenting viewpoint.

Terms of office: In **Namibia**, the Law Society currently has a structure in which Council members serve for two-year terms, but can be re-elected. A benefit of this approach is that it can guard against burn-out while allowing a successful, engaged member to participate for a longer period of time. Having two-year terms might also lead to frequent turn-over, which can lead to fresh ideas and perspectives. A potential drawback of such a short term of office is that it makes it difficult to implement longer-term plans, and accordingly can shift members' focus to short-term rather than long-term gains. Moreover, constant turnover can lead to loss of institutional knowledge, and discourage individuals from developing long-term in-depth knowledge of the organisation. Indeed, each new member will have to devote some time getting up to speed, which might represent a large institutional inefficiency.

Staggered vacancies: In **Namibia**, the Council of the Law Society is structured so that its composition does not change all at once. The benefit of this staggered approach is that it can facilitate knowledge transfer from one regime to the next. A possible downside is that it means elections need to happen more frequently. This might add an extra layer of administrative work. It may also discourage voter participation, as each election cycle is less consequential because only half, rather than all, of the seats are open for decision.

Officers: In **Namibia**, the Council of the Law Society currently has a Chairperson and a Vice-Chairperson as its only statutorily-mandated officers.[13] (While these are the designations used in the statute, the terms "President" and "Vice-President" have been used in practice for these two positions.[14]) As a contrasting example, in **Mauritius,** the Law Society must have six officers on a Council composed of eight members: President, Vice President, Secretary, Assistant Secretary,

---

[11] Legal Practitioners Act, 1996 (Botswana), s. 60. The Law Society of Botswana is a statutory body. There are three ways to become a member of the Law Society. Two relate to Government employment: membership is automatic for any member of the Attorney-General's Chambers who has been admitted and enrolled as a legal practitioner, and any legal practitioner who is employed by the Government or by a statutory corporation. The third avenue to membership applies to all other lawyers who hold a practicing certificate, pay a prescribed fee and undertake to do *pro deo* or *pro bono* work (in an unspecified amount). All the members of the Council are elected at an annual general meeting and hold office for two years. The officers are a Chairperson, Vice-Chairperson, Secretary, a Treasurer and unspecified "other officers". The Council has broad power to appoint committees and delegate any of the Council's functions to them. Legal Practitioners Act, 1996 (Botswana), s. 55-56, 60, 62, 64.

[12] Legal Practitioners Act 15 of 1995, s. 50(4).

[13] Legal Practitioners Act 15 of 1995, s. 45(2); Law Society of Namibia, "The Council", <http://lawsocietynamibia.org/content/about-the-law-society/the-council-of-the-law-society>.

[14] Personal communication, Law Society of Namibia, October 2017.

Treasurer and Assistant Treasurer.[15] A benefit of having so many officer positions is that it clarifies the roles that each Council member must play. This might lead to efficiency of governance and clarity of roles. Additionally, if one member must leave the Council, it clarifies what skills the member's successor is likely to need; for example, if a Treasurer resigned, the Council might seek someone with the skills to be a Treasurer. A potential drawback is duplication of efforts, such as between a Treasurer and Assistant Treasurer. Another potential drawback of multiple officers is that this might silo members into certain roles instead of drawing on their diverse talents.

Committees: To help it fulfil its functions, the regulatory body could provide for committees, or provide for the employment of administrative personnel, or both. The utilisation of committees allows for greater participation by members, and provides an avenue for members with specialised skills and interests to contribute to the profession in focused ways. However, it can be challenging to coordinate efforts or resources across multiple committees. It may also be difficult to find sufficient members to commit to carrying out committee work, especially if this takes place on a volunteer basis. This is especially challenging if the underlying body is composed of a relatively small membership.

Membership issues: Where the regulatory body is a membership body, one issue (already discussed above) is whether membership is **voluntary or mandatory** for all legal professionals. As noted above, some countries such as **New Zealand** and **Zimbabwe** make membership of a statutory law society voluntary while still empowering that law society to regulate all legal practitioners, whether or not they are members.

Another question is whether **candidate legal practitioners** carrying out practical training are allowed to be members. A similar question is whether **law students** may be members. A benefit of this is that it engages young professionals and helps to prepare them for legal practice. A disadvantage is that it fails to allow for attrition in the sense that not all law students will end up becoming legal practitioners. Still another issue is whether **lawyers who are not admitted to practice** – such as legally-trained academics or company advisers – may be members. A drawback to broad membership is that this approach could dilute the principle of self-regulation of the profession. One option is to provide for different categories of membership, with corresponding differences on rights and duties such as membership fees, voting rights and participation in some aspects of standard-setting and discipline. **Zambia**, discussed below, is an example of a jurisdiction with broad membership in different categories.

Methods for consulting membership: In **Namibia**, the main vehicle for consulting the membership of the Law Society is the annual general meeting of members, or a special general meeting of members which must be convened by the Council if demanded by at least one-tenth of the members of the Law Society.[16] In **South Africa,** the Legal Practice Council (as a regulatory and not a representative body) is not required to hold an AGM, but it must obviously communicate with the

[15] The Mauritius Law Society Act 33 of 2005, s. 7 (available at <www.mauritiuslawsociety.com/documents-of-mls/law-society-act-2005>). The Mauritius Law Society is a statutory body with mandatory membership of all attorneys. It is run by a Council of eight members: a State Attorney designated by the Solicitor General and seven other members elected by the Society, of whom at least two must be attorneys with 15 years of experience. Each member is elected for a two-year term. The Council's six officers are President, Vice President, Secretary, Assistant Secretary, Treasurer and Assistant Treasurer. The Mauritius Law Society Act 33 of 2005, ss. 4, 6-7; Mauritius Law Society, "Members of Council", undated, <www.mauritiuslawsociety.com/members-of-council> (listing only seven members).

[16] Legal Practitioners Act 15 of 1995, s. 44.

profession it regulates.[17] In general (as opposed to within the legal profession in particular), there is a move to experiment with online AGMs or to supplement AGMS with online outreach.

Disciplinary structures: These are discussed in detail in a section 15 below. However, briefly, there is often separate provision for a disciplinary body in order to give it a greater distance from professional control than other aspects of the regulatory structure. For example, disciplinary bodies may incorporate laypersons or persons appointed by Government, and they may be permanent or constituted on an *ad hoc* basis as needed.

Boards of Legal Education: Regulation of legal education is also discussed in detail in section 12 below. Generally, there is often separate provision for a body which regulates or advises on this issue, combining members of the legal profession and other persons.

Control of Fidelity Fund or similar: This issue is discussed in detail in section 17 below.

8.2 Funding of regulatory body

Some of the policy considerations with regard to funding independent regulatory agencies are the same as those faced by any organisation: setting priorities for expenditure, assuring adequacy of resources, maintaining budget accountability and oversight, managing resources efficiently and adhering to strong ethical standards.[18] However, independent regulatory agencies also encounter some unique considerations, particularly with respect to independence.

Regulatory agencies are generally subject to certain **governmental controls** on the use of their funds to ensure appropriate accounting, prudent management of resources, fiscal controls and the like. However, without an independent source of funds, agencies run a greater risk of governmental oversight being used to punish or reward the agency for its substantive decisions, which could have severe consequences on the agency's independence.

Regarding the **cost of regulatory functions**, it is essential that a regulatory agency be administered by highly competent professionals in a reasonable, transparent, and predictable fashion. However, regulatory agencies for the legal profession have to compete in the same labour pool from which private law firms and government draw their talent. An inability to recruit and retain highly qualified personnel is likely to have adverse effects on the quality of regulation.[19] Because of the narrow labour market and the rigorous skillset required, a law society may need to offer reasonably lucrative compensation packages in order to recruit and retain qualified and experienced personnel – which can affect funding needs.

The importance of **independence** has already been discussed above in section 6. Any perception that the agency is not independent will undermine the regulators' ability to perform their duties and could give rise to accusations that its decisions are based on political considerations rather than substantive merit. Hence, an independent source of funding, or at least a high degree of agency control over

[17] Law Society of South Africa, "Legal Practice Act latest", May 2017, Eighth Plenary Meeting of the National Forum on the Legal Profession 6 May 2017, <www.lssa.org.za/legal-practitioners/advisories/misc/legal-practice-act-28-of-2014/misc/legal-practice-act>.
[18] Ashley C Brown, "The Funding of Independent Regulatory Agencies", undated (available at <https://sites.hks.harvard.edu/hepg/Papers/AnguillaPUC.pdf>).
[19] Ibid.

funding, is important to maintain both actual independence and public perceptions of independence. To promote transparency and accountability, any agency which regulates the legal profession should make clear who pays for its operations, and how much its operations cost.[20]

Regulatory agencies have **three potential sources of funding** which are not mutually exclusive and are sometimes used complementarily:

1. assessments on the regulated industry
2. appropriations from the general treasury
3. fees for special services.[21]

In addition, some regulatory agencies source funding from consumer levies.

Assessments on the regulated industry: The first and most obvious advantage of funding the agency from the regulated industry is that it gives the agency an independent source of funding, removed from the political budget process. This accomplishes the goal of independence outlined above, shielding the agency from political retaliation for its decisions. This also means that the agency is not affected by the possible variability of revenue collection and budgetary allocations, which could destabilize the agency. Economically, this has the advantage that increases in the costs of services over time will be borne by the legal practitioners who primarily benefit from those services, rather than by the general public.

Appropriations in the Government budget: This approach to funding treats the regulatory industry as simply another government agency. It has the advantages of simplicity and transparency, but fails to provide financial independence and the concomitant insulation from politics. This can be mitigated to some degree by secure multi-year funding arrangements, which contribute to the independence of the regulator by protecting it from budget cuts motivated by political reaction to unpopular decisions.[22] It can also be argued that funding by means of Government allocations produces gains in efficiency gains, by eliminating the transaction costs involved in collecting assessments on the industry.

Fees for special services: Services for which the agency might charge a special fee include special studies for the government, license applications, special investigations, or firm-specific activities which are not regarded as routine investigatory matters. This approach has the advantage of allowing the agency to be compensated when it is compelled to take on activities that were not anticipated when the regular budget cycle occurred or which are more logically treated separately from the general budget. For example, regulatory agencies can incur high costs from litigation, which by its nature is difficult to anticipate and its financial impacts difficult to assess.[23]

Consumer levies: To come

[20] International Monetary Fund, *Code of Good Practices on Transparency in Monetary and Financial Policies: Declaration of Principles*, 1999.
[21] Ibid.
[22] Elizabeth Kelley and Bernard Tenenbaum, *Funding of energy regulatory commissions,* Washington, DC: World Bank, 2004 (available at <http://documents.worldbank.org/curated/en/817641468762588575/Funding-of-energy-regulatory-commissions>).
[23] "OECD Best Practice Principles for Regulatory Policy: The Governance of Regulators", Organisation for Economic Co-operation and Development, 2014 (available at <www.oecd.org/gov/regulatory-policy/the-Sgovernance-of-regulators-9789264209015-en.htm>).

8.3 Organisational structure in Namibia

All persons enrolled as legal practitioners are members of the Law Society of Namibia, and there is no provision for membership by any other persons.[24]

The Council of the Law Society is the key management body. It consists of eight members who are elected during annual meetings from within the Law Society. Council members are elected for two-year terms, though the terms are staggered so that the whole Council does not turn over simultaneously. Members may be re-elected.[25]

The Council is governed by a chairperson and a vice-chairperson. To promote diversity, the statute mandates certain requirements for Council members. At least four of the eight members must be racially disadvantaged and at least four must be legal practitioners in private practice. Additionally, the chairperson position must alternate every year between a racially disadvantaged person and a racially advantaged person. The vice-chairperson must be a racially disadvantaged person if the chairperson is a racially advantaged person, and vice versa.[26]

The Council may create committees to further its functions.[27] The Law Society website currently lists twenty committees, including a Legal Ethics Committee, a Law Reform Committee, a Human Rights Committee, a Legal Education and Professional Development Committee and a Fees and Guidelines Committee. Members serve on these committees on a volunteer basis.[28]

The Act allows the Council to make rules regarding its functioning.[29] Accordingly, the Council has established a process by which it may appoint a Director as the chief administrative officer of the Law Society and employ other persons as necessary to assist the Council in the performance of its functions.[30] At present, the Directorate of the Law Society includes the following positions:

- Director
- Manager: Professional Affairs
- Manager: Risk and Compliance
- Senior Risk and Compliance Managers x 3
- Manager: Finance and HR
- Librarian
- Office Administrator: Directorate
- Office Administrator: Professional Affairs
- Office Administrator: Reform Audit Support System (RASS) (vacant)
- General Office for Serving of Process (GOSP) Officer
- Messenger/Cleaner.[31]

---

[24] Legal Practitioners Act 15 of 1995, s. 43.
[25] Legal Practitioners Act 15 of 1995, s. 45.
[26] Legal Practitioners Act 15 of 1995, s. 45.
[27] Legal Practitioners Act 15 of 1995, s. 49.
[28] Law Society of Namibia, "The Committee System", undated, <http://lawsocietynamibia.org/content/about-the-law-society/the-committee-system>.
[29] Legal Practitioners Act 15 of 1995, s. 52.
[30] Law Society of Namibia, "Amended Rules of the Law Society of Namibia", Rule 12, undated <http://lawsocietynamibia.org/content/tariffs/regularoty/amended-rules-of-the-law-society>.
[31] Personal communication, Law Society of Namibia, October 2017.

As noted above, the Law Society's funds come from membership fees, fund-raising, investments, and surpluses in the Legal Practitioners' Fidelity Fund. It receives state funding only in respect of the activities of the Disciplinary Committee.[32]

[32] See section 6.4 above.

8.4 Organisational structure in South Africa

South Africa's Legal Practice Act 28 of 2014 describes how the Legal Practice Council is structured. The Act covers only the Council, and does not establish a membership body to represent the interests of profession. The Council consists of 23 members, of which 10 are practising attorneys, 6 are practising advocates, 2 are teachers of law designated "in the prescribed manner", 3 are appointed by the Minister of Justice, Legal and Parliamentary Affairs at the Minister's discretion, 1 is appointed by Legal Aid South Africa and 1 is appointed by the Legal Practitioners' Fidelity Fund Board.[33] All members must be South African citizens and fit and proper persons".[34] This composition provides representation from both attorneys and advocates as well as other key stakeholders, which is a measure for spreading influence across differing sectors of the legal profession. However, as noted above, it is somewhat worrying that the Act gives the Minister the power to initiate a process for dissolution of the Council if the Minister "loses confidence in the ability of the Council to perform its functions effectively and efficiently".[35]

The Act permits the Council to delegate some of its tasks. It is required to appoint an executive officer to act as an accounting officer.[36] The Act also mandates that the Council establish an executive committee of seven persons to govern administrative functions. The executive committee must contain the chairperson, deputy chairperson, and five other members who reflect the racial and gender composition of the population.[37] The Act also allows the Council to establish other committees to support its functions[38] and authorises it to delegate its powers and functions to other specified officials or entities.[39]

The Council is required to employ an executive officer to assist it to carry out its functions and it may employ other officials or staff as necessary and determine their remuneration and other conditions of service.[40]

As noted above, while the idea is to fund the Council from annual fees levied on legal practitioners, there are concerns that this may have to be supplemented by Parliamentary appropriations unless fees are increased above the planned level.[41]

8.5 Organisational structure in other jurisdictions

It is not really useful to consider organisational structure before the basic approach to regulation has been determined, as well as what sectors of the legal service profession will be regulated. At this stage, two examples are provided below – one with a similar approach to the one currently in place in Namibia (Zambia) and one with a similar approach to the one being introduced in South Africa (Ghana), to provide some idea of alternative organisational structures within those two paradigms.

---

[33] Legal Practice Act 28 of 2014 (South Africa), s. 7.
[34] Legal Practice Act 28 of 2014 (South Africa), s. 8.
[35] Legal Practice Act 28 of 2014 (South Africa), s. 14.
[36] Legal Practice Act 28 of 2014 (South Africa), s. 19.
[37] Legal Practice Act 28 of 2014 (South Africa), s. 20.
[38] Legal Practice Act 28 of 2014 (South Africa), s. 18.
[39] Legal Practice Act 28 of 2014 (South Africa), s. 21.
[40] Legal Practice Act 28 of 2014 (South Africa), s. 6(2)(a).
[41] See section 6.5 above.

Zambia: Two categories of members represented on Council

Zambia is an example of a jurisdiction with a particularly broad membership in its law association, which is divided into two categories. The Law Association of Zambia is a statutory body with voluntary membership which regulates the legal profession.[42]

Ordinary membership is open to any Zambian resident who -

- is admitted to the roll of practitioners in Zambia or qualified to practise elsewhere as a lawyer
- has a Zambian law degree or qualification obtained elsewhere which is acceptable to the Association for purposes of membership.[43]

Associate membership is open to anyone resident in Zambia who -

- is a student at the School of Law at the University of Zambia
- is a full-time student at a university elsewhere engaged in a programme leading directly to a degree acceptable to the Association for purposes of membership; or
- is an articled clerk
- is engaged in a programme of study acceptable to the Association for purposes of associate membership; or
- is a managing clerk employed by a legal practitioner in Zambia.[44]

Associate members pay lower membership fees than ordinary members[45] and have no voting rights.[46]

The Council, also referred to as the "Executive Committee",[47] consists of a maximum of 16 members, all of whom are elected by the ordinary members of the Law Association from amongst the ordinary and associate membership. Four of the Council members are officers: President, Vice President, Secretary and Treasurer.[48] Associate members are not eligible to serve as officers of the Association, and the number of associate members on the Council of the Association must not exceed one-quarter of the total membership of the Council.[49] It was recently decided to elect the Executive Committee every other year, with the next elections in 2018.[50]

The Council utilises seventeen committees to help it carry out its functions. Some cover administrative tasks while others have topical areas of focus. Examples are the Legal Practitioners' Committee, the House Committee, the Young Lawyers Committee, the HIV/AIDS Committee and the Women's Rights Committee.[51] The composition of the Legal Practitioners' Committee, which is appointed by the Council, is set by statute. This Committee must consist of 9-13 members of the Association who are currently practising as legal practitioners in Zambia and have been in practise for at least 10 years.

---

[42] It was established by the Law Association of Zambia Act of 1973. Law Association of Zambia, "About LAZ", undated, <www.laz.org.zm/about-laz/>. This statute is currently codified in Chapter 31 of the laws of Zambia (available at <www.zambialaws.com/Principal-Legislation/chapter-31law-association-of-zambia-act.html>). See Elias Munshya, "Regulating Lawyers in Zambia: Principles and Practice", 10 April 2017, blog article available at <https://eliasmunshya.org/2017/04/10/regulating-lawyers-in-zambia-principles-and-practice/>.

[43] Law Association of Zambia Act [Chapter 31], s. 5(3).

[44] Law Association of Zambia Act [Chapter 31],s. 5(4); Law Society of Zambia (Private) Rules (Rules made under Section 18 of the Law Society of Zambia (Private) Act, Chapter 47 of the Revised Edition, and continued in force by virtue of Section 17 (2) of the Law Association of Zambia Act), rule 3(2).

[45] Law Society of Zambia (Private) Rules, rule 4

[46] Law Society of Zambia (Private) Rules, rule 3(5).

[47] Law Association of Zambia Act [Chapter 31], s. 10(1).

[48] Law Association of Zambia Act [Chapter 31], s. 10(2).

[49] Law Association of Zambia Act [Chapter 31], s. 10(3).

[50] Law Association of Zambia, "About LAZ", undated, <www.laz.org.zm/about-laz/>.

[51] Law Association of Zambia, "About LAZ", undated, <www.laz.org.zm/about-laz/>.

This Committee has a number of important functions to exercise on behalf of the Association, including the issue of practising certificates; governance of the Compensation Fund; setting of rules on fees for legal services; and exercising certain disciplinary functions.[52] There is also a Disciplinary Committee composed of the Attorney-General, the Solicitor-General and five practitioners nominated by the Law Association and appointed by the Minister.[53] Furthermore, the Council "may engage employees and remunerate them in such manner as it may decide".[54]

Ghana: A Council with balance of judiciary, legal practitioners and government

In Ghana**,** the General Legal Council is a non-membership statutory regulatory body.[55] The Council regulates the legal profession, including education and ethics requirements.[56] Its composition deliberately mixes the judiciary, legal practitioners, government officials and academics. The Chief Justice of the Supreme Court is automatically the chairperson of the Council, and the next most senior Justice of the Supreme Court is automatically the deputy chairperson. The following two most senior Justices are also automatically members of the Council, as is the Attorney-General and the Head of the Faculty of Law at the University of Ghana. In addition, there are three persons nominated by the Minister and four members of the Bar elected by the Ghana Bar Association – thus giving the profession, the judiciary and government / government nominees each 4 out of the 13 Council members.[57] The General Legal Council appoints a Disciplinary Committee of 3-5 persons from amongst its members, from persons presently or formerly in "high judicial office" or from former members of the Council who are still practising as lawyers.[58] The Council may also appoint other committees and delegate to them any of its statutory functions other than those relating to discipline.[59] The Council is required to appoint a Director of Legal Education and may appoint other officers as required.[60] Ghana has a separate Ghana Bar Association which is not established by statute, but is recognized by the Constitution as the professional association for lawyers.[61] Membership is not mandatory, but all admitted members of the profession are automatically registered as members.[62]

---

[52] Law Association of Zambia Act [Chapter 31], s. 13(4)-(8) and 13A, read together with the Legal Practitioners Act [Cap 30] (Zambia) (available at <www.zambialii.org/zm/legislation/consolidated_act/30>).
[53] Legal Practitioners Act [Chapter 30] (Zambia), s. 4.
[54] Law Association of Zambia Act [Chapter 31], s. 12.
[55] It is created by the Legal Profession Act 32 of 1960 (Ghana) (available at <http://glc.gov.gh/wp-content/uploads/2015/09/LEGAL-PROFESSION-ACT-1960-ACT-32.pdf>).
[56] Legal Profession Act 32 of 1960 (Ghana), s. 1.
[57] Legal Profession Act 32 of 1960 (Ghana), First Schedule, para 2(1)-(2) (specifying 13 members of the General Legal Council). Para 2(3) makes confusing reference to "other members" which overlaps with the membership described in para 2(1) – but not completely. To add to the confusion, the website of the General Legal Council as of August 2017 listed only 11 current members: 4 Supreme Court Justices, the Attorney-General, 4 legal practitioners affiliated with the Ghana Bar Association, the Dean of the Faculty of Law at the University of Ghana and one member listed as a nominee of the Attorney-General. It also lists several other persons as being "in attendance" at the General Legal Council: a Secretary and six other representatives of academia. General Legal Council, "Council Members", undated, <www.glc.gov.gh/about-us/council-members/>, as accessed on 5 August 2017.
[58] Legal Profession Act 32 of 1960 (Ghana), s. 17. No term of office is prescribed, but this appears to be a standing body as opposed to an *ad hoc* one as members are listed on the Council website (see <www.glc.gov.gh/disciplinary-committee/members/current-members/>).
[59] Legal Profession Act 32 of 1960 (Ghana), First schedule, para 4.
[60] Legal Profession Act 32 of 1960 (Ghana), s. 1(4).
[61] Members of the Ghana Bar Association are represented on the Judicial Council (Art 153(f)) and the Rules of Court Committee (Art 157(c)). Constitution of the Republic of Ghana.
[62] See "How to Practise in Ghana", The Law Society (England and Wales), 2017, <http://communities.lawsociety.org.uk/international/regions/africa-and-the-middle-east/ghana/how-to-practise-in-ghana/5044581.fullarticle>.

9. Who is regulated

In 2016, the American Bar Association (ABA) published a report on the future of legal services. The starting point of this report is that there is an unmet need for legal services, which are often out of reach because they are increasingly expensive, time-consuming and complex. Ironically, this unmet need sits alongside a situation where many lawyers, and particularly recent law graduates, are unemployed or underemployed. At the same time, the delivery of legal services is being transformed by technology, globalization, and other forces:[1]

> Familiar and traditional practice structures are giving way in a marketplace that continues to evolve. New providers are emerging, online and offline, to offer a range of services in dramatically different ways. The legal profession, as the steward of the justice system, has reached an inflection point. Without significant change, the profession cannot ensure that the justice system serves everyone and that the rule of law is preserved.[2]

The ABA concludes that innovation and unconventional thinking are required.[3]

Some of the most challenging issues around the world at the moment are how to address new forms for the provision of legal services, and whether and how to regulate legal service providers other than admitted legal practitioners. This section looks at the regulation of law firms as entities, in-house counsel, alternative business structures, legal practitioners employed by the State, non-profit entities, non-practising lawyers, foreign lawyers operating inside the jurisdiction in various capacities, paralegals and possible new service delivery models. Regulatory issues pertaining to a split bar are discussed in the next section.

9.1 Law firms

Many regulatory bodies regulate individual legal practitioners. However, in some jurisdictions, the regulatory bodies regulate law firms as well. This is sometimes referred to as "entity regulation".[4]

The key benefit of holding firms accountable is that this makes it possible to discipline a firm in a situation where no particular legal practitioner can be identified as being personally responsible for wrongdoing attributed to the firm.[5] Regulating firms can boost public confidence in the effectiveness of regulation, by holding the most powerful groups of legal practitioners accountable.[6] Such regulation may be especially important in a system of self-regulation, to help combat any perception that regulators act more leniently toward large and influential firms.[7] Regulating law firms could also have the benefit of increasing public protection, as large law firms have cultures that influence how their members behave and thus exert considerable influence on the practice of law.[8]

---

[1] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 5, 8.
[2] Id at 8.
[3] Ibid.
[4] See, eg, National Association of Bar Counsel (USA) website: <www.nobc.org/index.php/jurisdiction-info/global-resources/entity-regulation>.
[5] Adam M Dodek, "Regulating Law Firms in Canada", *La Revue du Barreau Canadien*, Vol 90, 2011 at 419.
[6] Id at 387.
[7] Id at 396.
[8] Id at 387.

Potential arguments against firm regulation are concerns that this might de-emphasise personal responsibility – and that it might be ineffective as a method of increasing compliance with regulatory requirements if individual legal practitioners are already required to comply with relevant regulations.[9]

A related issue is the tradition of limiting the forms of legal practice. Many jurisdictions prohibit lawyers from sharing legal fees with non-lawyers, forming partnerships with non-lawyers or working as employees of non-lawyers. The basis for such prohibitions is the theory that such arrangements might compromise core values such as professional independence, client confidentiality and the duty of loyalty to the client. The fear is that business arrangements with non-lawyers could result in putting profits ahead of professional values.[10]

In **Namibia,** the Legal Practitioners Act 15 of 1995 makes provision for the regulation of juristic persons, providing that any reference in the law to a legal practitioner, a partner or a partnership in relation to legal practitioners shall be construed as including a reference to a professional company or to a member of such a company.[11] A private company may conduct a practice if it complies with certain conditions: its memorandum of association must provide that all present and past directors of the company shall be liable jointly and severally with the company for the liabilities contracted during their periods of office; only natural persons who are legal practitioners with fidelity fund certificates may be members or shareholders; and the company name must comply with certain requirements. Furthermore, every shareholder of the company must be a director of the company, and no one other than a shareholder of the company may be a director.[12] Partnerships are allowed so long as the partnership arrangement does not allow someone other than a legal practitioner "to enjoy, share or participate in fees reserved solely to a legal practitioner", or "secure for the legal practitioner the benefit of professional business solicited by" a person who is not a legal practitioner.[13]

In **South Africa**, the Legal Practice Act 28 of 2014 sets similar rules for legal practice through a commercial juristic entity. Its shareholders, partners or members must be comprised exclusively of attorneys, and legal services must be rendered only by or under the supervision of admitted and enrolled attorneys. The individual shareholders, partners or members must be jointly and severally liable for the entities debts and liabilities, as well as for any theft committed during their period of office.[14] Some asserted that the law should allow for any juristic entity to conduct an incorporated legal practice, regardless of ownership and control.[15] The Act commits the Council to future investigation of other forms of legal practice, including limited liability legal practices.[16] One

[9] Id at 387, 397.
[10] See, eg, Ronald C Minkoff, "United States: ABA Model Regulatory Objectives: Why They Matter To You", 10 May 2016 (available at <www.mondaq.com/unitedstates/x/488032/Strategic+Planning/ABA+Model+Regulatory+Objectives+Why+They+Matter+To+You>).
[11] Legal Practitioners Act 15 of 1995, s. 7(10).
[12] Legal Practitioners Act 15 of 1995, s. 7(1)-(2).
[13] Legal Practitioners Act 15 of 1995, s. 7(10), 33(1)(e).
[14] Legal Practice Act 28 of 2014, s. 34(7).
[15] See submission of Legal Expenses Group Africa (LEZA) on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 42 (available at www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf).
[16] Legal Practice Act 28 of 2014, s. 34(9).

commercial firm encouraged this, stating that allowing limited liability practices will benefit the public and the fact that they are not yet allowed discourages the establishment of new firms.[17]

In general, law societies in **Canada** regulate only individual lawyers. However, the regulatory bodies in the Canadian provinces of **Nova Scotia** and **British Colombia** receive complaints against law firms, investigate law firms, and engage in disciplinary action against law firms.[18]

In **England and Wales**, the Legal Services Board oversees the approved regulators and licensing authorities,[19] and the approved regulators may regulate businesses and other entities as well as individual lawyers.[20] For example, the Solicitors Regulation Authority can authorise a licensable body, a legal services body or a sole practitioner[21] and regulate the provision of legal services in any of these forms.[22]

In the **United States** the American Bar Association has the power to draft its *Model Rules* in a way that allows for regulation of various entities, but a proposal in the 1990s to amend the rules to include firms did not succeed.[23] As of 2011, only two of the fifty states engaged in discipline of law firms.[24]

In **Malawi**, the Malawi Law Society's strategic plan identifies regulation of law firms as an ideal to achieve, to enhance the goal of improving professionalism and independence. It plans to achieve this by establishing a standing committee to inspect law firms.[25]

9.2 In-house counsel

The term "in-house counsel" refers to lawyers who provide legal services mainly to their employers. They are thus, in a sense, legal practitioners with a single client. Another way to describe them is as employees of a business (other than a law firm) who provide legal advice and services to that business.

The main argument against permitting admitted legal practitioners to practise law in this way is that it puts lawyers under the control of non-lawyers, thereby potentially undermining their professional independence and their ability to adhere to ethical standards.

---

[17] Submission of Webber Wentzel on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 45 (available at www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf).
[18] "Firm Regulation and Business Structures in Other Jurisdictions", ABS Working Group, undated, <www.nobc.org/docs/Global%20Resources/Entity%20Regulation/Entity%20Regulation%20Chart%20May%2013%202015.pdf>.
[19] Legal Services Board, *Overseeing regulation The LSB's approach to its role*, 2013 at para 11–14 (available at <www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2013/20130611_LSB_Sets_Out_Its_Approach_To_Overseeing_Regulation.pdf>).
[20] Legal Services Board, "Section 51 – practising fees", undated, <www.legalservicesboard.org.uk/Projects/statutory_decision_making/section_51_practising_fees.htm>.
[21] Solicitors Regulation Authority, Handbook Version 18, 2016, Authorisation and Practicing Requirements, Authorisation Rules, Rule 4 (available at <www.sra.org.uk/solicitors/handbook/authorisationrules/part2/content.page>).
[22] Id, Rule 8.
[23] Adam M Dodek, "Regulating Law Firms in Canada", *La Revue du Barreau Canadien*, Vol 90, 2011 at 414.
[24] Ibid.
[25] Malawi Law Society, *Strategic Plan 2015-2020*, Blantyre: Malawi Law Society, 2016 at 12-13 (available at <http://malawilawsociety.net/index.php/downloads/1-strategic-plan-booklet>).

It may be important to distinguish between a legal practitioner employed by a company to serve *that company* as a client, and a legal practitioner employed by a company to serve other people as clients. For example, some have worried about the "Walmart Model" (referring to a ubiquitous US super-store) where lawyers might be employed to provide legal services to the store's customers in a situation where pressure to maximise profits could conflict with adherence to ethical standards.[26]

The **National Association of Bar Counsel** collected information on this issue from 70 jurisdictions and concluded that most common law jurisdictions *require* bar membership for in-house counsel while some *allow* it, but most civil-law jurisdictions *forbid* it.[27] Worldwide, bar registration for in-house counsel is required in only 28% of jurisdictions.[28]

In **Namibia**, no distinction is made in principle between lawyers and in-house counsel, although it is possible that working as a legal practitioner while employed by a private company could be construed as a private company conducting a practice, which would mean that the restrictions applicable to the formation of law firms discussed in the previous section would apply.[29]

In **South Africa**, the Legal Practice Act 28 of 2014 allows attorneys to practise only in the following ways:

- for their own account;
- as part of a commercial juristic entity where the shareholding, partnership or membership is comprised exclusively of attorneys;
- as part of a law clinic;
- as part of Legal Aid South Africa; or
- as a full-time government attorney or as an attorney for the South African Human Rights Commission.[30]

This effectively denies admitted legal practitioners employed by corporations the right to appear in court. One submission on the South African law suggested that this could also prevent a well-meaning corporation from employing legal practitioners to attend to the legal needs of its staff as an employee benefit.[31]

---

[26] See, eg, Ronald C Minkoff, "United States: ABA Model Regulatory Objectives: Why They Matter To You", 10 May 2016.

[27] "The Regulation of In-House Counsel – Overview of International Trends", National Association of Bar Counsel (USA), <www.nobc.org/docs/Global%20Resources/In%20House%20Counsel%20-%20Research%20OverviewMarch2015.pdf>.

[28] Charts on the regulation of in-house counsel, National Association of Bar Counsel (USA), <www.nobc.org/docs/Global%20Resources/Charts%20worldwide%20trend%20and%20regional.March2015.pdf>.

[29] It is also relevant to note in this regard that in some instances, even a non-lawyer may be allowed to represent a business in court. In the *Nationwide Detectives* case, the Supreme Court held that the common-law rule that juristic persons cannot be represented by persons other than legal practitioners had no longer absolute application since this infringes the constitutionally-guaranteed right of access to the courts where the person in question is the alter ego of a small, one-person corporation that either prefers to litigate without legal representation or is unable to do so due to cost. *Nationwide Detectives & Professional Practitioners CC v Standard Bank of Namibia Ltd, 2008*, NR 2008 at 300-301.

[30] Legal Practice Act 28 of 2014, s. 34(5).

[31] Submission of Legal Expenses Group Africa (LEZA) on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 42 (available at www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf).

In **Germany**, in-house counsel can function as legal practitioners if they are admitted to the local bar.[32] However, they can only be admitted to the bar if they are able to prove that their permanent employment relationship does not interfere with their independence,[33] since a lawyer is required to be an independent actor in the administration of justice.[34]

In the **UK**, salaried legal professionals are governed by the same regulations as legal professionals.[35] However, the code of conduct of the Solicitors Regulation Authority contains rules that deal especially with in-house practice. For example, these rules provide that an in-house legal practitioner may not act for clients other than his or her employer, other than in accordance with narrow specified exceptions.[36]

In **France**, which is a civil law jurisdiction, the concept of a salaried legal professional does not exist. In-house counsel cannot be admitted to the bar. [37]

9.3 Alternative business structures

The term "Alternative Business Structure" (ABS) refers to a business model that allows non-legal practitioners to be involved in law firms and the provision of legal services.[38] Other terms for this are "multi-disciplinary practice" and "non-lawyer ownership".

It has been argued that the prohibition on partnerships and business co-ownership between lawyers and non-lawyers inhibits useful innovation in business models.[39] For example, some clients might benefit from a multi-disciplinary "one-stop-shop" which combined, for example, legal and financial services or medical and legal advice.[40] According to the American Bar Association, Alternative Business Structures are catered for in one form or another in Australia, England and Wales, Scotland, Italy, Spain, Denmark, Germany, the Netherlands, Poland, Spain, Belgium, Singapore, New Zealand, some Canadian provinces and two United States jurisdictions.[41]

In **Namibia**, the Legal Practitioners Act 15 of 1995 prohibits non-lawyer ownership of law firms or other juristic persons which provide legal services.[42]

---

[32] The German Federal Lawyers Act (BRAO), ss. 46(2), 46a.
[33] The German Federal Lawyers Act (BRAO), s. 46a(1) read together with s. 7(8).
[34] The German Federal Lawyers Act (BRAO), s. 1.
[35] Council of the Bars and Law Societies of the European Union, "Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions", February 2004 at 48 (available at <www.ccbe.eu/NTCdocument/fish_report_enpdf1_1184145269.pdf>); Clement at 7.
[36] Practice Framework Rules of the Solicitors Regulation Authority 2011, Rule 4 (available at <www.sra.org.uk/solicitors/handbook/practising/content.page>.
[37] P Clement, "Rapprochement entre des professions d'advocat et de juriste d'entreprise, Reflexions et propositions", 2005 at 7, available at <http://www.lexisnexis.fr/pdf/DO/avocatjuriste.pdf>, citing art. 1 of Act No. 71-1130 of 31 December 1971, as modified by Act No. 2015-990 of 6 August 2015.
[38] The ABA Commission on the Future of Legal Services, *Issues paper Regarding Alternative Business Structures*, 8 April 2016 at 2.
[39] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 16.
[40] See, eg, oral submission of Competition Commission on the Legal Practice Bill, as summarised in Kim Hawkey, "A step closer: Oral hearings on the Legal Practice Bill", *De Rebus* (April 2013) at 24 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).
[41] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 16.
[42] Legal Practitioners Act 15 of 1995, s. 7(1)(b).

In **South Africa**, the question of new forms of legal practice, including "multi-disciplinary practices", was deferred for further investigation.[43] One group which commented on this issue suggested that alternative business structures, such as incorporated legal practices owned and controlled by non-legal practitioners should be recognised as long as the legal practitioners in such a practice were subject to the normal requirements for the practise of law.[44]

In the **United States**, the **District of Columbia** permits a lawyer to practice law in an organization where non-lawyers hold a financial interest or exercise managerial authority under certain circumstances. For example, this is allowed only if:

- the partnership or organization has as its sole purpose providing legal services to clients;
- all non-lawyers with managerial authority or a financial interest in the partnership or organisation undertake to abide by the Rules of Professional Conduct which apply to lawyers;
- the lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the non-lawyer participants to the same extent as if those non-lawyer participants were lawyers.

Furthermore a lawyer must not allow his or her employer to direct or regulate the lawyer's professional judgment.[45] In the state of **Washington**, non-lawyer ownership is limited to Limited License Legal Technicians who may own a minority interest in a law firm.[46] (The term "Limited License Legal Technician" refers to "a person qualified by education, training, and work experience who is authorized to engage in the limited practice of law in approved practice areas".[47])

In **New South Wales, Australia** legal practices are allowed to incorporate, share receipts and provide services together with non-lawyers provided that there is at least one "legal practitioner director" with accountability for the management of the practice's legal services. All legal practices must also have an "appropriate management system" which ensures that legal services are provided in accordance with professional ethical standards, and the state Office of the Legal Services Commissioner has issued ten criteria to measure the appropriateness of the firm's management systems. These new regulations opened the door to multi-disciplinary practises and served as a model for other Australian jurisdictions.[48]

---

[43] Legal Practice Act 28 of 2014, s. 34(9)(a). The South African Legal Practice Council must investigate and make recommendations to the Minister within two years after the commencement of the Act.

[44] Submission of Legal Expenses Group Africa (LEZA) on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 42 (available at www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf).

[45] Rules of Professional Conduct of the District of Columbia Bar, Rule 5.4; "Issues Paper Regarding Alternative Business Structures", Commission on the Future of Legal Services, American Bar Association, April 2016 at 3-4 (available at <www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issues_paper.pdf>).

[46] Washington Rules of Professional Conduct, Rule 5.9; "Issues Paper Regarding Alternative Business Structures", Commission on the Future of Legal Services, American Bar Association, April 2016 at 4. See also "Alternative Licensure: General Information Sheet and FAQ", National Association of Bar Counsel (USA), <www.nobc.org/docs/Global%20Resources/Alternate%20Licensure/NOBC%20-%20Alternative%20Licensure%20-%20General%20Information%20Sheet%20-%20for%20Website(00136131).pdf>.

[47] Washington Rules of Professional Conduct, Rule 1.0B(c).

[48] "Issues Paper Regarding Alternative Business Structures", Commission on the Future of Legal Services, American Bar Association, April 2016 at 5.

In **England and Wales**, Alternative Business Structures are permitted under the Legal Services Act of 2007 if the non-lawyer who wants to own a law firm has passed a fitness-to-own test. Furthermore, all firms offering legal services must have effective systems and controls in place to ensure compliance with the principles and rules governing legal practitioners.[49]

In 2015, the American Bar Association Commission on the Future of Legal Services published an **Issues Paper on Alternative Business Structures**. The majority of comments on this paper expressed strong opposition to ABS, with the main concern being that this could threaten the legal profession's core values, particularly the lawyer's duty to exercise independent professional judgment and to remain loyal to the client. Opponents to ABS also asserted that ABS has not made any significant improvement in access to legal services in the jurisdictions that permit it. On the other hand, the Commission pointed to empirical studies of ABS in the UK and Australia which found no evidence that such business structures have a detrimental impact on ethics or professional independence. The Commission ultimately recommended continued exploration of the risks and benefits of ABS, drawing on concrete data from the jurisdictions which allow ABS.[50]

9.4 Legal practitioners employed by the State

In the United States, Canada and Australia, some court cases have suggested that government attorneys should be held to a higher ethical standard than lawyers in private practice because they have a duty to act in the public interest and also because the costs implications of their practice falls on the taxpayer. However, there is not universal agreement on this theory amongst court cases or commentators.[51]

In **Namibia**, as discussed in section 2.6 above, the Government Attorney Proclamation R.161 of 1982 gives any person performing any functions in terms of that Proclamation as an attorney, notary or conveyancer the same rights, privileges and duties as any other attorney, notary or conveyancer.[52] However, legal practitioners who are working full-time for the State are not required to obtain and hold a fidelity fund certificate.[53] In addition, the Legal Practitioners Act permits non-legal practitioners who are employed by the State to prepare or draw up legal documents such as wills or contracts in the course of their official duties.[54]

---

[49] "Issues Paper Regarding Alternative Business Structures", Commission on the Future of Legal Services, American Bar Association, April 2016 at 5; Legal Services Act 2007 (England and Wales), Part 5.

[50] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 42-43.

[51] Relevant court cases in the US, Canada and Australia are briefly surveyed in Ian Gough, "Government's duty to be a model litigant", *De Rebus*, 1 May 2012 (available at www.derebus.org.za/governments-duty-model-litigant/). Gough concludes that there is no higher ethical duty on state attorneys than on their counterparts in private practice, although they may be bound to additional rules by virtue of being public officials. In contrast, Dodek asserts that "Government lawyers do owe a higher ethical duty than other lawyers which is explained through the concept of government lawyers as custodians of the rule of law. Existing forms of regulation are adequate for public protection but insufficient in public law terms to address concerns regarding the exercise of public power. Additional forms of accountability should be created including the development of specific codes of conduct for government lawyers." Adam M Dodek, "Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law", *Dalhousie Law Journal*, Vol. 33. No. 1, 2010 at 1-53 (available at <https://ssrn.com/abstract=1715172>). See also Allan C Hutchinson, "'In the Public Interest': The Responsibilities and Rights of Government Lawyers," 46 (1) *Osgoode Hall Law Journal* 2008 at 105-129 (available at <http://digitalcommons.osgoode.yorku.ca/ohlj/vol46/iss1/3>.

[52] Government Attorney Proclamation R.161 of 1982 (RSA), s. 5(1).

[53] Legal Practitioners Act 15 of 1995, s. 67(1).

[54] Legal Practitioners Act 15 of 1995, s. 22(2)(b).

Most regulatory statutes and codes do not address the subject of government lawyers explicitly, thus holding government lawyers to the same rules and ethical standards as private legal practitioners.[55] The **American Bar Association Model Rules of Professional Conduct** provide that the responsibilities of government lawyers may include authority concerning legal matters that normally reposes in the client in private lawyer-client relationships, such as the authority to decide upon a settlement.[56]

In **Australia**, government lawyers are not required to hold a practicing certificate even though their work encompasses legal practice.[57] However, they are bound by the general ethical and professional duties which apply to all lawyers.

9.5 Non-profit entities

Both Namibia and South Africa already have legislation which allows the provision of free legal services by law clinics or law centres (as discussed above in sections 2 and 3).

In **Namibia**, legal practise is permitted at a "law centre", which is a centre for clinical legal education in the Faculty of Law at the University of Namibia; or a centre controlled by a non-profit making organisation which provides legal services without charge,[58] such as the Legal Assistance Centre. Legal practitioners in the full-time employment of a law centre are not required to hold a fidelity fund certificate.[59]

In **South Africa**, the Legal Practice Act 28 of 2014 describes a law clinic as having the following characteristics:

- It may render legal services only if those services are provided by or under the supervision of attorneys.
- It may not share, divide or make over any portion of its professional fees to any other person, whether by way of partnership, commission, allowance or otherwise.
- It may not distribute any of its income or property to its members, governors or employees, except as reasonable compensation for services rendered.
- Is may engage candidate legal practitioners only in terms of requirements set by the Council in its rules.
- It may be restricted by the Council from rendering certain legal services specified by the Council in its rules.[60]

A law clinic may be established by a non-profit juristic entity which is registered in terms of South Africa legislation on non-profit organisations[61] provided that its founding documents mandate that the

---

[55] A C Hutchinson, "'In the Public Interest': The Responsibilities and Rights of Government Lawyers", *Osgoode Hall Law Journal,* Vol. 46, No. 1, 2008 at 112 (available at <http://passthrough.fw-notify.net/download/387759/http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1208&context=ohlj>).
[56] American Bar Association Model Rules of Professional Conduct, s. 18 (available at <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html>).
[57] Legal Profession Act, s. 2.2.2.(2).
[58] Legal Practitioners Act 15 of 1995, s. 1.
[59] Legal Practitioners Act 15 of 1995, s. 67(1).
[60] Legal Practice Act 28 of 2014 (South Africa), s. 34(8)(b).
[61] Non-profit Organisations Act 71 of 1997.

majority of the members of its governing body are comprised of legal practitioners and that any assets remaining when it ceases to exist will be transferred to another non-profit organisation with similar objectives. A law clinic may also be operated by any South African university, if it is "constituted and governed as part of the faculty of law at that university".[62]

In South Africa, under the current legal framework (the laws which are the predecessors to the Legal Practice Act, which is not yet in force), the public interest law centre known as the Legal Resources Centre, after much difficulty, was able to secure permission for attorneys and advocates to practise together in the centre.[63] It is not clear if this could be arranged in Namibia. However, it might be cost-effective and efficient for a law centre working in a specific area such as human rights or labour law to have a specialised "in-house advocate".

Another issue is whether non-profit entities should be able to recover disbursements and fees in successful litigation. In a 2010 South African case, the Labour Court awarded costs to the pro bono litigant on the attorney-client scale, noting that pro bono clients are at a disadvantage in that they are generally only awarded costs sufficient to cover disbursements, which enables opponents to litigate without constraints, discourages settlement and militates against the public interest. The Court also noted that allowing cost recovery for pro bono clients could increase access to justice by encouraging more attorneys to take on pro bono work.[64] A reported 2011 case in South Africa also allowed costs in a pro bono matter, finding that that the indemnity principle which generally guides cost orders could be departed from –

> (a) Where the litigant is indigent and is seeking to enforce constitutional rights against an organ of State; and
> (b) the legal representative acts on their behalf for no fee and accepts liability for all disbursements; and
> (c) the litigant agrees that the legal representative will be entitled to the benefit of any costs order made by the court or tribunal in his or her favour.[65]

In South Africa, the Legal Practice Act 28 of 2014 specifically addresses the recovery of disbursements by law clinics,[66] which (as discussed above in section 2) has proved to be a problematic issue in Namibia. Moreover, the right to recover the costs of legal services provided for free (by law clinics or by means of pro bono work) has been codified in the legislation, which provides that such fees must be calculated as if the client "actually incurred the costs of obtaining the services of the legal practitioner, law clinic or practice acting on his or her or its behalf". It also provides that, whenever legal services are provided for free, the client is deemed to have ceded the right to recover costs to the service provider in question. Such costs are subject to the normal taxation requirements.[67]

It is not entirely clear from the Legal Practice Act if attorneys working in law clinics are exempted from the requirement of holding a Fidelity Fund certificate. Interestingly, one university law clinic in

---

[62] Legal Practice Act 28 of 2014 (South Africa), s. 34(8)(a).
[63] Oral submission of Legal Resources Centre on the Legal Practice Bill, as summarised in Kim Hawkey, "A step closer: Oral hearings on the Legal Practice Bill", *De Rebus,* April 2013 at 25 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).
[64] *Zeman v Quickelberge and Another* (C45/2010) [2010] ZALC 122, citing *Lorna Naude v BioScience Brands Ltd* (C 842/08, 11 March 2010, unreported).
[65] *Thusi v Minister of Home Affairs & Another & 71 Other Cases* 2011 (2) SA 561 (KZP) at para 111.
[66] Legal Practice Act 28 of 2014 (South Africa), s. 34(8)(c).
[67] Legal Practice Act 28 of 2014 (South Africa), s. 92.

South African took the view that "Fidelity Fund certificates should be a requirement to practise as an attorney at a university law clinic, since such attorneys are often in receipt of trust money in the form of damages recovered on behalf of clients and deposits for disbursements".[68]

In the US state of **California**, non-profit law centres are not only permitted but also funded. The statute which creates the State Bar expressly authorizes it to collect, alongside its annual membership dues or otherwise, "voluntary financial support for nonprofit organizations that provide free legal services to persons of limited means". This is done by means of a surcharge added to the annual membership fee, but with allowing members to opt out of this extra charge if they wish.[69] About 100 nonprofit groups in California receive grants each year from the State Bar to provide free legal services to low-income persons, or to support the provisions of free legal services through technical assistance, legal training or advocacy support.[70]

In **New South Wales, Australia**, the Legal Profession Uniform Law Application Act 16 of 2014 makes provision for "community legal services" which are established and operated on a not-for-profit basis and provides legal or legal-related services that "are directed generally to people who are disadvantaged (including but not limited to being financially disadvantaged) in accessing the legal system or in protecting their legal rights; or are conducted in the public interest".[71] A community legal service or its governing body is required to have at least one Australian legal practitioner who is employed or engaged by the service, or on its governing body, who must act as a supervising legal practitioner for the service and take responsibility for its provision of legal services by the service.[72] The Act also authorises the making of specific rules to cover community legal services.[73] A community legal service is specifically authorised to recover legal costs incurred by it in respect of legal services that it provides.[74]

9.6 Non-practising lawyers

Non-practising lawyers might include legally-trained persons who do not engage in the practice of law but are part of the legal community as academics, researchers, employees of Government, a corporation or some other institution, political commentators and even politicians. Some law societies provide for associate memberships or honorary memberships for retired lawyers, law teachers, legal support staff, law students or anyone who is interested. Memberships such as these often involve a lower membership fee, and may exclude the right to vote or hold office in the law society.

In **Namibia**, the current law requires that every enrolled legal practitioner must be a member of the Law Society, and makes no provision for any membership by non-practising lawyers of any variety. The Constitution of the Society of Advocates provides that a general meeting of the Society may elect

---

[68] Submission of University of the Witwatersrand Law Clinic on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 45 (available at www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf).
[69] The State Bar Act (Business & Professions Code Div. 3 - Professions and Vocations Generally, Ch. 4 – Attorneys) (California), § 6033 and § 6140.03.
[70] The State Bar of California, "Legal Aid Grants", undated, <www.calbar.ca.gov/Access-to-Justice/Legal-Aid-Grants>.
[71] Legal Profession Uniform Law Application Act 16 of 2014 (NSW), s. 3 (definition of "community legal services").
[72] Legal Profession Uniform Law Application Act 16 of 2014 (NSW), s. 117.
[73] Legal Profession Uniform Law Application Act 16 of 2014 (NSW), s. 118.
[74] Legal Profession Uniform Law Application Act 16 of 2014 (NSW), s. 116(2).

"persons who have achieved distinction in the practice of law or the administration of justice" to be to Honorary Members. Honorary Membership does not confer any rights under the Constitution.[75]

In **Canada**, the Law Society of British Colombia provides a status of "non-practising lawyer". Members in this category are not permitted to practise law, but they are entitled to vote and hold office in the Law Society. However, this status is limited to persons who were previously practising members of the Law Society. The non-practising status results in reduced annual membership fees and exemption from the requirement to hold professional liability insurance.[76] This is typical of the approach taken by other Canadian law societies.[77]

In **New South Wales, Australia**, associate membership of the law society is available to law students and to law graduates who are intending to become practitioners. Advantages include access to resources which can assist with studies, networking opportunities and the ability to serve on law society committees and thereby influence policy.[78]

Queensland, Australia offers associate membership to articled clerks, legal support staff and university professors in the legal profession, and student membership to university students studying law. This inclusivity is designed to make the law society "the voice of the legal profession". Benefits of associate membership are access to updates about changes to legislation and policy and professional development activities, networking and opportunities to become involved in the work of committees.[79]

The ACT Law Society of the **Australian Capital Territory** makes associate membership available to anyone who would like to join. Members of the law society must hold a practising certificate in order to engage in legal practice.[80]

In **Uganda**, there is a status of honorary membership which is obtainable only by election. The Council of the Law Society "may elect as honorary members of the society such persons as it may think fit, either for life or for such period as the council may in any case deem appropriate".[81] No specific criteria are provided, and it is not clear if such members have voting powers.

---

[75] Constitution of the Society of Advocates of Namibia, s. 5.2.
[76] "Non-Practising Membership", Law Society of British Colombia, undated, <www.lawsociety.bc.ca/Website/media/Shared/docs/forms/MS-membership/nonpract-info.pdf>.
[77] See Andrew Flavelle Martin, "The limits of professional regulation in Canada: law societies and non-practising lawyers" 19(1) *Legal Ethics* 169-172 (2016).
[78] The Law Society of New South Wales, "Associate membership", undated, <www.lawsociety.com.au/community/forlawstudents/Associatemembership/index.htm>.
[79] Queensland Law Society, "Associate members", undated, <www.qls.com.au/Becoming_a_member/Associate_members> and "How to become a member", undated, <www.qls.com.au/Becoming_a_member/How_to_become_a_member>. Barristers can also be associate members.
[80] ACT Law Society, "Benefits of membership", undated, <www.actlawsociety.asn.au/membership>.
[81] The Uganda Law Society Act [Chapter 276], s. 5.

9.7 Foreign legal practitioners

Many jurisdictions regulate foreign legal practitioners who provide legal services in their jurisdiction. Providing mechanisms for access to foreign legal practitioners can open the door to specialised legal knowledge in a field where local lawyers lack expertise. This could be particularly important for international business agreements, for example. A regulatory body would want to regulate foreign legal practitioners for public benefit, both to ensure proper quality of service and to provide access to legal services (such as by keeping a roll of foreign legal practitioners and any limitations on their permission to practise). Another issue to be kept in mind, however, is that arrangements which exempt foreign legal practitioners from the standard requirements for admission and enrolment – even where these are reciprocal for local lawyers who seek to practise law in the country in question – could disadvantage the local legal services market.[82]

Licensing of foreign lawyers in the host country: The **International Bar Association** has outlined two approaches for regulating foreign lawyers: a Full Licensing Approach and a Limited Licensing Approach. A Full Licensing Approach would allow foreign lawyers to become licensed to practise the law of the host jurisdiction, for example by passing an examination, while a Limited Licensing Approach would allow foreign lawyers to practice the law of their home jurisdiction in their host jurisdiction.[83] The IBA further dictates that regulation of foreign lawyers be fair, uniformly applied and transparent.[84]

Some countries, including Namibia, utilise reciprocal agreements whereby the host country will allow a foreign lawyer to practise in the host country if the foreign country in question grants the host country's lawyers the same privilege.

In some countries, a Minister[85] or the Chief Justice[86], rather than the law society, regulates foreign legal practitioners. A benefit of this is it allows for someone who might be more informed about current international relations between the two countries to act according to such considerations and interests. However, a downside is that it separates regulatory activities across multiple bodies (eg the Ministry and the Law Society), causing administrative challenges and increasing the potential for inefficiencies and disconnects in communication. Also, where government officials are empowered to approve foreign professionals, there is a danger that this task could become politicised. [87]

A potential disadvantage of systems for recognition of foreign practitioners is the administrative burden of having to assess foreign legal education and accreditation systems, in order to verify which legal practitioners are sufficiently qualified to practise in the country in question.

---

[82] See, eg, submission of Adams & Adams on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 39 (available at www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf).
[83] International Bar Association, *IBA Statement of General Principles for the Establishment and Regulation of Foreign Lawyers, Adopted at IBA Council Meeting, Vienna, June 1998*, United Kingdom: IBA, 1998 at 2-3.
[84] Id at 4.
[85] For example, Legal Practice Act 28 of 2014 (South Africa), s. 24.
[86] For example, Law Society of Swaziland, "Membership", undated, <http://lawsocietyofswaziland.co.sz/index.php/membership>.
[87] For a local example of this problem in respect of another profession, see Ndapewoshali Shapwanale, "Special treatment for Zim 'experts'", *The Namibian*, 7 August 2017, reporting that the Minister of Works directed that 29 Zimbabwean architects and quantity surveyors be recognised by the Namibia Council of Architects and Quantity Surveyors, bypassing the formal process of assessment. Local members of these professions complained that no reasons for the special treatment had been provided.

In **Namibia**, there are three approaches which apply to foreign legal practitioners:

(1) **Reciprocal arrangements:** Where the Minister of Justice is satisfied that the law of a foreign country permits the admission or authorisation of Namibian legal practitioners to practise law in that country, whether generally or in particular cases, the Minister may – after consultation with the Chief Justice – declare this country by notice in the G*overnment Gazette* to be a reciprocating country. The Minister may – again after consultation with the Chief Justice – make regulations specifying the conditions under which lawyers resident in a reciprocating country may practise in Namibia.[88]

(2) **Permanent residents:** Permanent residents of Namibia can be admitted to practise in Namibia, if their law degrees have been designated as acceptable equivalents by the Minister, by means of two routes: (a) they have successfully completed a one-year course undergraduate study, have completed the required practical legal training and passed the Legal Practitioners' Qualifying Examination; (b) they are admitted to practise in a country designated in the Schedule to the Act, and either fulfil the same additional training, experience and examination requirements or are exempted from this by the Board of Legal Education.[89]

(3) **Certificates of authorisation:** The Chief Justice or the Judge-President (in the Chief Justice's absence) has the authority to issue a certificate of authorisation allowing a foreign legal practitioner to act in Namibia in relation to a specific matter. This decision must have regard to the complexity or special circumstances relating to the matter in question.[90]

In **South Africa**, under the Legal Practice Act 28 of 2014, the Minister of Justice and Constitutional Development (in consultation with the Minister of Trade and Industry and after consultation with the Legal Practice Council) will have authority to determine which foreign professionals may practise in South Africa. This includes the ability to give effect to mutual recognition agreements with other countries.[91] The Law Society of South Africa recommended that the law should rather provide for a panel of experts to determine, in conjunction with the Council, the suitability of foreign qualifications, training and experience.[92]

In the **United States,** the American Bar Association has published *Model Rules for the Licensing and Practice of Foreign Legal Consultants*,[93] as amended in 2006.[94] These *Model Rules* state that a foreign legal consultant must be "admitted to practise" in his or her home country to be licensed to practise in

[88] Legal Practitioners Act 15 of 1995, ss. 81(2)(b), 85(1) and (5).
[89] Legal Practitioners Act 15 of 1995, ss. 4(1)(c)(ii), 5(1)(a) (common-law jurisdictions) and (c) (civil -law jurisdictions), 5(4).
[90] Legal Practitioners Act 15 of 1995, ss. 85(2).
[91] Legal Practice Act 28 of 2014 (South Africa), s. 24.
[92] Submissions by the Law Society of South Africa on the Legal Practice Bill [B 20—2012], 12 February 2013 at para 4.8.1 (available at <www.lssa.org.za/upload/documents/Law%20Society%20of%20South%20Africa%20_%20Submissions%20on%20the%20Legal%20Practice%20Bill%2012%20February%202013.pdf>).
[93] American Bar Association Model Rule for the Licensing and Practice of Foreign Legal Consultants (available at <www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/FLC.authcheckdam.pdf>).
[94] American Bar Association, "Commission on Multijurisdictional Practice", undated, <www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html>.

the United States.[95] However, this presents a problem with respect to countries which do not permit in-house lawyers to be admitted members of the legal profession.[96]

Multinational law firms with local offices: As already described above in section 9.1, the Legal Practitioners Act 15 of 1995 includes provisions for the regulation of juristic persons. One of the prerequisites for conducting a practice as a juristic person in Namibia is that this juristic person must be incorporated and registered as a private company under the Companies Act 61 of 1973, with a share capital.[97] Thus, local branches of multinational firms must be locally-constituted.

The typical structure of a multinational law firm, especially for British and American firms, is a limited liability partnership with foreign offices being incorporated locally under relevant domestic laws.[98] There are some countries which don't allow foreign firms to form corporations within the country or create partnerships between domestic and foreign lawyers, most notably Japan, Singapore, and Hong Kong.[99] Firms which operate in these countries must either accept the different status accorded to foreign lawyers, or recruit local lawyers to staff their branch offices. There are also countries which have unique structures for local and multinational firms to operate in tandem. One example is a corporate holding structure called the "Swiss verein", with a "verein" referring to a structure which allows entities to join forces while retaining their existing forms. Under this model, different law partnerships can form an association where they share branding, administrative functions, and operating costs, while remaining separate legal entities with separate revenue pools. This approach keeps tax, accounting and liability issues separate in each country, which can be useful in negotiating practical challenges such as different tax years in different jurisdictions.[100]

In the **European Union** four different directives govern the provision of legal services from lawyers based in different Member States.[101] One of these distinguishes between activities relating to the representation of a client in court versus other legal activities.[102] Lawyers who represent their clients in legal proceedings or before public authorities are regulated by the rules of the host Member State, whereas lawyers who provide legal advice or representation in a forum outside of court are regulated

---

[95] American Bar Association Model Rule for the Licensing and Practice of Foreign Legal Consultants, s. 1(a).
[96] American Bar Association, *Draft Report: The Regulation of Foreign Lawyers, and in Particular Foreign In-House Counsel, in the U.S.: Proposals for a Better and More Comprehensive Framework*, undated at 1 (available at <www.americanbar.org/content/dam/aba/uncategorized/international_law/report_with_recommendation.authcheckdam.pdf>).
[97] Legal Practitioners Act 15 of 1995, s. 7(1)(a).
[98] Carole Silver, "Local Matters: Internationalizing Strategies for U.S. Law Firms", Indiana Journal of Global Legal Studies: Vol. 14, Issue 1, 2007 at 77-89.
[99] On the position in Japan, see Allison Bettin, "Foreign lawyers fight for reform in Japan", *JapanToday,* 28 September 2015 (available at <https://japantoday.com/category/business/foreign-lawyers-fight-for-reform-in-japan>).
[100] Chris Johnson, "Vereins: The new structure for global firms", *The American Lawyer,* 7 March 2013 (available at <http://archive.fo/EzN9b#selection-205.0-246.0>).
[101] (1) Council Directive 77/249/EEC of 22 March 1977, to facilitate the effective exercise by lawyers of freedom to provide services; (2) Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998, to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained; (3) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006, on services in the internal market and (4) Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013, amending Directive 2005/36/EC on the recognition of professional qualifications and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System.
[102] Council Directive 77/249/EEC of 22 March 1977, Art 4(1)-(3) and Art 4(4).

by the rules of the Member State from which they come. Thus, lawyers are generally allowed to provide legal advice in Member States other than their state of origin. Because the EU functions as a single market, the host Member State cannot require the foreign lawyer to establish a residence in the host Member State or to join a professional organisation in that state.[103] Member States can reserve the preparation of formal documents for appointment to administer estates of deceased persons, or the drafting of formal documents creating or transferring interests in land, to certain categories of lawyers.[104] This kind of approach could be relevant to Namibia if agreements were made within SADC.

9.8 Paralegals and limited licensing

The term "paralegal" is used here to denote the entire spectrum of possibilities for a person who has legal training without being a legal practitioner. This label has traditionally referred to persons who work at grassroots level to improve access to law by assisting members of the public with specific legal issues, or persons who work closely with lawyers within law firms to assist with specific tasks that do not require a formal legal qualification. However, the concept of a "paralegal" is expanding in scope. Internationally, there is a move toward references to "alternate licensure" or "limited licensing", referring to regulatory systems which license professionals other than lawyers to provide limited-scope legal services to the public without the supervision of a lawyer.[105] Some jurisdictions also refer to "legal assistants".[106] The American Bar Association's **Commission on the Future of Legal Services** uses the term "legal service providers" as an umbrella for the various persons who might be regulated; some of the examples it cites are:

- **courthouse navigators** (New York) - specially trained and supervised non-lawyers who provide information, moral support and one-on-one assistance to eligible unrepresented litigants;[107]
- **courthouse facilitators** (California and Washington) - persons with experience in a specific area of law (such as family law) who provide assistance to self-represented parties regardless of their income, working under the supervision of an attorney and often out of a court-based office;[108]
- **document preparers** (Arizona, California, and Nevada) - certified non-lawyers who provide assistance with document preparation, legal information and other services to self-represented individuals but are not allowed to give legal advice;[109] and
- **housing and consumer court advocates** (New York) - paralegals who represent to low-income persons under the supervision of an attorney in specific forums (with housing court advocates, for

[103] Council Directive 77/249/EEC of 22 March 1977, Art 4 (1).
[104] Council Directive 77/249/EEC of 22 March 1977, Art 1(2).
[105] See, eg, National Association of Bar Counsel (USA), "Alternative Licensure: General Information Sheet and FAQ", <www.nobc.org/docs/Global%20Resources/Alternate%20Licensure/NOBC%20-%20Alternative%20Licensure%20-%20General%20Information%20Sheet%20-%20for%20Website(00136131).pdf>.
[106] Ursula Furi-Perry, "Paralegal Licensing and Regulation: Part I-The 'Pros'", undated (available at <www.lawcrossing.com/article/618/Paralegal-Licensing-and-Regulation-Part-I-The-Pros/>)
[107] New York State Unified Court System, "Court Navigator Program", undated, <https://www.nycourts.gov/courts/nyc/housing/rap.shtml>.
[108] Judicial Council of California, "A quick reference Guide to the California Offices of the Family Law Facilitator", June 2015 at 2 (available at <http://www.courts.ca.gov/documents/ENFLFQuickRefGuide.pdf>); *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 22-23.
[109] See, eg, Arizona Judicial Branch, "Legal Document Preparers" undated, <www.azcourts.gov/cld/Legal-Document-Preparers>).

example, typically assisting tenants to defend themselves against eviction for non-payment of rent, to obtain repairs or to pursue remedies for violations of the Housing Code).[110]

In general, the Commission on the Future of Legal Services noted that jurisdictions where such roles are authorised may in some instances require that the individuals in question must work under the supervision of a lawyer, or in other instances authorise them to operate independently. Since the main motivation for broadening the concept of legal service providers is to provide greater access to legal services and the justice system, it is important to protect the public through the use of training, exams, certification, or similar mechanisms. The Commission cited the ABA Model Regulatory Objectives (discussed in section 8 above) as the framework which could guide regulation of all legal service providers.[111]

Regulating paralegals allows for broader governance of the entire legal services profession. Regulation can introduce a duty of confidentiality, and increase the pool of paralegals offering legal services. Most importantly, the licensing of paralegals can help to protect the public from unqualified individuals who may give them incorrect information or advice. This can be especially important if some members of the public are unaware of the distinction between a paralegal and a lawyer. Some paralegals also lobby for licensing in the hope that this could increase the scope of the services they are allowed to offer, which could also reduce the costs of legal services to the public.[112]

In South Africa, one organisation working in the area of access to justice asserted that excluding paralegals from the regulatory scheme "undermines the status of the group within the legal landscape of South Africa":

> In order to play the vital role that it should, the sector requires respect, which could be achieved through external recognition and regulation. Access to justice can be enhanced if the credibility of paralegals is fostered, and their role in the profession concretised. Separate regulation ... will ... detract from the legitimacy of the profession. Moreover, linkages between the formal legal profession and the paralegal sector should be strengthened, a goal that will be achieved by regulating legal and paralegal practitioners together.[113]

On the other hand, regulation and licensing of paralegals may create entry barriers which not all paralegals will welcome and so may be ignored by individuals who continue to act informally outside the regulatory environment. The cost of paralegal services to the public might also increase if licensing is mandated, particularly if there are costs to the paralegal in securing a licence. In the same vein, it is possible that the effect of licensing paralegals will push some legal services to unlicensed individuals such as legal secretaries or clerks, as a cost-saving measure. Separate licensing might be unnecessary if paralegals are required to work under the supervision of legal practitioners. One alternative to regulation is voluntary certification which would allow some paralegals to demonstrate their skill levels and thus gain an advantage in the market.[114]

---

[110] New York State Bar Association, "President's Report to the House of Delegates", 17 June 2015 at 7 (available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=57233>).
[111] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 40-41.
[112] See, eg, Ursula Furi-Perry, "Paralegal Licensing and Regulation: Part I-The 'Pros'", undated (available at <www.lawcrossing.com/article/618/Paralegal-Licensing-and-Regulation-Part-I-The-Pros/>).
[113] Submission of Constitutional Literacy and Service Initiative on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 41 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).
[114] See, eg, Ursula Furi-Perry, "Paralegal Licensing and Regulation: Part II-The 'Cons'", undated (available at <www.lawcrossing.com/article/643/Paralegal-Licensing-and-Regulation-Part-II-The-Cons/>).

Regulation of paralegals might consist of setting educational standards with or without continuing education requirements. It could involve certification programmes and regulation by a governing body via competency testing.[115] In South Africa, the Association of Paralegals Practitioners called for formal accreditation of the paralegal profession through the South African Qualifications Authority, with a paralegal national certificate as an entry requirement for paralegal practice, a code of conduct, a formal fee structure and a rule that persons deregistered or debarred as lawyers and persons with criminal records could not practise as paralegals.[116]

If regulation of legal practitioners and paralegals is the responsibility of a single body, this can foster shared resources and efficiencies. For example, if the regulatory body wants to create a legal education programme for its members, it would likely be beneficial to allow both paralegals and lawyers to participate. Regulation by a single body may also raise the credibility of paralegals and encourage consistency of communication regarding best practices and procedures relating to legal services, thus producing a higher degree of consistency in services provided to the public.[117]

In **Namibia**, there is no formal regulation of paralegals at present. However, a potential Namibian model can be found in the Veterinary and Veterinary Para-Professions Act 1 of 2013, which defines "veterinary para-professional" to mean "any person who is registered or deemed to be registered in terms of this Act to practise a veterinary para-profession which has as its object the rendering of services supplementing the services deemed in terms of the rules to pertain specially to a veterinary profession, working under direction of a veterinarian".[118] Two of the ten members of the Council which regulates the veterinary services profession must be veterinary para-professionals elected by the para-professional sector.[119] Both veterinarians and veterinary para-professionals must be registered in terms of the Act, with the qualifications to be set by the relevant Minister in consultation with the Council.[120] Any registered person is subject to discipline for unprofessional conduct,[121] and the Council may establish continuing professional development requirements for either sector.[122]

In **South Africa**, the question of regulating paralegals was deferred for further investigation.[123] David McQuoid-Mason, a law professor renowned for his work on increasing access to justice, states:

> Paralegal advice offices are a useful adjunct to conventional lawyer-based legal aid service schemes. Access to justice must be considered holistically, and paralegals are in the front line in the field when communities make their first contact with the law. Paralegal advice offices can play a valuable role in screening initial legal complaints and referring potential litigants to lawyer-based services… For the

[115] Catherine R Durgin, "Getting legal with paralegals: A look at state regulations", *Business Law Today*, Vol 16, No 3, January/February 2007 (available at <https://apps.americanbar.org/buslaw/blt/2007-01-02/durgin.shtml>).
[116] Submission of Association of Paralegals Practitioners on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 40 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).
[117] See, eg, submission of Association of Paralegals Practitioners on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 40 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).
[118] Veterinary and Veterinary Para-Professions Act 1 of 2013, s. 1.
[119] Veterinary and Veterinary Para-Professions Act 1 of 2013, s. 5.
[120] Veterinary and Veterinary Para-Professions Act 1 of 2013, ss. 24, 27-28.
[121] Veterinary and Veterinary Para-Professions Act 1 of 2013, ss. 55, 61.
[122] Veterinary and Veterinary Para-Professions Act 1 of 2013, s. 33.
[123] Legal Practitioners Act 15 of 1995, s. 7(1)(b). The Council must investigate and make recommendations to the Minister within two years after the commencement of the Act.

effective functioning of paralegal advice offices, workers should be paid for their services and properly trained.[124]

It should also be noted in connection with paralegals that one group in South Africa asserted that it is "difficult to find cogent reasons to justify that it is in the public interest that the largely administrative functions of conveyancing and notarial work should, by virtue of qualification requirements, in effect be provided by legal practitioners only".[125]

In **England and Wales**, paralegals do not generally fall under the Legal Services Board. However, the Board does provide for the regulation of some subsets of paralegals; for example, those who are employed by solicitors are regulated by the Solicitors Regulatory Authority.[126] There is a voluntary professional organisation for paralegals, the Institute of Paralegals,[127] and a voluntary regulatory collective for paralegals, the Professional Paralegals Register.[128]

In **Scotland,** the Law Society of Scotland and the Scottish Paralegal Association launched a Registered Paralegal Scheme in 2010, the first in the UK.[129] Though it was initially intended as a regulatory initiative, it is currently framed as a registration initiative because membership is voluntary rather than being a statutory requirement.[130]

Regulation of paralegals in the **United States** is inconsistent across state jurisdictions.[131] For example, in the state of **Washington**, the Washington State Supreme Court has authorised a program to license "Limited License Legal Technicians" (LLLTs) who are permitted to give advice only in certain family law matters and only within the limited scope of the LLLT license (which is outlined in court rules and regulations). LLLTs are not permitted to represent a client in court or in other dispute-resolution proceedings. The state of Washington also licenses "Limited Practice Officers" to deal with legal documents related to real estate and personal property transactions.[132]

In **Ontario, Canada**, licensed paralegals are permitted to perform a variety of legal services without an attorney's supervision. This includes representing clients in Small Claims Court and in the Ontario Court of Justice for minor criminal offences such as traffic violations. Paralegals are also permitted to represent clients before certain administrative boards. The Law Society of Upper Canada regulates

---

[124] David J. McQuoid-Mason, "The Delivery Of Civil Legal Aid Services In South Africa", 24 *Fordham International Law Journal* 111 (2000), quote from unpaginated version of article at section H.2.
[125] Submission of Legal Expenses Group Africa (LEZA) on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 42 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).
[126] Institute of Paralegals, "Regulation", undated, <www.theiop.org/regulation.html>.
[127] Institute of Paralegals, "Who We Are", undated, <www.theiop.org/about-us/introduction.html>; Institute of Paralegals, "Membership", undated, <www.theiop.org/membership.html>.
[128] Institute of Paralegals, "Regulation", undated, <www.theiop.org/regulation.html>.
[129] Neil Rose, "Time to recognise paralegals and reform regulation of their role", *The Guardian*, 28 September 2010 (available at <www.theguardian.com/law/2010/sep/28/law-paralegals-regulation-reform>).
[130] Scottish Paralegal Association, "The Law Society of Scotland Registered Paralegal Scheme", [2010], <www.scottish-paralegal.org.uk/about-us/registered-paralegal-scheme.aspx>.
[131] Catherine R Durgin, "Getting legal with paralegals: A look at state regulations", *Business Law Today*, Vol 16, No 3, January/February 2007 (available at <https://apps.americanbar.org/buslaw/blt/2007-01-02/durgin.shtml>); Paralegal Today, Patrick Vuong, "Paralegal Regulation in the United States", March/April 2006 (available at <http://paralegaltoday.com/issue_archive/features/feature1_ma06.htm>).
[132] National Association of Bar Counsel (USA), "Alternative Licensure: General Information Sheet and FAQ", <www.nobc.org/docs/Global%20Resources/Alternate%20Licensure/NOBC%20-%20Alternative%20Licensure%20-%20General%20Information%20Sheet%20-%20for%20Website(00136131).pdf>.

licensed paralegals as well as licensed lawyers. Aspiring paralegals must have a diploma from an accredited legal services programme, pass an entrance examination and demonstrate that they are of good character in order to be licensed.[133]

A 2016 review of almost a dozen countries in Sub-Saharan Africa found only two states with legislation formalising the role of paralegals: Nigeria and Sierra Leone. This assessment identified the **Sierra Leone** system as a source of model legislation for other countries wishing to advocate for comprehensive legal aid legislation which is inclusive of paralegals.[134]

In Sierra Leone, regulation of legal practitioners is handled by the General Legal Council established in terms of The Legal Practitioners Act 2000, which covers the admission, enrolment, practise and discipline of legal practitioners.[135] The provision of legal aid services by paralegals is governed separately under The Legal Aid Act 2012,[136] which defines "legal aid" broadly as "the provision of legal advice, assistance or representation to indigent persons".[137]

In terms of this legislation, accredited paralegals must have completed compulsory training, be employed by an accredited organisation and be individually accredited with the Legal Aid Board.[138] Paralegals are expressly included amongst the listed legal aid providers, alongside legal practitioners, civil society organisations, non-governmental organisations, and university law clinics – but they may only provide legal advice and assistance, not legal representation in court. [139]

The Legal Aid Board which regulates legal aid providers is chaired by a judge appointed by the President. Its members are:

- one representative of the Government's Law Officers Department;
- one representative of the Ministry responsible for social welfare;
- one representative of the Bar Association of at least five years standing at the Bar ;
- one representative of the Department of Law at a specified college;
- one representative of the Council of Paramount Chiefs ;

---

[133] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, Part I, s. 2(2); The Law Society of Upper Canada, "Paralegal Licensing Process Policies", <www.lsuc.on.ca/licensingprocessparalegal.aspx?id=2147495377>; National Association of Bar Counsel (USA) "Jurisdictions' Activity on Alternative Licensed Legal Professionals as of July 1, 2015" at 8 (available at <www.nobc.org/docs/Global%20Resources/Alternate%20Licensure/NOBC%20-%20Alternative%20Licensure%20Table%20-%20for%20Website(00139906).pdf>).

[134] G Dereymaeker, "Formalising the role of paralegals in Africa: A review of legislative and policy developments", July 2016 at 22, 34 (available at <file:///C:/Users/alewis/Downloads/FORMALISING_ROLE_OF_PARALEGALS_IN_AFRICA_DEREYMAEKER_2016.pdf>).

[135] The Legal Practitioners Act 15 of 2000 (available at <www.sierra-leone.org/Laws/2000-15.pdf>). As in the new dispensation in South Africa, the Council is not attached to any membership body. The Sierra Leone Bar Association appears to be a non-statutory representative body for the profession. See the Bar Association website: <www.barassociation.sl/>.

[136] The Legal Aid Act, 2012 (Sierra Leone) (available at <www.sierra-leone.org/Laws/2012-06.pdf>).

[137] The Legal Aid Act, 2012 (Sierra Leone), s. 1.

[138] G Dereymaeker, "Formalising the role of paralegals in Africa: A review of legislative and policy developments", July 2016 at 20; The Legal Aid Act, 2012 (Sierra Leone), s. 30(1)(d) and (2)(b).

[139] The Legal Aid Act, 2012 (Sierra Leone), s. 1 (definitions of "accredited paralegal", "legal advice and assistance" and "legal aid provider").

- one representative *each* from civil society and non-governmental organizations having experience, knowledge and expertise on issues relating to legal aid;[140]
- one representative of the Inter-Religious Council; and
- the chairman of the Local Government Association.[141]

There is no requirement for representation of the paralegal sector on the Board, and only the civil society and non-governmental organisations representatives would seem to be open to paralegals. There is also minimal participation of the legal profession.

The Board's responsibilities include accrediting all legal aid providers, entering into cooperation agreements with legal aid providers, determining the types of cases in which legal aid can be provided, and determining the income levels of persons who will qualify to receive legal aid.[142]

The Act provides for appointment of at least one paralegal to each Chiefdom in Sierra Leone, to provide legal advice, assistance and education and, as appropriate, to help divert cases to the formal justice system.[143] According to one commentator, the first duty "speaks to the tensions between formal and customary law, as well as the possible abuse of power by some traditional leaders", while the second "speaks to the role that paralegals play in promoting 'alternative dispute resolution', and their mediation between the formal and traditional justice systems".[144]

Police and prison officials have the obligation to notify the Legal Aid Board of the arrest or imprisonment of an unrepresented person who appears to be indigent, while judges and magistrates have discretion to do the same.[145] However, legal aid, including paralegal services, is provided to indigent persons in terms of the Act "if the interest of justice so require",[146] but without any further indications on how to determine this - leaving it, to a certain extent, to the accredited legal aid providers to do so.[147]

Institutions which are independent of the Legal Aid Board can provide legal aid, regardless of their funding source, only if they have entered into a cooperation agreement with the Legal Aid Board.[148]

The Legal Aid Act also provides for mechanisms of oversight. Firstly, all legal aid providers (including paralegals) must keep records of individual cases they intervene in and must report quarterly to the Legal Aid Board. Legal aid practitioners providing legal representation (who must be legal practitioners) are subject to disciplinary action if their conduct is unprofessional, and organisations providing legal aid (including paralegal services) can find their cooperation agreement with the Legal Aid Board cancelled if a legal aid provider fails to meet its obligations under a

[140] "Civil society organisations" and "non-governmental organisations" are distinguished throughout the legislation, but there is no definition of either term, nor any explanation of how the two categories differ.
[141] The Legal Aid Act, 2012 (Sierra Leone), s. 4.
[142] The Legal Aid Act, 2012 (Sierra Leone), ss. 9, 21.
[143] The Legal Aid Act, 2012 (Sierra Leone), s. 14.
[144] G Dereymaeker, "Formalising the role of paralegals in Africa: A review of legislative and policy developments", July 2016 at 20-21.
[145] The Legal Aid Act, 2012 (Sierra Leone), s. 35.
[146] The Legal Aid Act, 2012 (Sierra Leone), s. 20.
[147] G Dereymaeker, "Formalising the role of paralegals in Africa: A review of legislative and policy developments", July 2016 at 21.
[148] The Legal Aid Act, 2012 (Sierra Leone), ss. 33, 37(2).

cooperation agreement with the Board.[149] Providing legal aid without being accredited or having a cooperation agreement is a criminal offence, for which both individuals and organisations can be held liable.[150] It is also an offence to charge a fee for legal aid.[151]

As of 2016, the Sierra Leone system was not fully operational.[152] However, it has already been the subject of some interesting criticisms. In addition to the expected concern that paralegals may not have enough knowledge to provide sufficiently competent services, it has also been suggested that, by providing communities with a new approach to justice, they may change the traditional role of Paramount Chiefs as the main focal point for justice.[153] Another risk which has been noted is that supporting access to justice at community level could reduce pressure on the State to make the country's formal justice processes more accessible. Furthermore, a focus on informal processes could push clients towards reconciliation, mediation or out-of-court settlements as opposed to judicial legal processes – which could be a problem for women in particular in the current social context.[154] Others were primarily concerned about effective implementation;[155] the provision of a paralegal to each Chiefdom will in particular require a large number of trained paralegals, who are not yet available.[156]

9.9 Possible new models for the delivery of legal services

A 2015 study identified several new categories of legal services delivery providers:

- secondment firms, where lawyers work on a temporary or part-time basis in a client organization;
- companies combining legal advice with general business advice that is typical of management consulting firms;
- "accordion companies" which provide trained, experienced lawyers to fill short-term law firm staffing needs;
- virtual law practices and companies where attorneys primarily work from home to save on overhead expenses; and
- law firms and companies offering tailored, specialty services with unique fee arrangements or delivery models.[157]

The following are some specific examples of new modes of legal services delivery, some of which have been likened to legal services versions of Uber:

---

[149] G Dereymaeker, "Formalising the role of paralegals in Africa: A review of legislative and policy developments", July 2016 at 22; The Legal Aid Act, 2012 (Sierra Leone), ss. 31-33.
[150] The Legal Aid Act, 2012 (Sierra Leone), s. 37(2).
[151] The Legal Aid Act, 2012 (Sierra Leone), s. 37(1).
[152] G Dereymaeker, "Formalising the role of paralegals in Africa: A review of legislative and policy developments", July 2016 at 19-22.
[153] C Robb-Jackson, "Part of the Justice Puzzle: Community-based Paralegal Programs and Sierra Leone's Legal Aid Act", Canadian Journal of Poverty Law, 2013 at 63 (available at <www.povertylaw.ca/uploads/6/7/6/0/6760250/sierra_leone_robb-jackson.pdf>.)
[154] Id at 67-68.
[155] I Tommy and A Kallon, "The Legal Aid Act of Sierra Leone: When will Implementation Start?", *My Sierra Leone Online*, 3 April 2014 (available at <http://mysierraleoneonline.com/sl_portal/site/news/detail/2445>);
[156] G Dereymaeker, "Formalising the role of paralegals in Africa: A review of legislative and policy developments", July 2016 at 20-21.
[157] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 31, referencing Joan C Williams, Aaron Platt & Jessica Lee, *Disruptive Innovation: New Models of Legal Practice*, Center for WorkLife Law, UC Hastings College of Law, 2015, (available at <http://worklifelaw.org/wp-content/uploads/2015/09/Disruptive-Innovations-New-Models-of-Legal-Practice-webNEW.pdf>).

> Just as with ride hailing services like Uber, these new entrants into the legal services market are using new technologies to displace incumbent providers, threatening their business model while making services easier to obtain and often more affordable.[158]

Do-it-yourself document drafting: LegalZoom is an online technology company which provides tools that help customers in specified jurisdictions create "do-it-yourself" legal documents, such as wills and copyright applications, for a flat fee.[159] This had led to accusations of the unauthorized practice of law; for example, in the US state of North Carolina, the company was accused of this, but a settlement allowing the service to continue was eventually agreed.[160]

Legal process outsourcing: This is another new initiative whereby third party vendors are contracted to carry out discrete legal tasks less expensively than they could be done by the contracting law firm. Legal process outsourcers are often based in countries with less expensive legal markets. The concept initially applied to services such as transcription, word processing and other routine tasks, as well as paralegal services. However, such outsourcing has expanded into more substantive areas, such as patent applications, e-discovery, contract management and legal research. The commissioning law firms benefit because the outsourcing frees their lawyers to spend more time on higher value-added activities.[161]

Unbundling: A similar new technique for reducing the costs of legal services is unbundling. This refers to the practice of breaking legal representation into separate and distinct tasks, not all of which must be carried out by a legal practitioner. The approach allows the client and the lawyer to operate in terms of an agreement that limits the scope of services that are to be provided by the lawyer. For instance, unbundling might separate advice, research, document drafting, negotiation and court appearances. This approach benefits clients because it enables them to pay the lawyer only for the specific services they want. Lawyers may benefit if this approach results in an increased number of clients. Courts could also benefit if the result of the lowered legal costs is fewer unrepresented litigants.[162]

These examples are far from comprehensive. However, they should provide some idea of the innovations, opportunities and challenges which lie ahead. A new regulatory regime for Namibia should be mindful of the possibilities for non-traditional delivery of legal services trends, and of how to ensure that innovations in the legal services field benefit rather than exploit the public.

---

[158] Ray Bresica (Associate Professor of Law, Albany Law School), "For Lawyers, the Future is Now", *Huffington Post*, 6 September 2016, (available at <www.huffingtonpost.com/ray-brescia/for-lawyers-the-future-is_b_11874016.html>). See also Monica Zent, "An Uber for Lawyers? Here's Why It Makes Sense", *Huffington Post*, 7 January 2016, (available at <www.huffingtonpost.com/?icid=hjx004.0>).
[159] See the LegalZoom website: <www.legalzoom.com>.
[160] Ronald C Minkoff, "United States: ABA Model Regulatory Objectives: Why They Matter To You", 10 May 2016 (available at <www.mondaq.com/unitedstates/x/488032/Strategic+Planning/ABA+Model+Regulatory+Objectives+Why+They+Matter+To+You>).
[161] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 27.
[162] Id at 30.

10. Split v fused profession

The statutes governing the regulatory bodies in Namibia[1] and South Africa[2] each work to merge a formerly split profession, to at least some degree.

Traditionally, an attorney (in some jurisdictions, referred to as a "solicitor") has a more general role and will meet with the client first before referring the client to an advocate ("barrister") for specialised work, including advocacy in court. Advocates are generally briefed by attorneys, rather than being directly instructed by clients.

The reality of maintaining the split in practice will depend on the degree of partnership permitted between attorneys and advocates. If business and regulatory structures allow members of the two professions to form partnerships, then it is asserted that the split bar could become a legal fiction.[3]

Even where the legal profession is combined for purposes of statutory regulation, legal practitioners can generally form voluntary groups which provide for specialisation according to rules which they choose to adopt, as part of the freedom of association. This is the current position in Namibia.

10.1 Issues to consider

Increased access to specialised services: Advocates who are proponents of maintaining a split profession cite advocates' specialised knowledge as being a benefit to clients, and they cite advocates' independence as a source of professional pride.[4] Where the profession is split, the specialised skills of an advocate are available to all law firms and clients, including Government, rather than being affiliated to a specific firm which has exclusive rights to that advocate's services.[5] In **South Africa**, opponents of the proposed fusion of the profession asserted that a split profession assists small attorneys' firms to compete with larger firms, by making it possible for small firms to take on complex cases because they can call on the expert services of independent advocates.[6]

Split regulation: A split profession might also lead to a system of split regulation. Depending on the approach taken, this can lead to a higher degree of regulation overall if the purviews of the distinct regulatory bodies overlap. Double regulation benefits the public, as it would cause the legal providers to be more accountable. For example, under the present system in **Namibia**, all advocates are legal practitioners. This means that, as legal practitioners, they are subject to the regulation of the Law Society, and as advocates they make themselves subject to the additional regulation of the Society of Advocates.[7] If there is split regulation which does not overlap, this brings the disadvantage of applying

---

[1] Legal Practitioners Act 15 of 1995, s. 6.
[2] Legal Practice Act 28 of 2014 (South Africa), s. 114.
[3] John Wotton, "Fission or fusion, independence or constraint?", *The Law Society*, 25 January 2012.
[4] General Council of the Bar of South Africa, "The Role of the Advocate", undated, <www.sabar.co.za/advocates.html>.
[5] John Wotton, "Fission or fusion, independence or constraint?", *The Law Society*, 25 January 2012.
[6] Andisiwe Makinana, "Controversial Bill ends legal fraternity's self-regulation", *Mail & Guardian*, 13 November 2013 (reporting statement of Democratic Alliance (DA) spokesperson on justice and constitutional development, Dene Smuts).
[7] In practice, it was reported in 2014 that 'double discipline' is generally avoided: "So far, due to the beneficial relationship between the Law Society and the Society of Advocates, the Bar has in most cases been allowed to discipline its own in accordance with its own rules. The view is expressed that this aspect should be reconsidered

different codes of conduct to different professionals, but it also provides the advantageous element of "competitive stimulus".[8]

Efficiencies: This issue can cut both ways. It has been asserted that advocates' requisite position as sole practitioners allows them to market their professional services with a minimum of additional administration costs.[9] On the other hand, there may be efficiencies from having the functions of attorneys and advocates combined within a single practice.[10] Some have argued that fusion may be particularly helpful to an international practice, to allow for better competition of local firms with firms in other countries (such as the United States) which offer a fuller range of services under one roof.[11]

Blurring of distinction: In some jurisdictions, the distinction between attorneys and advocates has become merely, or mostly, nominal. In jurisdictions where the roles are blurred in practice (such as under the forthcoming dispensation in South Africa), there may be little reason to maintain the distinction.[12] Moreover, as the convergence between the two roles increases, maintaining a distinction that is merely nominal may lead to public confusion.[13]

Artificial imbalances of reputation: It has been argued that maintaining a split profession may lead to one branch of the legal profession being esteemed more highly than the other, even if education or skill levels do not justify that distinction.[14]

Conflicts of interest: Advocates or barristers work as sole practitioners, but they often share (or are required to share) chambers. This structure allows two barristers from the same chambers to represent opposite sides of a case. Some see this as a conflict of interest.[15] On the other hand, the fact of sharing premises does not undercut the obligation of client privilege, and the collegial relationship which shared chambers are intended to foster could mitigate against opposing sides wasting the clients' time on petty or needless issues. It has been asserted that conflicts of interests are more likely to arise in the case of attorneys who work together in firms.[16] It has also been noted that the arrangement of sharing chambers is conducive to camaraderie, civility and courtesy, which help opposing counsel to maintain professionalism.[17]

---

in a possible amendment due to the overlap." Esi Schimming-Chase, "The Fusion of the Legal Profession – A Namibian Perspective", *Advocate*, Vol 27, No 2, 44-47, August 2014 at 46.

[8] John Wotton, "Fission or fusion, independence or constraint?", *The Law Society*, 25 January 2012.

[9] General Council of the Bar of South Africa, "The Role of the Advocate", undated, <www.sabar.co.za/advocates.html>.

[10] John Wotton, "Fission or fusion, independence or constraint?", *The Law Society*, 25 January 2012.

[11] Ibid.

[12] Quentin Bargate, *Time for a Fused Legal Profession*, London: Bargate Murray, 2014 at 3 (available at <www.bargatemurray.com/wp-content/uploads/2014/04/Quentin_Bargate_Fusion_April_2014.pdf>).

[13] Ibid.

[14] Harry Cohen, "The Divided Legal Profession in England and Wales – Can Barristers And Solicitors Ever Be Fused?", *The Journal of the Legal Profession [of The University of Alabama School of Law]*, [Vol 12], [1987], at 11-12 (available at <www.law.ua.edu/pubs/jlp_files/issues_files/vol12/vol12art01.pdf>).

[15] Quentin Bargate, *Time for a Fused Legal Profession*, London: Bargate Murray, 2014 at 3.

[16] General Council of the Bar of South Africa, "The Role of the Advocate", undated, <www.sabar.co.za/advocates.html>.

[17] Claire Hogan, Tetyana Nesterchuk & Matthew Smith, "Values and Functions of a Referral Advocate" , The Bar of Ireland, March 2016 at para 56-ff (available at <www.lawlibrary.ie/media/lawlibrary/media/Value-and-functions-of-a-referral-advocate_3.pdf>).

Costs to clients: In some instances, maintaining a split profession often causes members of the public to pay two legal practitioners, when only one would otherwise suffice.[18] However, this consideration is somewhat illusory, as in the absence of an advocate, it might be necessary to employ a team of attorneys, or a single attorney would probably have to commit more hours to serve the client on his or her own. In South Africa, the current requirement that advocates may not appear in court unless an attorney is present was criticised on cost grounds, with one advocate asserting that it "made sense in the days before cell phones, but now the only effect of this rule is to require clients to pay for the cost of both an attorney and counsel at court, when this is often unnecessary." The same submission asserted that it is also obsolete to require attorneys to be present when an advocate consults with a client: "By analogy, in the medical profession when a patient consults a surgeon there is no requirement that the referring doctor or general practitioner be present."[19]

Seamless representation: When a single practitioner can run a case from start to finish, that practitioner is better able to learn the case inside and out. Moreover, the practitioner is better able to develop a relationship with the client by virtue of being involved with more details of the case.[20] Counterarguments would be the loss of a higher degree of specialisation, or the need to turn to multiple attorneys to achieve the same level of assistance.

Cab rank rule: Advocates traditionally operate according to the "cab rank rule".[21] This means that they have an ethical duty to accept any offered case, unless they can prove that there is a conflict of interests or that they are already fully engaged. The purpose of the rule is to ensure that anyone can obtain a skilled representative in court, regardless of the issue at dispute or the economic incentives of the particular case from the point of view of the legal representative. "The existence of the Cab Rank Rule promotes access to justice by ensuring that legal representation is available to all who need it, including odious clients and unpopular causes."[22] However, it has been argued that this "rule" is unenforceable in practice and so does not serve its intended purpose, since the greatest barriers to legal representation are lack of finances combined with lack of access to legal aid.[23] It has been asserted that a clearer rule which could be applied to the entire legal profession would be a prohibition on refusing representation on the basis of race, creed, colour, age, religion, sex, sexual orientation, national origin or disability.[24] However proving the existence of prohibited grounds for refusing a case would

---

[18] Quentin Bargate, *Time for a Fused Legal Profession*, London: Bargate Murray, 2014 at 3.
[19] Submission of Adv Nick Smythe on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 48 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).
[20] Society of Solicitor Advocates, "Benefits of Instructing a Solicitor Advocate", undated, <www.solicitoradvocates.org/benefits_instruct_soladv.aspx>.
[21] In Namibia, this is enshrined in Rule 12.5 of the Rules of the Society of Advocates of Namibia (2015 revision) ("…a member is under an obligation to accept a brief in the Courts in which he or she professes to practise, at a proper professional fee, unless there are special circumstances which justify a refusal to accept a particular brief. In particular, every person who is charged before the Court has a right to services of a member in the presentation of his or her defence. Subject to what has been said above, it is the duty of every member to whom the privilege of practicing in Courts of Law is afforded, to undertake the defence of an accused who requires his or her services. Any action which is designed to interfere with the performance of this duty is an interference with the course of justice").
[22] Claire Hogan, Tetyana Nesterchuk & Matthew Smith, "Values and Functions of a Referral Advocate" , The Bar of Ireland, March 2016 at para 25-ff (available at <www.lawlibrary.ie/media/lawlibrary/media/Value-and-functions-of-a-referral-advocate_3.pdf>).
[23] See John Flood and Morten Hviid, "The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market", Report for the Legal Services Board, 2013 (available at <https://research.legalservicesboard.org.uk/wp-content/media/Cab-Rank-Rule_final-2013.pdf>).
[24] Flood and Hviid at 39.

probably be equally difficult as applying the cab rank rule in practice, and a prohibition on such discrimination would not help those whose issues are unpopular or too small to interest a skilled legal practitioner on a purely economic basis. In any event, the concern about enforceability seems to miss the point; the cab rank rule encourages advocates to take any case, even one involving an unpopular issue, because it insulates them from being personally identified with the issue – meaning that the very existence of the principle is sufficient to encourage greater access to legal representation.

Insulation of advocates from malpractice: In South Africa, it was pointed out that it is difficult if not impossible in a split profession to hold advocates liable for negligence, since the advocate's opinion is given to an attorney and it is the attorney who is responsible to the client, using the advocate's expertise as a resource.[25]

Rules on unauthorised use of designation "advocate": Even if a split bar is *de facto* instead of mandated by law, it has been asserted that persons who are not practising law or who do not belong to any professional body should not be allowed to use the title "advocate". This could be misleading to the public, particularly if the person using the title is not subject to any ethical and professional standards or disciplinary systems. Improper use of the term could bring the profession of advocate into disrepute.[26]

10.2 Namibia: *de facto* split profession

In Namibia, the legal profession was divided into advocates and attorneys until the Legal Practitioners Act 15 of 1995 fused the profession.[27] Previously, advocates were considered specialists; members of the public could not see an advocate without first going to an attorney and getting a referral.[28] Also, attorneys could not appear in the High Court.[29] Before the merger, dual practice was not allowed. Now, a legal practitioner can perform all of the functions previously attributed to an advocate or an attorney.[30]

---

[25] Oral submission of Law Society of South Africa on the Legal Practice Bill, as summarised in Kim Hawkey, "A step closer: Oral hearings on the Legal Practice Bill", *De Rebus,* April 2013 at 28 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).

[26] Submission of Advocate EK Tsatsi on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 48 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).

[27] Legal Practitioners Act 15 of 1995; Society of Advocates of Namibia, "Legal System", undated, <www.namibianbar.org/NamLegal.htm> at "Role of Advocates in the Namibian Legal System". See *Afshani & Another v Vaatz* 2007 (2) NR 381 at para 8 ("At all relevant times prior to the promulgation of the Act - in fact, from the early 1920s - civil law in this country was practised by two professions: those of advocates and those of attorneys. Generally, each profession had its own domain of practice, its own rules of professional conduct and discipline, its own controlling body, and its own legal framework regulating admission, enrolment, privileges, rights of audience and to practise law.")

[28] Clive L Kavendjii & Nico Horn, "The Independence of the Legal Profession in Namibia" in Nico Horn and Anton Bösl (eds), *The Independence of the Judiciary in Namibia,* Windhoek: Konrad-Adenauer Stiftung, 2008 at 292.

[29] Esi Schimming-Chase, "The Fusion of the Legal Profession – A Namibian Perspective", *Advocate*, Vol 27, No 2, 44-47, August 2014 at 44.

[30] Society of Advocates of Namibia, "Legal System", undated, at "Role of Advocates in the Namibian Legal System" <www.namibianbar.org/NamLegal.htm>. *Afshani & Another v Vaatz* 2007 (2) NR 381 at para 13 identifies the legislative purpose of the Legal Practitioners Act as follows: "to consolidate the divergent legal professions into a single vocation subject to an all-inclusive statute regulating admission, enrolment, audience, discipline, control and the rights, duties and obligations associated with legal practice in a uniform, equal, fair and responsible manner". It goes on to state, "The Act also recognises the multiplicity of skills required in rendering a wide range of legal services to the public and, therefore, allows sufficient scope for diversity in legal

All legal practitioners now have the right of appearance in any court or tribunal, with the caveat that a legal practitioner has the right of audience in the Supreme Court of Namibia only if in possession of a certificate from the Council of the Law Society certifying that he or she has practised law for at least one year, or if he or she was admitted to practise by virtue of five years' employment as a magistrate, Director of Legal Aid, legal aid counsel or prosecutor.[31]

The Namibian Government's rationale for fusing the legal profession was to promote equal opportunities for legal practitioners regardless of race; the purpose was "to enable previously disadvantaged legal practitioners to compete for work on a level playing field (since historically the Bar was comprised predominantly of white Namibians), thereby ameliorating the effects of the apartheid system on previously disadvantaged lawyers in the legal profession".[32] Of course, despite this reform, only the passage of time can transform the composition of the cadre of legal practitioners with substantial years of experience.

A *de facto* distinction remains. The Society of Advocates continues to exist, as a voluntary organisation for advocates.[33] A legal practitioner may become an advocate by completing six months of pupillage followed by a two-month period of assistance to a High Court judge, and passing practical and theoretical examinations set by the Bar Council.[34] Once the legal practitioner is admitted, his or her name is entered onto the Roll of Advocates. Members of the Society of Advocates pay annual subscription fees which fund the services of the Society and the Bar Council.[35]

Without mentioning advocates explicitly, the Legal Practitioners Act provides that a legal practitioner who does not in the conduct of his or her practice accept, receive or hold any money for or on account of another person may apply for exemption from the requirement that all legal practitioners must hold Fidelity Fund Certificates.[36] Thus, this exemption is open only to legal practitioners who are advocates briefed by legal practitioners instead of by clients (or law centres who provide legal services without charge to their clients).[37]

The commitment to take briefs only from legal practitioners and not directly from clients is called the "referral principle" and all members of the Society of Advocates are required to adhere to it.[38]

---

practice among legal practitioners, eg those who practise law as notaries public (s 86), as conveyancers (s 87), in the service of a law centre or in the service of the State (cf the definition of 'practise' in s 1), for personal gain on their own account or in partnership either with (s 68) or without (s 67) fidelity fund certificates."

[31] Legal Practitioners Act 15 of 1995, s. 18 read together with s. 5(1)(cA).

[32] Esi Schimming-Chase, "The Fusion of the Legal Profession – A Namibian Perspective", *Advocate*, Vol 27, No 2, 44-47, August 2014 at 44. See also Clive L Kavendjii & Nico Horn, "The Independence of the Legal Profession in Namibia" in Nico Horn and Anton Bösl (eds), *The Independence of the Judiciary in Namibia,* Windhoek: Konrad-Adenauer Stiftung, 2008 at 295.

[33] Esi Schimming-Chase, "The Fusion of the Legal Profession – A Namibian Perspective", *Advocate*, Vol 27, No 2, 44-47, August 2014 at 46.

[34] Constitution of the Society of Advocates of Namibia (2015 revision), s. 5.1.1. This provision refers to four months of pupillage, but has been amended. The most recent revised version of the Constitution was not available at the time of writing.

[35] Id, s. 6.3, 23.2.2(a).

[36] Legal Practitioners Act 15 of 1995, s. 18.

[37] Society of Advocates of Namibia, "Legal System", undated, at "Role of Advocates in the Namibian Legal System" <www.namibianbar.org/NamLegal.htm>.

[38] Rules of the Society of Advocates of Namibia (2015 revision), rule 11.

One impact of the technical fusion of the legal profession pertains to costs. In the 2007 case *Afshani & Another v Vaatz*, the Supreme Court held that since the Legal Practitioners Act no longer distinguishes between attorneys and advocates, all legal practitioners have to be treated alike for the purposes of taxation. Thus, the fees paid by attorneys to advocates can no longer be construed as disbursements.[39]

The Constitution of the Society of Advocates – also referred to as the "Bar of the High and Supreme Court of Namibia" (or frequently just the "Bar") – defines an "advocate" as "any legal practitioner who practises law for his or her own account (a) only upon a brief of a lawyer acting on behalf of client; and (b) in the manner traditionally associated with the conduct and customs of advocates in private legal practice in Namibia".[40] It sets forth the following objects:

- The protection of the Namibian Constitution, the fundamental rights and freedoms enshrined therein and the principles of democracy, the rule of law and justice for all;
- The establishment and maintenance of an independent pool of specialist forensic experts to render a high standard of professional legal services to all persons requiring legal assistance;
- The supervision, maintenance and enhancement of the standards of conduct and ethics of its members and that of legal practitioners;
- The consideration and promotion of improvements in the teaching and practice of the law and in the administration of justice;
- The promotion and encouragement of co-operation between members and other legal practitioners, the Law Society of Namibia, lawyers, the public, the Government of Namibia, the International Bar Association and other professional bodies representing the interests of lawyers;
- The representation and presentation of views of its members in relation to matters falling within the objects of the Society.[41]

The Society of Advocates is administered by the Bar Council, which is elected annually by the members of the Society of Advocates and consists of the President, Vice-President, Secretary-General and Treasurer and "such additional member(s) as a meeting of members may from time to time decide".[42] The Bar Council issues fee parameters to its members, recommending minimum and maximum fees to be charged for particular legal services.[43] The Society of Advocates sets rules for its members, and the Bar Council is responsible for disciplining members who are accused of professional misconduct or undisciplined conduct.[44]

The Constitution of the Society of Advocates includes an explicit statement regarding cooperation with the Law Society:

> The Bar Council may in all matters of common concern to the Society and that of the Law Society of Namibia or any other Society of advocates, attorneys, barristers, solicitors or legal practitioners, co-operate with the Council thereof and for such purpose arrange joint meetings and take joint action in relation to such matters.[45]

---

[39] *Afshani & Another v Vaatz* 2007 (2) NR 381 (SC). This case also found that the Rules of the Supreme Court make reference only to legal practitioners, meaning that the tariff of fees applied to all legal practitioners should technically be the same. However, prior to 1995, attorneys did not have a right of appearance, meaning that the tariff in question was designed for *attendance* and was not appropriate for an *appearance*. Costs are supposed to indemnify the winning party for all reasonable costs incurred, so the Taxing Master should in this instance have exercised discretion (in accordance with Note II issued by the Chief Justice) to depart from the tariff in any situation where there are extraordinary or exceptional circumstances where the strict application of the tariff would be unjust.
[40] Constitution of the Society of Advocates of Namibia (2015 revision), s. 1.
[41] Id, s. 3.
[42] Id, ss. 11-13.
[43] Id, s. 15.1(d); Rules of the Society of Advocates of Namibia (2015 revision), rule 22.2.
[44] Id, s. 23.
[45] Id, s. 16.

The current position with regard to the *de facto* split has been summarised as follows:

> In the Namibian courts, an advocate may find him or herself appearing against an attorney, and quite a number of attorneys have successfully developed their own litigation practice. However, there remains a high demand for the specialised forensic services provided at the Bar because attorneys have continued to brief advocates in matters where they choose not to appear themselves due to time or other constraints.
>
> The standard of service provided by the Bar has therefore created a demand that did not wane with the coming into force of the Act. In Namibia, advocates essentially undertake two sets of examinations and two periods of practical training that place them in a position to develop and maintain their skills in the field of advocacy, with additional knowledge of the workings of an attorney's practice obtained before admission.
>
> …
>
> Our [advocates'] skills are also recognised by the Namibian courts with nine erstwhile members having been permanently appointed to the Bench, and the continued use of our members to assist with short term acting appointments in the High Court. Advocates also sit on the council of the Law Society of Namibia and some have served as its chairperson over the years. This is important as the representation of the Bar on Council is necessary for the enhancement of the satisfactory working relationship between the council and the Society of Advocates, which is imperative for the continued existence and growth of the Bar.
>
> In conclusion, for as long as advocates continue to provide the specialised forensic skills they have become known for, the Bar will continue to exist and thrive because attorneys with busy practices will continue to require the time and skill offered.[46]

In 2007, the Supreme Court described the existing situation as follows:

> Within the sphere of civil practice one nowadays finds legal practitioners who take instructions directly from clients but only attend to the more formal side of litigation and instruct other legal practitioners to attend to the forensic aspects thereof (the former sometimes referred to as 'instructing counsel'); those who do not take instructions directly from clients but only from other legal practitioners representing them and who mainly render services of a forensic nature (generally referred to as 'instructed counsel' or, informally, called 'advocates') and, lastly, those legal practitioners who take instructions directly from clients and who render both formal and forensic services in civil litigation to them. Although, *de jure* there may only be one legal profession, law is in reality practised by legal practitioners in a number of diverse styles under one regulatory and protective statutory umbrella.[47]

10.3 South Africa: unified but not fused

As described above in section 3, South Africa's Legal Practice Act 28 of 2014 created the Legal Practice Council to govern all legal practitioners in South Africa, including both advocates and attorneys.[48] It essentially unifies the legal profession, without effecting complete fusion.[49] As noted above, the Council will regulate the entire legal profession. It appears that there will be identical academic and professional qualifications for attorneys and advocates, and advocates will be able register in one of two different categories: to take instructions only from attorneys (in which case they will not require a fidelity fund certificate) or to take instructions directly from the public (in which case they will). The categories will be fluid, with conversion between the various categories being possible subject to any rules, requirements and conditions set by the Council.[50] It will be easier for

[46] Id at 46-47.
[47] *Afshani & Another v Vaatz* 2007 (2) NR 381 (SC) at para 14.
[48] Legal Practice Act 28 of 2014 (South Africa), s. 1–2 (defining "legal practitioner" to include both advocates and attorneys and stating that the Act applies to all legal practitioners).
[49] Jacques Halbert, "The link between the Legal Practice Bill and access to justice", *De Rebus*, October 2014.
[50] Legal Practice Act 28 of 2014 (South Africa), s. 32.

attorneys to obtain right of appearance in the higher courts,[51] and there will be only one Code of Conduct applicable to all legal practitioners.[52]

One other difference is that legal practitioners doing pupillage to become advocates will have to be paid instead of being required to work for nothing, which should open up the position of advocate to those less financially well-placed.[53] This requirement applies to all forms of practical legal training, including training required to become an attorney or an advocate.[54]

This approach has led some to call the new dispensation "fusion in disguise"[55] – even though the Government, as a concession to some opposing views, altered the original draft bill so that the titles of attorney and advocate were retained.[56] Government's position is that restructuring of the legal profession will facilitate its transformation so that the profession, and ultimately the judiciary, are more representative of the nation;[57] the goal as stated in the Act itself is to "provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic". [58]

Some legal practitioners supported fusion, on the basis that maintaining a dual profession places an unnecessary financial burden on the client because it entails some duplication of costs.[59] Others asserted that advocates and attorneys deliver different services and so require different qualifications, and were concerned that fusion of the profession would result in the loss of specialist expertise.[60]

Some practitioners have endorsed the new structure as it stands, on the grounds that it is likely to cultivate competition, improve service and reduce the costs of litigation.[61] Others have criticised the "unification without fusion" brought about by the Legal Practices Bill, or asserted that it is unlikely to result in significant practical changes.

For example, the General Council of the Bar of South Africa took the view that the relationship between advocates and attorneys would not change substantially under the new dispensation. They were of the opinion that attorneys will continue to brief advocates, since the referral system is an

---

[51] Legal Practice Act 28 of 2014 (South Africa), s. 25(3).
[52] Legal Practice Act 28 of 2014 (South Africa), s. 36. The rules for disciplinary proceedings must be similarly developed (s. 38(2)).
[53] John Jeffery, "The sky will not fall if the law is for all?", *Mail & Guardian,* 29 November 2013.
[54] Legal Practice Act 28 of 2014 (South Africa), ss. 1 ("'practical vocational training' means training required in terms of this Act to qualify as a candidate attorney or pupil in order to be admitted and enrolled as an attorney or advocate"), 27(2) (referring to rules which "must regulate the payment of remuneration, allowances or stipends to all candidate legal practitioners, including the minimum amount payable").
[55] Dene Smuts, "Legal Practice Bill: Fusion in disguise", *Mail & Guardian,* 29 November 2013.
[56] Department of Justice and Constitutional Development, Republic of South Africa, "Legal Practice Bill to Open Doors to Advocates", 7 June 2012 (available at <www.sabinetlaw.co.za/justice-and-constitution/articles/legal-practice-bill-open-doors-advocates>).
[57] See ibid. This stance led some opponents of the new structure to quip that the Government is "lost in transformation". See, eg, Dene Smuts, "Legal Practice Bill: Fusion in disguise", *Mail & Guardian,* 29 November 2013.
[58] Legal Practice Act 28 of 2014 (South Africa), s. 3(b)(iii).
[59] See, eg, Jacques Halbert "The link between the Legal Practice Bill and access to justice", *De Rebus*, October 2014, referring to members of Independent Association of Advocates of South Africa (IAASA).
[60] See, eg, ibid, referring to the Centre for Law and Society at the University of Cape Town.
[61] See, eg, "The Legal Practice Bill: what does it mean for members of the public?", Hooyberg Attorneys, 19 March 2015 (available at <https://hooyberglaw.wordpress.com/2015/03/19/the-legal-practice-bill-what-does-it-mean-for-members-of-the-public/>).

effective one. They asserted that it would be in the public interest for advocates and attorneys to work together rather than in competition, but preferred separate regulatory bodies for advocates and attorneys at the national and regional level. Regarding direct briefing of advocates by the public, they noted that so-called "rebel" advocates who side-line attorneys by dealing directly with the public could end up costing clients more by charging higher fees for work normally done by attorneys.

The Independent Association of Advocates of South Africa (IAASA) – which is now called the National Bar Council of South Africa – felt that the new approach involved a *quid pro quo* in the sense that it allows attorneys the right to appear in the High Court while allowing advocates to take instructions directly from the clients. However, they felt that it was likely to be rare in practice that attorneys would in fact appear in the High Court, as opposed to briefing advocates for this. IAASA found it appropriate that advocates should be briefed directly by the public in respect of a certain matters, including criminal matters; the drafting of contracts, wills and memoranda of incorporation; matters concerning the Consumer Protection Act 68 of 2008; arbitration and mediation.

The Law Society of South Africa had no problems with policy being set by a single body dominated by attorneys at national level but, in light of the significant differences between the two sectors, preferred separate regulatory chambers at regional level.[62] The General Council of the Bar suggested that, if regulation was to be combined into one body where attorneys and advocates were not equally represented, advocate representatives should at last have a measure of veto or some other particular voice in matters particular to the advocates' profession, such as the cab-rank rule.[63]

A representative from the Democratic Alliance opposition party stated:

> We believe that South Africa needs the split or divided profession but that the forms of practice that are essentially perpetuated are too rigid and protectionist. An advocate practising on the traditional independent basis will take on politically or socially unpopular cases, and this remains as necessary now as it was in the old South Africa.[64]

The late Justice Arthur Chaskelson expressed concerns that the new Act makes the advocates' profession into a 'junior partner' in the combined legal profession, which could have a detrimental impact:

> Although attorneys have had the right of audience in superior courts for many years, advocates still handle an overwhelming proportion of the constitutional litigation and other cases in those courts. Access to advocates enables smaller firms to compete with larger firms when their clients are involved in such litigation, and a weakening of the advocates' profession could have serious consequences not only for the legal profession, but for the public as well. That is a matter of great public importance that needs to be debated as a separate issue.[65]

Responding to allegations that the new approach somehow "punishes" advocates because it gives them lesser representation on the Legal Practice Council than attorneys, the Deputy Minister of Constitutional Development stated:

---

[62] This summary of views is based on Jacques Halbert "The link between the Legal Practice Bill and access to justice", *De Rebus*, October 2014 and Dene Smuts, "Legal Practice Bill: Fusion in disguise", *Mail & Guardian,* 29 November 2013. The primary documents were not examined.

[63] Oral submission of General Council of the Bar on the Legal Practice Bill, as summarised in Kim Hawkey, "A step closer: Oral hearings on the Legal Practice Bill", *De Rebus,* April 2013 at 31 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).

[64] Dene Smuts, "Legal Practice Bill: Fusion in disguise", *Mail & Guardian,* 29 November 2013.

[65] "The Rule of Law: The importance of independent courts and legal professions", Former Chief Justice Arthur Chaskalson's address to the Cape Law Society on 9 November 2012.

> But how can approximately 2 000 practising advocates have the same levels of representation as more than 21 000 attorneys? There were arguments that attorneys and advocates should have separate chambers to deliberate on matters such as discipline, but as both advocates and attorneys can appear in high courts, shouldn't the same disciplinary rules and standards apply?
>
> In any event, voluntary associations such as the Bar councils solely for advocates, or attorneys for that matter, can still exist. The majority of this country's judges are appointed from the ranks of practising advocates, so it would make absolutely no sense to disadvantage or prejudice the advocacy.[66]

It remains to be seen how this merger will play out in practice, as the Legal Practice Council has not yet formally convened.

10.4 Examples from other jurisdictions

The International Council for Advocates and Barristers (ICAB), established in 2002 as a forum for members of independent referral bars around the world, includes members of the bar from Australia, England and Wales, Hong Kong, Ireland, New Zealand, Namibia, Northern Ireland, Scotland, South Africa and Zimbabwe.[67]

In **England** the professions of barrister and solicitor remain split, though in practice, the roles are blurring.[68] Both barristers and solicitors can now obtain rights of audience in all courts. Barristers and solicitors have the same academic qualifications, but they undergo different practical training; barristers must complete a Bar Professional Training Course and one year of pupillage. Solicitors are typically employed by law firms and barristers are typically self-employed but may group together to share overhead costs in a collective known as a Chambers. However, barristers can now be employed by firms of solicitors, commercial organisations or Government. Some barristers, who theoretically work in a specialised profession, actually engage in more general practices and conversely, some solicitors specialise. Additionally, though members of the public traditionally needed a referral from a solicitor to instruct a barrister, this restriction is no longer the case in England; members of the public can currently instruct both solicitors and barristers directly, without needing a referral. Barristers are typically paid by project while solicitors are typically paid by the hour. Separate bodies regulate the separate professions,[69] though the Legal Services Board is a single body that oversees all of the regulators.[70]

In **Scotland**, the profession remains split between solicitors and advocates, although legislation from 1993 blurred the distinction. The Society of Solicitor Advocates is a voluntary organisation for

---

[66] John Jeffery, "The sky will not fall if the law is for all?", *Mail & Guardian,* 29 November 2013.
[67] Claire Hogan, Tetyana Nesterchuk & Matthew Smith, "Values and Functions of a Referral Advocate", The Bar of Ireland, March 2016 at 5.
[68] Unless otherwise indicated, the information on England comes primarily from Trinity Chambers, "What's the Difference Between a Barrister and a Solicitor?", 27 June 2014, (available at <www.trinitychambers.com/barrister-and-a-solicitor/>); Claire Hogan, Tetyana Nesterchuk & Matthew Smith, "Values and Functions of a Referral Advocate" , The Bar of Ireland, March 2016 at Annex II; Harry Cohen, "The Divided Legal Profession in England and Wales – Can Barristers And Solicitors Ever Be Fused?", *The Journal of the Legal Profession [of The University of Alabama School of Law]*, [Vol 12], [1987] and Quentin Bargate, *Time for a Fused Legal Profession*, London: Bargate Murray, 2014.
[69] The Solicitors Regulation Authority is the regulatory body for solicitors; the Bar Standards Board is the regulatory body for barristers. Legal Services Board, "Approved regulators", undated, <www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm>.
[70] Legal Services Board, "Approved regulators", undated, <www.legalservicesboard.org.uk/can_we_help/approved_regulators/index.htm>.

solicitors who engage in advocacy before Scottish courts.[71] Its existence reflects a shift in the Scottish jurisdiction, in which legal reforms in 1993 allowed Scottish solicitors to apply for rights of audience – previously reserved for advocates – in the Higher Courts, the Supreme Court, and the Judicial Committee of the Privy Council in London.[72] Aspiring advocates must undergo an 8-9 month period of specialised training known as "devilling" and then pass an assessment. They are not allowed to enter into partnership with each other or with any other person, with a view to preserving their independence.[73]

Most of the other jurisdictions with a split bar which were examined followed similar models. A few details of interest from various jurisdictions are as follows: In **Ireland,** although barristers traditionally receive instructions only from solicitors, the Council of The Bar of Ireland has since 1990 authorised some bodies and their members to have Direct Professional Access to members of The Bar of Ireland in non-contentious matters. Also the Bar operates a *pro bono* Voluntary Assistance Scheme, through which it makes voluntary legal assistance available directly from barristers to charities, non-government organisations and civil society groups which provide useful services to the public.[74] **New Zealand** is also exploring options for direct briefing of barristers by clients in some circumstances.[75]

Northern Ireland appears to be one of the few jurisdictions where solicitors are unable to qualify to appear in the highest courts.[76]

Zimbabwe has a *de facto* bar which operates in a broadly similar fashion to the bar in Namibia.[77]

In the **United States**, there is no distinction between attorney and advocate or solicitor and barrister. Once an American attorney fulfils the relevant requirements for a given court, the attorney can appear in that court.[78]

---

[71] Society of Solicitor Advocates, "About Us", undated, <www.solicitoradvocates.org/aboutus.aspx>.
[72] Society of Solicitor Advocates, "History", undated, <www.solicitoradvocates.org/sol_history.aspx>.
[73] Claire Hogan, Tetyana Nesterchuk & Matthew Smith, "Values and Functions of a Referral Advocate", The Bar of Ireland, March 2016 at Annex VIII.
[74] Id at Annex IV.
[75] Id at Annex VI.
[76] Id at Annex VII.
[77] Id at Annex X.
[78] Marilyn J Berger, "A Comparative Study of British Barristers and American Legal Practice and Education", *Northwestern Journal of International Law & Business*, Vol 5, No 3, Fall 1983, pages 540-584 at 560 (available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1152&context=njilb>).

11. Bestowing of professional honours or recognition

The designation of Queen's Counsel (or King's Counsel, depending on the monarch) has its origins in the English legal system. Accordingly, it is a system that specially affects Commonwealth jurisdictions. Some jurisdictions have moved away from the terminology "Queen's Counsel" to a designation that does not implicate monarchical relations. (In Namibia and South Africa, the equivalent designation is "Senior Counsel". In Nigeria, it is "Senior Advocate of Nigeria".) Most countries which have retained the honour have provided for conferring authorities other than the head of state.[1]

The phrase "taking silk" refers to a legal practitioner's appointment as Queen's Counsel. This is a reference to the silk robes that Queen's Counsel members traditionally wear. Accordingly, Queen's Counsel members are referred to as "silks".[2] It has been referred to as recognition "of the esteem in which the recipients of silk are held in their profession by reason of their integrity and of their experience and excellence in advocacy".[3] Legal practitioners who hold the designation are generally able to charge higher rates than those who do not hold the honour.

Traditionally, the designation was only available to barristers (or advocates). However, some jurisdictions, for example England, have altered their approach to make solicitors who engage in advocacy in the higher courts eligible for this designation. However, one English commentator objects to the special positon afforded to advocacy skills:

> My main objection to the silk system is its glorification of advocacy. Apart from the handful of honoraries, only those who practise – to quote the official website – "oral and written advocacy before the higher courts, arbitrations and tribunals and equivalent bodies" are eligible. Practising the law in any other way – in the solicitor's traditional role of using his skill and experience to advise, research and prepare cases, and find extra-judicial solutions to the client's problems – is deemed an inadequate qualification. This has become somewhat paradoxical when lawyers are urged to avoid going to court whenever possible by embracing conciliation and mediation. It would be more consistent to award silk to the best negotiators and deny it to those who end up in court.[4]

Some have objected to the practise on the grounds that it is based in "colonial history".[5] It has also been criticised on the grounds that it is not egalitarian[6] – but this is a criticism that makes no sense in

---

[1] Ugur Nedim, "The title of 'Queen's Counsel' may be reintroduced", Sydney Criminal Lawyers, 30 May 2015 (available at <www.sydneycriminallawyers.com.au/blog/the-title-of-queens-counsel-may-be-reintroduced/>); Chriss Merritt, "Government calls its new silks senior counsel, not Queen's counsel", *The Australian*, 9 July 2010 (available at <www.theaustralian.com.au/business/legal-affairs/government-calls-its-news-silks-senior-counsel-not-queens-counsel/news-story/b66b244a86696314531180c409ea5cb>); Dr Fabian Ajogwu, SAN [Senior Advocate of Nigeria], "Mansingh's Case & Fate of Silks in South Africa", *My Legal Notes* (blog), 17 May 2012 (available at <http://fabianajogwu.blogspot.com/2012/05/mansinghs-case-fate-of-silks-in-south.html>). As discussed below, South African is an exception.

[2] R Verkaik, "The Big Question: Should we abolish Queen's Counsel?", *The Independent*, 26 July 2006 (available at <www.independent.co.uk/news/uk/crime/the-big-question-should-we-abolish-queens-counsel-409395.html>).

[3] See *General Council of the Bar and Another v Mansingh and Others* 2013 (3) SA 294 (SCA) at para 7 and *Mansingh v General Council of the Bar & Others* 2014 (2) SA 26 (CC) at 32. This case is discussed in section 11.3.

[4] Geoffrey Bindman (visiting professor of law at University College London and London South Bank University), "On becoming a silk: ritual, restriction and royal allegiance", 22 May 2011 (available at <www.opendemocracy.net/ourkingdom/geoffrey-bindman/on-becoming-silk-ritual-restriction-and-royal-allegiance>).

[5] See, eg, Pierre de Vos (professor of constitutional law at the University of Cape Town), "The colonial roots of conferring silk on advocates", Daily Maverick, 20 November 2013 (available at

respect of an award based on merit, provided that is based on relevant criteria which are applied fairly to all applicants.

11.1 Issues to consider

Professional development: Namibia's Society of Advocates has argued that maintaining the Senior Counsel designation is beneficial for professional growth.[7] By providing a milestone with concrete qualification requirements, a system of professional honours can guide young lawyers through professional development. Having honours as a concrete goal to work for can also encourage hard work and commitment.[8] In Namibia, Senior Counsel are required to work together with Junior Counsel on most types of litigation-related matters,[9] as a means of skills transfer – with the downside being that this requirement may increase the costs of legal services in some cases.

Identification of leadership: Proponents of the honours designation assert that having such a mark of distinction helps to identify leaders in the field.[10] However, if the distinction is based more on political connections, race, gender or other factors instead of on legal ability, this benefit is invalidated.

International recognition: Proponents of honours point to the international nature of the Queen's Counsel system. As a Queen's Counsel mark is an internationally recognised designation, it may function to attract foreign business or to increase international confidence in the local legal system.[11] Advocates with this distinction may also be called upon to argue cases in countries outside their own jurisdictions.[12]

Increased competition: Proponents of honours contend that the designation helps solicitors to identify experienced barristers.[13] On the other hand, lack of the designation is a competitive disadvantage.[14] If the system is genuinely merit-based, this is not problematic – but it is a concern if the designation is political in nature or if it favours certain groups.

(<www.dailymaverick.co.za/opinionista/2013-11-29-the-colonial-roots-of-conferring-silk-on-advocates/#.WYq-adQrKHt>).

[6] See, eg, id and Udemezue Sylvester, "Senior Advocate of Nigeria: To be or not to be", *Vanguard*, 3 September 2009 (available at <www.vanguardngr.com/2009/09/senior-advocate-of-nigeria-to-be-or-not-to-be/>).

[7] Werner Menges, "Senior Counsel system revived", *The Namibian*, 16 April 2004 (available at <www.namibian.com.na/index.php?id=2941&page=archive-read>).

[8] See, eg, Udemezue Sylvester, "Senior Advocate of Nigeria: To be or not to be", *Vanguard*, 3 September 2009 (available at <www.vanguardngr.com/2009/09/senior-advocate-of-nigeria-to-be-or-not-to-be/>); *Mansingh v President of the RSA* 2012 (3) SA 192 (GNP) at para 50. (As discussed below, the holding of the case was overturned on appeal.)

[9] Rules of the Society of Advocates, Rule 12.32.

[10] R Verkaik, "The Big Question: Should we abolish Queen's Counsel?", *The Independent*, 26 July 2006.

[11] See, eg, Ugur Nedim, "The title of 'Queen's Counsel' may be reintroduced", *Sydney Criminal Lawyers*, 30 May 2015.

[12] See, eg, id ("Queen's Counsel in the UK are said to have profited from this recognition, with businesses in the Asia-Pacific choosing to 'import' QCs for difficult cases. Since Victoria and Queensland reintroduced the title, QCs in those states are reported to have seen similar benefits.")

[13] Director General of Fair Trading, "*Competition in professions*", March 2001 at 78 (available at <http://webarchive.nationalarchives.gov.uk/20140402172414/http://oft.gov.uk/shared_oft/reports/professional_bodies/oft328.pdf>).

[14] Id at 79.

Aid to referrals: Proponents claim that the honours designation guides solicitors in selecting barristers for referrals, especially for legal areas in which the solicitor has little experience.[15] However, the fact that the designation is not issue-specific reduces its helpfulness in this regard. In Namibia, clients sometimes request that Senior Counsel be briefed in a particular matter

Promotion of diversity: If the honours designation is fairly applied, it can increase confidence in the abilities of previously-disadvantaged members of the profession, thereby helping to equalise opportunities and promote diversity.[16] However, if the designation is not fairly available to all who meet the merit-based requirements, then it could have the opposite effect.[17]

Lack of utility: In England, in 2003, there was a public discussion regarding how to reform the honours system. Many stakeholders indicated that they found the Queen's Counsel designation unnecessary as a quality marker in the highly developed legal services market. Additionally, some asserted that the designation is not a reliable indicator of quality, as there are no means for specialisation, ongoing assessment or removal of the honour.[18] However, altering the criteria and/or structure of the honours designation could address some of these concerns. An honours designation must be indicative of quality to be a helpful tool.

Eligibility for honours: The Senior Counsel designation has traditionally been available only to advocates, with a few exceptions.[19] In **England**, now that solicitors can obtain a right of appearance in the higher courts, the designation has been made available to these "solicitor-advocates". In **Namibia**, the Society of Advocates by-passed the removal of legislative provisions on honours designations to revive the practice of conferring the title of Senior Counsel on its members in accordance with its own standards and procedures.[20] There does not appear to be an equivalent way for attorneys to receive such recognition through their statutory membership body – although there is nothing to prevent other voluntary associations from creating their own marks of distinction. The Law Society of Namibia does not have a system for conferring any honours on its members. Thus, maintaining the honours system as it stands runs counter to the fusion of attorney and advocate into a single undifferentiated profession.

---

[15] Id at 79-80.

[16] Id at 79. The report remarked that the appointments system "is secretive and, so far as we can tell, lacks objective standards. It also lacks some of the key features of a recognised accreditation system, such as examinations, peer review, fixed term appointments and quality appraisal to ensure that the quality mark remains justified. We were told that many solicitors and some barristers criticise the lack of objectivity of the system."

[17] The Association of Women Barristers stated as a response to the Government's consultation paper, "Constitutional reform: the future of Queen's Counsel", that the old selection process "perpetuates discrimination against solicitors, women and ethnic minorities The system of great weight being given to automatic judicial soundings instead of references is unacceptable and probably in breach of the Sex Discrimination Act 1975 and European Equal Treatment Directives There is a risk that the public may be misled as to a practitioner's expertise by virtue of the QC status in certain circumstances It is awarded as a lifetime honour and not in respect of a specific field of expertise." Association of Women Barristers, "Response to the Consultation Paper on the future of Queen's Counsel", at 2 (available at <http://webarchive.nationalarchives.gov.uk/20040722110442/http://www.dca.gov.uk/consult/qcfuture/responses/qc018.pdf>).

[18] M Blackwell, "Taking silk: an empirical study of the award of Queen's Counsel status 1981-2015", *Modern Law Review, 2015 Vol.* 78 (6) at 992.

[19] In Namibia, when Senior Counsel status was conferred by the President, there were at least two instances in which the designation was granted to legal practitioners who were not practising as advocates.

[20] Werner Menges, "Senior Counsel system revived", *The Namibian*, 16 April 2004.

Exclusivity: Any distinction which is awarded to only a few persons is by its nature exclusive - but the question is whether the exclusivity is "elitist" (in the sense of a belief that some persons deserve or receive special treatment because of their perceived superiority) or "elite" (in the sense of being amongst the most highly talented in a particular field, such as an elite sportsperson). An open, fair and transparent process can make the difference. In **England,** some have criticised that the Queen's Counsel system on the grounds that it is exclusionary, because it is secretive; it favours insiders or the status quo and it perpetuates an 'old boys' network'.[21] As it was a political appointee – the Lord Chancellor – who in the past played the main role in recommending candidates to the monarch, the system as it once stood had political implications (but has now been reformed).[22] In **Namibia**, the Society of Advocates counters concerns of inappropriate exclusivity by allowing any member to apply for the designation of SC, by providing clear qualifications and decision-making processes which are set out in the Rules of the Society of Advocates and by providing unsuccessful applicants with a right to request review of the decision. Another possible method to counter charges that the designation is improperly exclusionary would be to implement some form of affirmative action for previously-disadvantaged practitioners, such as waiving some of the expected years of experience or encouraging appropriately-skilled persons from previously-disadvantaged groups to apply for professional honours.

Selection process: The Queen's Counsel designation was traditionally bestowed by the monarch, though the selection process involved the decisions of civil servants and politicians. In such a system, where it is not people from within the profession who assess a candidate's qualifications, there is a risk that the system will honour those who have the best political connections rather than those who have the most appropriate skills.[23] For example, this concern has been raised in respect of the previous system in Namibia where SC status was conferred by the President,[24] and in Zambia where it has been alleged that the President has departed from established procedure to appoint persons without recommendation from the profession for considerations other than merit.[25]

The selection process is more likely to reflect ability if the decision to bestow it is made by legal professionals themselves, according to transparent and relevant criteria.

11.2 Professional honours in Namibia

The Legal Practitioners Act 15 of 1995 originally included a system for the designation of "Senior Counsel". Any legal practitioner could make application to the Minister of Justice for the conferral of Senior Counsel status. The application was referred for recommendation from the Judge President or

---

[21] M Blackwell, "Taking silk: an empirical study of the award of Queen's Counsel status 1981-2015", *Modern Law Review, 2015 Vol.* 78 (6) at 976.
[22] Id at 979.
[23] Director General of Fair Trading, "*Competition in professions*, March 2001 at 79; M Blackwell, "Taking silk: an empirical study of the award of Queen's Counsel status 1981-2015", *Modern Law Review, 2015 Vol.* 78 (6) at 976.
[24] According to a press report: "Many in the ranks of Namibia's legal practitioners are of the opinion that the suspension of the SC system was in some way aimed at [Advocate Dave] Smuts specifically, since Government was not sympathetic to his application [for SC status]. Lawyers have told *The Namibian* they suspected it was because of his involvement in cases in which the authorities faced accusations of human rights infringements; furthermore, because of the role he played as Chairperson of the Board of Trustees of the Legal Assistance Centre, of which he was the founding Director." Smuts' application for SC status was pending at the time of the government suspension of the practice. Werner Menges, "Senior Counsel system revived", *The Namibian*, 16 April 2004 (available at <www.namibian.com.na/index.php?id=2941&page=archive-read>).
[25] "LAZ [Law Association of Zambia] opposes [President Michael] Sata over SC status", *Daily Nation*, 11 May 2013 (available at <https://zambiadailynation.com/2013/05/11/laz-opposes-sata-over-sc-status/>).

the Chief Justice. The Minister then referred the application together with the judicial recommendations to the President, who had discretion to reject the application or to confer the designation. A legal practitioner appointed as a Senior Counsel was entitled to use the letters "SC" after his or her name. The statute also explicitly overruled the previous rule of practice which required a Senior Counsel to appear in court together with junior legal practitioner.[26]

Government ended this practice, first by means of a moratorium and then by repeal of the relevant provisions in the Legal Practitioners Act 15 of 1995.[27] Shortly before the repeal took effect, the Society of Advocates internally revived the repealed practice by providing a system in its own Constitution and Rules for conferring the honour of Senior Counsel upon a member.[28]

In terms of the Rules of the Society of Advocates, an applicant for Senior Counsel status must provide information on legal learning acquired; the history and nature of the applicant's practise and experience as an advocate; the level of professional skill and distinction attained by the applicant; and the leadership provided and contributions made by the applicant to the Society of Advocates (or to a referral bar in another country) and to the general administration of justice in Namibia.[29] The applicant is expected to have the following qualities in "high degree":

- Learning: Senior Counsel must be learned in the law so as to provide sound guidance to their clients and to assist in the judicial interpretation and development of the law;
- Skill: Senior Counsel must be skilled in the presentation and testing of litigant's cases, so as to enhance the likelihood of just outcomes in adversary proceedings;
- Integrity and honesty: Senior Counsel must be worthy of confidence and implicit trust by the judiciary and their colleagues at all times, so as to advance the open, fair and efficient administration of justice;
- Independence: Senior Counsel must be committed to the discharge of counsel's duty to the court, especially in cases where that duty may conflict with clients' interests;
- Disinterestedness: Senior Counsel must honour the cab-rank rule, namely the duty to accept briefs to appear from which they are competent and available, regardless of any personal opinions of the parties or the causes, and subject only to exceptions related to appropriate fees and conflicting obligations;
- Diligence: Senior Counsel must have the capacity and willingness to devote themselves to the vigorous advancement of the clients' interests;
- Experience: Senior Counsel must have the perspective and knowledge of legal practise acquired over a considerable period. As a general criteria, and save in exceptional circumstances, an application shall not be favourably considered unless an applicant has been a member of the Society (or a member of a Society of Advocates or barristers or referral Bar in another country) for at least 15 (fifteen) years. Mere length of period in practise shall not be determinative.[30]

---

[26] Legal Practitioners Act 15 of 1995, s. 79 of original Act (see *Government Gazette* 1141).
[27] The Legal Practitioners Amendment Act 6 of 1999 (*Government Gazette* 2126) did not in fact amend the Legal Practitioners Act 15 of 1995, but rather temporarily suspended sections 79(1), (2) and (3) until such time as they were reinstated by the Minister by notice in the *Government Gazette*. The provison were in fact never reinstated. The Legal Practitioners Second Amendment Act 22 of 2002 (*Government Gazette* 2892) repealed secton 79 in its entirety, as well as repealing Act 6 of 1999. It was brought into force on 1 November 2005 by Government Notice 139/2005 (*Government Gazette* 3529).
[28] See Werner Menges, "Senior Counsel system revived", *The Namibian*, 16 April 2004.
[29] Rules of the Society of Advocates, Rule 10.7.3.
[30] Rules of the Society of Advocates, Rule 10.8.

The applicant's practise is also expected to demonstrate "some or all of the following": experience in arguing cases on appeal; experience in conducting major cases in which the other party is represented by Senior Counsel; experience in conducting cases with a junior; and considerable practise in giving advice in specialist fields of the law. The applicant is also expected to have demonstrated leadership in "developing the diverse community of the Bar" and "making a significant contribution to the Namibian legal practise and the administration of justice in Namibia".[31]

Applications are considered once each year by the elected Bar Council together with all advocates who already hold Senior Counsel status. The Bar Council also seeks comment on the application from an existing or retired judge of the High or Supreme Courts of Namibia. The Bar Council also has discretion to consult with other legal practitioners or members of the judiciary, or other persons or bodies. If anyone consulted objects to the conferral of SC status, the Bar Council gives the applicant an opportunity to respond. The applicant is not allowed to 'campaign' directly or indirectly for support for the application.[32] An unsuccessful applicant has the right to request review of the decision by a general meeting of all members of the Society of Advocates.[33]

Once the designation has been conferred, the advocate in question has the right to use the letters "SC" (denoting *"Senior Counsel"*) after his or her name.[34] However, because the designation is no longer statutory, some judges do not include this designation when referring to counsel in their judgments. Because the designation is listed for advocates from South Africa and other countries when they are appearing in Namibia, local advocates have complained that this makes members of the local bar appear less qualified than their foreign learned colleagues.

The Rules of the Society of Advocates emphasise the need to confer SC status sparingly, to ensure that it is a meaningful indicator of skill and service:

> The system for the designation of Senior Counsel must be administered so as to restrict appointment to those members whose achievement of the qualities set out below displays and presages their ability to provide exceptional service as advocates and advisers in the administration of justice.[35]

The Society of Advocates has adhered to this principle, with only seven advocates currently holding the SC designation. Only three such honours have been conferred in the last five years: to a black male in 2012, a white male in 2013 and a black female in 2017.[36]

11.3 Professional honours in South Africa

"Senior Counsel" is the honours designation available to advocates given in South Africa.[37] The Constitution makes it the President's duty to confer these honours.[38] The President awards these honours annually, upon recommendation of the relevant Bar Council.[39]

---

[31] Rules of the Society of Advocates, Rule 10.8.8-10.8.9.
[32] Rules of the Society of Advocates, Rules 10.5-10.6, 10.10-10.15.
[33] Constitution of the Society of Advocates, s. 15.3.A.
[34] Rules of the Society of Advocates, Rules 10.16.
[35] Rules of the Society of Advocates, Rules 10.3.
[36] The most recent SC designations were awarded to Adv Gerson Hinda, Adv A Corbett and Adv E Schimming-Chase.
[37] General Council of the Bar of South Africa, "Do You Want to be an Advocate?", "What Is The Career Path Of An Advocate?", undated, <www.sabar.co.za/legal-career.html>.

The different constituent bars which form the General Council of the Bar in South Africa have slightly differing procedures, but the basic process is the same (as described in the Supreme Court of Appeal case discussed below):

> In all cases the process starts with an application for appointment by the candidate for silk to his or her bar. The application is then considered by a committee of silks of that bar. Thereafter the names of the approved candidates are presented to the Judge President of the particular high court, who makes a recommendation to the minister [referring to Minister of Justice and Constitutional Development]. The minister in turn makes a recommendation to the President, who confers the status of silk. Judges President are not bound by the decisions of the bar to recommend the successful candidates to the minister. In this way, so the appellants contend, the procedure endeavours to provide for a system of peer review as well as an evaluation by the judges of the high court in which the applicant for silk usually appears.[40]

The conferment of the status "amounts to a public recognition by the President of the professional eminence in which the recipient is held".[41]

An unsuccessful applicant for Senior Counsel status in South Africa brought suit on the question of whether the Constitution gives the President of South Africa the power to confer silk. The Supreme Court of Appeal, overturning the High Court ruling in the applicant's favour,[42] found that the power is covered by the President's constitutional authority to confer honours. The Constitutional Court confirmed the holding of the Supreme Court of Appeal.[43]

One issue considered by the Supreme Court of Appeal was the argument that such honours are conferred by the President only to advocates, and are not given to attorneys, accountants, doctors or any other professionals. The Court found this argument to be without merit, citing the particular historical context for the appointment of senior counsel by the President, and noting that "[t]he reason for this historical distinction is probably that the legal profession and its institutions have traditionally been regarded as integrally related to the administration of justice, which in turn is properly the concern of the head of state". The Court suggested that the extension of the honours system to attorneys might require special legislation since this is not historically a prerogative of the head of state in the same way that honours to advocates are.[44]

The system for conferral of Senior Counsel status has been controversial in South Africa in recent years. One of the government's criticisms of the situation existing before the advent of the new law was that "[b]lack people and women are almost entirely absent from the ranks of senior partners in large firms of attorneys and senior counsel at the Bar".[45] At the same time, some white advocates have reportedly been unhappy that some black colleagues who had argued fewer cases have been

---

[38] South Africa Constitution, s. 84(2)(k) (available at <www.gov.za/documents/constitution-republic-south-africa-1996-chapter-5-president-and-national-executive#84.%20Powers%20and%20functions%20of%20President%20.

[39] General Council of the Bar of South Africa, "Do You Want to be an Advocate?", "What Is The Career Path Of An Advocate?", undated, <www.sabar.co.za/legal-career.html>.

[40] *General Council of the Bar and Another v Mansingh and Others* 2013 (3) SA 294 (SCA) at para 8.

[41] Id at para 12.

[42] *Mansingh v President of the RSA* 2012 (3) SA 192 (GNP).

[43] *General Council of the Bar and Another v Mansingh and Others* 2013 (3) SA 294 (SCA). The holding was confirmed on appeal in *Mansingh v General Council of the Bar & Others* 2014 (2) SA 26 (CC).

[44] *General Council of the Bar and Another v Mansingh and Others* 2013 (3) SA 294 (SCA) at para 31.

[45] Department of justice and Constitutional Development, "The Legal Practice Act", 2015, <www.justice.gov.za/legislation/factsheet-LegalPracticeAct.htm>.

recommended for Senior Counsel status before them.[46] Furthermore, it was argued that the system of conferring silk status on some selected advocates is inherited from the colonial era and thus requires reconsideration.[47] Moreover, the 'silk system' is blamed for resulting in higher fees being charged by advocates with Senior Counsel status.[48]

The new Legal Practice Act 28 of 2014 makes no reference to "senior counsel" status, other than to provide that those who hold this status prior to the commencement of the Act will retain it.[49]

11.4 Professional honours in other jurisdictions

In **England**, the Queen's Counsel designation was originally reserved for barristers. However, in 1995, the English system was reformed to permit solicitors to be so honoured.[50] (The change came about because of the introduction of possible routes whereby solicitors could acquire rights of appearance in the higher courts, thus becoming "solicitor-advocates".) The Lord Chancellor originally recommended candidates. However, debate over the purpose and effectiveness of the Queen's Counsel system led the then-Lord Chancellor to suspend his participation in the appointment of Queen's Counsel in 2003, on the basis of his belief that his role in recommending legal practitioners for the honour did not add value to the designation.[51] In 2004, the Government announced that the process would resume but with a panel, rather than the Lord Chancellor, making the qualitative assessments surrounding the candidates.[52] The current Queen's Counsel Selection Panel is independent of the Bar Council, the Law Society and the Government. It aims to be fair and transparent in identifying excellence.[53] Accordingly, it holds an annual competition in which potential candidates must submit an application and, if invited, participate in an interview before the Selection Panel which will recommend a candidate to the Lord Chancellor.[54] The Panel is currently chaired by a lay person, with four other lay members, two solicitors, two barristers, and a member of the judiciary.[55]

In **Ireland**, the Legal Services Regulation Act 2015 mandated that the Legal Services Regulatory Authority create an Advisory Committee to oversee the granting of "Patents of Precedence".[56] A practitioner who has received the Patent may use the term "Senior Counsel". Patents are available for

---

[46] "Advocates wait for silk status: Whenever you're ready, Mr Prez", *news 24*, 07 September 2014.
[47] Pierre de Vos, "The colonial roots of conferring silk on advocates", *The Daily Maverick*, 29 November 2013 (available at <www.dailymaverick.co.za/opinionista/2013-11-29-the-colonial-roots-of-conferring-silk-on-advocates/#.WYw37Ijyu00>).
[48] O Rogers, "High fees and questionable practices", *Forum Ethics*, April 2012 at 2 (available at <www.sabar.co.za/law-journals/2012/april/2012-april-vol025-no1-pp40-42.pdf>).
[49] Legal Practice Act 28 of 2014, s. 114(4), 118(d).
[50] R Verkaik, "The Big Question: Should we abolish Queen's Counsel?", *The Independent*, 26 July 2006.
[51] S Wilson, R Mitchel, T Storey and N Wortley, "English Legal System Directions", Oxford, 2011 at 391.
[52] Ibid.
[53] Queen's Counsel Appointments, "Background to QC Appointments", undated, <www.qcappointments.org/about-us/introduction/>.
[54] Queen's Counsel, "FAQ for Applicants 2017 Competition" (available at <www.qcappointments.org/wp-content/uploads/2017/02/FINAL-FAQs-for-Applicants-2017.doc>).
[55] Queen's Counsel Appointments, "The Selection Panel", undated, <www.qcappointments.org/about-us/the-selection-panel/>. The ten members listed are: Sir Alex Allan (Chair; lay member); Wanda Goldwag (lay member); Tony King (senior solicitor); Martin Mann QC (senior barrister); Edward Nally (senior solicitor); Quinton Quayle (lay member); Maggie Semple OBE (lay member); Dame Janet Smith (senior judiciary); Shaun Smith QC (senior barrister); Ranjit Sondhi CBE (lay member).
[56] Legal Services Regulation Act 65 of 2015 (Ireland), s. 172 (available at <www.irishstatutebook.ie/eli/2015/act/65/enacted/en/pdf>).

barristers and solicitors alike.[57] The Advisory Committee consists of six members: the Chief Justice (who acts as chairperson), the President of the High Court, the Attorney General, the Chairperson of the Bar Council, the President of the Law Society and a lay member nominated by the Minister.[58] Accordingly, the bulk of committee members are leaders from within the profession. This model allows for decision making by persons who are more likely to be well-informed of candidates' merits than a model in which the monarch (or other government official) is the main decision maker.

In **Nigeria**, the conferring authority for "Senior Advocate of Nigeria" (SAN) status is the Legal Practitioners Privileges Committee (LPPC) established by statute. The designation is available only to barristers. This Act and rules issued by the LPPC in terms of the statute prescribe guidelines for its conferment. The criteria include a minimum practice experience of 20 years (previously 10 years) and that the legal practitioner must have achieved distinction in the legal profession as demonstrated in accordance with the guidelines which are periodically issued. In addition, a legal practitioner who applies to be appointed to the rank of SAN must show that he or she has undertaken a minimum amount of pro bono cases.[59] The LPPC comprises the Chief Justice as chairperson, the federal Attorney-General, one Justice of the Supreme Court, the President of the Court of Appeal, five of the Chief Judges of States of Nigeria, the Chief Judge of the Federal High Court, and five legal practitioners who are Senior Advocates of Nigeria.[60] The LPPC issues guidelines for the conferment of the award of the Rank of SAN.[61] It was reported in July 2017 that 156 lawyers had applied for SAN status, with 72 being shortlisted and 30 approved.[62]

There has been a public discussion recently about the role of SAN due to the fact that the Acting Chief Justice of Nigeria asked the Nigerian Bar Association to nominate its eligible members for possible appointments to the Supreme Court of Nigeria and the Nigerian Bar Association shortlisted nine persons, including six persons with SAN status.[63] It was argued that it would be unfair to allow advocates with SAN status to be appointed to the Supreme Court bench since they have been already been privileged to attain the level of SAN.[64]

---

[57] Legal Services Regulation Act 65 of 2015 (Ireland), s. 170 .

[58] Legal Services Regulation Act 65 of 2015 (Ireland), s. 172.

[59] Legal Aid Act, 2011 s. 18(2). ("A legal practitioner who applies to be appointed to the rank of Senior Advocate of Nigeria shall be required to show evidence of diligent conduct of not less than three pro bono cases in the legal year immediately preceding his application.")

[60] Legal Practitioners Act [Chapter 207](Nigeria), s. 5; Dr Fabian Ajogwu, SAN [Senior Advocate of Nigeria], "Mansingh's Case & Fate of Silks in South Africa", *My Legal Notes* (blog), 17 May 2012.

[61] Guidelines for the Conferment of the Award of the Rank of Senior Advocate of Nigeria, 2016, Federal Republic of Nigeria, Official Gazette 5. August 2016, Vol 103 No. 123 at B389-401. The first guidelines were issued in 2007 and have since been reviewed four times. The Nigeria Lawyer, "LPPC releases new guidelines for the conferment of the rank of SAN in Nigeria", 31 August 2016 (available at <http://thenigerialawyer.com/lppc-releases-new-guidelines-for-the-conferment-of-the-rank-of-san-in-nigeria/>.

[62] Wali Akinola, "Festus Keyamo, "29 others become new Senior Advocates of Nigeria", [July 2017], *NAIJ.com* (available at <www.naij.com/1113667-breaking-festus-keyamo-29-senior-advocates-nigeria.html>). These numbers appear to apply only to the year in question. Note that this article appears to have confused the Nigerian Judicial Council with LPPC.

[63] D Iriekpen and S James, "Babalakin Counsels against appointment of Senior Advocates to S' Court, except …", *ThisDay*, 24 march 2017, available at <www.pressreader.com/nigeria/thisday/20170324/281479276241940>; L Okenwe, "Lawyers differ on appointment to the Supreme Court", *The Authority*, 22. February 2017, available at <http://authorityngr.com/2017/02/Lawyers-differ-on-appointment-to-the-Supreme-Court/>.

[64] L Okenwe, "Lawyers differ on appointment to the Supreme Court", *The Authority*, 22 February 2017, available at <http://authorityngr.com/2017/02/Lawyers-differ-on-appointment-to-the-Supreme-Court/>.

Uganda provides for Presidential designation of any legal practitioners as Senior Counsel if they have been practising for more than 10 years, based on the recommendation of an Advocates (Special Rank) Committee consisting of the Chief Justice, the Attorney-General and the Chairperson of the Uganda Law Society. The Attorney-General is automatically granted this rank upon appointment to the position, but otherwise no more than three advocates may be designated with this rank each year and the total number of Senior Counsel may never exceed 25. The rank can be revoked in cases of professional misconduct.[65]

In **Kenya**, the President may confer Senior Counsel status on any legal practitioner of 15 years standing who is a person of "irreproachable professional conduct who has rendered exemplary service to the legal and public service in Kenya".[66]

11.5 Other honours

Professional honours need not be limited to Senior Counsel designations, nor to barristers/advocates.

In **Namibia**, the Judge JP Karuaihe Trust, in consultation with the Law Society, annually confers the Legal Excellence Awards on law students and legal practitioners. In 2016, these awards included the following:

- Best Student Excellence Awards (Best JTC Student and Best LLB Final Year Student)
- Legal Excellence Award for Social Responsibility
- Legal Excellence Award for Human Rights.

To give added publicity to the awards, the Law Society arranges an event prior to its AGM when a large number of members can be present to witness their peers be awarded for their achievements. The awards also generally receive good media coverage.[67]

In **England and Wales**, the Law Society offers Excellence Awards for solicitors.[68] It recognises individuals across several categories including Junior Lawyer of the Year, Woman Lawyer of the Year, Solicitor of the Year (In-house Counsel) and Solicitor of the Year (Private Practice). It also

---

[65] The Advocates (Special Rank) Regulations, Statutory Instrument 267-8 (S.I. 18-1978) (available at <uls.or.ug/doc/Advocates_Regulations267.pdf>. The Attorney-General apparently maintains the rank after leaving office, unless it is removed for misconduct. See, eg, Anthony Wesaka & Isaac Imaka "Mbabazi hits back at Deputy Attorney General over petition remarks", *Daily Monitor*, 21 March 2006, available at <www.monitor.co.ug/News/National/Mbabazi-hits-back-at-Deputy-Attorney-General-/-/688334/3126176/-/senxu5/-/index.html> ("Chief Justice Bart Katureebe said the petitioner is a former attorney general and that by virtue of that, he is a senior counsel.")

[66] Advocates Act [Chapter 16] (Kenya), s. 17(1). The legal profession in Kenya is fused, with the term "advocate" referring to all legal practitioners. See The Law Society of Kenya, "About LSK", undated, <http://lsk.or.ke/about-lsk/>; Seafarers' Rights. "Using Lawyers in Kenya", 2012, <http://seafarersrights.org/wp/wp-content/uploads/2014/10/KEN_LEGAL-GUIDE_USING-LAWYERS_2012_ENG.pdf>.

[67] "Pro bono work by Legal practitioners" *The Namibian*, 2 February 2017; D Steinmann, "JP Karuaihe Trust awards students and legal performers", *The Namibia Economist,* 21 December 2016, available at <https://economist.com.na/21260/extra/jp-karuaihe-trust-awards-student-and-legal-performers/>.

[68] The Law Society, "Law Society Excellence Awards 2016", undated, <http://lawsocietynamibia.org/content/news/press-statements-2016/judge-jp-karuaihe-jpk-trust-legal-excellence-awards>; Daniel Steinmann, "JP Karuaihe Trust awards student and legal performers", *Namibia Economist*, 21 December 2016; Nangula Shejavali, "LAC gets award for human rights work", *The Namibian*, 24 Oct 2008.

recognises teams for achievements such as Excellence in Pro Bono, Excellence in Diversity and Inclusion, and Excellence in Technology.[69]

The **Law Society of Upper Canada** bestows the Law Society Medal on professionals who have made significant contributions to the profession.[70] It also awards other medals for more specific types of service, such as one to celebrate a professional's contributions to community service, one to honour a distinguished paralegal and one to recognise the advancement of human rights.[71]

The Tanganyika Law Society in **Tanzania** has an Excellence Award Committee.[72] Having a committee within the regulatory body could be a promising mechanism for determining who receives certain honours.

In the **United States**, private entities sometimes attempt to identify top legal professionals. For example, a group named Best Lawyers compiles a list of top lawyers by soliciting votes from practicing professionals.[73] This list purportedly represents the top 4% of practicing lawyers in the country.[74] As of 2016, Best Lawyers was publishing lists in 75 countries across the world.[75]

However, awards such as these, without the weight of tradition attached to the Queen's Counsel / Senior Counsel status generally do not command the same degree of prestige. In order for an honour to translate into an increase in status or earning power, a rigorous selection process and a wide degree of recognition is required. An example which comes to mind from another sector is the university league tables published annually in the UK by a few different sources, many of which carry great weight nationally and internationally and thus have an influence on the popularity of the universities covered.[76] Any honour or ranking which seeks to be a source of significant influence requires time to become established.

---

[69] For example, see The Law Society, "Excellence Awards winners 2016", undated, <www.lawsociety.org.uk/support-services/events-training/excellence-awards/previous-winners/2016-winners/>.

A legal professional in England and Wales might also receive honours under the more general British New Year Honours System, which includes designation as knight/dame, Commander of the Order of the British Empire (CBE), Officer of the Order of the British Empire (OBE), and others. The government can recognize legal professionals who have contributed to public life through these honours. See Gov.uk, "The Honours System", undated, <www.gov.uk/honours/types-of-honours-and-awards>; Government Legal Department and Attorney General's Office, "Legal profession recognized in New Year Honours", 5 January 2017 (available at <www.gov.uk/government/news/legal-profession-recognised-in-new-year-honours>).

[70] The Law Society of Upper Canada, "The Law Society Medal", undated, <www.lsuc.on.ca/law-society-medal/> (listing the 2017 winners).

[71] The Law Society of Upper Canada, "Medals, Awards and Honours", undated, <www.lsuc.on.ca/with.aspx?id=765>.

[72] Tanganyika Law Society, "TLS Committees", undated, <http://tls.or.tz/c-tls-committees/>.

[73] Best Lawyers, "Frequently Asked Questions", undated, <www.bestlawyers.com/methodology/faq\>.

[74] U.S. News, "U.S. News – Best Lawyers® Releases 2017 Best Law Firms List", 1 Nov 2016, <www.usnews.com/info/blogs/press-room/articles/2016-11-01/us-news-best-lawyers-releases-2017-best-law-firms-list>.

[75] Best Lawyers, "History", undated, <www.bestlawyers.com/history>.

[76] See, eg, Rebecca Mitchell, "The Which, When and Why of University League Tables Students' Use and Perceptions of Institutional vs Subject Rankings". The Knowledge Partnership, September 2015 (at 31: "University league tables are an established resource known to and used by many applicants during their university decision-making process.")

12. Entry into the profession

The **United Nations Basic Principles on the Role of Lawyers** state:

> Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.[1]

In 2012, the imposition of certain requirements as a pre-requisite to legal practise was challenged in **Kenya**. (Note that the term "advocate" in Kenya is synonymous with legal practitioner.[2]) Kenya's Advocates Act requires that advocates, after completing the requisite training programme and being issued with a practising certificate, may not set up in private practice until after they have worked for two years in the office of the Attorney-General, in an organization approved by the Council of Legal Education, or under the supervision of an advocate with at least five years of practise experience.[3] Two newly certified advocates challenged this requirement, arguing that it was unconstitutional because it amounted to slavery or servitude, forced labour and discrimination against young advocates. The Court rejected the arguments that the rule constituted slavery or forced labour, on the grounds that pursuit of a legal career is a voluntary act, and those who choose to pursue this career must abide by the conditions set by statute in respect of training, qualification and practice. Those who wish to set up on private practise similarly make a voluntary choice, and the temporary restriction which is imposed does not prevent a young advocate from earning a living.[4] The Court also rejected the discrimination argument, noting that the experience requirement applied to all advocates of any gender, race or age and also served a rational and legitimate purpose:[5]

> The pursuit of law and legal practice is not just a business. It is a profession which values ethics, professional responsibility and is committed to the highest ideals of justice. I agree with the contention by the Society that section 32 is necessary to enable newly admitted advocates acquire experience and skills for a limited period of tutelage under their more experienced colleagues. It is a concession that raw knowledge gained outside the confines of real life experience does not guarantee the provision of quality service to the public.[6]

12.1 Issues to consider

Designated Education Board: Having a designated board to oversee educational requirements allows for membership tailored to that purpose. Thus, professionals with appropriate expertise can comprise the decision makers.

Rigidity: In both Namibia and South Africa, a statute designates the personal and educational requirements a candidate must satisfy before becoming a legal practitioner. This makes for more rigidity than a system without statutorily-mandated requirements. A benefit of setting qualifications by law is that this sets a nationwide minimum qualification standard, acting as a form of quality control.

---

[1] United Nations Basic Principles on the Role of Lawyers, 1990, Art 9.
[2] See The Law Society of Kenya, "About LSK", undated, <http://lsk.or.ke/about-lsk/>; Seafarers' Rights. "Using Lawyers in Kenya", 2012, <http://seafarersrights.org/wp/wp-content/uploads/2014/10/KEN_LEGAL-GUIDE_USING-LAWYERS_2012_ENG.pdf>.
[3] Advocates Act [Chapter 16] (Kenya), s. 32.
[4] *Okenyo Omwansa George & another v Attorney General & 2 others* [2012] eKLR at paras 57-66 (available at <http://kenyalaw.org/Downloads_FreeCases/85311.pdf>).
[5] Id at paras 67-72.
[6] Id at para 70.

However, having statutory requirements is risky in an environment where legislation does not move quickly, as it may be challenging to update the legislation as needed.

High barriers to entry: If a body of practicing legal professionals sets the requirements for entry into the profession, there may be a conflict of interest in the sense that it would be in existing practitioners' best interest to create high barriers of entry to suppress competition.[7] Moreover, a system with excessively high barriers to entry might disproportionally disadvantage poorer people who seek to join the profession but cannot afford the requisite education. High entry qualifications may also increase the costs of legal services to clients. Having a smaller body such as a Board decide on entry qualifications may help mitigate potential conflicts of interest, by making decision-makers more visible and thereby more accountable.

Low barriers to entry: Lowering barriers can be a tool to assist transformation in situations where there was previous unfair disadvantage. However, if the standards for entry into the profession are too lax, the public will suffer because there will be an excess of practitioners who are not able to provide high-quality service. This could damage the reputation of the legal profession and hamper the work of the courts.

12.2 Entry into the profession in Namibia

Entry requirements: The Legal Practitioners Act 15 of 1995 sets out the criteria for persons to be admitted into the profession. A person must be "a fit and proper person"; have Namibian citizenship, permanent residency or (in some cases) a work permit; and satisfy the prescribed academic and practical legal training requirements. As discussed above in section 2.10, these requirements include

- a degree in law from the University of Namibia or an approved foreign equivalent (with the law leaving the length and contents of this law degree unspecified;
- practical legal training which includes a course of post-graduate study and attachment to a practicing legal practitioner
- passing the Legal Practitioners Qualifying Exam.[8]

Supervisory body: The Board for Legal Education is the body that certifies that a candidate has satisfied the academic and practical legal training requirements.[9] It also approves the syllabus for the course of post-graduate study and supervises the Legal Practitioners' Qualifying Examination.[10] The Board includes legal professionals and legal educators among its membership. It is composed of 11 members: the Chief Justice (Chairperson), four persons appointed by the Minister (one of whom must be employed in the training of candidate legal practitioners), one person appointed by the Attorney General, the Prosecutor General, the Dean of the Faculty of Law of the University of Namibia and three legal practitioners appointed by the Council of the Law Society.[11] The Board is responsible for approving the syllabus for post-graduate study, setting the guidelines for practical training, and supervising the Legal Practitioners' Qualifying Examination.[12]

---

[7] "Not enough lawyers?", *The Economist*, 3 September 2011 (available at <www.economist.com/node/21528280>).
[8] Legal Practitioners Act 15 of 1995, s. 4-5.
[9] Legal Practitioners Act 15 of 1995, s. 5.
[10] Legal Practitioners Act 15 of 1995, s. 11.
[11] Legal Practitioners Act 15 of 1995, s. 8.
[12] Legal Practitioners Act 15 of 1995, s. 11.

Academic qualifications: In the past, the Faculty of Law offered a B Juris degree which could be obtained after three years of study and an LLB degree after two additional years of study.[13] The B Juris, combined with certain required practical training, was a sufficient qualification for employment as a magistrate or a prosecutor in the lower courts, as well as for other jobs which did not require a full legal professional qualification. An LLB was required for entry into the JTC training programme stipulated under the Legal Practitioners Act 15 of 1995 as a requirement for practising law in Namibia.

In 2012, the Law Faculty began phasing out these two undergraduate degrees. It now offers new entrants only a four-year undergraduate LLB degree. One year of service in the university's legal aid clinic is compulsory for final year LLB students.

There are no legislative requirements for law teachers (although this is mandated in some jurisdictions) and no official regulatory body; according to the Law Faculty of UNAM, most of its full-time law professor or lecturers hold at least a Master's degree in law, although this does not seem to be a hard and fast requirement.[14] Law teachers in Namibia are free to become members of the Society of Law Teachers of Southern Africa (SLTSA), a voluntary body which aims at promoting research and teaching in the field of law, furthering the common professional interests of teachers of law and representing their views.[15] SLTSA is open to law teachers of universities anywhere in Southern Africa.

Justice Training Centre: The Justice Training Centre (JTC) at the University of Namibia operates the required course of post-graduate study for the training of candidate legal practitioners who are in possession of an LLB degree (or an approved equivalent degree from another country). This course currently takes place over nine months, which includes attendance at three months of compulsory full-time lectures at the JTC. During the entire nine-month period, the candidate legal practitioner must serve for at least 60 hours/month in attachment to a practicing legal practitioner.

Legal Practitioners' Qualifying Examination: The JTC administers the Legal Practitioners' Qualifying Examination (LPQE) in accordance with regulations issued under the Legal Practitioners Act 15 of 1995 and instructions from the Board of Legal Education. The regulations set the topics which are to be covered by the LPQE and specifies how marks will be calculated.

The current regulations require that continuous assessment on written assignments done during the year and the results on the Mid-Year Examination will constitute components of the final mark; the mark in each subject on the LPQE itself counts for 60% of the final mark, while continuous assessment counts for 40% of the final mark. The candidate must obtain a score of 40% on each subject in the LPQE and an overall mark of 50% on the aggregate of the LPQE score and the continuous assessment mark. A candidate must pass every subject (except the optional topic of conveyancing), and five attempts are allowed; if the candidate has still not passed all of the subjects, he or she must wait five years for another attempt unless the Board of Legal Education gives consent for an exception to this

[13] Under the previous programme, students were eligible to register for an LLB if they held a B Juris degree or had achieved prescribed credits in the B Juris programme after the third year of study. It was also possible for students to be admitted to the LL B programme if they held a B Juris or an equivalent degree from another university.
[14] Faculty of Law of UNAM, "Overview", undated, <www.unam.edu.na/faculty-of-law>.
[15] SLTSA, "About", undated, available at <www.sltsa.org.za/about/>.

rule. A successful candidate will receive a "Certificate in Law Practice" from the Board of Legal Education indicating the candidate's final grade.[16]

Fees: Fees are set by regulation. Enrolment in the required post-graduate programme is N$700, plus N$700 tuition fee for each subject (for a total of at least N$8400: N$700 plus N$7700 for the required 11 subjects). In addition, there is an examination fee for each subject of N$600 for the first sitting and N$650 for each subsequent sitting (for a minimum of N$6600 if all 11 required subjects were passed on the first try).[17] Thus, the minimum cost of the post-graduate programme is N$15 000.

12.3 Entry into the profession in South Africa

Entry requirements: The Legal Practice Act 28 of 2014 lays out the requirements for who may be admitted to practice as a legal practitioner in South Africa. A person must have fulfilled the required educational and practical qualifications, must be a South African citizen or permanent resident and "a fit and proper person".[18] The educational and practical requirements include:

- a South Africa LLB (which requires either four years of study for an LLB or five years of study as a combination of a three-year Bachelor's degree followed by a two-year LLB degree);
- vocational training including a community service requirement which will be prescribed by the Minister
- a legal practice management course (for attorneys and advocates who intend to take briefs directly from clients);
- success on a competency-based examination or assessment.[19]

Supervisory body: Unlike Namibia's statute, which establishes a Board for Legal Education separate from the Council of the Law Society, South Africa's statute makes the Legal Practice Council itself determine the procedures and directions regarding practical training;[20] the academic qualifications are provided in the statute, and it is not clear who will take responsibility for the competency-based examinations or assessments for candidate legal practitioners, as this is to be set forth in future rules.

As noted above, the Council will consist of 16 legal practitioners, 2 teachers of law, 3 persons designated by the Minister, 1 person designated by Legal Aid South Africa, and 1 person designated by the Legal Practitioners' Fidelity Fund Board.[21] However, even though Namibia's Board of Legal Education is deliberately composed for the purpose of furthering legal education, both Namibia's Board and South Africa's Council only have two members who are explicitly legal educators (two out of 11 in Namibia and two out of 23 in South Africa).

12.4 Entry into the profession in other jurisdictions

General: In the **United States**, each state sets its requirements for practising in the state. Thus, a practitioner must pass that particular state's bar examination and meet other educational and character

[16] Regulations relating to candidate legal practitioners, Government Notice 228/1995 (Government Gazette 1207), as amended by Government Notice 58/1997 (Government Gazette 1528), Government Notice 67/1997 (Government Gazette 1537) and Government Notice 8/1999 (Government Gazette 2025).
[17] Id at Annexure 6.
[18] Legal Practice Act 28 of 2014 (South Africa), s. 24.
[19] Legal Practice Act 28 of 2014 (South Africa), ss. 26, 29.
[20] Legal Practice Act 28 of 2014 (South Africa), s. 28.
[21] Legal Practice Act 28 of 2014 (South Africa), s. 7

and fitness requirements as determined by the state.[22] Different entities administer the bar examination in each state, such as (for example) the Alaska Bar Association, the Florida Board of Bar Examiners and the Supreme Court of Georgia's Office of Bar Admissions.[23] However, there are aspects of the system with some degree of uniformity. Twenty-six states and the District of Columbia adhere to a Uniform Bar Examination (UBE), a standardized bar exam that can be used in any jurisdiction that accepts the UBE.[24] Moreover, most states require that a student graduate from a law school accredited by the American Bar Association in order to be eligible to practise.[25]

In **Malawi**, there is a statutory Council of Legal Education which exercises a large degree of control over legal education. It has authority to

- make regulations for the syllabus and curriculum of legal education in law schools in Malawi;
- establish, conduct, regulate, manage, control and supervise courses of legal education in Malawi;
- conduct, regulate, manage, control and supervise the holding of examinations in law in Malawi, including power to set the examination papers and to provide for marking;
- to advise and make recommendations to the Minister on matters relating to legal education and qualifications for the admission and enrolment of legal practitioners.[26]

This Council is comprised of

- the Chief Justice of Malawi (Chairperson)
- the Attorney General or a representative appointed by him or her;
- a judge of the High Court, to be appointed by the Chief Justice;
- a magistrate appointed by the Chief Justice;
- two persons in the legal service of the Government appointed by the Minister;
- the chairperson of the Malawi Law Society;
- a legal practitioner nominated by the Malawi Law Society and appointed by the Minister;
- two law teachers appointed by the Minister.[27]

Entrance exams for admission to law school: In many countries law students need to pass an entrance exam to be admitted to a university for the study of law. For example in the **United States**, besides having a bachelor's degree or its equivalent (a four-year university degree), students are required to take the Law School Admissions Test (LSAT), a test which is designed to measure mental qualities such as analytical thinking and problem-solving ability. In **France**, students need to pass an entry examination which can be taken only three times.[28] In **Ghana**, in order to qualify for admission to the Ghana School of Law for the Professional Law Course which is required in order to be enrolled as Barristers at Law or Solicitors of the Supreme Court, applicants have to pass an entrance examination and an interview.[29]

---

[22] For example, see Lawyer Edu, "Steps to Become a Lawyer/Attorney", undated, <www.lawyeredu.org/> (providing information on the requirements for admission in each state).
[23] ABA For Law Students, "Bar Exam Directory", undated, <http://abaforlawstudents.com/stay-informed/bar-exam-directory/>.
[24] Kaplan Bar Review, "What Is the Uniform Bar Exam (UBE)?", undated <www.kaptest.com/bar-exam/law-school/uniform-bar-examination>.
[25] "Not enough lawyers?", *The Economist*, 3 September 2011 (available at <www.economist.com/node/21528280>).
[26] Legal Education and Legal Practitioners Act [Chapter 3:04] (Malawi), s. 4.
[27] Legal Education and Legal Practitioners Act [Chapter 3:04] (Malawi), s. 5.
[28] Les Avocats, "Accessing the legal profession in France", undated, <www.cnb.avocat.fr/en/accessing-legal-profession-france>.
[29] Ghana School of Law, "Entry Requirements", undated, <http://gslaw.edu.gh/admissions/entry-requirements/>.

Law teachers: In **Germany**, the *Hochschulrahmengesetz* (Higher Education Framework Act) sets the minimum prerequisites for becoming a professor or lecturer in any field at a public university. A professor must have a completed university degree, educational suitability and special qualifications for academic work, usually as demonstrated by the quality of his or her PhD along with any additional scientific achievements. A person who is appointed as a professor is assigned the status of a civil servant with either limited or unlimited tenure.[30] However, since the Constitution guarantees academic freedom, the role of the state is limited to setting minimum standards.[31]

Student law clinics: As a way to facilitate practical experience, law clinics exist at each law school in **South Africa**.[32] Law clinics enhance legal education by giving students the opportunity to practice such lawyering skills as interviewing, negotiating and analysing cases, while at the same time expanding the resources for legal representation for indigent people and organisations.[33] The professional rules for the attorneys' profession include an entire section dealing with the requirements that must be met by a recognised law clinic.[34]

Representation of clients by law students: In **South Africa**, one university law clinic suggested that suitably-qualified final-year law students should have a right of appearance in the lower courts.[35] This could be a way to enhance access to justice while also providing practical training.

Qualifying exams: In **England and Wales**, the Solicitors Regulatory Authority (SRA) proposed a new system with a series of centralised exams that a would-be practitioner must pass in lieu of any required courses or degree. Additionally, the SRA's proposal would have allowed a candidate to take each exam repeatedly if necessary, with no limit on the number of times a candidate may take the exam and no restriction on how much time may pass between completion of all exams.[36] The Law Society expressed concerns about this proposal. It argued that permitting students to re-take the exams infinitely without restricting the time period within which all exams must be completed might lead to a situation in which a student has forgotten the content of the first exam by the time he or she has completed the series years later.[37] It is also worth noting that if the exams involve a fee, the policy of allowing a candidate to re-take exams indefinitely would benefit wealthy students who can afford such an option. The Law Society also expressed concerns regarding the removal of a required educational curriculum, fearing that such a system would make it harder for poorer students to secure funding for legal education if set courses are no longer required.[38]

---

[30] *Hochschulrahmengesetz*, paras 44-46.
[31] German Constitution, Art 5(3).
[32] P Maisel, "Expanding and Sustaining Clinical Legal Education in Developing Countries: What we can learn from South Africa", *Fordham International Law Journal*, Vol. 30, Issue 2, 2006 at 374.
[33] Id at 375-376.
[34] For example, according to rule 52.4 of the rules for the attorneys' profession, the legal services provided by a recognised law clinic may be rendered only to persons who would not otherwise be able to afford them.
[35] Submission of Wits Law Clinic on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 45 (available at www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf).
[36] "Proposed changes for entry to the solicitors' profession would disproportionately affect poorer students, warns Law Society", *The Law Society*, 16 September 2015(available at <www.lawsociety.org.uk/news/press-releases/proposed-changes-for-entry-to-the-solicitors-profession-would-disproportionately-affect-poorer-students-warns-law-society/>).
[37] Ibid.
[38] Ibid.

Practical training and experience: To become a solicitor in **England and Wales**, after graduating from law school candidates have to complete a one-year full-time Legal Practice Course.[39] Subsequently, candidates have to fulfil a two-year training contract with a firm of solicitors.[40]

In **Germany**, to practice law, legal practitioners have to successfully undertake two state examinations, with the second one being taken only after having completed a mandatory two-year clerkship program. During the clerkship, clerks have to work in all major fields of legal practice; they are required to work for a judge, in a government agency or for a ministry, in a law firm and for a district attorney.[41] During the clerkship, clerks receive a monthly allowance paid by the state in which they undergo the clerkship.

In **South Africa**, after having obtained an LLB degree, law students must currently complete at least two years of service under a contract of articles of clerkships. They must also attend a course approved by their provincial law society.[42] In addition, the Law Society of South Africa runs a mentorship program. In the course of the program a mentee, which is a newly-admitted attorney, is assigned to a mentor, who is an attorney with at least eight years' experience in a specific area of law. The mentors and mentees are matched according to their location and the skills that are supposed to be transferred.[43]

Community service or pro bono work: In the **United States,** New York was the first state to require lawyers to perform unpaid work as a condition of being licensed to practice.[44] Applicants are required to perform 50 hours of pro bono services in order to be admitted to the New York State Bar.[45]

Previous criminal convictions: In the **United States**, every jurisdiction requires bar applicants to prove that they are of good moral character and otherwise fit to practice law. However, having a criminal record does not necessarily mean that applicants are barred from admission to the bar.[46] For example, in the state of **Indiana**, a felony conviction is *prima facie* evidence of lack of the requisite good moral character which the applicant has the burden to overcome.[47] In the state of **Texas**, a felony conviction or probation for a felony offence with or without an adjudication of guilt is a bar to application for five years after the completion of sentence or probation. Thereafter, applicants must

---

[39] Law Society of England and Wales, "The Legal Practice Course", undated, <www.lawsociety.org.uk/law-careers/becoming-a-solicitor/qualifying-as-a-solicitor/legal-practice-course/>.
[40] Law Society of England and Wales, "Period of recognised training", undated, <www.lawsociety.org.uk/law-careers/becoming-a-solicitor/qualifying-as-a-solicitor/period-of-recognised-training/>.
[41] Deutsches Richtergesetz (German judges' law), s. 5(1); German Federal Lawyers Act (BRAO), s. 4.
[42] Law Society of South Africa, "Compulsory Course for Candidate Attorneys", undated, <www.lssalead.org.za/candidate-attourneys/compulsory-course-for-candidate-attorneys>. See Attorneys Act 53 of 1979, s 2(a)(c).
[43] Law Society of South Africa, "Mentorship", <www.lssalead.org.za/legal-practitioners/mentorship-programme>.
[44] A Barnard, "Top Judge makes free legal work mandatory for joining State Bar", *The New York Times*, 1 May 2012 (available at <www.nytimes.com/2012/05/02/nyregion/new-lawyers-in-new-york-to-be-required-to-do-some-work-free.html>).
[45] New York State Unified Court System, "Pro Bono Bar Admission Requirements", undated <www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml>; see Rules of the Chief Administrative Judge, s. 118.1.
[46] National Conference of Bar Examiners and American Bar Association Section of Legal Education and Admission to the Bar, "Comprehensive Guide to Bar Admission Requirements 2016" at 5 (available at <www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2016_comp_guide.authcheckdam.pdf>).
[47] Ibid.

demonstrate present good moral character.[48] To be admitted to the State Bar of **California,** applicants must go through a background check and receive a positive moral character determination, as well as proving that they have complied with any court order for child or family support.[49]

Professional recommendations: In **Uganda**, to become an advocate (an enrolled lawyer with a right of audience in court) an applicant has to have two recommendations from advocates with current practicing certificates who have practiced for more than three years.[50]

[48] Id at 6.
[49] The State Bar of California, "Admission Requirements", undated, <www.calbar.ca.gov/Admissions/Requirements>.
[50] Uganda Law Society, "Become an advocate", undated, <www.uls.or.ug/members/become-an-advocate/>.

13. Transformation: Making the profession representative of society

The **United Nations Basic Principles on the Role of Lawyers** charge Governments, professional associations of lawyers and educational institutions to ensure that there is no discrimination in the legal profession with respect to entry or continued practice "on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status" – but notes that a requirement, that a lawyer must be a national of the country of practice shall not be considered discriminatory.[1] Furthermore, these Principles state:

> In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.[2]

The transformation of the legal profession is essential to ensure the transformation of the judiciary.

Transformation is a particular challenge in Namibia (and in South Africa) given the impact of apartheid and lingering race bias, and pervasive sex discrimination both before and after Independence. In South Africa, the concept of a transformed legal profession has been described as "an open, bias-free and non-hierarchical profession which sees the removal of prejudices so that talent can flourish, unhindered by the assumptions that are often linked to the characteristics of race, sex, gender and sexual orientation, among others".[3] It goes on to state:

> Transformation is not a case of facilitating the appointment of less qualified black lawyers to senior positions; rather, it is about the removal of barriers that impede talented lawyers from opportunities to develop and gain skills, experience and knowledge within the legal profession because they are black, women, lesbian, living with a disability or disease or, in some way, non-compliant with the dominant homogenous culture.[4]

To assess transformation, it is necessary to consider "the entire lifespan of a legal career".[5]

This section contemplates measures which have been adopted to encourage diversity and to counter the impact of past discrimination.

13.1 Issues to consider

Enhancing ability of profession to serve clients: Promoting diversity among the professional base will likely have a positive impact on the profession's ability to serve the public, as a diverse set of professionals will be better able to relate to a diverse set of clients.[6] It may be easier for members of the legal profession to effectively communicate with and represent their clients if the lawyer and the client share a similar background, and especially if the lawyer can communicate effectively in the client's home language. This is a special consideration in a jurisdiction like Namibia, which has a wide

---

[1] United Nations Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, art 10 (available at <www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>)

[2] Id, Art 11.

[3] Centre for Applied Legal Studies, "Transformation of the Legal Profession", August 2014 at 9.

[4] Id at 4.

[5] Ibid.

[6] "Promoting diversity in the legal profession", *The Law Society [UK]*, 14 October 2016 (available at <www.lawsociety.org.uk/support-services/research-trends/promoting-diversity-in-the-legal-profession/>).

diversity of cultures and languages. Moreover, it has been shown that people have less confidence in a legal system comprised of persons who do not look like them or share their cultural experiences.[7]

Potential ineffectiveness of affirmative action measures: Policies that aim to promote diversity in the profession can lead to counterproductive results if they are not carefully crafted and implemented. For example, in the United States, a study found that many diversity programmes do not actually increase representation of minorities and women. Instead, the mere existence of a diversity policy can lead persons (especially those in the advantaged group) to discount allegations of discriminatory treatment, and it can cause those in the advantaged group to feel that they are being treated unfairly. Moreover, experiments in the United States revealed that the existence of diversity programmes in a company *did not* on its own make minorities feel as though a company would treat them more fairly. A programme that aims to promote diversity should focus on mechanisms of accountability rather than just promoting diversity in name.[8]

Speed versus sustainability: In South Africa, Judge Phineas Mojapelo noted the need to make sure that the speed of transformation does not outpace sustainability: "It will be fruitless to bring quick-fix measures overnight that will simply be swept away by lack of attention to sustainability. Effectiveness and sustainability must underpin our transformation programme as we resolve to speed it up." One example which this judge cites is the changes to the requirements for obtaining a law degree which have resulted in "quantity but certainly not quality". He recommended that there should be a redesigned LLB which is structured as a postgraduate degree with initial non-legal courses which will enhance basic underlying skills.[9] Interestingly, it has been suggested that having excessive numbers of black legal practitioners entering the profession dilutes the chances of a black candidate attorney securing employment or a black legal practitioner getting briefed.[10]

Maternity leave and parenting: Maternity leave can be particularly challenging for sole practitioners and women in small firms. Furthermore, court work is difficult to combine with the unpredictable demands of parenting, which – due to persisting social stereotypes – tends to fall predominantly on mothers.

Black women: Special consideration should be given to the position of black women in the legal profession, given that they sit at the intersection of racism and sexism.

13.2 Transformation in Namibia

Membership of Council: As discussed above, the Legal Practitioners Act 15 of 1995 has mechanisms for promoting diversity among the Law Society's leadership. At least half of the Council members

---

[7] Will A Gunn, "From the Chair", *The Innovator*, Vol 2, No 1, December 2016 at 2 (available at <www.americanbar.org/content/dam/aba/images/racial_ethnic_diversity/Innovator_Vol02Issue01_.pdf>).

[8] Tessa L Dover, et al., "Diversity Policies Rarely Make Companies Fairer, and They Feel Threatening to White Men", *Harvard Business Review*, 04 January 2016 (available at <https://hbr.org/2016/01/diversity-policies-dont-help-women-or-minorities-and-they-make-white-men-feel-threatened>).

[9] Deputy Judge President, Phineas Mojapelo, South Gauteng High Court, edited version of an address to the annual general meeting of the Limpopo Law Council in Polokwane, 7 September 2012 (available at <www.saflii.org/za/journals/DEREBUS/2012/101.pdf>).

[10] Thuli Madonsela, speech to Black Lawyers Association national general meeting, 21 May 2016, Pietermaritzburg, KwaZulu-Natal (as reported in Mapula Thebe, "The culture of racism and its effects on black legal practitioners", *De Rebus*, 1 July 2016, <www.derebus.org.za/culture-racism-effects-black-legal-practitioners/>).

must be previously racially-disadvantaged, with the chairperson alternating year to year between a racially-advantaged person and a racially-disadvantaged person, with the vice-chairperson being from the opposite group in each case.[11] However, although the Act contemplates diversity of race in the Council, it does not require diversity along other lines, such as gender, region or home language. Nevertheless, with respect to gender balance, there have been a number of female members of the Council as well as female Presidents.[12] The Namibia Law Association, which is a voluntary group of lawyers, promotes transformation in the legal profession and seeks to advance the interests of law firms which were historically disadvantaged.[13] Looking at diversity from other angles, while the Act does specify that at least half of the Council members must be legal practitioners in private practice, it does not discuss representation of other types of professions, such as advocates, academics, paralegals, judges or laypersons.

Statistics: The comparative numbers presented in section 2 show that the legal profession, once almost the exclusive province of white men, has certainly diversified since Independence. The issue is whether the pace is sufficient, and whether all previously-disadvantaged groups are now enjoying fair opportunities to enter and succeed in the legal profession.

13.3 Transformation in South Africa

Membership of Council and other bodies: South Africa's Legal Practice Act 28 of 2014 mandates diversity in the membership of the Legal Practice Council. However this diversity reflects diversity of professional roles rather than diversity of the population. For example, the Legal Practice Act mandates that the 23-person Legal Practice Council must consist of ten practising attorneys, six practising advocates, and various other profession-oriented requirements.[14] It recommends attention to race and gender demographics in all of the key bodies created by the legislation, but does not mandate that the Council possess any particular diversity of race or gender.[15] It similarly promotes the inclusion of persons with disabilities, without requiring this.[16]

It is relevant to note that the two voluntary professional bodies mandated by the law to assist with the transition to the new set-up are both focused on the empowerment of previously-disadvantaged persons. The Black Lawyers Association focuses on empowering black lawyers, although its membership is open to all.[17] It strives to achieve this through, amongst other things, sharing information about instances of racism against members of the black community[18] and hosting lectures on various calls to action.[19] The National Association of Democratic Lawyers also draws its membership from those in the legal profession who were historically disadvantaged.[20] Its activities

[11] Legal Practitioners Act 15 of 1995, s. 45.
[12] Personal communication, Law Society of Namibia, October 2017.
[13] See section 2.9 above.
[14] Legal Practice Act 28 of 2014 (South Africa), s. 7.
[15] Legal Practice Act 28 of 2014 (South Africa), ss. 7(2)(a), 19(5), 20(3)(a), 37(5)(a), 62(2)(a), 63(5)(a), 96(2)(a).
[16] Legal Practice Act 28 of 2014 (South Africa), ss. 7(2)(c), 62(2)(b), 63(5)(5), 96(2)(b).
[17] Black Lawyers Association, "About Us", undated, <www.blaonline.org.za/aboutus>.
[18] For example, "Racism is in Our Society is a Big Problem", *BLA Northern Cape Newsletter*, Issue 1, 2016 at 2 (available at <www.bla.org.za/uploads/notifications/BLA%20Northern%20Cape%20Newsletter%201%20of%202016.pdf>).
[19] For example, "Calling the BLA to Action", *BLA Northern Cape Newsletter*, Issue 1, 2016 at 2 (available at <www.bla.org.za/uploads/notifications/BLA%20Northern%20Cape%20Newsletter%201%20of%202016.pdf>).
[20] NADEL website, "Who We Are", undated, <www.nadel.co.za/>.

include promoting transformation of the composition of the judiciary and gender-sensitivity training for lawyers.[21]

Promoting racial diversity: Although much has been written about the need for racial transformation, concrete suggestions have proved harder to locate. Some specific recommendations are as follows, with the caveat that this list is not comprehensive:

> **Legal education:** As noted above, it has been suggested that the length and content of the LLB degree should be re-considered.[22] Some have argued that shortening the degree, although intended to assist previously-disadvantaged persons, has actually had the opposite impact; "the premier law degree which qualified its achievers for the legal professions, and which previously required five years of study at a time when it was aimed predominantly at those who came from privileged schools, would now require only four years of study, including for many who came from less well-equipped and staffed schools".[23] The same lawyer argues that one result of this move has been a lack of attention to language skills, which are crucial in light of the fact that "[l]anguage is the *currency* of litigation".[24]
>
> **Ending crony briefing by the State:** Another suggestion is to harness the power of the State as a litigant to combat established patterns whereby briefs are based on old networks dominated by white men. It would be possible to give precise and detailed instructions to the State Attorney to ensure an even *and wide* distribution of work amongst historically disadvantaged legal practitioners. However, in practice, State briefing patterns tend to favour a small minority of well-connected black practitioners and so fails to assist with broad-based transformation.[25] A similar suggestion has been made with respect to the State's Legal Aid programme.[26]
>
> **Briefing Pattern Action Group:** The Law Society of South Africa has set up a Briefing Pattern Action Group with six tasks:
>
> - to develop a uniform protocol on the procurement of legal services;
> - to set targets for entities doing State work;
> - to establish a common register for the recording of State legal work, with reference to name, frequency, value and nature of brief;
> - to draft a Code of Conduct for private enterprise in respect of legal work;
> - to consider relevant research, training and development;

---

[21] NADEL website, "What We Do", undated, < www.nadel.co.za/#>.
[22] Deputy Judge President, Phineas Mojapelo, South Gauteng High Court, edited version of an address to the annual general meeting of the Limpopo Law Council in Polokwane, 7 September 2012 (available at <www.saflii.org/za/journals/DEREBUS/2012/101.pdf>).
[23] Izak Smuts, "On transformation and the legal profession", *politics web*, 12 September 2013, <www.politicsweb.co.za/news-and-analysis/on-transformation-and-the-legal-profession--izak-s>.
[24] Ibid.
[25] Ibid.
[26] Kameel Premhid, "Transformation of the Legal Profession: Briefing Patterns in the Spotlight (Legal Aid)", Helen Suzman Foundation, 4 December 2015, <http://hsf.org.za/resource-centre/hsf-briefs/transformation-of-the-legal-profession-briefing-patterns-in-the-spotlight-legal-aid>. ("Legal Aid's budget is a bucket of money that can be used to create certainty of income generation for new (black) advocates. This certainty can make it less personally financially risky, as well as afford black advocates the opportunity to gain important skills (acquiring the merit they are often accused of lacking". The author posits that this might assist more black advocates to achieve silk status. He acknowledges that more briefing of outside counsel could lead to staff retrenchments within Legal Aid, but views this as a strategic trade-off.)

- to monitor progress with regard to briefing patterns, considering performance by the State and the corporate sector.[27]

Payment during pupillage: The forthcoming requirement that pupils at the Bar must be paid could increase access to the Bar. The Legal Practice Act 28 of 2014 requires the Legal Practice Council to issue rules regulating the payment of remuneration, allowances or stipends to all candidate legal practitioners, including the minimum amount payable. This applies to practical training for aspiring attorneys and advocates.[28]

Quotas: The Johannesburg Bar Council adopted a rule in 2015 making it unprofessional conduct and a disciplinary offence for lead counsel "to accept or remain on brief where there is a team of three or more counsel on brief in a matter and no member of the team is a black person".[29] A contrasting view on briefing quotas was expressed by then-Public Protector Thuli Madonsela: "Do we encourage that we are entitled to briefing because of our race, because that is the same as saying one is not entitled to briefing because of one's race. Black practitioners should rather say they are entitled to briefing because of their excellence." She motivated rather that Government "should make sure that the briefing patterns are in line with the achievement of equality".[30]

Group system for advocates: The Johannesburg Bar has also introduced a 'group system' whereby advocates are allowed to establish chambers in groups in a semi-corporate structure, as approved by the Bar Council. The theory is that such a group system can assist new members of the Bar from previously-disadvantaged backgrounds, by providing them with more opportunities for training, networking and mentorship.[31]

Community service as a transformative measure: It has been cogently argued that transformation should not focus only on the upper echelons of the legal profession, but on the lower courts and public interest organisations where most people in the country encounter the law. Thus, participation in community service "needs to be understood not as fulfilling the legislative requirements to be qualified or a form a charity or sacrifice, but rather that working in these spaces is equally important to the transformation of the country as a whole and facilitating access to justice".[32]

---

[27] Law Society of South Africa, "Briefing Pattern Action Group", <www.lssa.org.za/briefing-pattern-action-group>; Resolutions adopted at the Summit on Briefing Patterns in the Legal Profession held at Emperor's Palace, Kempton Park, 31 March 2016, (available at <www.lssa.org.za/upload/Summit%20on%20Briefing%20Patterns%20in%20the%20Legal%20Profession%20Resolutions%2031%20March%202016.pdf>)

[28] Legal Practice Act 28 of 2014 (South Africa), s. 27(2), read with definition of "practical legal training" in s. 1.

[29] Media release by the Johannesburg Society of Advocates, 30 October 2015 (available at <www.politicsweb.co.za/politics/johannesburg-bar-adopts-race-quota-rule--dali-mpof>).

[30] Thuli Madonsela, speech to Black Lawyers Association national general meeting, 21 May 2016, Pietermaritzburg, KwaZulu-Natal (as reported in Mapula Thebe, "The culture of racism and its effects on black legal practitioners", *De Rebus*, 1 July 2016, <www.derebus.org.za/culture-racism-effects-black-legal-practitioners/>).

[31] Geoffrey Allsop, "Transformation of the South African Judiciary and bar twenty years after the establishment of a constitutional democracy", 28 August 2016, <www.linkedin.com/pulse/transformation-south-african-judiciary-bar-twenty-years-allsop>.

[32] "Thandiwe Matthews , "Of rainbows and pots of gold –Transformation of the law, society and the legal profession in South Africa" in "Twenty Years of South African Constitutionalism", *New York Law School Law Review*, November 2014, unpaginated version accessed online (available at <www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Matthews.pdf>).

Facility in indigenous languages: It has been asserted that young lawyers of all backgrounds should be encouraged to become fluent in an indigenous African language, to help prevent marginalisation of indigenous languages in the legal system.[33] This could even be made into a professional requirement.

Post-graduate practical training: The Law Society of South Africa operates a "School for Legal Practice" which offers in-depth vocational and practical training for law graduates at nine locations, along with one distance training centre. Candidate attorneys who successfully complete the course qualify for one year's credit against the current requirements regarding articles. The objective is to encourage the development of the practical legal skills lawyers need to become effective practitioners. Financial assistance is provided to deserving students.[34]

Black women: According to a study of transformation in the legal profession project by the Centre for Applied Legal Studies (CALS), which gathered information through a variety of field research techniques, black women face particular challenges and barriers at various points in their legal careers due to the intersection of race and gender discrimination:

- **A shortage of jobs and few connections to established members of the profession:** because the profession remains largely male and white, it is unlikely that black women will have longstanding connections with people in the profession. Connections remain an important part of entering the profession – not necessarily because of nepotism but rather to learn the standard modes of behaviour and how best to conduct oneself within a very particular law culture;

- **Offers from the corporate sector which cannot be matched by the legal profession:** many outstanding young lawyers move to the corporate sector;

- **Cultural alienation:** black and/or female lawyers face invisible rules determined by social interaction outside of work. Informal engagement around weekends and sport create alienating cultural practices;

- **Bias based on historic roles of black women:** many black female lawyers noted that they are associated with their white colleagues' domestic workers, albeit subliminally;

- **Racism:** there are lawyers who continue to refer to black women as window dressing, a direct form of racism which speaks to the person's race / gender rather than their capability;

- **Sexual harassment:** women are exposed to a spectrum of alienation based on references to their physicality, from inappropriate and lewd comments, to violence and rape;

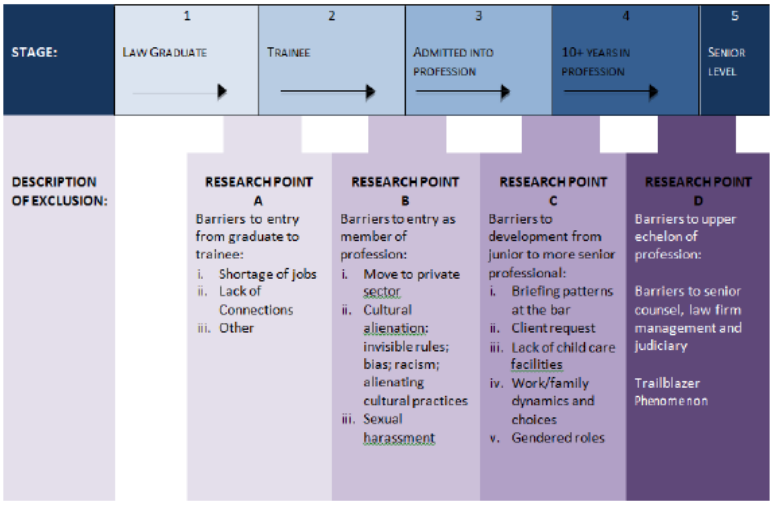
- **Briefing patterns:** both at the Bar and at firms, briefing patterns tend to prefer a small selection of black women and a larger selection of white men. This is due to a reluctance to brief outside one's race and/or sex and also due to client demands (although the inverse is also true in that clients may demand diversity in their legal representation);

- **Behaviour based on gendered roles:** women are still asked to pour the tea in meetings, even if there are other junior men, reinforcing the domestic assumptions regarding women's roles;

- **Lack of childcare facilities:** work/family dynamics and social imperatives continue to preference female childcare over male childcare. This is exacerbated by the insistence by senior female members of the Bar that childcare was not – and is not – necessary; and

[33] Ibid.
[34] See Law Society of South Africa, School for Legal Practice, "Practical Legal Training Course 2018", <www.lssalead.org.za/upload/Schoolbrochure2018v3.pdf>.

- **The trailblazer phenomenon:** exceptional women who have reached the senior levels of the profession have set a standard of excellence required for black women to succeed that does not apply to white men.[35]



Source: Centre for Applied Legal Studies, "Transformation of the Legal Profession", August 2014 at 14.

CALS recommends that transformation needs a champion within each law firm, which must be someone who is in a senior and powerful position, and that the legal profession as a group needs to acknowledge and respond to patterns of discrimination and exclusion – which can be subtle and even unconscious. Constructive criticism promotes excellence, but senior lawyers need to exercise care to criticise junior lawyers as individuals and not as members of any particular group. It recommends that all Law Societies and Bar Councils should have fair and representative mechanisms to address discrimination and harassment, both to protect victims and to hold perpetrators to account; these should include, at a bare minimum, policies on sexual harassment and sexual discrimination. It would also be useful to conduct long-term research, to trace the career progress of black female law graduates over time.[36]

Some additional empirical research on women in the legal profession in South Africa comes from a Master's dissertation which focused on women at the Bar in Cape Town. One theme which emerged in this study is the importance of ongoing mentoring as an ingredient of career success. This study also noted that women often get pigeon-holed into topics like family law and matrimonial issues, which are incorrectly deemed to be "soft" areas of law with less complexity than, say, commercial work. Amongst the recommendations offered was to involve retired judges in mentoring young lawyers and judges and more research to track briefing patterns and attrition at the Bar.[37]

To facilitate membership of the Bar by women and to address gender inequalities, some bar associations like the Cape Bar and the Johannesburg Society of Advocates have adopted maternity policies. For example, according to the Johannesburg Society of Advocates, a member is relieved from

[35] Centre for Applied Legal Studies, "Transformation of the Legal Profession", August 2014 at 12 (emphasis added).
[36] Centre for Applied Legal Studies, "Transformation of the Legal Profession", August 2014 at 62-64 and 37-40 (on "latent discrimination").
[37] Rudo Runako Chitapi, "Women in the Legal Profession In South Africa: Traversing The Tensions from the Bar to the Bench", University Of Cape Town, LLM In Public Law (Minor Dissertation) [2014]. See section 2.4 on mentoring, section 2.5 on pigeon-holing and recommendations at 80-ff.

the obligation to pay Bar fees for a period of three months after giving birth.[38] The Cape Bar adopted a maternity policy in 2009 according to which female members may take a six-month maternity leave period during which they are entitled to a remission from Bar dues *and* receive a Bar contribution towards their chambers rental and floor dues.[39]

13.3 Transformation in other jurisdictions

In **England and Wales**, the Law Society launched a Diversity and Inclusion Charter in 2009. It aims to promote diversity by helping firms and practices achieve and maintain diversity standards. Participation is voluntary, though as of May 2017, 467 firms and practices had signed on to the charter. Signatories pledge to strive for inclusion in recruitment, retention, and career progression; share examples of successful programmes to promote diversity; and promote accountability by assigning responsibility to a specific, senior-level member. The charter has three levels of competence to help firms recognise their progress. The red level indicates compliance with legislation, the amber yellow indicates inclusion of stakeholders in the development of diversity initiatives, and the green level is results-based, requiring signatories to demonstrate positive results. There are two versions of the standards, allowing small practices and large practices to target results appropriate to their size. Required participation in a biennial report helps to facilitate accountability.[40] In addition, the Equality Act 2010 provides a framework to protect the rights of individuals and improve equality of opportunity for all.[41] For example, the Equality Act protects against unfavourable treatment of pregnant women.[42]

In the **United States**, the American Bar Association (ABA) passed Resolution 113 in 2016 to encourage and promote diversity.[43] It asks signatories to support the diversity resolution, and also to promote participation in the ABA Model Diversity Survey. Thus, it provides a mechanism for improved information gathering, the theory being that unified collection of diversity data will better enable firms to assess their diversity progress. [44]

The ABA's Diversity and Inclusion 360 Commission has also developed the ABA Pathway to the Profession Project to help underrepresented communities enter the legal profession and improve their professional successes. This Project comprises multiple smaller projects, including The National Online Pre-Law Program (a free online curriculum accessible via mobile devices which targets diverse students); the Bias Interrupters Study (which aims to explore the biases persons with disabilities and LGBT persons face in order to determine what steps may assist); and the Digital Justice Initiative

---

[38] Johannesburg Society of Advocates website: <https://johannesburgbar.co.za/wp-content/uploads/MATERNITY-POLICY-2-OCT-2012.pdf>.
[39] See Cape Bar website: <https://capebar.co.za/transformation/>.
[40] The Law Society [England and Wales], "The Law Society's Diversity and Inclusion Charter", [2017], <www.lawsociety.org.uk/support-services/practice-management/diversity-inclusion/articles/law-society-diversity-and-inclusion-charter/>.
[41] The Law Society [England and Wales], "The Law Society's Framework for Equality, Diversity and Inclusion 2016-2019, at 3.
[42] Equality Act 2010, s. 18.
[43] American Bar Association, "113", undated, <www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/113.html>; Andrea R Johnson, "Taking Action: ABA Resolution 113 and the ABA Model Diversity Survey", *The Innovator*, Vol 2, No 1, December 2016 at 1 and 4-5 (available at <www.americanbar.org/content/dam/aba/images/racial_ethnic_diversity/Innovator_Vol02Issue01_.pdf>).
[44] Andrea R Johnson, "Taking Action: ABA Resolution 113 and the ABA Model Diversity Survey", *The Innovator*, Vol 2, No 1, December 2016 at 1 and 4-5 (available at <www.americanbar.org/content/dam/aba/images/racial_ethnic_diversity/Innovator_Vol02Issue01_.pdf>).

(which brings together relevant communities to identify ways to address conflicts that exist between communities of colour and law enforcement, or between or persons with disabilities and law enforcement).[45]

In 2014, the Business Law Section of the American Bar Association adopted the Diversity and Inclusion Plan which aims to ensure full access to the profession and the Business Law Section and to shift from a focus of diversity to a focus on inclusion. For example, as part of this Plan, the Business Law Section established a Diversity Clerkship Program which places up to nine diverse law students in eight-week judicial clerkships in business courts across the country. The Section also provides leadership opportunities to diverse business lawyers.[46]

In 2016, the ABA also adopted Resolution 107, which encourages bar associations which require continuing legal education to include a mandatory educational programme on diversity and inclusion, along with a programme on the elimination of bias.[47]

The National Bar Association is a voluntary US association for African-American attorneys and judges. It aims to help its members achieve professional success and to help African-Americans more broadly, through a variety of initiatives. For example, it aims to advance black economic empowerment by supporting black communities through pro bono legal advice. It also engages in attempts to shape policy to benefit African-Americans, such as by advocating for police body cameras (to provide evidence of encounters between police officers and citizens as a way of increasing accountability for mistreatment) and encouraging appointments of diverse judges.[48]

The **Law Council of Australia** has developed an "Equitable Briefing Policy for Female Barristers and Advocates" according to which, when selecting a counsel, all reasonable endeavours should be made to

- Identify female counsel in the relevant practice area and
- Genuinely consider engaging such counsel, and
- Regularly monitor and review the engagement of female counsel, and
- Periodically report on the nature and rate of engagement of female counsel.[49]

Diversity, of course, has dimensions other than race, gender and disability. In **Botswana,** as mentioned above, the Legal Practitioners Act of 1996 prescribes some measures of diversity in the Law Society of Botswana's Council. The diversity contemplates years of experience, ensuring that there are well-experienced members on the Council as well as a more junior perspective: of the seven members of

---

[45] "ABA Pathways Project", *The Innovator*, Vol 2, No 1, December 2016 at 7 (available at <www.americanbar.org/content/dam/aba/images/racial_ethnic_diversity/Innovator_Vol02Issue01_.pdf>).
[46] C W Young, "The Business Law Section Has Long Focus on Diversity and Inclusion" *The Innovator*, Vol 2, No 1, December 2016 at 11-12 (available at www.americanbar.org/publications/diversity-in-the-profession/diversity-in-the-profession-winter2016/the-business-law-diversity-inclusion.html>).
[47] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 33.
[48] Kevin Judd, "The National Bar Association: Securing Justice through Unity and Collaboration", *The Innovator*, Vol 2, No 1, December 2016 at 8 (available at <www.americanbar.org/content/dam/aba/images/racial_ethnic_diversity/Innovator_Vol02Issue01_.pdf>).
[49] Law Council of Australia, "Equitable Briefing Policy for Female Barristers and Advocates", June 2009 at 2, available at <https://www.lawsocietywa.asn.au/wp-content/uploads/1970/01/LCA-equitable-briefing-policy.pdf>; see also The Victorian Bar Equality Of Opportunity Briefing Policy, adopted in 2004 (available at <www.justice.vic.gov.au/home/justice+system/laws+and+regulation/regulation+of+legal+services/victorian+bar+equality+of+opportunity+briefing+policy>).

the Council, three members must be legal practitioners with at least 7 years' standing, and at least one must be a legal practitioner with less than 3 years' standing. The Act also contemplates diversity of citizenship: at least five members must be citizens of Botswana, which allows for up to two non-citizen members.[50] It is worth noting that the construction of this provision does not require that non-citizens be on the Council; it merely allows for this. The Act therefore provides provisions in which Botswana's Council can benefit from diversity of experience and viewpoints.

[50] Botswana's Legal Practitioners Act, 1996, s. 60.

14. Continuing education requirements for legal practitioners

A strong and well-educated legal profession is of utmost importance, especially when it comes to the promotion of legal independence of the judiciary.

In **Namibia**, one of the Law Society's objectives is "[t]o promote the education of lawyers at all stages and levels, with particular emphasis on the broadening of such education".[1] It provides annual bursaries for the study of law and occasional optional training seminars for practitioners – but there is no mandatory continuing legal education requirement for the legal profession.

However, the concept of continuing education is not unfamiliar to other practising professionals in Namibia. For example, the Social Work and Psychology Act, the Pharmacy Act, the Medical and Dental Act and the Nursing Act all contain provisions explicitly authorising the respective regulatory bodies to establish requirements for continuing professional development for the practitioners they govern. The provisions allow the councils for each medical profession to determine from time to time the continuing professional development that will apply to registered or enrolled persons, or to specific classes of such persons. Each council is also in charge of determining the nature, extent, duration and conditions of this continuing professional development.[2] According to the Continuing Professional Development directives for the health professions of the Health Professions Councils of Namibia, every registered health professional is required to accumulate 30 so-called Continuing Education Units (CEUs) per 12 month period, whereby at least 5 CEUs should be for ethics, human rights and medical law. The Continuing Professional Development Committee approves educational activities for this purpose and determines how many CEUs a specific activity will carry.[3]

The introduction of a similar mandatory continuing education requirement for legal practitioners could help to ensure a high level of up-to-date legal knowledge.

In **South Africa**, the Legal Practice Act will empower the Legal Practice Council to determine, after consultation with legal practitioners and other relevant role-players, "conditions relating to the nature and extent of continuing education and training, including compulsory post-qualification professional development".[4] The Council is also empowered to accredit training institutions that offer compulsory post-qualification professional development.[5]

In the US state of **California**, every three years, all active members of the State Bar must complete at least 25 hours of legal education activities which are approved by the Bar or offered by a Bar-approved provider. Four of these hours must be education in legal ethics. Certain state officials and full-time professors at accredited law schools are exempted. Some of the required continuing education can be done as self-study through the Internet.[6]

---

[1] The Law Society of Namibia, "Objectives", undated, <http://lawsocietynamibia.org/content/about-the-law-society/objectives>.
[2] Social Work and Psychology Act 6 of 2004, s. 34(1); Pharmacy Act 9 of 2004 , s. 32(1); Medical and Dental Act 10 of 2004, s. 32(1); Nursing Act 8 of 2004, s. 34(1).
[3] Health Professions Councils of Namibia, "Continuing Professional Development Directives for the Health Professions", 2011 at 7 (available at <www.hpcna.com/images/councils-images/cpd/cpd_forms/CPD%20directives%20revised%202011.pdf>).
[4] Legal Practice Act 28 of 2014, s. 6(5)(e).
[5] Legal Practice Act 28 of 2014, s. 6(5)(g).
[6] The State Bar Act (Business & Professions Code Div. 3 - Professions and Vocations Generally, Ch. 4 – Attorneys) (California), § 6070.

In **New Zealand**, a lawyer providing regulated services must accumulate a minimum of 10 hours/year of continuing professional development. If a lawyer completes more than the minimum of the required hours, he or she may carry an excess of up to five hours of activities into the next year.[7]

In **Ontario, Canada**, each lawyer and paralegal has to complete at least 12 hours/year of Continuing Professional Development in eligible educational activities.[8] As stated by the Law Society of Upper Canada, the purpose of this requirement is to maintain or enhance the legal practitioner's professional knowledge, skills, attitudes and professionalism.[9] The Law Society determines which activities are eligible to be counted for this purpose.[10] The be-laws of the Law Society require that one-quarter of the annual hours of professional development *must* be spent in activities accredited by the Society which cover "ethics, professionalism or practice management topics".[11] The Law Society imposes a fine for later completion of the continuing education requirement, and no carry-over into the following year is permitted.[12]

In **Uganda**, every advocate (ie every enrolled lawyer with a right of audience in court) has to complete a programme of continuing legal education which covers a minimum of 20 hours/ year.[13] The Uganda Law Society offers a wide range of activities for lawyers to comply with those regulations.[14]

In **Nigeria**, all registered lawyers – with the exception of those who serve as judge, kadi or magistrate of any federal or state court or as Attorneys-General or who are on active duty in the Armed Forces of Nigeria – are required to participate in mandatory continuing legal education courses. During every two-year period, lawyers must complete 30 hours of Continuing Legal Education. For benchers (those who hold leadership positions in the Law Society) and Senior Advocates, the required Continuing Legal Education activity is reduced to 24 hours for every three-year reporting period.[15] The required hours can be earned by attending continuing legal education courses, by teaching law courses, by writing law books and law review articles, or by attending *pro bono* training.[16]

---

[7] Lawyers and Conveyancers Act 2006 (New Zealand), 2013 Rules, Rule 6.2.

[8] "Continuing Professional Development", By-law 6.1 issued under s. 62(0.1) and (1) of the Law Society Act, R.S.O. 1990 (Ontario), available at <www.lsuc.on.ca/uploadedFiles/By-Law-6.1-Continuing-Legal-Education-09-25-13.pdf>. The required time is calculated as "one hour of eligible activities for each calendar month in the year during which for any amount of time the licensee practises law in Ontario as a barrister and solicitor or provides legal services in Ontario". By-law 6.1, s. 2(2).

[9] The Law Society of Upper Canada, "Continuing Professional Development Requirement", undated, <www.lsuc.on.ca/CPD-Requirement/>.

[10] "Continuing Professional Development", By-law 6.1 issued under s. 62(0.1) and (1) of the Law Society Act, R.S.O. 1990 (Ontario), s. 1.

[11] "Continuing Professional Development", By-law 6.1 issued under s. 62(0.1) and (1) of the Law Society Act, R.S.O. 1990 (Ontario), s. 2(2).

[12] "Continuing Professional Development", By-law 6.1 issued under s. 62(0.1) and (1) of the Law Society Act, R.S.O. 1990 (Ontario), ss. 6 (Fee for late compliance), 2(5) (No carry-over).

[13] The Advocates (Continuing Legal Education) Regulations, S.I. 78 of 2004, regulation 3 (available at <www.ulii.org/ug/legislation/statutory-instrument/2007/78/si-2007/78.pdf>). In Uganda, all enrolled lawyers with a right of audience in court are referred to as advocates. International Bar Association, Uganda page, undated, <www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_Uganda.aspx>; Nano Matlala, "Lay down the law on transformation", *Sunday Independent*, 1 November 2015.

[14] For example a "latest in the law"-session or a course on leadership negotiation and management skills for lawyers, cf the Continuing Legal Education Calendar 2017 of the Uganda Law Society, available at <www.uls.or.ug/site/assets/files/1260/uls_cle_calendar_2017-1.pdf>.

[15] Mandatory Continuing Legal Education Rules of the Nigerian Bar Association, Rule 8(1)

[16] Id, Rules 15, 16 and 17.

In **Australia**, legal practitioners are required to meet compulsory annual continuing professional development requirements which are stated in very broad terms. For example, solicitors in **New South Wales** are required to fulfil a minimum of 10 units annually (with units usually being equivalent to hours), including at least 1 unit each in ethics and professional responsibility; practice management and business skills; professional skills; and substantive law. Activities do not have to be accredited to count for this purpose, but they must be of significant intellectual and practical content; deal primarily with matters relating to the solicitor's area of practice; be conducted by persons with academic qualifications or practical experience in the subject covered; and be appropriate to extend the knowledge and skills of the solicitor in relevant areas.[17]

A continuing professional development (CPD) activity may consist of:

- a seminar, workshop, lecture, conference, discussion group, multimedia or web-based program, private study of audio/visual material or any other educational activity, or
- the research, preparation or editing by a solicitor of:
  - an article published in a legal publication, or
  - a legal article published in a non-legal publication, or
  - published Law Reports or other legal services, or
- the preparation and/or presentation by a solicitor of written or oral material to be used in a CPD activity or in other forms of education provided to solicitors and/or to other professionals and/or to other persons including those undertaking practical or supervised legal training, or
- membership of a committee, taskforce or practice section of a professional association, designated local regulatory authority or the Law Council of Australia or of other committees, provided that the solicitor regularly attends its meetings, if the work performed on the committee, taskforce or practice section is of substantial significance to the practice of law and is reasonably likely to assist the solicitor's professional development, or
- postgraduate studies relevant to a solicitor's practice needs.[18]

Private study does *not* qualify as a CPD activity "unless it involves the private study of audio/visual material specifically designed for the purpose of updating a solicitor's knowledge and/or skills relevant to his/her practice needs".[19]

A solicitor is required to renew his or her practise certificate annually, which requires certification of compliance with the CPD rules. Each solicitor is required to maintain records of CPD activities as well as evidence showing that they were undertaken for a period of at least three years, and the regulatory authority may at any time demand to see this documentation or any other evidence of compliance. A solicitor who is not compliant with the rules on CPD activities may be given a chance to submit a plan on how to rectify the situation, or to apply for an exemption.[20]

A solicitor can make written application to be exempted in whole or in part from the CPD requirements.[21] The grounds for exemption include (without being limited to) the following:

- illness or disability,

[17] Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 (New South Wales), Rules 5-7 (available at <www.legislation.nsw.gov.au/~/view/regulation/2015/242/full>, dated 18 November 2016).
[18] Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 (New South Wales), Rule 8.1 (paragraph numbers omitted).
[19] Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 (New South Wales), Rule 8.2.
[20] Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 (New South Wales), Rules 12-15.
[21] Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 (New South Wales), Rule 16.1-16.2.

- the location of the solicitor's legal practice,
- the absence of the solicitor from legal practice for example due to parenting leave or unemployment,
- the solicitor has reduced hours of practice owing to part time or casual employment,
- the solicitor's circumstances are such that the solicitor is required to hold a practising certificate but is not engaged in legal practice,
- the solicitor has been in practice for a period exceeding 40 years and does not practise as a principal,
- hardship or other special circumstances.[22]

The regulatory authority can grant pro rata exemption in appropriate cases (such as parenting leave or part-time employment), or grant an exemption subject to conditions.[23]

The Solicitors Regulatory Authority (SRA) in **England and Wales** has recently replaced its previous "inputs-based" system of continuing professional development, where compliance was based on completion of a certain number of hours of an approved activity, with an "outputs-based system", where compliance is based on self-assessment and self-reporting of activities selected by the solicitor to fulfil this needs identified by that solicitor.

Solicitors previously had to complete 16 hours annually of accredited training, study or events for Continuing Professional Development. This approach was replaced in November 2016 with a system of "continuing competence" whereby an individual solicitor is expected to reflect on his or her practice to identify any learning needs; plan how to address those needs by identifying suitable learning activities; complete the self-identified learning activities (which could, for example, involve something such as reading relevant law journal articles or watching an online video); evaluate how the learning activity met the identified learning needs and how the knowledge and skills gained will be incorporated into the solicitor's practice; and keep a record of the process (which may make use of forms prepared by the SRA).

Examples of learning activities are:

- participation in courses
- working towards professional qualifications
- coaching and/or mentoring sessions
- work shadowing
- listening to or watching audio/visual material
- distance learning
- writing on law or practice
- research
- production of a dissertation counting towards an SRA recognised qualification
- development of specialist areas of law
- preparing and delivering training courses forming part of the process of qualification or post-admission training
- work towards a National Vocational Qualification (NVQ) or other qualification.[24]

There is no required number of hours of learning activities, and a solicitor can decide that he or she has no learning needs and as a result engage in no learning activities. Each solicitor must make an

[22] Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 (New South Wales), Rule 16.3 (paragraph numbers omitted).
[23] Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015 (New South Wales), Rule 16.4-16.6.
[24] Ibid.

annual declaration, in a format provided by the SRA, confirming that the process of reflection and action as appropriate has been completed. The more detailed records relating to continuing competence will generally be scrutinised only if some complaint or other risk identification has prompted an investigation of a particular solicitor.[25]

Proponents of the new system argue that the old approach often resulted in solicitors enrolling in courses irrelevant to their practice at the last minute, just to complete the required number of hours – asserting that the new system will be more efficient, cost-effective and relevant. Further attempts to define and regulate mandatory training, such as by prescribing content for continuing professional development, would not be sensible since there would no way to cater for the wide diversity of practice – while the new approach provides for maximum flexibility. Also, it was observed that larger law firms already generally provide in-service training which exceeds any SRA requirements under the old or new systems.[26]

However, a cautionary note has been sounded regarding effective implementation of the new system, noting that the change is "a big cultural shift" for the regulated community and will require capable monitoring and supervision in order to be effective.[27] Conversely, another criticism of the new approach is that some firms have introduced unnecessarily bureaucratic procedures to ensure compliance in practice, to fill the void left by the absence of clear rules and regulations on how continuing competence will be assessed and monitored.[28]

The Legal Services Consumer Panel[29] has also expressed concerns about the new approach in connection with individual accountability, monitoring and quality assurance – suggesting that the SRA's approach, which gives solicitors and firms more responsibility for self-regulation, "needs to be matched with tough sanctions for those who abuse this trust". The Consumer Panel also observed that the effectiveness of the proposals would "hang on the SRA knowing when firms are not providing legal services of an appropriate standard", pointing to a need for more detail about how this information will be gathered. This group also noted that, in a climate where consumers are unable to assess or compare technical quality, there might be incentives for employers to minimise the investment they make in training legal staff if there is an absence of monitoring by the regulatory

---

[25] "Continuing Competence Guidance – FAQs", as updated 2 December 2016, SRA website: <www.lawsociety.org.uk/support-services/advice/articles/continuing-competence-guidance-faqs/#one>. The annual declaration must state: "I have reflected on my practice and addressed any identified learning and development needs." Solicitors are also expected to keep more detailed internal records in case these are requested by the SRA. Ibid.

[26] See, for example, Eduardo Reyes, "Education and training: Take solicitors' word for it", *The Law Society Gazette*, 26 September 2016, available at <www.lawgazette.co.uk/features/education-and-training-take-solicitors-word-for-it/5057881.article>; Mac Mackay, Daw Ltd, "Competency-based CPD training: a solution", *Thompson Reuters Practical Law*, 28 August 2014, available at <https://uk.practicallaw.thomsonreuters.com/0-579-1505?transitionType=Default&contextData=(sc.Default)>.

[27] "Legal Services Board approves SRA changes to CPD", *VinciWorks blog*, 11 February 2015, quoting a letter from LSB Chief Executive, Richard Moriarty to Paul Philip, Chief Executive of the SRA, <http://vinciworks.com/blog/legal-services-board-approves-sra-changes-to-cpd/>.

[28] See, for example, Melissa Hardee, "Continuing competence: meeting requirements is easier than you think" The Law Society (England and Wales) website, 1 March 2017, available at <www.lawsociety.org.uk/news/blog/continuing-competence-meeting-requirements-is-easier-than-you-think/>.

[29] This is a body which advises the Legal Services Board about the interests of the consumers of legal services, by investigating issues that affect consumers and seeking to influence decisions about the regulation of lawyers accordingly. The Panel is made up of eight laypersons with expertise from a range of backgrounds, supported by a small policy secretariat. "Welcome to the Legal Services Consumer Panel", Legal Services Consumer Panel website: <www.legalservicesconsumerpanel.org.uk/>.

body. The Consumer Panel favoured a system which incorporated flexibility, but would still require solicitors "to show evidence of planning, recording and reflecting on their development activity", encourage them "to undertake structured learning activities", and require that learning activities be more explicitly recorded. The Consumer Panel stated, "The key is that the SRA has an evidence base to use to establish whether adequate CPD [continuing professional development] has been undertaken". The Consumer Panel also suggested that the SRA should actively monitor competence by requiring periodic reaccreditation for solicitors who practise in "higher risk areas" of law.[30]

In **Canada**, the Supreme Court ruled in 2017 that it is acceptable for lawyers' licenses to be suspended for failure to complete mandatory continuing professional development requirements. In this case, a legal practitioner challenged the Law Society of Manitoba's rules on continuing professional development.[31]

The starting point for the majority judgment was this statement:

> A lawyer's professional education is a lifelong process. Legislation is amended, the common law evolves, and practice standards change as a result of technological advances and other developments. Lawyers must be vigilant in order to update their knowledge, strengthen their skills, and ensure that they adhere to accepted ethical and professional standards in their practices.[32] [para 1]

The majority judgment provides an instructive background to the continuing professional development (CPD) rules in the province of Manitoba. The CPD requirements in Manitoba were not always mandatory. In 2007, the Law Society approved rules requiring all lawyers to report their CPD hours. It collected and considered the CPD hours reported by its members over a two-year period, and found that many lawyers had completed no CPD activities at all, or less than one hour per month of such activities. After consulting its members on this issue, the Law Society took a decision to move from a voluntary CPD program to a mandatory one. The new approach required all practising lawyers to complete 12 hours of CPD activities each year. Where a lawyer failed to comply, the Law Society could send a written notice giving that lawyer 60 days to comply with the CPD requirements. Failure to comply within 60 days of the date on which the letter was sent would lead to automatic suspension from practising law until such time as the CPD requirements were met and a reinstatement fee paid. If suspension on these grounds takes place more than once, the Law Society has the option of referring the matter to the complaints investigation committee.[33]

In the case at hand, Mr Green, a long-standing legal practitioner, failed to report any CPD activities for 2012 or 2013. In 2014, the Law Society sent a letter notifying him that he would be suspended from practise if he did not comply with the rules on CPD within 60 days, inviting him to correct any errors in his self-reported CPD record and informing him that the 60-day time period could be extended. Me

---

[30] Legal Services Consumer Panel, "Consultation response SRA: training for tomorrow – a new approach to continuing competence", April 2014, available at <www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2014%2004%2001%20SRA%20CPD.pdf>. It was suggested that "higher risk areas" for consumers would include will-writing, probate and estate administration, and asylum advice – and possibly other areas mapped out by the SRA.

[31] *Green v Law Society of Manitoba* 2017 SCC 20 (available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16499/index.do>).

[32] Id, majority opinion at para 1.

[33] Id, majority opinion at paras 7-9, citing (and quoting) Rules of the Law Society of Manitoba, Rules 2-81.1(8), (12) and (13). The Rules of the Law Society of Manitoba on continuing professional development are available in full at <www.lawsociety.mb.ca/education/continuing-professional-development/documents/cpd-requirements/P2-D8.1.pdf>.

Green did not reply or seek review of the Law Society's decision, but instead sought a declaratory judgment on the validity of the CPD rules. Both the lower court and the Court of Appeal dismissed Mr Green's application. The Supreme Court found that the CPD rules, including the sanction of suspension for non-compliance, were a reasonable exercise of the Law Society's statutory mandate "to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence" and its statutory duty to "establish standards for the education . . . of persons practising or seeking the right to practise law in Manitoba" and "regulate the practice of law in Manitoba".[34] Moreover, the enabling legislation explicitly authorises the benchers (persons holding leadership positions in the Law Society) to "establish and maintain, or otherwise support, a system of legal education, including . . . a continuing legal education program" and empowers the Law Society "to establish consequences for contravening this Act or the rules".[35]

The Court noted, "As a practical matter, an unenforced educational standard is not a standard at all, but is merely aspirational."[36] It also found a suspension to be a reasonable way to ensure compliance with the CPD program's requirements, observing that many lawyers in Manitoba had filed to comply with the CPD programme when it was voluntary and that other consequences, such as fines, may not secure compliance it stated, "An educational program that one can opt out of by paying a fine is not genuinely universal."[37]

The majority opinion pointed out that requirements for CPD "do not relate solely to the competence of lawyers. While they may improve the currency of a lawyer's knowledge, these standards also protect the public interest by enhancing the integrity and professional responsibility of lawyers, and by promoting public confidence in the profession".[38]

Turning to procedural issues, the Court held that imposition of an administrative suspension without provision for a right to a hearing or a right of appeal did not make the CPD rules unreasonable, but declined to consider procedural issues further in a declaratory judgment as opposed to a review.[39]

Two judges dissented from the majority opinion, but only in respect of the fact that the rules made the suspension for non-compliance automatic – which could in their view result in needless erosion of public trust in the professionalism of the legal profession. They were also concerned that this approach did not allow for consideration of possibly compelling reasons for the failure to comply with the CPD requirements. [40] The dissenting judgment noted that analogous rules in other Canadian provinces give the regulatory authorities a degree of discretion in dealing with non-compliance, as well as providing for either exemptions or waivers in appropriate circumstances:

> In **New Brunswick**, an exemption can be requested and, if denied, a hearing can be sought. In **Ontario**, the Law Society can exempt a lawyer from mandatory Continuing Professional Development, or reduce the number of hours. The Executive Director of **Nova Scotia's** Barristers' Society can waive the requirements if the waiver is "in the public interest". In **British Columbia**, if there are "special circumstances", a lawyer can apply to the Practice Standards Committee which can, in its discretion, order that the lawyer not be suspended. In **Saskatchewan**, an exemption can be granted by the Director of Education "in exceptional circumstances". **Quebec's** regulations and policy with respect to

[34] Id, majority opinion at para 29, quoting the Legal Profession Act, C.C.S.M., c. L107, s. 3(1) and (2)(a)-(b).
[35] Id, majority opinion at paras 33-34, quoting the Legal Profession Act, C.C.S.M., c. L107, ss. 43(c)(ii), 65.
[36] Id, majority opinion at para 46.
[37] Id, majority opinion at para 47.
[38] Id, majority opinion at para 59.
[39] Id, majority opinion at paras 51-ff.
[40] Id, dissenting opinion, beginning at para 70.

> exemptions specify which exceptional circumstances will allow a member to be "exempted", and which will not. The list of permissible exemptions include parental leave; medical reasons, such as accidents; having to act as a caregiver; being in a disaster zone or a war zone and not being able to attend training activities. Non-permitted exemptions include a gradual return to work following a work stoppage for medical reasons; part-time work; a precarious financial situation; an intensive work period; being outside of Quebec for professional or personal reasons; not actively practicing the legal profession; not being obligated to contribute to the professional insurance; being unemployed; taking a year off; and holidays. In the **Yukon**, the Chair of the Continuing Legal Education Committee "may order that . . . the member not be suspended".[41]

The dissenting judges would have struck down the rule in question on the basis that its failure to provide for discretion in respect of the sanction for non-compliance with the CPD rules was unreasonable.

[41] Id, dissenting opinion at para 92 (emphasis added and footnotes omitted).

15. Discipline

15.1 Issues to consider

Source of professional standards: Professional standards may be articulated in the legislation, or developed by the profession.

Composition of disciplinary body: While the legal profession is in most jurisdictions self-regulating to a great extent, the public may lack confidence that discipline will be sufficiently robust if the profession disciplines its own members without any external involvement. On the other hand, if Government is too closely involved with disciplinary procedures, this threatens the separation of powers and opens the door to perceptions that political factors may be inappropriately influential. Some jurisdictions include lay-persons on their disciplinary authorities, as a way of ensuring that they have a degree of independence from both Government and the profession.

Transparency: Unlike in Namibia, disciplinary hearings in some other jurisdictions are open to the public and descriptions of complaints and outcomes are published online. This increases the transparency of the process, but could also have an unfair negative impact on the reputation of a legal practitioner who is the subject of a complaint but ultimately found to be blameless.

Sanctions: Namibia currently has a narrow, traditional range of sanctions – reprimand, financial penalty, suspension or disbarment. Some other jurisdictions provide for a much wider range of responses which can be tailored to fit the situation, with some being aimed more at remedial action than punishment.

Reactive versus proactive approaches: Most regulatory bodies approach discipline as a reactive process initiated by a complaint from a member of the public. However, a recent trend is the introduction of more proactive approaches, such as self-assessments or random reviews by the regulatory body, with a view to identifying and assisting with problems and reduce before clients experience problems that might give rise to complaints.

Criminal offences: As the Law Society of Namibia has begun to explore, there are two issues here. One is when a legal practitioner's violation of a professional or ethical standard should be the basis for a criminal offence. The other is when a criminal offence unrelated to the practise of law should be grounds for disciplinary action or disbarment, on the basis that it offends the requirement that a lawyer as an office of the court should be a person of good moral character.

15.2 Discipline in Namibia

Unprofessional or dishonourable or unworthy conduct: The Legal Practitioners Act 15 of 1995 makes one of the objects of the Law Society of Namibia "to maintain and enhance the standards of conduct and integrity of all members of the legal profession".[1] The Act provides a non-exhaustive list of instances of "unprofessional or dishonourable or unworthy conduct".[2]

Disciplinary proceedings: The Act provides for the establishment of a Disciplinary Committee which exercises disciplinary control over legal practitioners and candidate legal practitioners. The

[1] Legal Practitioners Act 15 of 1995, s. 41(a).
[2] Legal Practitioners Act 15 of 1995, s. 33.

Disciplinary Committee consists of four legal practitioners appointed by the Council and one person appointed by the Minister of Justice who acts as a secretary for the Committee. Every member of the Disciplinary Committee is appointed for two years.[3]

Upon application made by the Council or a person affected by the conduct of a legal practitioner, the Disciplinary Committee has the power to require the legal practitioner to answer the allegations. Alternatively, if the Disciplinary Committee believes that the application does not disclose a *prima facie* case of unprofessional, dishonourable or unworthy conduct on the part of the legal practitioner in question, it can dismiss the application without hearing it.[4]

An applicant who is aggrieved by a decision of the Disciplinary Committee may appeal to the Court against that decision and the Court can either confirm the decision of the Disciplinary Committee or order the Committee to hear the application. According to the High Court ruling in the case of *Vaatz v Law Society of Namibia*, the hearing is not required to be held in public, finding that such a disciplinary enquiry does not constitute criminal proceedings and thus does not fall within the ambit of Article 12 of the Namibian Constitution.[5]

If the Disciplinary Committee is of the opinion that an application discloses a *prima facie* case of unprofessional, dishonourable or unworthy conduct on the part of a legal practitioner – or if the High Court has ordered the Committee to hear the application – the Committee has to fix a date for the hearing and inform the applicant and the legal practitioner thereof.

If Disciplinary Committee finds that unprofessional, dishonourable or unworthy conduct has occurred, it has the power to reprimand the practitioner, or to combine a reprimand with a financial penalty of up to N$10 000. It also has the discretion to make an application to the High Court for an order to strike the legal practitioner's name from the Roll or to suspend the legal practitioner from practice. The test for these more serious sanctions is that the legal practitioner "is guilty of unprofessional or dishonourable or unworthy conduct of a nature or under circumstances which, in the opinion of the Court, show that he or she is not a fit and proper person to continue to be a legal practitioner". If the High Court finds that neither striking from the Roll nor suspension is warranted, it can issue a reprimand or a reprimand combined with a financial penalty of up to N$ 10 000.[6] The Committee also has the power to make an appropriate costs order in respect of a disciplinary proceeding.[7]

The High Court can order temporary suspension from practice pending the outcome of the case, if there are reasonable grounds to believe that the legal practitioner is guilty of unprofessional, dishonourable or unworthy conduct and the alleged conduct "is of such serious nature that it is in the public interest or the interest of the legal practitioner's clients that the legal practitioner should be prevented from carrying on his or her practice until the disciplinary proceedings against the legal practitioner have been finalised or until further order".[8]

---

[3] Legal Practitioners Act 15 of 1995, s. 34.
[4] Legal Practitioners Act 15 of 1995, s. 35(1)-(2).
[5] Art. 12(1)(a) of the Constitution of Namibia provides: "In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society."
[6] Legal Practitioners Act 15 of 1995, ss. 32(1)-(2), 34.
[7] Legal Practitioners Act 15 of 1995, ss. 35(11).
[8] Legal Practitioners Act 15 of 1995, ss. 32(3)-(5).

A legal practitioner whose name has been struck from the Roll may apply to the High Court for restoration. Such an application requires supporting recommendations from the Council and the Disciplinary Committee.[9]

Anyone who is aggrieved with a decision of the Disciplinary Committee has a right of appeal to the High Court.[10]

The Disciplinary Committee determines its own procedure in respect of legal practitioners. However, the grounds and procedure for disciplinary action by the Disciplinary Committee against *candidate* legal practitioners, and the conditions for renewing their registration, are prescribed by the Minister in regulations.[11]

It should be noted that the costs of the functioning of Disciplinary Committee are paid out of Parliamentary appropriations,[12] with this being the only Government funding that the Law society receives. Accordingly, any financial penalties imposed by the Disciplinary Committee or costs payable to the Committee are paid into the state coffers, and can be recovered by execution if necessary.[13]

Criminal offences: The Legal Practitioners Act 15 of 1995 provides for a few criminal offences by legal practitioners:

- practising on his or her own account or in partnership without a fidelity fund certificate or (an exemption from holding such as certificate);[14]
- accepting, receiving or holding any money for another person in the conduct of his or her practice while exempted from holding a fidelity fund certificate;[15]
- continuing to practise as a legal practitioner (directly or indirectly on his or her own account or in partnership or association with another person) after being struck off the Roll or suspended from practice;[16]
- being employed in any capacity connected with the practice of a legal practitioner after being struck off the Roll or suspended from practice, without the written consent of the Council;[17]
- employing or remunerating in connection with his or her practise a person who has been struck off the Roll or suspended from practice, without the written consent of the Council;[18]
- contravening any of the provisions of the Act pertaining to trust accounts;[19]
- failing to comply with a summons from the Disciplinary Committee.[20]

Other offences under the Act relate to unqualified persons rather than to legal practitioners.

---

[9] Legal Practitioners Act 15 of 1995, s. 38.
[10] Legal Practitioners Act 15 of 1995, s. 35(3).
[11] Legal Practitioners Act 15 of 1995, s. 36(2). The current regulations relating to candidate legal practitioners are contained in Government Notice 228/1995 (GG 1207), as amended by Government Notice 58/1997 (GG 1528), Government Notice 67/1997 (GG 1537), Government Notice 8/1999 (GG 2025) and Government Notice 8/2011 (GG 4649).
[12] Legal Practitioners Act 15 of 1995, s. 34(11).
[13] Legal Practitioners Act 15 of 1995, s. 35(12).
[14] Legal Practitioners Act 15 of 1995, s. 20.
[15] Legal Practitioners Act 15 of 1995, s. 67(3).
[16] Legal Practitioners Act 15 of 1995, s. 23(1).
[17] Legal Practitioners Act 15 of 1995, s. 23(1).
[18] Legal Practitioners Act 15 of 1995, s. 23(2).
[19] Legal Practitioners Act 15 of 1995, s. 31.
[20] Legal Practitioners Act 15 of 1995, s. 39(4).

In 2016, the Law Society circulated for comment a draft position paper on the general question of whether criminal offences committed by a legal practitioner should be grounds for disciplinary proceedings. This paper recommended that disciplinary proceedings should be undertaken in respect of charges or convictions of legal practitioners and candidate legal practitioners in respect of offences that indicate a lack of some characteristic that would make them a fit and proper person to practise law – such as serious offences involving violence, dishonesty, or interference with the administration of justice, or a repeated pattern of lesser criminal charges "which would indicate an indifference on the part of the offending legal practitioner to abide to the law".[21] In justifying the recommendation that disciplinary action should be undertaken on the basis of a charge of such an offence, without waiting for a conviction, the paper noted that criminal trials can be very lengthy, and that the purpose of disciplinary sanction would be to protect the public, not to punish the offender.[22] It also noted that the standard of proof in a criminal trial is beyond a reasonable doubt, while that in a disciplinary proceeding is a preponderance of probabilities.[23] These draft proposals inspired some controversy.[24] Discussion of the issue with a view to compiling a draft policy on the matter is still underway in August 2017.[25]

15.3 Discipline in South Africa

Code of Conduct: Under the forthcoming system in South Africa established by the Legal Practice Act 28 of 2014, the Legal Practice Council (which includes a mixture of elected representatives of the profession and appointed or *ex officio* members) will draw up a Code of Conduct applicable to all legal practitioners. This Code will be published in the *Government Gazette* for public comment before being finalised.[26] Violation of the Code of conduct constitutes "misconduct".[27]

Disciplinary proceedings: Complaints of misconduct against legal practitioners, candidate legal practitioners or "juristic entities" are to be investigated by an investigating committee consisting of one or more persons appointed by the Council. The investigating committee will decide whether to refer the case to a disciplinary committee. Disciplinary committees will be constituted by the Council on an *ad hoc* basis and will normally include one advocate, one attorney and one lay person. When establishing disciplinary committees, the Council must take into account (amongst other things) the racial and gender composition of South Africa, national and provincial demographics and the need to ensure that the committee includes an attorney if the complaint concerns an attorney or a candidate attorney, and an advocate if the complaint concerns an advocate or a pupil. The lay member of the Committee must be drawn from a list of persons approved by the Office of the Ombud as being suitable for this task.[28] (These seem to be quite a large number of considerations to satisfy in a group composed of only three persons.)

The Council has the responsibility to make rules on the procedure to be followed by these disciplinary bodies. As in the case of the Code of Conduct, these rules must be published for comment in the

[21] *Position Paper: A Position Paper on Legal Practitioners / Candidate Legal Practitioners accused of Criminal Offences*, [Law Society of Namibia], [2016] at 14.
[22] Id at 12.
[23] Id at 10.
[24] See, eg, Denver Kisting, "Law society under fire for 'draconian paper'", *The Namibian*, 31 October 2016.
[25] Personal communication, Law Society of Namibia, August 2017.
[26] Legal Practice Act 28 of 2014 (South Africa), s. 36. The rules for disciplinary proceedings must be similarly developed (s. 38(9)-(2)).
[27] Legal Practice Act 28 of 2014 (South Africa), s. 36(2).
[28] Legal Practice Act 28 of 2014 (South Africa), ss. 37(5).

Government Gazette for public comment before being finalised.[29] Disciplinary proceedings must be open to the public, unless the chairperson of a disciplinary committee directs otherwise in response to an application by a person with an interest in the matter who can show good cause for holding the proceedings in private.[30] The particulars of all disciplinary hearings, including the allegations, the names of the members of the Disciplinary Committee and the outcome – must to be published on the Council's website and updated once a month.[31]

If the Disciplinary Committee finds that the person before it is guilty of misconduct, it may consider evidence in mitigation or aggravation of "sentence".[32] The following sanctions are available in the case of a legal practitioner:

- an order to pay compensation to the complainant
- a fine, payable to the Council (which may not exceed the maximum amount determined from time to time by the Minister by notice in the *Gazette*, on the advice of the Council);
- order that his or her Fidelity Fund certificate be withdrawn;
- a formal warning which is to be endorsed against his or her enrolment;
- a caution or reprimand.

The Committee may also advise the Council to apply to the High Court for an order striking the lawyer's name from the Roll, suspending him or her from practice, interdicting him or her from dealing with trust monies; or any other appropriate relief. The Committee itself may impose a temporary suspension from practise, or from some particular aspect of the practice, pending the finalisation of an application to the High Court for suspension.[33]

Specific sanctions are also provided for juristic entities and candidate legal practitioners.[34] The Disciplinary Committee may order the person who was the subject of the complaint to pay the costs of the investigation or the disciplinary hearing.

Misconduct does not constitute a criminal offence per se, but it may be a crime under some other law.[35]

There is a right of appeal to an appeal tribunal consisting of three to five persons appointed by the Council, including one advocate, one attorney and one lay person drawn by the list maintained by the Office of the Ombud.[36]

The Act also contemplates the possibility of reinstatement to the Roll,[37] although (in contrast to Namibia) no specific procedure for this is included.

Legal Services Ombud: As noted above, the law also establishes a Legal Services Ombud, who is to be a former judge appointed by the President. This Ombud will consider complaints from the public

[29] Legal Practice Act 28 of 2014 (South Africa), s. 38(1).
[30] Legal Practice Act 28 of 2014 (South Africa), s. 38(4).
[31] Legal Practice Act 28 of 2014 (South Africa), ss. 37-38; "The Legal Practice Bill: What will change for attorneys?", *De Rebus* 3 (July 2014).
[32] Legal Practice Act 28 of 2014 (South Africa), s. 40(2)-(3).
[33] Legal Practice Act 28 of 2014 (South Africa), s. 40(3)(a).
[34] Legal Practice Act 28 of 2014 (South Africa), s. 40(3)(b)-(c).
[35] See Legal Practice Act 28 of 2014 (South Africa), s. 39(9).
[36] Legal Practice Act 28 of 2014 (South Africa), s. 41.
[37] See Legal Practice Act 28 of 2014 (South Africa), s. 30(5)(b).

and may also proactively investigate matters of concern on his or her own initiative.[38] The Ombud is empowered to investigate maladministration in the application of the Act; abuse of power, unfair or improper conduct or undue delay in performing a function in terms of the Act or any "act or omission which results in unlawful or improper prejudice to any person" – if the Ombud considers that there is a possibility of harm to the integrity and independence of the legal profession or public perceptions of the profession.[39] The Ombud may also monitor the work of investigating committees, disciplinary committees and appeal tribunals.[40]

It should be noted that the Law Society of South Africa suggested that the independence of the Legal Services Ombud would have been enhanced if appointment to this post was by the Chief Justice instead of the President.[41]

15.4 Discipline in other jurisdictions

In **Ontario, Canada,** the Law Society of Upper Canada provides a mechanism for persons to make complaints about their lawyer or paralegal, although it provides advice for resolving the matter informally first.[42] Complaints may relate to professional misconduct or conduct unbecoming a licensee,[43] or to a failure to meet standards of professional competence.[44] The Law Society's Convocation (a meeting of the governing body of "benchers", 40 persons comprising mostly elected members of the Law Society[45]) appoints a Complaints Resolution Commissioner for a three-year term, whose function is to attempt to resolve complaints.[46]

In addition, there is a free-of-charge Discrimination and Harassment Counsel service to assist anyone who has experienced discrimination or harassment by a lawyer or a paralegal or within a law firm or legal organisation, by providing them with assistance to take action or get redress; this service is funded by the Law Society but operates separately and at arm's length from the Law Society.[47]

Complaints initially go to an intake department for substantiation and investigation. The issue may be addressed by means of mentoring, if this will serve the public interest without placing any member of the public at risk. If the complaint is not resolved and the investigation reveals sufficient evidence of serious misconduct, then it is referred for formal disciplinary proceedings. Up to this stage, complaints

[38] Legal Practice Act 28 of 2014 (South Africa), s. 48.
[39] Legal Practice Act 28 of 2014 (South Africa), s. 48(1)(a).
[40] Legal Practice Act 28 of 2014 (South Africa), s. 42.
[41] Submissions by the Law Society of South Africa on the Legal Practice Bill [B 20—2012], 12 February 2013 at para 4.11 (available at <www.lssa.org.za/upload/documents/Law%20Society%20of%20South%20Africa%20_%20Submissions%20on%20the%20Legal%20Practice%20Bill%2012%20February%202013.pdf>).
[42] The Law Society of Upper Canada, "How to Make a Complaint", undated, <www.lsuc.on.ca/with.aspx?id=644>.
[43] Law Society Act, R.S.O. 1990 (Ontario), s. 33.
[44] Law Society Act, R.S.O. 1990 (Ontario), s. 41.
[45] Law Society Act, R.S.O. 1990 (Ontario), ss. 10-16.
[46] Law Society Act, R.S.O. 1990 (Ontario), ss. 49.14-49.19.
[47] The Law Society of Upper Canada, "Helping you with your legal needs", undated, at 3 (available at <www.lsuc.on.ca/uploadedFiles/EN-your-legal-needs.pdf>). See also Discrimination and Harassment Counsel Program, "FAQ", undated, <www.dhcounsel.on.ca/en-ca/faqs>.

are treated confidentially.[48] If a case is closed without disciplinary proceedings, the complainant can ask for the decision to be reviewed by the Complaints Resolution Commissioner.[49]

All disciplinary matters are heard by the Law Society Tribunal.[50] The tribunal consists of two divisions: a hearing division and an appeal division.[51] The hearing division consist of the chair of the Tribunal and at least three persons appointed by Convocation,[52] whereas the appeal division consist of the chair of the Tribunal and at least five persons appointed by Convocation;[53] panels in both divisions must include at least one lay-person and one elected bencher.[54] The disciplinary hearings are public, as well as orders and reasons in each case, unless the Tribunal has ordered the contrary.[55]

If the hearing division of the Law Society Tribunal concludes that the legal practitioner is guilty of professional misconduct, a wide range of orders of orders is available to it. It can:

- revoke the legal practitioner's licence;
- permit the legal practitioner to surrender his or her licence;
- suspend the legal practitioner's licence either for a definite period or until terms and conditions specified by the hearing division are met to the satisfaction of the Law Society;
- impose a fine on the practitioner not exceeding $10 000, payable to the Law Society;
- order the legal practitioner to obtain or continue treatment or counselling, including testing and treatment for substance addiction or substance abuse, or to participate in other programs to improve her or his health;
- order the legal practitioner to participate in specified programs of legal education or professional training or other programs to improve her or his professional competence;
- restrict the areas of law in respect of which the legal practitioner may practise or provide legal services;
- restrict the legal services that the legal practitioner may provide;
- order the legal practitioner to practise law or provide legal services only as an employee of a person approved by the Law Society or under the supervision of a legal practitioner approved by the Law Society
- order the legal practitioner to co-operate in a review of his or her professional business and to implement the recommendations made by the Law Society;
- order the legal practitioner to maintain a specified type of trust account or to accept specified co-signing controls on the operation of his or her trust accounts, or order that the legal practitioner cannot maintain any trust account in connection with his or her professional business without leave of the Law Society;
- order the legal practitioner to refund a client all or a portion of the fees and disbursement paid to him or her by the client;

---

[48] Professional Regulation Committee, Report to Convocation, 25 April 2013, section on "Report on the New Tribunals Complaints Protocol" at 323-325 (available at <www.lsuc.on.ca/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2147494499>).
[49] Law Society Act, R.S.O. 1990 (Ontario), ss. 49.15(1)(b); The Law Society of Upper Canada, "The Complaints Process: How it Works", undated, <www.lsuc.on.ca/complaints/>.
[50] Law Society Tribunal, "About the Tribunal", undated, <https://lawsocietytribunal.ca/Pages/Mainpage.aspx#11>.
[51] Law Society Act, R.S.O. 1990 (Ontario), s. 49.20.1(2).
[52] Law Society Act, R.S.O. 1990 (Ontario), s. 49.21(2).
[53] Law Society Act, R.S.O. 1990 (Ontario), s. 49.29(2).
[54] Law Society Act, R.S.O. 1990 (Ontario), ss. 49.21(2), 49.29(2).
[55] The Law Society Tribunal, "Orders and Reasons", undated, <https://lawsocietytribunal.ca/Pages/Orders.aspx>.

- order the legal practitioner to pay to the Law Society for the Compensation Fund an amount that does not exceed the total amounts of grants made from the Fund as a result of dishonesty on the part of the legal practitioner;
- order the legal practitioner to give notice of any order made by the Tribunal to the legal practitioner's partners, employers or clients affected by the conduct giving rise to the order;
- reprimand the legal practitioner.[56]

In the **United States**, lawyers are governed by professional rules which are typically adopted and enforced by state supreme courts.[57] However, in most cases, state or local bar organisations, have primary responsibility for discipline.[58]

California is an example of a state where disciplinary responsibility rests with the Bar. Clients can file a complaint to the State Bar of California. If the State Bar is of the opinion that the complaint does not appear to involve an ethical violation, the file will be closed.[59] If the file is not closed, a State Bar complaint analyst will write to the lawyer in question to collect his or her side of the story. If the State Bar is of the opinion that there is not enough evidence to prove a serious ethical violation, it can issue a warning to the lawyer in question. A full investigation will be launched if the State Bar attorney who reviews the complaint sees evidence of a serious violation.[60] If the State Bar decides to proceed against the lawyer in question, the matter will go to the independent State Bar Court. The State Bar Court Judge can decide whether the lawyer in question should be suspended or disbarred, or it may close the case without disciplining the lawyer.

In contrast, **New York** is an example of a state where disciplinary responsibility rests with the judiciary. The Appellate Division of the State Supreme Court and the discipline and grievance committees appointed by that Court have the power to monitor attorneys' conduct.[61] If a committee is of the opinion that an attorney's conduct was improper, it can send a letter of caution, admonition or reprimand to the attorney. In case of serious misconduct, the committee can refer the matter to the Court for action. The Court can, after hearing the matter, decide to take disciplinary action against the attorney in question, such as suspending him or her or revoking the attorney's license to practice law.[62]

In **England and Wales**, complaints from members of the public are handled by the Legal Ombudsman.[63] The Legal Ombudsman can order a legal services provider -

- to refund or reduce fees;
- to pay compensation to the client;
- to carry out extra work as necessary to put things right;
- to apologize; or

---

[56] Law Society Act, R.S.O. 1990 (Ontario), s. 35(1).
[57] F C Zacharias, "The Myth of Self-Regulation", *Minnesota Law Review*, Vol 93, 2009 at 1147 (available at <www.minnesotalawreview.org/wp-content/uploads/2012/01/Zacharias_MLR.pdf>).
[58] See id at 1160.
[59] The State Bar of California, "How to File a Complaint against an Attorney", undated, <www.calbar.ca.gov/Public/Complaints-Claims/How-to-File-a-Complaint>.
[60] Ibid.
[61] New York State Bar Association, "A Guide to Attorney Disciplinary Procedures in New York State", undated, <www.nysba.org/resolvingconflict/>.
[62] Ibid.
[63] See the Law Society, "Complaining about a solicitor", undated, <www.lawsociety.org.uk/For-the-public/Using-a-Solicitor/Complaints/>; Legal Service Board, "Frequently Asked Questions : How do I complain about my lawyer", undated, <www.legalservicesboard.org.uk/can_we_help/faqs/index.htm#lsbcomplain>.

- to return documents.

The Legal Ombudsman also has the power to refer the complaint to the court.[64] As noted above in section 5.2, the Legal Ombudsman operates independently of the representative bodies for legal professionals and the approved regulators, as well as independently from Government,[65] with its budget being funded primarily by a levy on the legal profession.[66]

In **Kenya**, where the legal profession is fused and the term "advocate" refers to all legal practitioners,[67] the Advocates Act provides for the establishment of a Complaints Commission which is a department within the office of the Attorney General and consists of commissioners appointed by the President.[68] The Commission has the duty to receive and consider complaints made by any person with regard to the conduct of advocates or law firms. The Commission has the power to reject a complaint if it is of the opinion that it lacks substance. If it appears to the Commission that the complaint may disclose a disciplinary offence, it must refer the matter to a Disciplinary Tribunal consisting of the Attorney-General as its chairperson, the Solicitor-General or another person deputised by the Attorney-General and six advocates of not less than ten years standing.[69] The Tribunal can dismiss the complaint if it is of the opinion that there is no *prima facie* case of misconduct. If the Tribunal decides to hear the complaint, it may either dismiss the complaint or, if it finds professional misconduct, it may order:

- that the advocate be admonished;
- that the advocate be suspended from practice for a specified period not exceeding five years;
- that the name of the advocate be struck off the Roll;
- that the advocate pay a fine; or
- that the advocate pay compensation or reimbursement to the aggrieved person.[70]

Advocates who are aggrieved by an order of the Tribunal may appeal against the order to the Court.[71] The registrar of the court must publish a notice in the *Government Gazette* regarding suspension and disbarments.[72]

---

[64] Legal Ombudsman, "What happens when my complaint is investigated?, undated, at 2, available at <www.legalombudsman.org.uk/wp-content/uploads/2014/09/Factsheet3-Investigating-your-complaint.pdf>.

[65] See The Law Society of England and Wales, "Key facts - Regulatory regime in England and Wales", undated, <www.lawsociety.org.uk/support-services/risk-compliance/regulation/key-facts-regulatory-regime-england-wales/>.

[66] Ministry of Justice, "New ombudsman for complaints against lawyers", 7 October 2010, <http://webarchive.nationalarchives.gov.uk/20101013220519/http://www.justice.gov.uk/news/announcement071010a.htm>; Legal Ombudsman, "About us", undated, <www.legalombudsman.org.uk/page/2/?faqs-category=about-us.>

[67] See The Law Society of Kenya, "About LSK", undated, <http://lsk.or.ke/about-lsk/>; Seafarers' Rights. "Using Lawyers in Kenya", 2012, <http://seafarersrights.org/wp/wp-content/uploads/2014/10/KEN_LEGAL-GUIDE_USING-LAWYERS_2012_ENG.pdf>.

[68] Advocates Act [Chapter 16] (Kenya), s. 53(1).

[69] Advocates Act [Chapter 16] (Kenya), s. 57(1). The law originally provided for referral to a local Disciplinary Committee, which consisted of three members appointed by the Chief Justice (the Attorney-General or the Solicitor-General and two Senior Counsels). Advocates Act [Chapter 16] (Kenya), ss. 19(a), 53(4)(a). However, the Disciplinary Committee was replaced with the Disciplinary Tribunal by a 2012 amendment to the Advocates Act (S A Roba, "Paper on the Advocates disciplinary machinery", 12 November 2015, available at <https://sawe2015.wordpress.com/2015/11/12/paper-on-the-advocates-disciplinary-machinery-a-the-advocates-complaints-commission-b-the-advocate-disciplinary-committee/>.) The amended Advocates Act is somewhat confusing on this point as it uses both the terms "Disciplinary Tribunal" and "Disciplinary Committee".

[70] Advocates Act [Chapter 16] (Kenya), s. 60(4). See also K Koross, "Have a complaint against your Lawyer? Come to us", *The Star*, 27 May 2013 (available at <www.the-star.co.ke/news/2013/05/27/have-a-complaint-against-your-lawyer-come-to-us_c779239 >; Office of the Attorney General and Department of Justice, "Advocates Complaints Commission", undated, <www.statelaw.go.ke/advocates-complaints-commission/>).

In support of this system, the Kenyan Law Society provides a simple online form for the public to use to submit either complaints or compliments.[73]

In **Ghana**, the website of the Ghana Legal Council which regulates the legal profession provides a good example of online public information in the form of a clear and simple explanation of the steps in a disciplinary process.[74] Furthermore, the General Legal Council informs the public through its website of all sanctions recently issued by its Disciplinary Committee, as well as ongoing and forthcoming disciplinary proceedings.[75] Recent decisions, sanctions and disbarments are also listed; the list of sanctions provides a brief description of the complaint and the decision.[76] This laudable transparency enables members of the public to draw their own conclusions about the capacity and reputation of particular lawyers – although it could prejudice lawyers who were ultimately found to be without blame in future or ongoing disciplinary proceedings. However, this concern is mitigated somewhat by the fact that proceedings appear to be listed on the website only after a *prima facie* case of misconduct has been established.

An interesting innovation from **Germany** is that some local bar associations offer "citizen consultation hours" to inform citizens about the prospects of their complaints about local lawyers.[77]

15.5 Proactive approaches

Examples of proactive-regulation: "**Compliance-based regulation**" is a term often used to denote a more proactive approach to regulation which can foster better professional practices. Under this method, the regulator "identifies practice management principles and establishes goals, expectations and tools to assist lawyers and paralegals in demonstrating compliance with these principles in practice". This prevents several drawbacks of reactive, complaints-based regulation which can only respond to a problem after the client who complains has already suffered the impact of poor service. It also addresses the concern that many instances of improper conduct may never be brought to the attention of the regulator. Compliance-based regulation encourages legal practitioners "to reflect on and improve the systems they have in place", with a view to improve practice management, increasing client satisfaction and reducing the incidence of complaints.[78]

As a specific example of this approach, the **Law Society of Upper Canada** conducts various forms of compliance-based regulation, which involve both individual practitioners and law firms. The key proactive mechanisms are as follows:

---

[71] Advocates Act [Chapter 16] (Kenya), s. 62(1).
[72] Advocates Act [Chapter 16] (Kenya), s. 69(2).
[73] The Law Society of Kenya, "Disciplinary Tribunal", undated, <http://lsk.or.ke/public/>.
[74] "Disciplinary Process & Procedures", undated, <www.glc.gov.gh/disciplinary-committee/practice-procedures/>. The term "prima facie" should, however, be explained in layperson's terms.
[75] General Legal Council, ongoing proceedings at <www.glc.gov.gh/disciplinary-committee/ongoing-proceedings/> and upcoming proceedings at <www.glc.gov.gh/disciplinary-committee/upcoming-matters/>. The latter briefly lists the particulars of the alleged misconduct. Both pages name the complainants.
[76] General Legal Council, links under the drop-down list for the Disciplinary Committee at <http://www.glc.gov.gh/>.
[77] See, for example, Rechtsanwaltskammer Berlin, "Die Buergersprechstunde", undated, <www.rak-berlin.de/rak-berlin/buergersprechstunde.php>.
[78] The Law Society of Upper Canada, "Promoting Better Legal Practices", undated and unpaginated (available at <www.lsuc.on.ca/with.aspx?id=2147502111#>).

Practice Management Review: Lawyers in their first eight years of practice may be randomly selected for review. A Practice Management Review covers all aspects of practice, including file management, time, client and financial management. In the course of conducting the review, Law Society staff may speak with firm leadership, managing partners, and firm administrators if any issues are uncovered that relate to firm-wide matters.[79] Privileged documents are not exempted from being turned over in the course of such a review.[80] The Review is a private matter between the Law Society and the licensee being reviewed; the public is not informed that a Review is taking place, and the final report is not available to the public. The report may include recommendations. If the licensee does not accept the recommendations voluntarily, the Law Society can appoint a panellist to consider whether the recommendations should be embodied in a binding order. If an order is sought, the matter is determined by the Hearings Division of the Law Society, which may also consider whether the licensee is failing or has failed to meet standards of professional competence, and if so include appropriate provisions in the order.[81] Such an order is not made public unless it imposes terms, conditions, limitations or restrictions on the licensee.[82] Failure to comply with an order can result in a suspension of the license to practise law.[83] It should be noted that the vast majority of lawyers who have participated in these reviews have reported that they were constructive and helpful.[84]

Focused Practice Review: A Practice Management Review may be conducted in circumstances where the Law Society "is satisfied that there are reasonable grounds for believing that the licensee may be failing or may have failed to meet standards of professional competence". This conclusion can be based on a consideration of (amongst other things) the nature, number and type of complaints made to the Law Society against that licensee, any undertaking given to the Law Society by the licensee or information that comes to the attention of the Law Society in the course of considering a complaint or as the result of an investigation or an audit.[85] In these circumstances, the Practice Management Review is referred to as a "Focused Practice Review".[86]

---

[79] The Law Society of Upper Canada, "Promoting Better Legal Practices", undated and unpaginated; Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, s. 42; "Regulation of Conduct, Capacity and Professional Competence", By-law 11 issued under the Law Society Act, R.S.O. 1990 (Ontario), ss. 27-ff, available at <www.lsuc.on.ca/uploadedFiles/By-Law-11-Regulation-Conduct-05-25-2017.pdf>.

[80] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, s. 49.8.

[81] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, ss. 42-44, see in particular ss. 42(7), 43(1), 44(1); "Regulation of Conduct, Capacity and Professional Competence", By-law 11 issued under the Law Society Act, R.S.O. 1990 (Ontario), ss. 30-37.

[82] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, s.49.12; "Regulation of Conduct, Capacity and Professional Competence", By-law 11 issued under the Law Society Act, R.S.O. 1990 (Ontario), s. 37(7)-(8).

[83] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, s. 45.

[84] "Regulation of Conduct, Capacity and Professional Competence", By-law 11 issued under the Law Society Act, R.S.O. 1990 (Ontario), s. 26(1):

> The Society may require a licensee to provide to the Society specific information about the licensee's quality of service to clients, including specific information about,
> (a) the licensee's knowledge, skill or judgment;
> (b) the licensee's attention to the interests of clients;
> (c) the records, systems or procedures of the licensee's professional business; and
> (d) other aspects of the licensee's professional business.

[85] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, s. 42; The Law Society of Upper Canada, "Promoting Better Legal Practices", undated and unpaginated.

[86] The Law Society of Upper Canada, "Promoting Better Legal Practices", undated and unpaginated. This term does not appear in the legislation or by-laws.

Re-entry Review: Lawyers re-entering private practice after a hiatus of five years are required to undergo a review within 12 months of the date on which they return to practice.[87]

Request for information: The Law Society may require a practitioner to provide information pertaining to the quality of service to clients, including information about –

(a) the licensee's knowledge, skill or judgment;
(b) the licensee's attention to the interests of clients;
(c) the records, systems or procedures of the licensee's professional business; and
(d) other aspects of the licensee's professional business.

The Law Society must provide a written notice to a licensee of the requirement to provide such information, together with a detailed list of the specific information which is being requested. The licensee has a duty to provide the information within 30 days unless an extension is agreed. This request seems to be entirely at the discretion of the Law Society; the by-laws do not include any qualifying criteria.[88]

Audit: The Law Society may conduct an audit of the financial records of a licensee or group of licensees for the purpose of determining whether the financial records comply with the requirements of the Society's by-laws.[89] Such audits appear to be entirely at the discretion of the Law Society, but under certain circumstances the licensee being audited may be required to pay all or some portion of the costs of the audit.[90]

Capacity application: The Law Society may request its Hearing Division to determine if a licensee is "incapacitated", which means that he or she is incapable of meeting any of his or her obligations as a licensee because of physical or mental illness or other infirmity, or excessive use or addiction to of alcohol or drugs. If incapacity is found, the possible orders include suspension or restriction of the licence to practise law, or an order to obtain or continue treatment or counselling.[91]

Another jurisdiction which utilises a range of proactive interventions is **New South Wales, Australia:**

Compliance audits: This is a procedure which is similar to Ontario's Practice Management Review:

> The NSW Legal Services Commissioner has the authority to conduct compliance audits of law practices where there are "reasonable grounds" to do so based on the conduct or complaint history of the law practice or one or more of its associates. The purpose of the compliance audit will be to ensure that the law practice is complying with Legal Profession Uniform Law, the Uniform Rules and other applicable professional obligations.

---

[87] The Law Society of Upper Canada, "Promoting Better Legal Practices", undated and unpaginated.
[88] "Regulation of Conduct, Capacity and Professional Competence", By-law 11 issued under the Law Society Act, R.S.O. 1990 (Ontario), s. 26.
[89] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, s. 49.2.
[90] For example, this is possible where the licensee is being audited because of failure to submit required reports to the Law Society, or where the licensee being audited does not co-operate or prolongs the audit by failing to produce proper financial records. "Regulation of Conduct, Capacity and Professional Competence", By-law 11 issued under the Law Society Act, R.S.O. 1990 (Ontario). s. 38.
[91] Law Society Act, R.S.O. 1990 (Ontario), Chapter L.8, ss. 37-40.

> The law practice will be given at least three weeks' notice of the intention to conduct a compliance audit and an OLSC[92] officer will work with the law practice to arrange a mutually convenient date to cause minimum disruption for the law practice.
>
> In many circumstances the principals of the law practice will be asked to complete a questionnaire before the compliance audit so that time and resources can be more effectively targeted during the course of the on-site audit.
>
> Most audits take about two days and include a general discussion with the principals and brief, informal interviews with other key members of staff. A selection of current and recently closed matter files will also be reviewed.
>
> At the end of the two day audit, OLSC staff will meet with the principals of the law practice to provide initial feedback and answer any queries that the principals may have.
>
> A draft Compliance Audit Report will be provided to the principals within approximately ten business days. The principals will have the opportunity to comment on the Report. Once the Report is finalised a copy will be provided to the Law Society.
>
> The Report may provide management system directions if the Commissioner has concerns that need to be addressed as a matter of priority. A law practice must comply with a management system direction given to it.[93]

External intervention: New South Wales also provides for various forms of "external intervention" in the business and professional affairs of law practices for the purpose of protecting the interests of the general public, clients and the owners and employees of law practices (insofar as their interests are not inconsistent with those of the general public and clients).[94] The grounds for external intervention are wide. In addition to being warranted when a legal practitioner dies, leaves practice or becomes insolvent, it can also be imposed when the regulatory authority forms a "belief on reasonable grounds" that the law practice or an associate of the law practice is not dealing adequately with trust money or trust property or is not properly attending to the affairs of the law practice; where a serious irregularity has occurred in relation to trust money or trust property or the affairs of the law practice; or where the legal practitioner "has failed to properly account in a timely manner to any person for trust money or trust property received by the law practice for or on behalf of that person" – amongst other grounds.[95] The intervention may take the form of the appointment of an external supervisor of trust money of the law practice, an external manager of the law practice

---

[92] The Office of the Legal Services Commissioner (OLSC) is an independent statutory body that deals with complaints about lawyers.

[93] "Compliance Audits". Office of the Legal Services Commissioner, undated, <www.olsc.nsw.gov.au/Pages/lsc_practice_management/olsc_compliance_audits.aspx>, based on ss. 256-257 of the Legal Profession Uniform Law (NSW), Act 16a of 2014, available as it stood at 3 November 2016 at <www.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/lpul333/>. Section 256 states:

> (1) The designated local regulatory authority may conduct, or appoint a suitably qualified person to conduct, an audit of the compliance of a law practice with this Law, the Uniform Rules and other applicable professional obligations if the designated local regulatory authority considers there are reasonable grounds to do so, based on-
>
> (a) the conduct of the law practice or one or more of its associates; or
>
> (b) a complaint against the law practice or one or more of its associates.
>
> (2) The appointment of a suitably qualified person may be made generally, or in relation to a particular law practice, or in relation to a particular compliance audit.
>
> (3) A report of a compliance audit is to be provided to the law practice concerned and may be provided to the designated local regulatory authority.

[94] Legal Profession Uniform Law (NSW), Act 16a of 2014, s. 323.

[95] Legal Profession Uniform Law (NSW), Act 16a of 2014, s. 326.

or a receiver – depending on the circumstances.[96] In each case, the legislation act sets out the role and powers of the external official in detail.[97]

Self-assessment tools: Another example of a pro-active approach is guided self-assessment. One such system is implemented by the Ethics and Professional Responsibility Committee of the **Canadian Bar Association**, which has developed an "**Ethical Practices Self-Evaluation Tool**" designed to assist lawyers and law firms to examine their ethical practices. The introduction to this Self-Evaluation Tool explains:

> The CBA Ethics and Professional Responsibility Committee has prepared this Ethical Practices Self-Evaluation Tool to assist Canadian law firms and lawyers to systematically examine the ethical infrastructure that supports their legal practices. The goal of the Self-Evaluation Tool is not to be prescriptive but rather to encourage exploration and discussion of firm practices. As such, the questions, practices and resources listed should be approached as suggestions rather than mandates. Lawyers are also encouraged to think creatively about what additional content could be appropriately and helpfully added to the Self-Evaluation Tool. Individual firms will have unique circumstances and needs to which lawyers should be attentive.[98]

This Self-Evaluation Tool identifies 10 components of an ethical infrastructure,[99] explains each objective and provides questions to assess compliance. It also provides examples of good practice and useful resources. For example, the section on client communication is as follows:[100]

> Breakdowns in communication are a major source of complaints against lawyers. Client service issues, which include failures to communicate, amounted to 56% of the complaints received by the Law Society of Upper Canada in 2012. As reported by the Lawyers' Insurance Association of Nova Scotia: "[t]he most common source of miscommunication is a simple one: lawyers routinely fail to realize how little they are actually saying - the "I'm Sure it was Obvious" effect….Nothing is ever obvious unless you made it obvious by spelling it out (preferably in writing).

Objective	Possible questions to ask in assessing compliance with this objective	Potential systems and practices to ensure objective is met	Examples of available resources
Communication with clients is clear, continuous and courteous	Do clients and lawyers share the same understanding of terms and scope of the retainer? Do lawyers keep clients adequately informed of the status of their representation? Is client feedback actively solicited? Are client complaints adequately dealt with internally?	Engagement letters and termination of engagement letters are used. Policies are in place that ensure systematic recording of conversations with clients (for example, policies relating to archiving email and creating notes of client meetings and phone calls). Client instructions are confirmed in writing. Clients are provided with regular progress and costs updates with a frequency and in a form that suits their needs. Clients are copied on important correspondence sent and received. Client surveys are conducted to determine satisfaction with service. Policies and procedures are in place for addressing client complaints.	What Do You Do With Client Feedback? (CBA) Retainer Precedents (LawPro) Communication Toolkit (Law Society of British Columbia) Client Service and Communication Practice Management Guidelines (Law Society of Upper Canada) Documenting/Effective Communication (Lawyers' Insurance Association of Nova Scotia) Model Client Survey (Law Society of British Columbia) Post-matter client service survey precedent (LawPro) **Follow the link for additional resources...** (.pdf)

[96] Legal Profession Uniform Law (NSW), Act 16a of 2014, s. 327.
[97] Legal Profession Uniform Law (NSW), Act 16a of 2014, ss. 329-367.
[98] "CBA Ethical Practices Self-Evaluation Tool", [2013-2014], <www.lians.ca/sites/default/files/documents/00077358.pdf>.
[99] Competence, client communication, confidentiality, conflicts of interest, preservation of client property/trust accounting/file transfers, fees and disbursements, hiring, supervision/retention/lawyer and staff wellbeing, rule of law and the administration of justice and access to justice.
[100] Ibid (footnotes omitted).

As another example of self-assessment, in **Australia**, lawyers are required to complete a Self-Assessment Form rating their compliance with specified objectives which are conducive to "Appropriate Management Systems", and to submit the form to the regulator by means of an online portal. The regulator then assesses the responses and takes steps to assist law practices that appeared to be experiencing difficulties. [101] The process is described in Queensland as being a motivational one:

> We don't expect legal practitioner directors necessarily to rate the systems their firm has in place when they first receive the self assessment form but the systems they have in place when they complete and return the form - we count the self assessment process a success if it causes them to make improvements. The purpose of the exercise is not to catch anyone out but to help law firms develop and maintain management systems and workplace cultures that nurture and sustain best practice.[102]

Proactive approaches could be a useful supplement to procedures for dealing with complainants.

[101] For example, the form used for the "Incorporated Legal Practices Self Assessment Audit" in Queensland, Australia can be found at <www.lsc.qld.gov.au/__data/assets/pdf_file/0005/97781/ILP-Self-Assessment-Audit-Form-Version-4.pdf>.
[102] "Self-Assessment Audits", 2013, <www.lsc.qld.gov.au/compliance/compliance-audits/self-assessment-audits>.

16. Fees for legal services

There is a strong public interest in accessible and affordable legal services. For example, 2012, the South African Constitutional Court remarked:

> No doubt skilled professional work deserves reasonable remuneration, and no doubt many clients are willing to pay market rates to secure the best services. But in our country the legal profession owes a duty of diffidence in charging fees that [go] beyond what the market can bear. Many counsel who appear before us are accomplished and hard-working. Many take cases *pro bono*, and some in addition make allowance for indigent clients in setting their fees. We recognise this and value it. But those beneficent practices should find a place even where clients can pay… .[1]

The possibility of capping or regulating legal fees is often discussed as a way of increasing access to justice. However, it has also been pointed out in South Africa that mechanisms aimed at ensuring that fees for legal services are reasonable are unlikely to bring the cost of lawyers within the reach of most members of the public, noting that more emphasis on pro bono work will be required to achieve this goal.[2]

It is also important to remember that fee regulation is not limited to capping fees. It can set floors as well as ceilings, or provide acceptable ranges. Regulations can also be in the form of guidelines, or they may be strictly enforced.

This section will look at fee regulation. Pro bono work is discussed in section 20 below. The issue of cost recovery by law clinics (or in pro bono cases) is discussed in section 9.5 above.

Note that this paper does ***not*** discuss general issues relating to costs orders, or mechanisms which could be introduced to lower the costs of legal services to the public – such as protective costs orders (now available for cases in the public interest in terms of new Rules of the High Court),[3] conditional fee agreements (where the legal practitioner's payment in the event of success is based on normal hourly rates often topped up with an extra "success fee"), contingency fee agreements (where the legal practitioner in a successful case collects a percentage of the award rather than an hourly rate, and receives nothing if the case is unsuccessful[4]), reforms to the state-funded legal aid system or legal

---

[1] *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* [2012] ZACC 17 at para 11. The Court cited the following recent literature on legal fees in a footnote to this paragraph:

> Compare Rogers "High fees and questionable practices" (April 2012) vol 25 (1) *Advocate* at 40-2. See, too, Gravett "'I am not overcompensated enough': the moral compass of the American lawyer" (April 2012) vol 25 (1) *Advocate* at 43-8; Rautenbach "Compromising counsel's fees" (April 2012) vol 25 (1) *Advocate* at 48-9; Mlambo "The reform of the costs regime in South Africa: Part 1" (April 2012) vol 25 (1) *Advocate* at 50-2; and Mlambo "The reform of the costs regime in South Africa: Part 2" (August 2012) vol 25 (2) *Advocate* at 22-33. See also Wallis, "Some thoughts on the commercial side of practice" (April 2012) vol 25 (1) *Advocate* at 33-6.

[2] Oral submission of General Council for the Bar (Mr van Rooyen) on the Legal Practice Bill, as summarised in Kim Hawkey, "A step closer: Oral hearings on the Legal Practice Bill", *De Rebus,* April 2013 at 30-31 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>): "Perhaps we are focusing too much on fees being the bar to access to justice. Suppose we halve advocates' fees, suppose we cut them down to a third. How many of the poor and needy will be able to afford them? I would like to put my head on the block and say that I do not think it would make that much of a difference. What we need to focus on is … improving on our *pro bono* services."

[3] Rules of the High Court of Namibia (contained in Government Notice 4/2014 (GG 5392) as amended by Government Notice 118/2014 (GG 5526) and Government Notice 227/2014 (GG 5608), Rule 20.

[4] See, eg, the Contingency Fees Act 66 of 1997 (South Africa).

insurance schemes. There are all large topics in their own right, and they go beyond the central issue of regulation of the legal profession.[5]

16.1 Issues to consider

Free market and competition concerns: There is a tension between fee regulation and free market competition. In Namibia (as discussed in more detail below), the Competition Commission has already invalidated the tariff guidelines issued by the Law Society. Although fee regulation explicitly authorised by statute would apparently be acceptable in the Namibian context, there would be a need to respect the principles of the Competition Act 3 of 2003, which include the goal of providing consumers with competitive prices and choices.

Conflicts of interests if profession sets its own fees: There is always a danger that self-interest will prevail in a self-regulating profession which sets its own fees. One example of a check on this comes from **Zambia**, where a Remuneration Committee made up of five legal practitioners appointed by the Law Association makes recommendations on fees to be issued in "statutory instruments" by the Chief Justice (for non-contentious business) and the High Court Rules Committee (for contentious business).[6]

Minimums, maximums or fee ranges: Some jurisdictions set minimum charges and make it unlawful for a legal practitioner to charge less.[7] Other set maximum fees, but this can encourage most legal practitioners to charge the maximum which is permissible.[8] The same problem can arise in respect of fee ranges.

Strict fee caps versus guidelines: Similarly, even if the proposed fees are non-binding guidelines rather than binding rules, they will still influence the market.

Transparency: Instead of focusing on set fees, some jurisdictions emphasise the importance of transparency for clients, with some requiring legal practitioners to provide clients with written costs estimates at the outset.

---

[5] For a detailed discussion of some of these issues, see Zoila Hinson and Dianne Hubbard, *Costs and Contingency Fees*, Access to Justice in Namibia: Proposals for Improving Access to Courts, Paper No. 3, Legal Assistance Centre, 2012.

[6] Legal Practitioners Act [Cap 30] (Zambia), s. 70. Examples of recent Scales of Fees are the Legal Practitioners' (Conveyancing and Non-Contentious Matters) (Costs) Order, Statutory Instrument No. 7 of 2017 (available at <www.zambialii.org/zm/legislation/statutory-instrument/2017/7/si_2017_7.pdf>) and the Legal Practitioners (Costs) Order, Statutory Instrument No. 6 of 2017 (not located online). The astronomical increases since the last scale of fees was issued in 2001, in some cases by as much as 500%, were decried in the press. "Expensive Justice" (editorial), *Daily Nation*, 3 April 2017 (available at www.dailynation.news/expensive-justice/>). However, it seems as if there was some confusion over the fact that the Scale of Fees was expressed in "fee units" and not kwacha. "LAZ clarifies on hiked Legal Practitioners' costs", QFM Zambia, <www.qfmzambia.com/2017/04/06/laz-clarifies-on-hiked-legal-practitioners-costs/>; Michael Kasonde, "LAZ explains legal fees misrepresentation", *The Mast*, 10 August 2017 (available at <www.themastonline.com/2017/04/09/laz-explains-legal-fees-misrepresentation/>.

[7] "Legal Practitioners' Fees and Complaints Handling Procedures", Malawi Law Society, undated, <http://malawilawsociety.net/index.php/public-advice/56-legal-practitioners-fees-and-complaints-handling-procedures>; Legal Education and Legal Practitioners Act [Chapter 3.04] (Malawi), First Schedule.

[8] See, eg, submission of Webber Wentzel on the Legal Practice Bill, as summarised in Kim Hawkey, "Written submissions on the Legal Practice Bill", *De Rebus*, April 2013 at 45 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).

Assessing reasonableness: Some jurisdictions provide mechanisms whereby an external party can be asked to assess the reasonableness of the fees charged, even in non-litigious matters.

Impact of lower fees on legal profession: In South Africa, the Law Society of South Africa expressed concerned about "poor lawyers" in a period where government-funded work – such as legal aid and Road Accident Fund claims – has become reduced while increasing unemployment has at the same time reduced the number of private clients. It was noted that some existing legal practitioners are struggling, referencing those outside the "magic circle" of lawyers regularly briefed by government, parastatals and the rich.[9] Given that the costs of entering the legal profession are high, it is not unreasonable to take into account the interests of the legal profession in securing a reasonable return on services. This is particularly important where charges are based on time; since available working hours are finite, legal practitioners in a time-based fee system are limited in their ability to work more in order to increase their income.

Methods of fee calculation: The dominant method used by lawyers to price their services is time-costing based on "billable hours". This system is easy to understand and implement, and it ensures that there is a relationship between the costs of providing the service and the fee which is charged to the client. Because it is a common standard, it facilitates comparisons between different lawyers by consumers. However, this method of billing can encourage lawyers to undertake unnecessary work, to persist in inefficient ways of working or to exaggerate the actual time spent on a matter. Time billing makes the price to be charged for a particular service open-ended, since the amount of time which will be needed to complete the task cannot be predicted with certainty in advance. Hourly rates are set primarily with reference to what the market will bear rather than with reference to cost accounting, and so often provides returns which are significantly higher than costs. Furthermore, time billing transfers all risks to the client – including unforeseen circumstances which may increase the time needed for the task, inefficiency or duplication of work – an creates a conflict of interest between the law firm that wants to maximise the time and staff devoted to a task and the client who want to minimise these factors. Another problem is that time billing results in random cross-subsidisation amongst clients; for example, the first client to bring a case under a new piece of legislation pays for the firm's acquisition of knowledge about the new law, while subsequent clients get the benefit of that newly-acquired knowledge at no cost. Also, time billing tends to count mechanical functions (meetings, telephone calls, letters, etc) instead of measuring meaningful progress on a legal issue.

Some possible alternatives to time billing include:

- **Blended billing rate:** This involves charging by time, but based on a single hourly rate which averages the levels of the various legal practitioners who might be utilised.
- **Fixed fee:** With a fixed fee, the lawyer charges the client a set amount for a specific service. However, this can put the lawyer and the client at odds in considering a settlement, for example – as early settlement could benefit the lawyer and disadvantage the client in respect of the fee paid. It can also motivate firms to pass work to its less-experienced and lower-paid lawyers in order to maximise profits.
- **Value billing:** The approach bases the fee on the value of the overall service provided along with client satisfaction.

[9] Oral submission of Law Society of South Africa on the Legal Practice Bill, as summarised in Kim Hawkey, "A step closer: Oral hearings on the Legal Practice Bill", *De Rebus,* April 2013 at 28 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).

- **Event billing**: negotiating a price for each event in a series of services, such as initial advice, filing, discovery, interlocutory disputes, mediation, etc. This approach avoids some of the problems of applying a fixed fee to an unpredictable situation.
- **Contingency fees:** This is a fee arrangement whereby the lawyer is paid only gets paid if the case succeeds, with the payment to the lawyer having a sufficient premium to cover the risk taken.
- **Hybrid methods:** Approaches to fees can combine a mixture of different approaches.[10]

16.2 Fees in Namibia

Fees for litigious work: Guidelines for fees for litigious work are set out in Namibia's various Rules of Court (the rules of the magistrate's courts, the High Court and the Supreme Court), and a dissatisfied client is entitled to have these fees taxed, and the decisions made in the process of taxation are subject to review.[11]

As a general rule, costs in Namibian courts follow the event, meaning that the losing party must pay at least some portion of the legal fees and disbursements of the winning party. However, an award of costs is an exercise of judicial discretion which is guided by the circumstances of each case.[12] If neither party is substantially successful, then the court may order that the parties each bear their own costs.[13] Namibian courts normally award costs "as between party and party". Party and party costs are "amounts which the successful party has paid, or becomes liable to pay, in connection with the due presentment of his case" and include only "costs which are *prima facie* directly and necessarily incurred in connection with the due presentment of the case".[14] These costs are assessed by the taxing master based on schedules of fees annexed to the rules of the various courts.[15]

---

[10] "Billable Hours – past their use-by date", Address by The Hon Wayne Martin Chief Justice of Western Australia., Perth Press Club Launch of Law Week 2010 (available at <www.supremecourt.wa.gov.au/_files/Perth_Press_Club_Law_Week_20100517.pdf>).

[11] Rules of the High Court of Namibia, Rules 70-71; Rules of the Supreme Court of Namibia (contained in Government Notice 56/1990 (GG 86), as amended by Government Notice 119/2003 (GG 2994)), Rule 13.

[12] AC Cilliers, *Law of Costs* (3d ed), Durban: LexisNexis, 2008 at 2-4; Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, *5th edition*, Cape Town: Juta, 2009 at 955-956. See *Ferreira v Levin, Vryenhoek v Powell* 1996 (2) SA 621 (CC) at 625, which refers to two basic principles in respect of costs: "the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even the second principle is subject to the first. The second principle is subject to a large number of exceptions…" [footnote omitted].

[13] See Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, *5th edition*, Cape Town: Juta, 2009 at 957-ff.

[14] See *Mouton and Another v Martine* 1968 (4) SA 738 (T) at 744B-D; *Handl v Handl* 2008 (2) NR 489 (SC) at para 20 ("…the word costs, when used in a court order, does not give any difficulty of interpretation. It means party and party costs.").

In general, section 48(d) of the Magistrates Court Act 32 of 1944 gives a magistrate discretion to award costs that he or she deems just, including 'counsel and client' costs where appropriate. The court may award higher costs than those prescribed by the tariffs if the case involved difficult questions of fact or law, multiple claims, or a claim or defence which was vexatious or frivolous. Magistrates' Courts Rules of Court, Rule 33(8). The court has similar discretion in respect of costs in a number of specific circumstances covered by the rules and the Act. See Rules (1)(a) and (6), 18(11), 27(6), 31(3), 33(2), 55A(5), 56(9), 60(3), (5) and (6). See also Magistrates Court Act 32 of 1944, section 65A(1), 65K(1)-(3) and 74, read with 74F(3)-(4).

Despite the general rule restricting costs awards to party and party costs, Namibian courts will sometimes award costs on an 'attorney and client' ('counsel and client') basis, holding the unsuccessful party responsible for the full amount of the professional services rendered by the winning party's legal practitioner as well as all disbursements. However, this is generally done only in unusual situations, such in instances of dishonesty, malicious motives or grave misconduct. Herbstein & Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, *5th edition*, Cape Town: Juta, 2009 at 971-972. There are also

In respect of the magistrate's court, the rules on fees are made by a Rules Board composed of the Chief Magistrate, a staff member nominated by the Minister and a legal practitioner nominated by the Law Society of Namibia.[16] The legislation provides for the taxing of costs by the clerk of the court, subject to the review of a judicial officer.[17] In respect of the High Court, the rules on fees are made by the Judge President, with the approval of the President. The rules may cover "the tariff of fees chargeable by legal practitioners " and "the taxation of bills of costs, including bills of costs not relating to litigation, and the recovery of costs".[18] In respect of the Supreme Court, the rules on fees are made by the Chief Justice, with the approval of the President. These rules may cover "the tariff of fees chargeable by advocates and attorneys in matters before the Supreme Court" and "the taxation of bills of costs in respect of matters before the Supreme Court and the recovery of such costs".[19]

The rules of the magistrate's court and the High Court provide different scales of fees for instructing and instructed counsel.[20] The Rules of the Supreme Court contain no such distinction. Prior to the fusing of the legal profession, when there was a formal distinction between attorneys and advocates, payments to advocates were treated as "disbursements" in respect of the taxing of costs. However, after the advent of the Legal Practitioners Act 15 of 1995, the Supreme Court held that all legal practitioners must be treated alike for the purposes of taxation of costs under the Rules of the Supreme Court, with the fees of instructed counsel, like those of instructing counsel, being treated as fees in bills of costs and taxed in accordance with the prescribed tariffs, rather than being included under the category of disbursements – but with the taxing master retaining discretion to allow appropriate fees and charges not specifically addressed in the tariffs.[21]

For the purposes of this discussion, the key point is that the prescribed tariffs given are not reflective of the actual fees charged by legal practitioners. Firstly, they are generally not firmly fixed. For example, the Rules of the High Court state that the fees provided for instructing counsel are considered to be the reasonable fees for the professional legal services rendered, "unless on good cause shown and specifically otherwise ordered by the Court".[22] Those provided for instructed counsel are presented as a range between minimum and maximum.[23] In the Rules of the Supreme Court, the

---

exceptions to the general rule that costs will be awarded to a successful party, such as in the case of misconduct, exorbitant claims, or unnecessarily protracted proceedings. See id at 961-ff; an example is *Mobile Telecommunications Ltd v Namibia Communications Commission and Others* (A 26/2011) [2012] NAHC 94 (3 April 2012) (unreported), where the successful litigant was awarded only 75% of its costs because of its consistent failure to act in accordance with the Rules of Court. (at paras 81-83).

[15] "Taxing" in this context refers to assessing the appropriateness and validity of the costs claimed with reference to tariffs set by the rules of court. It does not have anything to do with "tax" in the sense of a levy paid to the state.

[16] Magistrates' Courts Act 32 of 1944 (SA), s. 25(1) and (3)(ii).

[17] Magistrates' Courts Act 32 of 1944 (SA), ss. 80-81.

[18] High Court Act 16 of 1990, s. 39(1)(xvi)-(xvii).

[19] Supreme Court Act 15 of 1990, s. 37(1)(r) and (t).

[20] Magistrates' Courts Rules of Court, Annexure 1, Tables A-C (as amended by Government Notice 178/1992, *Government Gazette* 537); Rules of the High Court of Namibia, Annexures D and E.

[21] *Afshani and Another v Vaatz* 2007 (2) NR 381 (SC). The same holding was made with respect to the Rules of the High Court of Namibia, which were since updated. *Kaese v Schacht and another* [2009] NAHC 95 at para 23. See also *Otjozondu Mining (Pty) Ltd v Purity Manganese (Pty) Ltd and Others* [2011] NAHC 307, which agreed that the fees of instructed counsel should be taxed as fees and not disbursements, but found that Rule 69(4) of the Rules of the High Court of Namibia as they stood at that time allows for some differentiation between the approach to fees of instructing and instructed counsel.

[22] Rules of the High Court of Namibia, Annexure D.

[23] Rules of the High Court of Namibia, Annexure E.

tariffs for some forms of work are also expressed as a range.[24] Furthermore, the tariffs provided are part-party costs, not counsel-client costs. A legal practitioner is entitled to remuneration for his or her services, regardless of whether these are included in the schedule of fees and regardless of whether the action succeeds. The tariffs provided in the various rules of court are intended to apply in the case of costs orders, to ensure that a portion of the costs incurred by the winning party (the party-party costs) are reimbursed by the unsuccessful litigant. But the balance constitutes counsel-client costs which remain payable by the client, meaning that the tariffs of fees do not reflect the total fees which may be charged by the legal practitioner.[25] Additionally, the infrequent amendment of some of the prescribed tariffs puts them increasingly out of pace with the legal services market, thus widening the gap between party-party costs and counsel-client costs.[26]

Fees for non-litigious work: The Law Society does not have an explicit statutory power to set fees, but rather a power to "prescribe the manner of assessment" of any fees charged by a legal practitioner for non-litigious work and related expenses. It may assess fees at the request of the client or the legal practitioner, or of its own accord.[27] The Law Society has issued rules for assessment of fees by the Council or by a committee appointed by the Council for this purpose (with no composition specified). The assessment process must take into account 13 principles set out in those rules, including "any tariff of fees approved by the Society for the sole purpose of serving as a guide to members".[28]

The fee scale issued for this purpose for 2008-2015 emphasised that it was intended as a guideline and not a maximum-minimum tariff.[29] It also noted that the approach to assessment should be to determine a reasonable "time rate" for the function in question and the amount of time reasonably required to perform that function – even if a flat fee was agreed.[30] The tariff guidelines provided for varying years of experience and inflationary increases. It also provided separate tariffs for work by candidate legal practitioners. In terms of types of work the tariffs provided guideline tariffs for the following:

- Non-litigious matters
  - general (applicable to matters not covered elsewhere)
  - fee for drawing
  - appearances before statutory and non-statutory bodies - preparations of applications
  - insolvencies/liquidations
  - regular collecting of rent
  - administration of trusts

---

[24] Rules of the Supreme Court of Namibia, Annexure.
[25] See AC Cilliers, *Law of Costs* (3d ed), Durban: LexisNexis, 2008 at 4-4.
[26] New Rules of the High Court were issued in 2014. The tariffs in the Magistrates' Courts Rules of Court seem to have been last amended in 1992, while those in the Rule of the Supreme Court date from 1990.
[27] Legal Practitioners Act 15 of 1955, s. 48
[28] Rules of the Law Society, Rule 23; quote from Rule 23(2)(k). All 13 principles contained in Rule 23(2) are as follows:

(a) the amount and importance of the work done;
(b) the complexity of the matter or the difficulty or novelty of the work or the questions raised;
(c) the skill, labour, specialised knowledge and responsibility involved on the part of the member;
(d) the number and importance of the documents prepared or perused without necessarily having regard to length;
(e) the place where and circumstances in which the services or any part thereof were rendered;
(f) the time expended by the member;
(g) where money or property is involved, its amount or value;
(h) the importance of the matter to the client;
(i) the quality of the work done;
(j) the experience or seniority of the member;
(k) any tariff of fees approved by the Society for the sole purpose of serving as a guide to members; and
(l) whether the fees and disbursements have been incurred or increased through overcaution, negligence or mistake on the part of the member.

[29] Non-litigious tariffs 2014-2015, para A.3.
[30] Id, para A.4.1-A.4.2, A.5.

    - collecting debts
    - distributions
    - registration of companies
    - registration of close corporations
- Litigation matters
    - criminal cases
    - civil cases.[31]

The Law Society also published tariff guidelines for conveyancing fees (in the form of recommended minimum fees)[32] and suggested guideline trademark charges.[33]

Decision of the Namibian Competition Commission: Namibia's Competition Act 2 of 2003, which came into force in 2008,[34] prohibits (amongst other things) decisions and practices which reduce competition for goods or services.[35] The Namibian Competition Commission is empowered to exempt professional associations with rules that restrict competition if the rules in question are reasonably required to maintain professional standards or the ordinary function of the profession.[36]

In 2015, the Law Society applied to the Namibian Competition Commission for such as exemption. The Law Society also asserted that some of its rules did not require an exemption as they were authorized by the Legal Practitioners Act 15 of 1995.

The Competition Commission held that the Commission has jurisdiction over all economic activity within Namibia or having effect in Namibia and so has jurisdiction over the rules of the Law Society, except where the rule in question is specifically authorised by law. The Commission then granted in part and refused in part the requested exemptions with respect to specific rules.[37]

The general findings of the Commission were as follows, with the specifics summarised in the table below. These findings are reported in some detail, as they affect the kinds of future guidelines on fees which might be acceptable in terms of the Competition Act.

- The Commission granted an exemption in respect of a range of rules on professional fees, based mainly on the assumption that those rules might be useful for the maintenance of professional standards, that their purpose was to protect members of the public and that some of the rules prohibit or punish overreaching. However, the Commission refused to grant an exemption in respect of the rule that equated charging a contingency fee with unprofessional conduct, on the grounds that this was not specifically authorized by the Legal Practitioners Act and was not required for the maintenance of professional standards. It also refused to authorise the

[31] "Non-litigious tariffs 2014-2015" at <http://lawsocietynamibia.org/content/tariffs/non-litigious-tariffs-2014-2015/>. The name is misleading as the online tariffs covered more years and also included some guidelines for tariffs in respect of litigation-related work.
[32] "Conveyancing fees", Conveyancing Committee, undated, <http://lawsocietynamibia.org/content/tariffs/conveyancing-trademark-fees/conveyancing-fees>.
[33] "Trademarks", 2002, <http://lawsocietynamibia.org/content/tariffs/conveyancing-trademark-fees/trademarks>.
[34] The Competition Act 2 of 2003 (GG 2964), as amended by the State-owned Enterprises Governance Act 2 of 2006 (GG 3698) which was subsequently re-named the Public Enterprises Governance Act, was brought into force on 3 March 2008 by GN 54/2008 (GG 4004).
[35] Competition Act 2 of 2003, s. 23.
[36] Competition Act 2 of 2003, s. 31.
[37] General Notice 564 of 2015, Notice of Decision of Commission regarding Exemption in respect of Professional Rules, Case No: 2010DEC0054EXEMP, *Government Gazette* 5906, 23 December 2015.

establishment of tariff guidelines, on the basis that this was neither supported by internationally applied norms nor required to maintain professional standards.

- The Commission granted exemptions in respect of all the rules on reserved work with exception of the rule prohibiting anyone employed by a firm who is not a legal practitioner of at least 10 years' standing from hold himself or herself out as being a consultant to that firm, on the basis that this limitation was not specifically authorized by the Act and was unnecessary for the maintenance of professional standards.

- The Commission held that the rules dealing with multidisciplinary practices should be exempted, mainly because they were regarded as necessary for the maintenance of professional standards.

- With regard to the rules on marketing and advertising, the Commission granted exemption only for a few paragraphs of the Annexure on Advertising Guidelines: the paragraph authorising publicity about fees for legal services provided that charges were clearly expressed; the permissibility of advertising under a group name or logo and the law firm's responsibility for the contents of advertising issued on its behalf by anyone else. These guidelines were either considered to be necessary for the maintenance of professional standards or permissive rules that did not require exemption. However, the Commission confusingly *refused* to grant an exemption on the "guidelines on advertising and publicity", which appears to refer to these rules generally.

- With respect to touting, the Commission refused to grant the requested exemptions, finding that the definition of what amounts to touting was too wide and not necessary for the maintenance of professional standards.

Ruling of Competition Commission on Law Society Rules General Notice 564 of 2015 (*Government Gazette* 5906) 23 December 2016	
Exemption granted	**Exemption denied**
Professional fees	
Rule 21(2)(h)	
Rule 21(2)(k)	
Rule 21(2)(l)(i)-(ii)	
Rule 21(2)(m)	Rule 21(2)(n)
Rule 21(2)(o)	
Rule 23(1)	
Rule 23(2), with the exception of Rule 23(2)(k)	Rule 23(2)(k)
Reserved work	
Rule 21(2)(w)	Rule 21(2)(x)
Rule 21(2)(y)(iii)	
Multidisciplinary practices	
Rule 21(2)(g)	Rule 21(2)(i)
Rule 21(2)(p)	Rule 21 (2)(y)(ii)
Rule 21(2)(aa)	Rule 21(2)(ff)
Advertising and marketing	
	Rule 21(2)(f)
	Rule 21(2)(bb)
	Rule 21(2)(ee)
	Rule 21(3)
	Paragraph 2.1 of Annexure A
	Paragraph 2.4 of Annexure A
	Paragraph 4.2 of Annexure A

	Paragraph 4.3.1 of Annexure A
	Paragraph 4.3.2 and cautionary notes of Annexure A
	Paragraph 5.1.1 of Annexure A
Paragraph 5.1.2 of Annexure A	Paragraph 7.1 of Annexure A
Paragraph 8 of Annexure A	Paragraph 11 (also 11.1.1 and 11.2) of Annexure A
Paragraph 12 of Annexure A	"Guidelines on advertising and publicity" (which seems to refer to Annexure A in its entirety)
Touting	
	Rule 21(2)(t)(i)-(vi)
	Rule 21(2)(y)(i)
	Paragraph 6 of Annexure A

16.3 Fees in South Africa

The Legal Practice Act 28 of 2014 imposes a duty on the South African Law Reform Commission to conduct investigations and make recommendations to the Minister on how to deal with the problem that legal fees are unaffordable for most people and what legislative and other interventions could improve access to justice by the public. This must be done within two years after the commencement of the relevant portion of the Act. In the interim, fees for both litigious and non-litigious legal services will be set by the Rules Boards of the various courts – although clients may still agree to higher or lower fees.

The law also requires that a legal practitioner, upon first receiving instructions from a client, must provide the client with a written estimate of the envisaged costs of the legal services in question.[38]

Opponents have argued that this approach to fees goes against the concept of a free-market economy, and that it will be difficult to set fees which take into account the diversity of legal practice from small towns to large cities.[39] In oral hearings about the Act before it became law, the South African Competition Commission expressed concerns about possible future price-setting by a body dominated by legal practitioners, on the grounds that this would involve an inherent conflict of interest. The Commission proposed that a separate independent structure should be established to set and regulate fees, with the consumers of legal services being represented on that body. It also recommended that, to protect the public, only maximum fees should be set and not minimum fees, which only protect practitioners. The Commission also supported the removal of restrictions on advertising as a way to increase competition.[40]

16.4 Fees in other jurisdictions

In **Ontario, Canada**, the Law Society of Upper Canada does not set fees for legal services or publish fee guidelines. However, it makes procedures available for members of the public who feel that they have been overcharged. Lawyers and paralegals are required to provide an account that shows a lump sum for fees, based on an hourly rate or an agreed-upon flat fee, and a breakdown of disbursements. A member of the public who is not provided with such an account can request assistance from the Law Society. If a member of the public has received an account but is unsatisfied with it, the Law Society recommends discussing it with the legal services provider as a first step to get clarity on the legal work

[38] Legal Practice Act 28 of 2014 (South Africa), s. 35.
[39] "The Legal Practice Bill: What will change for attorneys?", *De Rebus* 3 (July 2014).
[40] Oral submission of Competition Commission on the Legal Practice Bill, as summarised in Kim Hawkey, "A step closer: Oral hearings on the Legal Practice Bill", *De Rebus* (April 2013) at 23 (available at <www.lssa.org.za/upload/documents/DR%20LPB%20April%202013.pdf>).

involved and how long it took, and to see if any negotiation is possible. If the client remains dissatisfied, there are two avenues of redress, one for services provided by paralegals and one for services provided by lawyers. For paralegals, the remedy is to submit a claim to the Small Claims Court. For lawyers, the client may contact the Assessment Office of the Ontario Superior Court of Justice to request a review of the lawyer's account. This must be done within one month of receiving the account, unless a judge gives permission for a longer time frame.[41]

In **Ghana**, the General Legal Council – which is the regulatory body for the legal profession – sets a scale of fees for various types of legal work. Legal practitioners are expected to charge amounts within the approved ranges, unless the poverty of the client requires a lower fee or no fee at all.[42] However, there are allegations that the power to discipline legal practitioners for overcharging may be selectively applied. For example, in June 2017, the General Legal Council banned a renowned human rights lawyer from practicing for three years, on the basis that he overcharged a client whom he represented in a human rights case. As of August 2017, this disciplinary action was on appeal.[43]

In **Germany**, fees for legal services are generally calculated in accordance with the German Lawyers' Fees Act (*Rechtsanwaltsvergütungsgesetz*). However, clients are free to enter into an individual agreement with their lawyer or law firm. When choosing to adopt an individual agreement, the applicable laws still set certain rules which must be followed. It is prohibited to agree on legal fees which are *lower* than provided by the German Lawyers' Fees Act.[44] Furthermore, performance-based remuneration is generally not permitted.[45] In addition, it is prohibited to make an agreement which binds a lawyer to pay court fees, administration fees or the costs of other parties.[46]

In **Slovenia**, lawyers' fees are regulated by the Attorney Fees Act (*Zakon o odvetniški tarifi*). However, the Slovenian Bar Association has the power to adopt new attorneys' fees, which have to be approved by the Minister of Justice and Public Administration.[47]

In **New Zealand**, there are no set fees. However the New Zealand Law Society assists the public by providing clear and concise information on fees (as reproduced on the following page).[48]

---

[41] The Law Society of Upper Canada, "Your Legal Bill - Too High?", undated, <www.lsuc.on.ca/with.aspx?id=640>.
[42] General Legal Council (Ghana), "GBA Approved Fees", 9 April 2015, <www.glc.gov.gh/resources/gba-approved-fees/>. The GBA is the Ghana Bar Association, which is a professional association for all legal practitioners in Ghana (which no longer has a split profession). It is traditional for all lawyers who are admitted to practise to be members of the GBA, but this does not seem to be mandatory. See "Ghana Bar Association" on the Pan African Lawyers Union website at <https://lawyersofafrica.org/institution/ghana-bar-association/>.
[43] See "Francis Xavier-Sosu files appeal to quash 3-year ban", 7 June 2017, *citifmonline* website: <http://citifmonline.com/2017/06/07/francis-xavier-sosu-files-appeal-to-quash-3-year-ban/>; "General Legal Council dragged to Supreme Court over 'draconian' rules", 22 June 2017, *citifmonline* website: <http://citifmonline.com/2017/06/22/general-legal-council-dragged-to-supreme-court-over-draconian-rules/>.
[44] German Lawyers' Fees Act (RVG), s. 4.
[45] German Federal Lawyers' Act (BRAO), s. 49b(2).
[46] Ibid.
[47] European Justice, "Costs of proceedings -Slovenia", undated, available at <https://e-justice.europa.eu/content_costs_of_proceedings-37-si-en.do?member=1>. See Slovenian Bar Act, s. 19 (available at <www.odv-zb.si/en/regulations/bar-act>).
[48] New Zealand Law society, "How much will it cost?" undated, <www.lawsociety.org.nz/for-the-community/how-can-we-help-you/how-much-will-it-cost>.

New Zealand Law Society

How much will it cost?

Your lawyer must inform you up front of the basis for charging and the process for payment. The fee will take into account the time taken and the lawyer's skill, specialised knowledge and experience.

It may also depend on the importance and complexity of the matter, the nature of the work and how urgent it is, results achieved and the costs of running a practice, and any quote or estimate given or fee agreement made at the outset.

Various arrangements can be made for fees, including:

- Paying instalments as the work is being done.
- Paying at the end of the work.
- Paying a fee in advance (this must be held in trust and charges can be deducted only with your authority).
- A conditional fee (based on success).

Whatever arrangement is made, the fee should be fair and reasonable to both you and your lawyer and, as mentioned above, you must be given information in advance about the basis of charging and how and when payment is to be made.

As well as the fee, the lawyer may have to pay other charges (usually called disbursements) on your behalf and these will be passed on to you. These can include such things as court fees, registration charges and toll calls. Your lawyer can tell you what these are likely to be.

Sometimes a lawyer will, with your permission, instruct another lawyer to act on your behalf. In this case, your lawyer may bill you for the other lawyer's fees.

A lawyer is required to tell you if you might be entitled to legal aid.

How can I control the legal costs?

You can help keep the cost of legal services down by giving your lawyer a clear outline of what you need or what the problem is. This will assist when he or she estimates the likely cost.

In legal work, many factors can be hard to measure and may affect the final cost. Delays by another party can also increase costs and be outside your lawyer's control. If what is involved changes or looks as though it will change, discuss it with your lawyer promptly.

You are free to tell your lawyer that you don't want to spend more than a certain amount in legal fees and ask her or him to check with you before going over this amount.

Check that you and the lawyer understand and agree about what work is to be covered, what the fees and any other charges are likely to be, how you can pay them, and the process for the lawyer to report progress and any changes to you.

Money handling

If you have any doubts about how a lawyer is handling funds held on your behalf, phone 0800 261 801 to discuss your concern with a New Zealand Law Society Complaints and Standards Officer.

17. Compensation schemes for misappropriation of client funds

Historically, legal practitioners commonly mixed their own funds with client funds, resulting in great losses for clients if the firm became insolvent. In the 20th century, it became common practice to enact laws forbidding combining the funds of a legal practitioner with those of a client, and to provide a system of compensation to clients in instances of misappropriation of client funds.[1]

Compensation funds are generally funded in the same way in most jurisdictions. They are usually administered by the bar association or law society, or by a council of lawyers (with the occasional inclusion of a layperson) appointed by the bar association or law society. The primary differences between such funds are the size of the fund, the ease of obtaining compensation and the types of losses that the fund will compensate. It appears that in Europe, such funds will generally compensate for negligence and malpractice but not outright theft, while the position in North America is exactly the opposite.[2]

17.1 Issues to consider

Losses compensated: Should the compensation fund be limited to losses from theft (as in Namibia at present), or should it also function as a self-funded professional insurance scheme which protects against negligence and malpractice? Criteria for claiming against the Fund should also be considered, including the applicable timeframe and what evidence the claimant must provide.

Administration of compensation fund: Issues to take into consideration include whether or not to include in the administrative body representatives of Government, the finance sector and/or lay-persons, and whether the controlling body should be elected, appointed or constituted by some mixture of methods.

Cap on coverage: Should the maximum amount of claims against the fund be limited?

Sustainability of funds: The mechanism for funding the scheme must obviously be balanced against the amount of clams paid out. Annual contributions from members of the profession are the norm, but it is important to assess the level of contribution to ensure steady, secure and adequate funding.

Alternatives: Instead of maintaining a central compensation fund, it is possible to rather require legal practitioners to hold their own professional indemnity insurance. This is the case in Germany in respect of "*Rechtsanwälte*" (who are comparable to solicitors).[3] However, this would deprive the regulatory body of a source of funding from the interest and surpluses of a central compensation fund.

17.2 Namibia: Legal Practitioners Fidelity Fund

Namibia has established a Legal Practitioners Fidelity Fund pursuant to the Legal Practitioners Act 15 of 1995.[4] The purpose of the fund is to "reimburse members of the public who may have suffered

[1] Solicitors Regulation Authority (England and Wales), "Compensation Arrangements Review: Comparative Study", [2014] (available at <www.sra.org.uk/documents/SRA/comparative-study.pdf>).
[2] See ibid.
[3] Solicitors Regulation Authority (England and Wales), "Compensation Arrangements Review: Comparative Study", [2014] at 12 (available at <www.sra.org.uk/documents/SRA/comparative-study.pdf>)
[4] Legal Practitioners Act 15 of 1995, s. 56.

pecuniary loss due to the theft of money or property entrusted to a legal practitioner".[5] The fund is administered by trust by the Legal Practitioners' Fidelity Fund Board of Control, which consists of the chairperson of the Council of the Law Society and three legal practitioners appointed annually by the Council. At least two of the appointed legal practitioners must not be members of the Council, and at least two must have been engaged in private practice for a period of not less than five years.[6]

Generally, every legal practitioner must apply annually for a fidelity fund certificate and pay an annual contribution to the Fund.[7] Legal practitioners in the full-time employment of the State or of a law centre are not required to hold a fidelity fund certificate.[8] Exemptions from the requirement may be made for legal practitioners who do not in the conduct of their practice accept, receive or hold moneys for or on account of another person[9] – with this being primarily applicable in practice to advocates belong to the Society of Advocates and are briefed only by attorneys.

Every legal practitioner who holds or receives moneys on behalf of another person is also required to have a separate trust banking account in to which such moneys are deposited. These accounts are protected from attachment and can be placed under the control of a *curator bonis* if the circumstances require it.[10] Failure to operate a trust account as the law requires is a criminal offence, as is accepting money from or on behalf of clients without a fidelity fund certificate or failing to keep books of account which distinguish between money held on the legal practitioner's own account versus money held for others.[11]

The Fidelity Fund and its interest gains are an important source of funding for the Law Society. Whenever the amount of the Fidelity Fund exceeds N$1 million, the Board of Control may apply the excess to bursaries, "for the purpose of the furtherance of the administration or dispensation of justice". to fund the participation of members of the Law Society in activities of any international or regional association of legal practitioners, to pay an honorarium or compensation to a person for services rendered at the request of the Board of Control to enhance the professional standards of legal practitioners, or to contribute towards the costs of running the Law Society and its law library.[12]

17.3 South Africa: Legal Practitioners Fidelity Fund

In South Africa the Legal Practitioners' Fidelity Fund operates similarly to Namibia's Fund.[13] It is administered by a Legal Practitioners' Fidelity Fund Board which consists of five legal practitioners (inducing one advocate) elected in accordance with procedures established by the Legal Practice Council, two persons, designated by the Council with expertise in the field of finance (drawn from nominations by the Independent Regulatory Board of Auditors) and two persons chosen by the Minister. The selection of Board members is expected to take into account the racial and gender composition of South Africa, the need to include representation of persons with disabilities and

[5] Legal Practitioners Act 15 of 1995, s. 54.
[6] Legal Practitioners Act 15 of 1995, s. 56.
[7] Legal Practitioners Act 15 of 1995, s. 68-69.
[8] Legal Practitioners Act 15 of 1995, s. 67(1).
[9] Legal Practitioners Act 15 of 1995, s. 67(2)-(4).
[10] Legal Practitioners Act 15 of 1995, s. 26-29. A *curator* can be appointed by the High Court on application by the Council if the legal practitioner dies, becomes insolvent or is suspended or struck off the Roll (in addition to a few other specified circumstances).
[11] Legal Practitioners Act 15 of 1995, ss. 31, 67(3), 25(1).
[12] Legal Practitioners Act 15 of 1995, s. 71.
[13] Legal Practice Act 28 of 2014, Chapter 6.

provincial representation as far as is practicable.[14] South Africa also requires legal practitioners to operate trust accounts in similar fashion to Namibia.[15]

17.4 Compensation schemes in other countries

In 2006 the International Bar Association carried out a comprehensive survey of client compensation arrangements, and suggested standards for effective compensation schemes based on the standards set by the American National Client Protection Organization.[16] More recently, in 2013, the Solicitors Regulation Authority (England and Wales) produced a comparative study of fidelity cover arrangements.[17] This latter survey is readily available online. It considers more than a dozen jurisdictions and provides comparisons with respect to what losses are covered, the eligibility criteria for making claims from the fund, the maximum amount of coverage and how the compensation funds are financed. Given the availability of this resource, it has been deemed unnecessary to provide further comparisons here.

[14] Legal Practice Act 28 of 2014, s. 62.
[15] Legal Practice Act 28 of 2014, Chapter 7.
[16] Adrian Evans and John Moorhouse, "Protecting Clients of a Globalised Profession: Implications of Members' Responses to the International Bar Association Survey of Client Compensation Arrangements: 2004-05". International Bar Association, 2006. This study is cited in the publication of the Solicitors Regulation Authority (England and Wales) referred to in the previous footnote, but could not be located online.
[17] Solicitors Regulation Authority (England and Wales), "Compensation Arrangements Review: Comparative Study", [2014] (available at <www.sra.org.uk/documents/SRA/comparative-study.pdf>).

18. Communication with public about legal profession

18.1 Advertising by lawyers

According to the US Supreme Court, traditional bans on advertising by lawyers "originated as a rule of etiquette and not as a rule of ethics":[1]

> Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on "trade" as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow "above" trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.[2]

In line with this view, advertising by lawyers is now more often restricted than prohibited, with a view to ensuring that it is not false or misleading.

In **Namibia**, the Legal Practitioners Act 15 of 1995 is, for the most part, silent on the subject of advertising aside from providing one restriction: the appearance of a lawyer's name together with his or her qualifications as a legal practitioner in an advertisement in conjunction with the name of a person who is not a legal practitioner is considered to constitute unprofessional or dishonourable or unworthy conduct if the advertisement conveys or is able to convey the impression that the lawyer in question is associated in his or her legal practice with the non-legal practitioner.[3] In accordance with the Act, the Law Society of Namibia issued guidelines for advertising and publicity which also prohibit touting.[4] However, even though the Law Society gives guidance on what shall be seen as touting, the line between legal advertisement and illegal touting is somewhat blurred.[5]

In the 1991 High Court case of *Vaatz v Law Society of Namibia*, the High Court set aside the finding of the Council of Law Society that the appellant was guilty of touting. The appellant had published an article in a newspaper on the question of maintenance for children and had outlined a number of deficiencies in the legal system, especially in the maintenance courts. The article concluded with a general invitation to join an association – yet to be formed by the appellant - aimed at ensuring that the cited problems with regard to child maintenance were met by the authorities. The High Court concluded that no reasonable reader would have realistically considered that the appellant was inviting

---

[1] *Bates v State Bar of Arizona* 433 US 350 (1977) at 371.
[2] Id at 371-72 (references omitted).
[3] Legal Practitioners Act 15 of 1995, s. 33(1)(d).
[4] Legal Practitioners Act 15 of 1995, s. 52. The Act does not explicitly authorise rules on advertising, but it empowers the Council of the Law Society, with the approval of the Chief Justice, to makes rules "on any other matters which the Council considers it necessary or expedient to prescribe for carrying out or giving effect to this Act". The guidelines on advertising were authorised by Rule 21(3) of the Rules of the Law Society of Namibia and contained in Annexure A to these rules. See General Notice 340/2002 (Government Gazette 2848).
[5] According to Rule 21(2)(t) of the amended rules of the Law Society of Namibia, "without derogating from the generality of the prohibition against touting, the following shall be construed as touting":

> (i) To solicit custom or work directly or indirectly from any person; or
> (ii) To make unsolicited visits or telephone calls or to send unsolicited letters or printed material to any person except to an existing professional connection with a view to establishing a legal practitioner / client relationship with such person;
> (iii) To permit, encourage or connive with another person to do any of the aforegoing on his or her behalf;
> (iv) To enter into an arrangement with any person, whether an employee or not, for the introduction of clients to the legal practitioner, practising with a Fidelity Fund Certificate [with exceptions for referrals between legal practitioners and introductions pertaining to work by one legal practitioner for another on an agency basis]".

them to become his client and thus the appellant should not have been found guilty of touting. Furthermore, the High Court sent a warning note to the Law Society of Namibia to ascertain whether its rules on touting were in line with Article 21 of the Constitution, which includes protection for freedom of speech and expression. This case shows that it could be difficult to determine when advertisements and publicity are permissible in terms of the rules of the Law Society.[6]

Furthermore, in 2015, the Namibian Competition Commission was asked to decide on an application from the Law Society of Namibia for exemptions in respect of some of the Rules of the Law Society.[7] The Commission granted in part and refused in part the requested exemptions. It confusingly addressed the permissibility of specific provisions of Guidelines on advertising, exempting some specific provisions but not others, but then refused to exempt Rule 23(3) of the Rules of the Law Society which authorises the guidelines, as well as the "guidelines on advertising and publicity", seemingly in their entirety:

> Rule 21(2)(f), Rule 21(2)(bb), Rule 21(2)(ee), Rule 21(3) and the guidelines on advertising and publicity are in the Commission's view too broad, not necessary for the maintenance of professional standards and should therefore not be exempted. These rules can be narrowly tailored with a simple rule that allows for any restrictions on advertising that conforms with general advertising standards.[8]

The Commission also refused to grant the requested exemption for the rule on touting, on the grounds that the definition of what amounts to touting in terms of the rules of the Law Society was too wide and not necessary for the maintenance of professional standards.[9] Thus, the current position in Namibia regarding advertising by legal practitioners is not entirely clear.

Most other jurisdictions examined allow lawyers to advertise, with some restrictions aimed at protecting the public.

For example, in the **United States**, the rules governing advertising by legal practitioners have changed radically since the 1977 Supreme Court decision *Bates v State Bar of Arizona* discussed above. In that case, the appellants had placed an advertisement in a newspaper for their practice stating that they were offering "legal services at very reasonable fees".[10] The Supreme Court concluded that by advertising his or her fees, a lawyer would not undermine true professionalism and that advertising legal services was not inherently misleading and could help clients to get useful information about a lawyer before selecting one. This case usefully considered some of the pros and cons regarding the advertisement of legal services. For example, it was argued that such advertising will inevitably will be misleading because legal services are highly individualized to the client and case, because the consumer is unable to determine in advance precisely what legal services are needed, and because such advertisements might highlight irrelevant factors and fail to take into account the relevant factor of skill. The Court rejected these arguments, noting that routine services (such as uncontested divorces or name changes) are sufficiently standardised to lend themselves to advertisement, that consumers can in many cases identify the specific legal task they are seeking and that the public is sophisticated enough to realise the limitations of advertising; the Court stated, "If the naiveté of the public will

---

[6] *Vaatz v Law Society of Namibia* 1991 (4) SA 382 (Nm).
[7] According to s. 31(1) of the Competition Act 2 of 2003, a professional association whose rules contain a restriction that has the effect of preventing or substantially lessening competition in a market may apply to the Commission for an exemption.
[8] General Notice 564 of 2015, Notice of Decision of Commission regarding Exemption in respect of Professional Rules, Case No.: 2010DEC0054EXEMP, *Government Gazette* 5906, 23 December 2015 at 9.
[9] Ibid. See section 16.2 of this paper for a further discussion of the decision of the Competition Commission.
[10] *Bates v State Bar of Arizona*, 433 US 350 (1977) at 354.

cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective."[11] In response to the argument that advertising might have the harmful effect of stirring up litigation, this was found to be counter-balanced by the idea that advertising might serve to inform a wronged person of the option of redress: "Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange."[12] Most importantly, as this case held, the advertisement of legal services falls within the scope of the First Amendment protection for free speech,[13] while noting that this would not protect advertising that is false, deceptive, or misleading.[14]

This decision led to the lifting of restrictions on advertising of legal services in the United States.[15] While the advertisement of legal services is now generally allowed, direct contact with prospective clients (ie solicitation of clients), is not.[16] However, the line between legal advertisement and illegal solicitation is not clear. For example, in *Zauderer v Office of Disciplinary Counsel,* the Supreme Court held that the applicant (a lawyer) could run a newspaper advertisement publicising his willingness to represent women who had suffered injuries resulting from their use of a certain contraceptive.[17] In the 1988 Supreme Court case *Shapero v Kentucky Bar Association*, the Supreme Court concluded that sending an advertising letter to potential clients who had foreclosure suits filed against them did not constitute illegal solicitation.[18]

In **Australia**, the Legal Profession Conduct Rules require a legal practitioner and the principal of a law practice to ensure that any advertising, marketing or promotion in connection with the practitioner or the law practice is not false, misleading, deceptive, offensive, likely to be prejudicial to or diminish public confidence in the administration, likely to bring the profession into disrepute or prohibited by law.[19] In addition, these rules prohibit a legal practitioner from conveying a false or misleading impression that he or his law practice has specialist expertise in relation to services offered by him or his practice or to advertise or otherwise imply that he or his practice is accredited by a relevant professional body to provide specialist services in an area of legal practice unless he or his law practice is so accredited.[20] Legal practitioners can generally only advertise themselves as accredited specialists if they have obtained a valid specialist accreditation. If the legal practitioner has not obtained a valid specialist accreditation and wants to refer to himself or herself as a specialist, the legal practitioner must ensure that doing so would not convey a false or misleading impression. In determining whether a claim to be a specialist does convey a false or misleading impression, the Legal Profession Complaints Committee will consider criteria pertaining to overall practise experience and degree of involvement with the speciality in question.[21]

---

[11] Id at 372-75, quote from 375.
[12] Id at 375-76, quote from 376.
[13] Id at 380-ff.
[14] Id at 383.
[15] A Breytenbach and E J North, "The Role of Marketing and Advertising in the Legal Profession", *South African Journal of Economic and Management Sciences* Vol 3 No. 3, 2000 at 415.
[16] See Rule 7.3 of the Model Rules of Professional Conduct of the American Bar Association.
[17] *Zauderer v Office of Disciplinary Counsel, Supreme Court of Ohio* 471 US 626 (1985).
[18] *Shapero v Kentucky Bar Association* 486 US 466 (1988).
[19] Legal Profession Conduct Rules 2010, Rule 45(1).
[20] Id, Rule 45(2).
[21] Legal Profession Complaints Committee, Western Australia, "Use of the terms 'specialist' and 'expert' in advertisements", March 2014 at 3 (available at <www.lpbwa.org.au/Documents/Complaints/Information-for-Legal-Practitioners/Guidelines-for-use-of-terms-Specialist-and-Expert.aspx>.

18.2 Matching clients with lawyers

In **Namibia,** the Law Society provides a database of legal practitioners and law firms which can be accessed via its website. Various criteria can be used to narrow the search, such as location in Namibia (by town), specific legal categories (prosecutor, conveyancer, notary, law centre, etc) or areas of work (aviation, banking, family law, etc).[22] However a test of this function indicates that the database search function does not work entirely reliably, nor is it entirely up-to-date.[23] This is a matter for concern, as inaccuracies in such a database could unfairly disadvantage those who are omitted from searches which should produce their names. Providing a public database for this purpose comes with a duty to maintain it regularly, which requires updated input from the legal practitioners who are to be included.

In **South Africa**, the Law Society of South Africa as an umbrella body publishes contact details of all law societies in South Africa and advises members of the public contact the relevant provincial law society to find a lawyer.[24] It also suggests contacting the relevant provincial law society to confirm that an attorney is on the practicing roll and in good standing. As of August 2017, only one of the four provincial law societies provided for searches for attorneys by area of work, while two others listed members only in the categories of attorney, notary, conveyancer and law firm and one listed members only by name.[25] Thus, most of these listings are less useful to the public than the Namibian approach.

In addition to offering a database of all legal practitioners who are licensed by the Law Society, the **Law Society of Upper Canada** provides a referral service that will give the user the name of a lawyer or paralegal within or near the user's community who will provide a free consultation of up to 30 minutes to help determining the user's rights and options. The referral is initiated by completing a simple online form, or by telephone for crisis situations. The Law Society also provides a **"**Directory of Certified Specialists" which provides information about lawyers who have met established standards of experience and knowledge in specific areas of law. The listed specialties include typical areas such as criminal law and family law, as well as more specific categories such as citizenship and immigration, construction law, indigenous legal issues.[26]

In the **United States,** *Avvo Legal Services* is an online service which matches clients with lawyers who work in the practice area related to the client's need. The client pays a pre-set fee up-front. Avvo keeps the money until the service has been provided, then pays the entire amount over to the lawyer. Avvo's profit comes from a separate marketing fee paid by the lawyer, which varies depending on the amount paid by the client for the service. Other such legal matching services include Rocket Lawyer, Total Lawyers and Priori Legal.[27] A similar service (no longer in operation) was *ABA Law Connect*, started by the American Bar Association through Rocket Lawyer. Customers paid a small fee to ask an

---

[22] The Law Society of Namibia, "Find a practitioner", undated, available at <http://lawsocietynamibia.org/content/find-members/find-a-practitioner>.

[23] For example, the Director of the Legal Assistance Centre does not appear in a search for "law centre", and the only legal practitioner who is reported in that search left the LAC some years ago.

[24] Law Society of South Africa, "Find an attorney", undated, <www.lssa.org.za/public/getting-legal-assistance/find-an-attorney>.

[25] Based on the links to the four provincial law societies provided by the Law Society of South Africa at <www.lssa.org.za/public/getting-legal-assistance/find-an-attorney>.

[26] Law Society of Upper Canada, "Finding a Lawyer or Paralegal", undated, available at <www.lsuc.on.ca/find-a-lawyer-or-paralegal/>. See also <www1.lsuc.on.ca/specialist/jsp/directory1.jsp>.

[27] Ronald C Minkoff, "United States: ABA Model Regulatory Objectives: Why They Matter To You", 10 May 2016 (available at <www.mondaq.com/unitedstates/x/488032/Strategic+Planning/ABA+Model+Regulatory+Objectives+Why+They+Matter+To+You>).

ABA-member lawyer one question online plus a follow-up question. After that, the client and the lawyer were free to negotiate further legal services between themselves if they wished. However, the ABA dropped this programme after complaints from some of its constituent bars who feared it would take business away from sole practitioners, and from local and state bar referral services that build revenue for the bars.[28] It may be only a matter of time before digital marketing combined with online ratings become the major avenue for choosing a lawyer, following on similar developments in areas such as tourism.

18.3 Public information about role of legal profession and regulator

In **Namibia**, all press statements of the Law Society of Namibia are displayed on their official website, which also includes full texts of the legislation and rules governing the legal profession. In addition, the Law Society website informs the public about its mission, objectives and structure (including information on Council membership and committees). However, the website is not entirely up-to-date about the legal framework; for example, it does not report the 2015 decision of the Namibian Competition Commission which impacted the rules and tariffs. It also lists the standing committees existing in 2014, but it is not clear if this information is current in 2017.[29] The Law Society does not have a Facebook page.

Some regulatory bodies have useful "Frequently-Asked Questions" on their websites, aimed at explaining to the public what they do (and what they do not do). A good example is the Legal Services Board (LSB) of **England and Wales**, which answers questions such as "Why was the LSB created?" and "Is the LSB really independent?".[30]

The **Law Society of Upper Canada** provides information especially for the public on its official website.[31] This website includes a simple publication entitled "Helping you with your Legal Needs" that gives brief and clear guidance on the role of law society as a regulator, on what lawyers and paralegals can do, how to choose a lawyer and how to make a complaint to the Law Society.[32] The website also contains a very clear list of what the Law Society *cannot* do (investigate legal fees, provide legal advice or order a lawyer or paralegal to pay compensation for negligence). The public can find information about the qualifications of lawyers and paralegals, how to choose the right legal professional and how to handle everyday legal problems,[33] or brief information about typical legal issues, (such as child custody and wills).[34] "Law videos" aiming at informing the public about relevant laws can be found on the Law Society's YouTube channel.[35]

---

[28] Ibid; S. Beck, "ABA Abandons Rocket Lawyer Venture Amid Attorney Backlash," *The American Lawyer,* 18 February 2016 on the discontinuation of the programme.
[29] Law Society of Namibia website: <http://lawsocietynamibia.org>. As a point of information, the Law Society website cannot be properly viewed in all of the most popular web browsers.
[30] Legal Services Board (England and Wales), "Frequently Asked Questions (FAQs)", undated, <www.legalservicesboard.org.uk/can_we_help/faqs/index.htm>.
[31] The Law Society of Upper Canada, "Services for the Public", undated, available at <www.lsuc.on.ca/with.aspx?id=1064>.
[32] "Helping you with your legal needs", Law Society of Upper Canada, <www.lsuc.on.ca/uploadedFiles/EN-your-legal-needs.pdf>.
[33] Law Society of Upper Canada, links from the page "Services for the public", <www.lsuc.on.ca/with.aspx?id=1064>.
[34] Law Society of Upper Canada, links from "Your Law", <www.lsuc.on.ca/yourlaw/>.
[35] Available at <www.youtube.com/lawsocietylsuc>, with a link from the website of the Law Society of Upper Canada at "Your Law", <www.lsuc.on.ca/yourlaw/>.

The Children and Law Committee of the **Law Society of South Australia** published a comic book called "Smart Guy needs Lawyer" to inform adolescents about the role of lawyers in court proceedings, what to expect from the lawyer-client relationship and how young people can play a positive and active role in the legal decision-making process.[36] Furthermore, the Law Society provides an app aiming at informing the public about the laws relating to cyberbullying, age of consent and sexting in South Australia.[37]

[36] The comic book is available at <www.lawsocietysa.asn.au/LSSA/Lawyers/Publications/Smart_Guy_Needs_a_Lawyer.aspx>.
[37] The app is called "Out of Bounds" and can be downloaded from the Apple and Android app stores.

PART B
OUTREACH AND SERVICES TO THE PUBLIC

19. The legal profession and the public interest

One of the targets in the **United Nations Sustainable Development Goals** is to: "Promote the rule of law at the national and international levels and ensure equal access to justice for all".[1]

The **United Nations' Basic Principles on the Role of Lawyers** emphasise the legal profession's duty to work alongside Government to ensure that adequate legal services are provided to the poor:

> 3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.
>
> 4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.[2]

The statutory objects of the **Law Society of Namibia** include several goals which are aimed at the public good: furthering the development of the law as an instrument of social engineering and social justice, promoting applied research in the development of the law and participating in law reform and promoting the rule of law and the protection of human rights.[3]

It is not unusual for law societies to include amongst their objects responsibilities to the public. For example, in **South Africa** the objects of the Legal Practice Council include promoting and protecting the public interest and upholding and advancing the rule of law, the administration of justice, and the Constitution of the Republic. In **Uganda** the objects of the Uganda Law Society include "to protect and assist the public in Uganda in all matters touching, ancillary or incidental to the law".[4] In **Malawi**, the Malawi Law Society has an identical object.[5] In Ontario, Canada, the functions of the Law Society

---

[1] The Sustainable Development Goals (SDGs) are a set of 17 goals adopted by the United Nations in 2015, along with specific targets for achievement by 2030 in respect of each goal. They follow on the Millennium Development Goals (MDGs) which were in place until 2015. Although not legally binding, this framework is internationally influential. Goal 16 is "Peace, Justice, and Strong Institutions: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". Target 3 under this goal is quoted in the text. See, eg, <http://17goals.org/us_main_page_section/the-goals/>; *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All,* OECD and Open Society Foundations, 2016 at 3-ff (available at <www.oecd.org/gov/delivering-access-to-justice-for-all.pdf>).

[2] United Nations Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990, arts 3-4 (available at <www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>).

[3] Art. 40 of the Legal Practitioners Act 15 of 1995.

[4] The Uganda Law Society Act [Chapter 276], s. 3(d).

[5] Legal Education and Legal Practitioners Act [Chapter 3:04] (Malawi), s. 26(1)(d).

include duties "to maintain and advance the cause of justice and the rule of law", "to facilitate access to justice for the people of Ontario" and "to protect the public interest".[6]

One of the statutory functions of the Board of Trustees of the State Bar of the US state of **California** is to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice, including, but not by way of limitation, all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public".[7] The statute also requires that a "Governance in the Public Interest Task Force" made up of a subset of the members of the Board of Trustees be convened every three years to make recommendations "for enhancing the protection of the public and ensuring that protection of the public is the highest priority in the licensing, regulation, and discipline of attorneys".[8]

This part of the report examines the role of the legal profession and law societies in activities aimed at upholding rule of law and increasing access to law.

[6] Law Society Act, R.S.O. 1990 (Ontario),s. 4.2.
[7] The State Bar Act (Business & Professions Code Div. 3 - Professions and Vocations Generally, Ch. 4 – Attorneys) (California), § 6031(a).
[8] Id, § 6001.2.

20. Pro bono work

The term "pro bono" is a commonly-used short form of the Latin phrase "pro bono publico" meaning "for the public good". In the legal profession, it refers to the situation where private legal practitioners volunteer to provide free professional services for good causes or for people who cannot afford to pay.

As stated in the Commonwealth (Latimer House) Principles adopted by Commonwealth Ministers of Justice at Abuja in 2003, "Legal professional organisations should assist in the provision, through pro bono schemes, of access to justice for the impecunious."[1] In the words of the State Bar Act of the US state of California:

> In view of their expertise in areas that critically affect the lives and wellbeing of members of the public, lawyers are uniquely situated to provide invaluable assistance in order to benefit those who might otherwise be unable to assert or protect their interests, and to support those legal organizations that advance these goals.[2]

Pro bono work can be mandatory or voluntary. It can be argued that there is no need for mandatory pro bono work if the government legal aid system is organised and well-funded. However, a legal aid system is unlikely to fully meet the need for pro bono services. For example, in Namibia, non-governmental organisations and charitable groups are not entitled to legal aid. Furthermore, the legal aid system suffers from severe budget constraints and provides assistance in only limited categories of cases based on a means test set at a rate which excludes many who cannot afford legal services.[3]

Some believe that mandatory pro bono is good policy because it gives more people access to representation; even if many routine legal tasks can be done by paralegals or non-lawyers, an unrepresented party is at a severe disadvantage if the opposing party is represented by an experienced and able lawyer.[4] It accords with the commitment of many law societies to advance the rule of law and public access to justice. Furthermore, where the pro bono custom is not well-established in the legal profession, binding requirements may be the only way to implement it.

On the other side, it has been argued that mandatory pro bono will result in inefficient and low quality representation, because it would force lawyers to provide pro bono services whether or not they have an interest in doing so.[5] Furthermore, not every lawyer is equally qualified (or interested) to carry out a full range of pro bono work, since many pro bono cases require special knowledge of specific areas.[6] This problem can be addressed through a "buy-out" whereby lawyers would be able to pay off their pro bono obligation by paying a certain amount (preferably a certain percentage of their income) to legal aid or to a "pro-bono-organisation". [7] Another point to keep in mind is that a mandatory pro bono

---

[1] *Commonwealth (Latimer House) Principles on the Three Branches of Government*, as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003 at Art V (available at <http://thecommonwealth.org/sites/default/files/history-items/documents/LatimerHousePrinciples.pdf>

[2] The State Bar Act (California) (Business & Professions Code Div. 3 - Professions and Vocations Generally, Ch. 4 – Attorneys), § 6073.

[3] T Haidula, "Budget cuts catch up with justice", *The Namibian*, 19 January 2017, available at <www.namibian.com.na/160256/archive-read/Budget-cuts-catch-up-with-justice>.

[4] R C Cramton, "Mandatory Pro Bono", *Cornell Law Faculty Publications*, 1999 at 1125 (available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2233&context=facpub>.

[5] Id at 1127.

[6] Ibid.

[7] See id at 1128.

requirement would require some mechanism and manpower for monitoring and enforcement, which could add extra administrative costs.

Unlike many other countries, **Namibia** has no binding rules on pro bono work by members of the legal profession. However, the Law Society of Namibia has established a Committee on "Access to the Law and Social Responsibility" which is tasked to encourage and develop a pro bono model for the legal profession.[8] For the last few years, the Law Society has also been hosting free legal advice days in different locations in Namibia, in some instances in collaboration with the Office of the Ombudsman. On these days, legal practitioners volunteer their time to gather at a central location which is publicised in advance in order to provide free legal advice to members of the public. The Judge JP Karuaihe Trust, in consultation with the Law Society, gives annual Legal Excellence Awards which include an award for social responsibility – and consideration of the nominations for these awards takes pro bono work into account.[9] Nevertheless, there is not a very well-established pro bono tradition in Namibia, as compared to some other countries. For example, virtually all major law firms in the US and the UK offer structured pro bono services.[10] However, the Society of Advocates of Namibia has taken a decision to amend its rules to require a certain amount of pro bono work by its members.[11] Pro bono schemes in Namibia could be broadly defined to include arrangements whereby private lawyers might support and strengthen state institutions such as future Small Claims Courts, the Anti-Corruption Commission and the Office of the Ombudsman.

In **South Africa**, the Legal Practice Act 28 of 2014 includes a community service requirement. The law authorises the relevant minister to prescribe requirements for community service by candidate legal practitioners or as a condition of the continued enrolment of practising legal practitioners.[12] At the moment, legal practitioners under age 60 in South Africa are required by the rules of the Law Society of South Africa to provide 24 hours per year of free legal advice to members of the public who qualify for this in terms of a means test. Failure to comply with this requirement without good cause constitutes unprofessional conduct.[13] One commercial law firm in South Africa has staffed offices in poor communities, where its lawyers give legal advice and conduct rights education programmes. Another has provided attorneys for six-month assignments with the State's Public Defenders' office as well as staffing for a Domestic Violence Help Desk at a magistrate's court. Several commercial firms in South Africa have delivered free pro bono services which would cost millions of rand if they were provided for fees.[14] In addition, law clinics exist at each university in South Africa.[15] These not only

---

[8] Law Society Namibia, "About the law society", <www.lawsocietynamibia.org/content/about-the-law-society>, last accessed 10 July 2017; "Pro bono work by Legal practitioners" *The Namibian*, 2 February 2017.
[9] Law Society of Namibia, "Judge JP Karuaihe (JPK) Trust: Legal Excellence Awards", 2016, <http://lawsocietynamibia.org/content/news/press-statements-2016/judge-jp-karuaihe-jpk-trust-legal-excellence-awards>.
[10] See, eg, Lamin Khadar, *The Growth of Pro Bono in Europe: Using the Power of Law for the Public Interest*, DLA Piper & PILnet, 2016 at 12 (available at <https://probonoconnect.nl/wp-content/uploads/2017/03/PILnet-pro-bono-report.pdf>).
[11] Personal communication from member of the Bar Council, January 2017. The amended Rules of the Society of Advocates of Namibia were not yet available at the time of writing.
[12] Legal Practice Act 28 of 2014 (South Africa), s. 29.
[13] Law Society of South Africa, "Pro bono", undated, <www.lssa.org.za/our-initiatives/advocacy/pro-bono>; Rules for the Attorneys' Profession, Rule 25 (available at <www.lssa.org.za/upload/RulesForTheAttorneysProfession2016.pdf>. The Cape Law Society applies a slightly different version of the rule, which is contained the same document.
[14] Latham & Watkins LLP, *A Survey of Pro Bono Practices and Opportunities in 84 Jurisdictions*, March 2016, at 603-4.
[15] P Maisel, "Expanding and Sustaining Clinical Legal Education in Developing Countries: What we can learn from South Africa", *Fordham International Law Journal*, Vol. 30, Issue 2, 2006 at 374.

enhance legal education for students by giving them the opportunity to learn practical lawyering skills such as interviewing, negotiating and analysing cases, but also expand the resources for legal representation for indigent people and charitable organisations.[16]

According to the **American Bar Association**, "When society confers the privilege to practice law on an individual, he or she accepts the responsibility to promote justice and to make justice equally accessible to all people. Thus, all lawyers should aspire to render some legal services without fee or expectation of fee for the good of the public."[17] The American Bar Association urges all American lawyers to provide a minimum of 50 hours of pro bono services annually.[18]

In the US state of **New York**, lawyers who apply to be admitted to practice are required to demonstrate that they have performed 50 hours of pro bono work.[19] The state of **California** makes pro bono work a matter of personal conscience. The State Bar Act states: "It has been the tradition of those learned in the law and licensed to practice law in this state to provide voluntary pro bono legal services to those who cannot afford the help of a lawyer. Every lawyer authorized and privileged to practice law in California is expected to make a contribution." Where pro bono work is not feasible, a lawyer instead fulfil his or her "pro bono ethical commitment" by providing financial support to organizations providing free legal services to persons of limited means in an amount equivalent to the hours of pro bono legal service that he or she would otherwise have provided.[20] Lawyers who participate in certain pro bono programmes are eligible to have their annual State Bar membership fee waived.[21]

In **Uganda**, advocates (ie all enrolled legal practitioners with a right of appearance in court) are required to provide 40 hours of pro bono legal services per year, or make a payment in lieu of such service.[22]

In **South Korea**, lawyers are required by law to do at least 30 hours of pro bono work annually. However, there is an option to pay into the pro bono fund instead of working the specified hours. Lawyers who have been practicing for less than two years and lawyers over the age of 60 are excused from fulfilling the requirement.[23]

---

[16] Id at 375-376; see Rules for the Attorneys' Profession, Rule 52 on law clinics (available at <www.lssa.org.za/upload/RulesForTheAttorneysProfession2016.pdf>.

[17] ABA Standing Committee on Pro Bono and Public Service, American Bar Association website, "Pro Bono Publico", undated, <www.americanbar.org/groups/legal_education/resources/pro_bono.html>.

[18] ABA Model Rules of Professional Conduct, Rule 6.1.

[19] Rule 520.16 of the Rules of the New York Court of Appeals states that applicants who successfully pass the bar examination in New York State must demonstrate that they have performed 50 hours of qualifying pro bono service before applying for admission to practice.

[20] The State Bar Act (Business & Professions Code Div. 3 - Professions and Vocations Generally, Ch. 4 – Attorneys) (California), § 6073.

[21] The State Bar of California, "Pro bono opportunities", undated <www.calbar.ca.gov/Access-to-Justice/Pro-Bono>.

[22] Advocates (Pro Bono Services to Indigent Persons) Regulations, Statutory Instrument No. 39 of 2009; Uganda Law Society, "Pro Bono Project of ULS", undated, <www.uls.or.ug/projects/pro-bono-project/pro-bono-project/>. (In Uganda, the term "advocates" refers to all enrolled lawyers with a right of appearance in court. International Bar Association, Uganda page, undated <www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_Uganda.aspx>; Nano Matlala, "Lay down the law on transformation", *Sunday Independent*, 1 November 2015.)

[23] Latham & Watkins LLP, *A Survey of Pro Bono Practices and Opportunities in 84 Jurisdictions*, March 2016, at 610, citing the Attorney-at-Law Act 2000.

In the state of **Victoria, Australia**, the government utilises a tender scheme for the provision of legal services to government which incorporates a pro bono requirement. Tenders are used to select general and specialised panels of law firms to provide legal services to government departments. In order to eligible, law firms are required to provide a certain amount of pro bono legal services, measured as a percentage of the value of the fees they will derive from the government services. They can undertake to provide a higher percentage of pro bono work to increase their weighing in the tender selection process. Pro bono services for this purpose can include legal or paralegal advice or representation; legal research, education or law reform work; or provision of staff, financial assistance, equipment, sponsorship or other in-kind assistance. This scheme was introduced in 2002. In 2006, a review of its impact concluded that it raised the profile of pro bono work across the legal profession in Victoria and encouraged law firms to develop and formalise pro bono programs. Others observed that the pro bono component of the tender scheme encouraged firms to include participation in pro bono work as a requirement in annual performance reviews of their staff, and to appoint pro bono coordinators or partners. It also encouraged lawyers entering the profession to critically evaluate potential employers on the basis of their pro bono programmes. It has helped to make the provision of pro bono services a normal and expected adjunct to commercial legal work. The tender approach has been hailed as a way "in which government can use its contractual weight to promote better social justice outcomes".[24]

Pro bono clearinghouses: In order to maximise the use of resources for pro bono work, some jurisdictions make use of independent referral services or clearinghouses to match legal services with those who need them. For example in Australia, many jurisdictions established Public Interest Law Clearing Houses (PILCHs). In some cases, these were joint intiatives between private firms, non-governmental organisations and professional associations. For example, the Victoria PILCH was established in 1994 by the Consumer Law Centre of Victoria, the Fitzroy Legal Service, six Melbourne law firms and the Victorian Bar Council. (In 2013, PILCH Victoria and PILCH New South Wales merged into Justice Connect, and PILCH Queensland is now LawRight.[25]) These groups assess requests for pro bono assistance from not-for-profit organisations and individuals and then enlist its members to see if they are willing to accept a referral.[26] In South Africa, ProBono.Org operates a similar clearinghouse.[27]

There are also international clearinghouses, such as TrustLaw, which is the global pro bono legal programme of the Thomson Reuters Foundation. It connects high-impact non-governmental organisations and social enterprises with law firms around the world who are willing to provide free legal assistance. TrustLaw has, for example, arranged for the provision of research assistance on comparative law for the Legal Assistance Centre by lawyers from a Swiss firm.[28]

---

[24] "Reform of Commonwealth legal services purchasing proposals: Submission to the Australian Government Attorney-General's Department, the Honourable Robert McClelland MP", PILCH (Public Interest Law Clearing House, Melbourne, 2008 at 4-ff, quote at 5 (available at <www.justiceconnect.org.au/sites/default/files/Commonwealth%20Legal%20Services%20Reform.pdf>). See also Deed of Standing Offer for the Provision of Legal Services, Government Legal Services Panel, Victorian Government's Solicitors Office, undated, www.procurement.vic.gov.au/State-Purchase-Contracts/Legal-Services-Panel.

[25] Other similar groups in Australia are Justice Net SA and Law Access in WA.

[26] See, for example, the Justice Connect website: <www.justiceconnect.org.au/clearing-connecting-%E2%80%93-pro-bono-powerhouse-re-wired> and the LawRight website: <http://communitylegalqld.org.au/find-legal-help/find-centre/queensland-public-interest-law-clearing-house-incorporated>.

[27] See the group's website: <www.probono.org.za/>.

[28] TrustLaw website: <www.trust.org/trustlaw/>.

Law society and bar council referral services: Some professional bodies have also established their own referral services for pro bono work. For example, in Australia, the New South Wales Bar Association established the Legal Assistance Referral Scheme (LARS) to formalise its pro bono practice. LARS provides a referral service which consists of three stages. In the first stage, applicants are required to supply information about their financial situation, their income and previous applications for legal aid. In the second stage, the Bar Council considers the application and assesses whether the legal matter has reasonable prospects of success. At this stage, barristers who have agreed to provide services under LARS are requested to provide written advice to the Council on the merits of the matter and the probability of success which are then considered by the Bar Council. In the third stage of the process, the Bar Council considers other factors such as whether the conduct of the case is in the public interest. If the application is successful, LARS will try to find a barrister who is willing to provide legal services to the applicant. At that stage, the role of LARS ceases and the applicant and the barrister involved take the matter forward as agreed.[29]

Another example from Australia is the Victorian Bar Legal Assistance Scheme (VBLAS), established in 1995. Members of the Victorian Bar and barristers who are not formally registered with the Bar but are willing to provide assistance on a pro bono basis can become members of VBLAS. Applicants for pro bono assistance apply to the VBLAS office, which connects appropriate cases with its members.[30]

[29] National Pro Bono Resource Centre, "History of Australian Pro Bono Referral Schemes", May 2006 at 12-13 (available at <www.probonocentre.org.au/wp-content/uploads/2015/09/ReferralSchemesHistoryReport.pdf>.
[30] Id at 39-40.

21. Law reform work

In Namibia, the **Law Reform and Development Commission** is charged with examining all branches of the law of Namibia and making recommendations for the law reform and development, including recommendations on new or more effective procedures for the administration of the law and the dispensing of justice and laws to enhance respect for human rights or to ensure compliance with international legal obligations.[1] One of the eight members of the body essentially represents the Law Society.[2] Members of the Law Society have also occasionally served on subcommittees set up by the Commission to consider specific topics. However, the Commission has noted that it often struggles to get comments on proposals from practising members of the profession and particularly from the most-experienced lawyers who might have particularly useful ideas to contribute.

Comments on draft legislation: The Law Society does not regularly comment on draft legislation or policy documents, or give submissions to Parliamentary hearings on draft legislation. The same is true of individual legal practitioners. There appears to be scope for the Law Society to inform its members about legislative developments and to encourage members to provide input. The Law Society of South Africa regularly comments on policy documents and draft legislation "that affects the public interest and the legal profession". Its impressive list of comments and submissions can be viewed and downloaded from the website.[3] The Bar Council of England and Wales has a Law Reform Committee which regularly responds to consultations issued by the government's Law Commission and various government departments.[4] The Manitoba Bar Association in Canada has a Legislation and Law Reform Committee which reviews *all* bills introduced in the Manitoba Legislature.[5] The New Zealand Law Society continuously comments on Law Commission and Government Agency discussion papers and draft legislation,[6] and provides information for lawyers and non-lawyers via email on a weekly basis.[7] The Law Society of South Australia seeks to influence policy and legislation through various submissions to the government, opposition parties and courts. All submissions are archived and can be downloaded via the website of the Law Society.[8]

---

[1] Law Reform and Development Commission Act 29 of 1991, s. 6.

[2] Law Reform and Development Commission Act 29 of 1991, s. 3. The Commission consists of

- a chairperson appointed by the President after consultation with the Minister of Justice;
- the Ombudsman;
- one legal practitioner appointed by the President after consultation with the Law Society of Namibia;
- one staff member of the Ministry of Justice nominated by the Minister and appointed by the President
- one law lecturer from the Faculty of Law of the University of Namibia appointed by the President after consultation with the Vice-Chancellor; and
- not more than three persons appointed by the President after consultation with the Minister of Justice "on account of any qualification relating to the objects of the Commission".

[3] Law Society of South Africa "Comments on legislation", undated, <www.lssa.org.za/our-initiatives/advocacy/comments-on-legislation>.

[4] The Bar Council website: <www.barcouncil.org.uk/media-centre/bar-blog/contributing-writers/2017/may/law-reform-bar-council-and-criminal-bar-association-jointly-respond-to-the-law-commission%E2%80%99s-protection-of-official-data-plans/>.

[5] Manitoba Bar Association, "Legislation and Law Reform Committee", <http://cba-mb.ca/Sections/MBA-Committees/Legislation-and-Law-Reform>.

[6] New Zealand Law Society, "Law reform submission", undated, <www.lawsociety.org.nz/news-and-communications/law-reform-submissions >.

[7] New Zealand Law Society, "Email updates", undated, <www.lawsociety.org.nz/news-and-communications/email-updates/nzls-weekly>.

[8] The Law Society of South Australia, "Submissions", undated, <https://lawsocietysa.asn.au/LSSA/MediaCentre/Submissions/LSSA/Media/Submissions.aspx?hkey=1e816d7d-c12c-47a7-a29d-6cd815a33288 >.

Initiating law reform proposals: It would be helpful for the Law Society to consider, not just comments on law reform proposals from government, but also the proactive initiation of law reform proposals, working in cooperation with through the Law Reform and Development Commission or appropriate line ministries. For example, the need for introducing a plea bargaining system in Namibia has been discussed over the last years without any notable results.[9] Members of the Law Society familiar with criminal work would be well-placed to push this idea forward by drafting amendments to the Criminal Procedure Act 51 of 1977, thus helping to reduce the case backlog in Namibia's courts.[10] As a point of comparison, the Law Association of Zambia has a Law Reform and Constitutional Affairs Committee which conducts research on potential areas of legal reform and makes necessary recommendations on draft legislation and legal developments.[11]

Assistance to government with legal drafting: Some jurisdictions assist governments with legal drafting work. For example, the Law Society of Kenya assists local governments with drafting by-laws and conducts training for their legal officials.[12] Another example is the Estonia Bar Association, which assists with legislative drafting at the national level.[13] An example from the United States is the Colorado Bar Association, which has a committee that does not engage in legislative drafting, but helps to point out drafting errors and improve the clarity of proposed legislation.[14] In Namibia, legal drafting can often be a bottleneck that slows down needed legislative reform, meaning that assistance in this area could have a significant impact.

Bill summaries: Another helpful function could be to provide simplified versions of bills tabled in Parliament for the benefit of the public and Parliamentarians – as the Legal Assistance Centre has done with selected legislation.

---

[9] The basic concept of plea bargaining is the following: the prosecutor and the defence come to an agreement in which the accused usually agrees to plead guilty in exchange for the prosecutor's agreeing to take or refrain from taking a particular course of action. See NM L Ndeunyema, "Igniting the Plea Bargaining Discourse in Namibia: What is it and Do we need it?", 4 (2) *Namibia Law Journal*, 2012 at 61. Codifying plea bargaining was cited by Judge President Damaseb in his report on the promotion of access to justice in Namibia as one of several initiatives which could improve the justice system. Judge President Damaseb, "Promoting Access to Justice in the High Court of Namibia: First Report", 2010 at 67-ff.

[10] See Ndeunyema at 58, 66; W Menges, "Alarm over High Court's criminal case load", *The Namibian*, 17 January 2014; Address on behalf of the Minister of Justice, 16 January 2014 on the occasion of the opening of the high court legal year 2014 (available at <http://lawsocietynamibia.org/index.php?option=com_content&view=article&id=113:labor-law-booklet&catid=12:front-page-items>).

[11] The Law Association of Zambia, "Law Reform and Constitutional Affairs Committee, undated, <www.laz.org.zm/2014/07/01/law-reform-committee/ >.

[12] Odihaimbo & Odihaimbo Advocates website, <http://odhiamboandodhiambo.co.ke/news/16-news/17-law-society-of-kenya-to-help-counties-draft-better-laws>.

[13] Estonia Bar Association website: <www.advokatuur.ee/eng/frontpage>.

[14] Colorado Bar Association, "Legislative Policy Committee: Mission Statement", undated, <www.cobar.org/For-Members/Committees/Legislative-Policy-Committee>.

22. Supporting an independent and effective judiciary

A properly functioning independent judiciary is a key element of democracy.[1] Judges and officers of the courts should be protected from any political influence or pressures that might affect their judgements.[2] The independence of the judiciary is deeply connected to the work of the legal profession.[3] Since lawyers are probably the first to know whether a judge is corrupt, open to bribery or otherwise intimidated, lawyers could play a decisive role in the investigation of corruption in some jurisdictions.[4] In Namibia, the **Judicial Services Commission** includes two members of the legal profession nominated by the "organisation or organisations representing the interests of the legal profession in Namibia".[5]

Supporting the judiciary against interference and attack: In recent years the Law Society of Namibia and the Society of Advocates have both spoken out against attacks on the independence of the judiciary and the legal profession.[6]

Service as acting judges: Article 82(2)-(3) of the Namibia Constitution authorises the President to appoint acting judges of the Supreme Court or High Court "to fill casual vacancies in the court or to enable the court to deal expeditiously with its work". The Namibian judiciary strongly depends on the system of appointing acting judges to minimise the severe shortage of judges, to diminish the backlog of cases and to replace permanent judges in cases of conflict of interest.[7] Furthermore, the current practise allows potential permanent judges to gain experience and helps to evaluate the suitability of individuals for possible permanent appointment.[8] Members of the legal profession have made themselves available for this purpose, and are likely to continue to do so as necessary.

Dealing with delayed judgements and hearings: One of the biggest threats to the public confidence in Namibia's judiciary is the excessive delays in the delivery of judgements.[9] The Law Society made representations on this issue to the Judicial Service Commission, but the problem is not yet entirely resolved despite significant improvement. This is an issue which may require ongoing monitoring and intervention. Long waits for court dates are another issue that remains problematic in Namibia. The legal profession is well-placed to propose initiatives to remedy these problems.

---

[1] J B Diescho, "The paradigm of an independent judiciary", in N Horn and A Bösl, eds, *The Independence of the Judiciary in Namibia*, November 2008 at 18.
[2] Ibid.
[3] See Clive L Kavendjii & Nico Horn, "The Independence of the Legal Profession in Namibia" in Nico Horn and Anton Bösl (eds), *The Independence of the Judiciary in Namibia,* Windhoek: Konrad-Adenauer Stiftung, 2008 at 301.
[4] Id at 305.
[5] Judicial Service Commission Act 18 of 1995, s. 2(2)(a); Namibian Constitution, Article 85(1).
[6] See Clive L Kavendjii & Nico Horn, "The Independence of the Legal Profession in Namibia" in Nico Horn and Anton Bösl (eds), *The Independence of the Judiciary in Namibia,* Windhoek: Konrad-Adenauer Stiftung, 2008 at 304.
[7] See N Tjombe, "Appointing acting judges to the Namibian bench: A useful system or a threat to the independence of the judiciary", in N Horn and A Bösl, eds, *The Independence of the Judiciary in Namibia*, November 2008 at 230; R Routh, "Necessity of Acting Judges explained:, *New Era*, 7 June 2017, <http://allafrica.com/stories/201706071140.html>.
[8] Id at 231.
[9] See, eg, W Menges, "Delayed judgements to the fore at court opening", *The Namibian*, 17 January 2012; Judge President P T Damaseb, "Promoting Access to Justice in the High Court of Namibia: First Report", 2010 at 10.

Small claims courts: In 1997, the Law Reform and Development Commission published a Report on Small Claims Courts, proposing the establishment of an informal, non-adversarial court system in which individuals could litigate certain categories of disputes involving relatively small sums.[10] However, the proposed Small Claims Courts have not yet been established.[11] Establishing Small Claims Courts in Namibia could improve access to justice and could help to ease the backlog of cases, and legal practitioners could support this initiative by volunteering to serve as presiding officers or in other capacities.

Expanded mediation services: The introduction of mediation as part of the case management system at the High Court has proved successful, in part because of the dedicated assistance of legal practitioners as mediators. One intervention proposed by Namibia's National Human Rights Action Plan to improve access to justice is the establishment of a court-accredited arbitration and mediation system for the lower courts.[12] This is another area where the legal profession could be instrumental.

Judicial clerks: The Law Society could consider sponsoring recent law graduates or legal practitioners to serve as judicial clerks. This could improve the courts' efficiency as well as providing useful experience for young lawyers.

---

[10] Law Reform and Development Commission, "Report on Small Claims Courts", December 1997, available at <https://namiblii.org/na/other/report-small-claims-court/lrdc-6-report-small-claims-courts.pdf>; Z Hinson and D Hubbard, "Access to Justice in Namibia: Proposals for Improving Public Access to Courts – Costs and Contingency Fees, Legal Assistance Centre, 2012 at 10.

[11] The idea is still recommended. See, eg, Implementation Plan 2015-2016, National Human Rights Action Plan, July 2015, at 1.

[12] *National Human Rights Action Plan 2015-2019*, Republic of Namibia, at 33

23. Supporting law schools and legal training institutions

One of the statutory objects of the Law Society is "to promote the education of lawyers at all stages and levels, with particular emphasis on the broadening of such education".[1]

Bursaries: The Law Society annually provides bursaries for the study of law, in accordance with the authority in the Legal Practitioners Act 15 of 1995 make grants from the Legal Practitioners' Fidelity Fund and the Namibian Legal Practitioners' Trust "to any person or institution for tertiary education for the purposes of education or research in the science of law or in legal practice".[2]

Law lecturers: Members of the legal professions regularly make themselves available to serve as law lecturers at the Faculty of Law and the Justice Training Centre.

Law student awards: The Law Society annually sponsors awards to recognise top Namibia law students.[3]

Student law review: The Society of Advocates has contributed financial sponsorship to the *UNAM Law Review*, which is a student journal established in March 2012.[4]

Access to IT equipment: It may be helpful to take steps to ensure that students from disadvantaged backgrounds have access to good IT equipment and other educational learning resources which may help level the playing field.

Legal aid clinic: One area where the Law Society could intensify its relationship with the Law Faculty is in connection with the Legal Aid Clinic, a project which aims at both providing practical legal education to LLB students and making legal services available to indigent persons. Working for the Legal Aid Clinic is mandatory for all final year students of UNAM.[5] The Law Society could provide support to the legal practitioners and law students working for the Legal Aid Clinic.

Supporting candidate lawyers from outside Windhoek: The location of the JTC and most attachment opportunities) in Windhoek creates extra expense for aspiring lawyers from other parts of Namibia, where communities are less well-served by the legal profession and lawyers are particularly needed. Financial support to ameliorate this issue could be considered.[6]

Attachments: The legal profession is already widely involved in the training of candidate legal practitioners, by providing attachments for them in accordance with the requirements for entry into the profession. However, in line with the goal of broadening legal education, the Law Society could consider sponsoring longer-term internships and mentoring programmes,[7] both within Namibia and abroad – particularly given that the period of attachment has become shorter over the years. As a point

---

[1] Legal Practitioners Act 15 of 1995, s. 41(e).
[2] Legal Practitioners Act 15 of 1995, s. 71(a)(i).
[3] See, eg, <http://lawsocietynamibia.org/content/news/press-statements-2016/judge-jp-karuaihe-jpk-trust-legal-excellence-awards>. This is a joint initiative with the Judge JP Karuaihe (JPK) Trust.
[4] See the UNAM Law Review website: <http://unamlawreview.info/home/4590636515>.
[5] UNAM Faculty of Law, "Overview", <www.unam.edu.na/faculty-of-law>.
[6] See Adv R Metcalfe, "I fully support the Law Association", *Republikein* (letter), 15 March 2017.
[7] See Clive L Kavendjii & Nico Horn, "The Independence of the Legal Profession in Namibia" in Nico Horn and Anton Bösl (eds), *The Independence of the Judiciary in Namibia,* Windhoek: Konrad-Adenauer Stiftung, 2008 at 307.

of comparison, the Law Society of South Africa runs a mentorship which assigns a newly-admitted attorney a mentor, who is an attorney with at least eight years' experience in a specific area of law. The mentors and mentees are matched according to their location and the skills that are supposed to be transferred.[8] International exposure could be particularly beneficial in stimulating creative thinking and seeding new ideas for Namibia.

Incubating socially-conscious law practices: The Chicago Bar Foundation has a Justice Entrepreneurs Project, aimed at helping young lawyers start innovative, socially-conscious law practices that provide affordable services to low and moderate-income people.[9]

[8] Law Society of South Africa," Mentorship", undated, <www.lssalead.org.za/legal-practitioners/mentorship-programme>.
[9] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 29.

24. Improving public access to law and justice

One important aspect of strengthening the rule of law is the accessibility of the law itself.[1] Everyone should be able to find out, without undue difficulty, the law that governs his or her economic, social and political life.[2] Apart from access to the applicable laws, legal practitioners need ready access to case law and precedents.

Modern technology can make the law more widely accessible than it has been in the past. Since most people in Namibia (as in the rest of Africa) access the internet exclusively via smartphones, websites providing access to legal information should be "mobile-friendly".[3]

24.1 Initiatives in Namibia

Namlex: *Namlex* is a list of the laws in force in Namibia, organised by topic. The index also provides other information, such as references to rules and regulations, notices, appointments, court cases and commentary under each statute. The idea for *Namlex* was originated by the late Adv Anton Lubowski in anticipation of Namibian Independence, and the bulk of the work for the first edition of *Namlex* was carried out under his direction. The Legal Assistance Centre took over the work after his death and has been publishing regular updates since 1997. The purpose of *Namlex* is to make the law more readily accessible and understandable to the public, and it is regularly utilised by legal practitioners and the judiciary. As of 2017, discussions are underway between the Legal Assistance Centre and the Office of the Attorney-General on how to make *Namlex* sustainable.

Namlex Appendix: The Legal Assistance Centre is in the process of supplementing *Namlex* with a separate, linked document called the *Namlex Appendix*, which contains detailed entries for all multi-lateral international treaties binding on Namibia, including a summary of the treaty, the date of signature and ratification/accession and other explanatory information including case citations and information on the applicability to Namibia of treaty amendments and protocols. As of 2017, discussions are underway between the Legal Assistance Centre and the Ministry of International Relations and Cooperation on how to make the *Namlex Appendix* sustainable.

Annotated statutes and regulations: The Legal Assistance Centre was contracted by the Parliamentary Support Project (PSP) in 2012 to prepare annotated versions of all statutes in force in Namibia, including those which originated in South Africa or "South West Africa" prior to Namibian Independence. The contract was amended to cover the preparation of annotated versions of all post-Independence regulations in force in Namibia. The task of producing annotated versions of pre-Independence regulations was contracted to Lexis Nexis. These statutes and regulations are now available free to the public on the websites of Parliament and the Legal Assistance Centre.[4]

---

[1] K Anderson, M Badeva-Bright and T Mafukidze, "AfricanLII – An Approach to Developing Free Access to Law in Africa", undated at 2, <www.hklii.hk/conference/paper/2A2.pdf>.
[2] Ibid.
[3] M Veselinovic and B Clements, "Reading this on a computer? Then you (probably) don't live in Africa", *CNN International Edition*, 19 February 2015, available at <http://edition.cnn.com/2015/02/19/africa/africa-mobile-internet/index.html>; K Anderson, M Badeva-Bright and T Mafukidze, "AfricanLII – An Approach to Developing Free Access to Law in Africa" at 5 (available at <www.hklii.hk/conference/paper/2A2.pdf>).
[4] See Namibian Parliament, "Annotated Laws and Regulations", <https://laws.parliament.na/about-us/> and Legal Assistance Centre website: <www.lac.org.na/laws/annotated_statutes.php>.

Namibia Law Reports: The Namibian Law Reports is a project initiated by the Legal Assistance Centre. It aims to enhance access to judgments and thereby facilitate the work of legal practitioners. It was initially published on an annual basis, increasing to biannual publication beginning in 2006 and increasing to four times per year beginning in 2013.[5] Finding funding for this initiative has been difficult, although grants from the Legal Practitioners' Fidelity Fund and the Namibian Legal Practitioners' Trust have been provided in some years, including 2017, for some of the costs of engaging an editor.[6]

Namibia Law Journal: The Namibia Law Journal was initiated as a joint project of the Supreme Court of Namibia, the Law Society of Namibia and the University of Namibia.[7] The initial plan was to publish this journal twice each year. This was achieved from 2009 to 2012. However, only one issue was published each year from 2013 to 2016, with no issue appearing in 2015. The difficulty of getting legal practitioners to submit articles was reportedly one of the challenges encountered.

UNAM Law Review: The UNAM Law Review was initiated in March 2012 by a group of law students who submitted a proposal for the publication to the Faculty of Law. Five issues have been produced to date.[8] This initiative received some financial support from the Society of Advocates, amongst others.[9]

Superior courts website: The Superior Courts website provides open access to case law by publishing the judgments of the High Court and the Supreme Court as soon as they are issued.[10]

NamibLII and SafLII: The Namibia Legal Information Institute (NamiibLII) provides open access to court judgments and legislation as well as to reports and announcements by the Judicial Service Commission and reports of the Law Reform and Development Commission.[11] It is linked to the Southern African Legal Information Institutes (SAFLII), which is a similar online repository of legal information for the region, established with the goal of promoting the rule of law.[12] These are part of the World Legal Information Institute (WorldLII), which aims to provide free, independent and non-profit access to worldwide law.[13]

Simplified information about the law: The **Legal Assistance Centre** is Namibia's main producer of public education materials about the law, including booklets, comics, films and animations. The LAC has distributed comics and pamphlets as inserts in various newspapers, as a way of reaching people in far-flung parts of Namibia. A broad range of topics is covered, including gender-based violence, family law, land, environment, HIV-related issues and LGBT rights. The **Institute of Public Policy Research (IPPR)** also publishes accessible analyses of laws on particular topics, particularly elections, access to information, corruption-related issues and laws related to economics and business.

---

[5] LAC press release, "Thirty Volumes of Namibian Case Law", <www.lac.org.na/news/pressreleases/pressr_lawreports.pdf>.
[6] Personal communication, Legal Assistance Centre, August 2017.
[7] See Justice Peter Shivute, Chief Justice of the Supreme Court, "Foreward," *Namibian Law Journal*, Vol 1, Issue 1 at 1.
[8] "Welcome to the UNAM Law Review", undated, <http://unamlawreview.info/home/4590636515>.
[9] See Editorial, *UNAM Law Review*, Vol 3, Issue 1 (2016).
[10] See Namibia Superior Courts website: <www.ejustice.moj.na/SitePages/Home.aspx>.
[11] The website is at <www.namiblii.org/>. The more logical name, NamLII (www.namlii.org/), is a casino site. This name is not in use for the online database because of a contractual dispute.
[12] Southern African Legal Information Institute, About SAFLII, <www.saflii.org/content/about-saflii-0>.
[13] For a list of affiliated databases, see WorldLII at <www.worldlii.org/databases.html>.

The Law Society produced some public education material in the past, but has not continued this in recent years.

Public advice days and awareness campaigns: As discussed in section 20 above, the Law Society has also been hosting free legal advice days in different locations in Namibia, following on a pilot initiative by the Legal Assistance Centre in 2013, in commemoration of its 25th birthday as an organisation. This is an initiative which could be expanded.

24.2 Initiatives in other jurisdictions

Public advice days and awareness campaigns: The **Law Society of South Africa** initiated a "National Wills Week" during which the participating attorneys drafted basic wills free of charge.[14] In 2015, the South African Department of Justice and Correctional Services started an "Access to Justice Week" which targeted women. Attorneys provided free legal services during this week at the courts' service desks, with the focus being matters such as divorce, domestic violence, guardianship and maintenance.[15] During this week, the Department of Justice and Correctional Services also offered "Justice Live Chats" on social media as well as a phone-in programme on several radio stations.[16] The **Law Society of Kenya** holds a Legal Awareness Week which aims to extend legal literacy. Members of the Law Society provide free legal advice as well as showcasing their services, with a view to promoting a better public understanding of the role of lawyers.[17]

Simplified legal education materials: Many law societies produce legal education materials for the general public. For example, the **New Zealand Law Society** provides guides on various legal issues, such as buying and selling property and family violence. These can be downloaded from its website for free.[18]

Legal aid services: The **Uganda Law Society** initiated a Legal Aid Project in 1992 to provide legal assistance to poor and vulnerable people in Uganda. The government-run legal aid programme provides assistance only in capital cases and had a large case backlog. The Law Society's Legal Aid Project was established to meet the unmet need for free legal assistance.[19]

Support to paralegals: In 2003, in **Sierra Leone**, the National Forum for Human Rights and the Open Society Justice Initiative collaborated to establish a programme to provide basic justice services through community-based paralegals.[20] An independent organisation called "Timap for Justice"

---

[14] National Wills Week, <www.lssa.org.za/our-initiatives/advocacy/national-wills-week>.
[15] Access to Justice Week <www.lssa.org.za/our-initiatives/advocacy/access-to-justice-week>.
[16] Justice and Constitutional Development hosts Access to Justice Week Campaign, <www.gov.za/speeches/justice-and-constitutional-development-legal-advice-during-access-justice-week-campaign-15>.
[17] Law Society of Kenya, "Legal Awareness Week", undated, <http://lsk.or.ke/public/legal-awareness-week/>.
[18] The Law Society of New Zealand, "Guides to the law", undated, available at <www.lawsociety.org.nz/news-and-communications/guides-to-the-law>.
[19] Uganda Law Society, "Legal Aid Project-Introduction", undated, <www.uls.or.ug/projects/legal-aid-project/introduction/>.
[20] *Between Law and Society – Paralegals and the Provision of Primary Justice Services in Sierra Leone,* New York: Open Society Institute, 2006 at 22 (available at https://www.opensocietyfoundations.org/sites/default/files/between-law-and-society-20100310.pdf); L Waldorf, "Legal empowerment and horizontal inequalities after conflict", *WIDER Working Paper,* No. 2017/50 at 3, (available at <www.econstor.eu/bitstream/10419/161611/1/881438677.pdf>).

recruits local lay people with least a secondary school education to become paralegals.[21] They receive training in law, the workings of the government and paralegal skills before beginning to work, and they are continually trained and supervised by legal professionals.[22] The work of paralegals has been professionalised and facilitated since the 2012 adoption of the Legal Aid Act, which recognises the role of paralegals as part of the legal aid framework.[23] To support local accountability, the paralegals are overseen by "Community Oversight Boards".[24] Another paralegal project was started in Sierra Leone in 1996 by the non-governmental organisation Prison Watch Sierra Leone. This project aims at providing basic legal orientation and "legal first aid" to persons deprived of their liberty or at risk of going into detention.[25] Since the placement of paralegals in prisons to provide free legal services, the numbers of prisoners held in remand has reduced by 20% and the percentage gaining access to bail increased by 13%.[26]

"Legal check-ups": According to an American Bar Association (ABA) report,

> Legal checkups are analogous to medical checkups. Sometimes a person is aware of a problem, as indicated by an overt symptom, such as fever or pain (indicating a medical problem) or receipt of a summons or complaint (indicating a legal problem). At other times, medical and legal issues are only discovered after using a diagnostic tool…. many individuals fail to recognize when they have a legal problem, and even when they do, they fail to seek legal assistance.[27]

The ABA suggests that legal checkups can "empower people by helping them identify their unmet legal needs and make informed decisions about how best to address them". The idea is to make these consultations available free or at low costs to people of limited means. They can also be provided via internet-based platforms.[28]

---

[21] *Between Law and Society – Paralegals and the Provision of Primary Justice Services in Sierra Leone,* New York: Open Society Institute, 2006 at 23.
[22] Ibid.
[23] G Dereymaeker, "Formalising the role of paralegals in Africa: A review of legislative and policy developments", July 2016 at 19 (available at <file:///C:/Users/alewis/Downloads/FORMALISING_ROLE_OF_PARALEGALS_IN_AFRICA_DEREYMAEKER_2016.pdf>).
[24] C Tanner and M Bicchieri, "When the law is not enough – Paralegals and natural resources governance in Mozambique", 2014 at 36-37, available at <www.fao.org/3/a-i3694e.pdf>.
[25] Prison Watch Sierra Leone, "Access to Justice Programme", undated, <www.prisonwatchsl.org/justice/>.
[26] OECD and Open Society Foundations, *Leveraging the SDGs for Inclusive Growth: Delivering Access to Justice for All,* 2016 at 14, available at <www.oecd.org/gov/delivering-access-to-justice-for-all.pdf>.
[27] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 44.
[28] Id at 44-45.

25. Using modern technology to enhance access to justice

According to the American Bar Association, "Technology has disrupted and transformed virtually every service area, including travel, banking, and stock trading. The legal services industry, by contrast, has not yet fully harnessed the power of technology to improve the delivery of, and access to, legal services."[1] Technology certainly has the capacity to enhance access to justice.

25.1 Initiatives in Namibia

Even though some major steps have recently been made to implement open access to legal information in Namibia (as discussed in section 24 above), legal professionals and citizens still face obstacles when consulting judicial decisions or basic legislative texts – with the newest resources available not yet being well-known or updated quickly enough. Furthermore, many if not most government policies, plans and draft legislation are available only in hard copy.

There are a few current initiatives which attempt to further harness modern technology, beyond simply providing law-related materials online.

Namibian Courts Information System (NAMCIS): The Namibian Courts Information System is an electronic records management system launched by the Ministry of Justice in 2008. It aims at providing support for the automation of routine administrative work.[2] All courts in Namibia currently make use of NAMCIS to capture records including court proceedings.[3]

E-justice: The Namibian Courts have introduced "e-justice", which is an "internet-based system for delivering process and maintaining court case files".[4] This system is available to sheriffs, legal practitioners and firms of legal practitioners, who can log in to the system with a password in order to electronically generate, deliver and file process and maintain court case files.[5] It includes a "service bureau", which is an administrative unit which can assist an individual who is not a registered user to carry out litigation through the e-justice system at his or her own cost.[6]

Electronic system for managing trusts: The Master of the High Court in Namibia has similarly established an electronic system for managing trust documents.[7]

Legal advice and information via SMS: The Legal Assistance Centre has made some strides in utilising SMS messaging as a way to give legal information and advice to people in remote parts of

---

[1] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 18.
[2] A Hartman, "Court administration takes fast lane at Swakopmund", *The Namibian*, 5 September 2008, available at <www.namibian.com.na/index.php?id=49367&page=archive-read>.
[3] R M Abankwah and M N Hamutumwa, "The Management of Magistrate Courts Records in Namibia", in P Jain and N M Mnjama, eds., *Managing Knowledge Resources and Records in Modern Organizations,* December 2016 at 174.
[4] Rules of the High Court, Government Notice 4 of 2014 (GG 5392), effective from 16 April 2014, definition of "e-justice" in Rule 1.
[5] Id, definition of "registered user" in Rule 1.
[6] Id, definition of "service bureau" in Rule 1.
[7] Personal communication, Law Society of Namibia, October 2017. Trusts are registered with the Master of the High Court pursuant to the Trust Moneys Protection Act 34 of 1934.

Namibia. This has the advantage of allowing for an ongoing dialogue at little cost to the client. The use of SMS as a communications channel has been coupled with radio programme and comic book distribution to allow for follow-up to the general information presented in those formats.

25.2 Initiatives in other jurisdictions

Online dispute resolution: This technique is regularly used in the private sector to help businesses and individuals resolve civil matters without the need for court proceedings or court appearances. One example from **Canada** is PARLe (Plateforme d'Aide au Reglement des Litiges en ligne = Online Dispute Resolution Platform[8]). A Canadian Cyberjustice Laboratory has designed an online tool to settle simple, low-intensity legal disputes. The platform utilises a two-step procedure. As a first step, the complainant creates a user account on the court's website and completes a simplified form inviting the other party to negotiate. After receiving the invitation, the respondent can choose amongst three options: (1) Accept one of the proposed solutions, in which case a written agreement will be sent to the parties by email. (2) Respond to the invitation by becoming involved in a negotiation process. (3) Give no response within the set time period, in which case the negotiation option is rejected and the case is closed. In the second step, if the negotiation process has failed, the parties can request the intervention of a mediator. The mediator will act as an intermediary between the parties and can suggest solutions or invite the parties to communicate. If the parties come to an accord, a written agreement formalizing this outcome will be sent to them by email. If the parties fail to agree, the case will be transferred to a judge.[9]

Court kiosks: These are interactive machines somewhat akin to the Automated Teller Machines used in banking. They are used in courts for some basic tasks, to reduce the workload of clerks, provide for speedier transactions and reduce operating costs. They can, for example, provide docket information (case numbers, hearing dates and times, names of parties, judges and attorneys) or be used to pay traffic fines and child maintenance payments.[10] **India** uses voice-based legal information kiosks ("Nyaya Path") to provide legal information to marginalised people on social welfare law, policies and schemes. These kiosks, installed in rural areas, are equipped with touch screens, free print facilities, animated videos and content in local languages. Paralegal volunteers have been appointed to assist people with the navigation process of the information kiosk.[11]

Legal advice and information via SMS: Since basic information about legal rights and the functioning of justice institutions is not easily available, SMS-based initiatives are often used to provide legal information.[12] For example, the UmNyango project in **South Africa** uses SMS technology to improve access to legal information for rural women and men.[13]

---

[8] In French, the acronym makes a nice pun as "parle" refers to talking.

[9] Laboratoire de Cyberjustice, "ODR:PARLe", undated, available at <www.cyberjustice.ca/en/projets/odr-plateforme-daide-au-reglement-en-ligne-de-litiges/>.

[10] See, eg, Frank Olea, "Bring the courts to the people with kiosks", Kiosk Marketplace, 5 November 2014, <www.kioskmarketplace.com/blogs/bring-the-courts-to-the-people-with-kiosks/>.

[11] A Kumar, "Info kiosk benefit thousands in tribal areas of India", *OneWorld South Asia*, 22 May 2015, available at <http://southasia.oneworld.net/news/info-kiosks-benefit-thousands-in-tribal-areas-of-india#.WXdYS4jyuyI>. The project is led by the OneWorld Foundation India in collaboration with UNDP and the Government of India.

[12] S Herbert, "Improving access to justice through information and communication technologies", Governance and Social Development Resource Centre (GSDRC), 13 February 2015 (available at <http://www.gsdrc.org/docs/open/hdq1201.pdf>).

[13] Anil Naidoo, " The UmNyango project: using SMS for political participation in rural KwaZulu Natal" in S Ekine, ed, *SMS Uprising: Mobile Activism in Africa*, 2010 at 72.

Legal advice and information via the internet: In the US state of **Tennessee**, TN Free Legal Answers (a project of the Tennessee Alliance for Legal Services in collaboration with the Tennessee Bar Association) aims at providing pro bono services via the internet.[14] In order to obtain the legal service, the user has to answer some questions to determine whether he or she qualifies for help.[15] This web based pro bono clinic aims at providing legal aid to clients in urban areas who cannot attend at local legal clinics because they lack transportation, have child care issues or face conflicting work schedules.[16] The service provides legal aid without the need to be at a particular location at a set time.

Do-it-yourself document drafting: As discussed in section 8.9 above, in the United States, **LegalZoom** provides online tools for "do-it-yourself" legal documents, such as wills and copyright applications, for a flat fee.[17]

Mobile phone applications: Mobile phone applications ("apps") are one way to reach members of the public with legal information or assistance. According to one commentator, "Apps in this area not only give everyday people resources to solve their legal problems – they educate people about the law and empower them. In the end, we may end up with a more educated citizenry that can engage meaningfully in the political process."[18] One app has been developed to allow users to create, sign, and send legally binding contracts from a smartphone.[19] Apps could prove to be particularly useful in Namibia, where smartphones are far more widespread than computers.

---

[14] Tennessee Alliance for Legal Services, "TN Free Legal Answers (formerly OTJ)", undated, available at <www.tals.org/node/206/online-tn-justice#OTJ>.
[15] Ibid.
[16] Tennessee Alliance for Legal Services, "ABA Free Legal Answers", undated, available at <www.tals.org/abafreelegalanswers>.
[17] See the LegalZoom website: <www.legalzoom.com>.
[18] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 28 (quoting Georgetown Law Professor Tanina Rostain from Joe Dysart, "20 apps to help provide easier access to legal help", *American Bar Association Journal*, 1 April 2015).
[19] Ibid.

26. Public feedback and responsiveness to public needs

Regular, systematic research and feedback are important tools to inform improvements in legal services to ensure that they meet the needs of the public.

26.1 Feedback on public opinion in Namibia

In Namibia, there have been no large-scale efforts to obtain detailed public feedback on satisfaction with legal services and justice delivery. The Legal Assistance Centre has assessed the operation of some specific laws in Namibia,[1] but has not to date explored broader issues such as access to justice. Some general information is contained in the 2013 Baseline Study Report on Human Rights in Namibia and in the regular Afrobarometer surveys, conducted in Namibia most recently in 2014/15. Some key results on courts and the law are reported here, as they suggest the need for follow-up investigation and the solicitation of further public input.

2013 Baseline Study Report on Human Rights in Namibia: This report was based on a 2012 survey of 1280 people in every region, supplemented by 20 focus group discussions involving 126 people.[2]

The survey found that 87% of respondents had heard the term "human rights", with almost 40% of these respondents having been informed of human rights through the media and 26% at school.[3] Furthermore, almost 80% of respondents felt that human rights are protected in Namibia,[4] with many crediting the law as a source of human rights protection but few identifying the courts as playing a role.[5]

Who or what protects human rights in Namibia?

	N	%
In the Constitution and other laws	333	22.5
In international law	36	2.4
By social norms and values	26	1.8
By police	368	24.8
By government	474	32.0
By judiciary	68	4.6
By workers of Ombudsman's office	62	4.2
Through media	12	.8
HR not protected	4	.3
Others	100	6.7
Total	1483	100.0

Source: *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 38.

[1] For example, the Legal Assistance Centre has conducted empirical research into the operation of the Combating of Rape Act 8 of 2000, the Combating of Domestic Violence Act 4 of 2003 and the Maintenance Act 9 of 2003 and aspects of the Communal Land Reform Act 5 of 2002, amongst others.
[2] *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 26-28.
[3] *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 35-36.
[4] *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 37.
[5] *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 38 (see table).

Some 70% of respondents were aware of the Constitution,[6] and the majority of those who had believed that it was relevant to their lives.[7]

Questions on the Constitution for respondents who were aware of the Constitution

	Yes		No		Total	
	N	%	N	%	N	%
Have you ever seen a copy of the Constitution?	598	66.2	305	33.8	903	100.0
Have you read the Constitution?	437	49.8	441	50.2	878	100.0
Do you think the Constitution is relevant to your life?	697	82.3	150	17.7	847	100.0
Are you aware of the three branches of government?	520	59.8	349	40.2	869	100.0

***Source*:** *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 39.

Respondents were also asked to report on barriers to justice. The responses are shown in the table below. The report summarised the findings as follows:

> Close to a third of the respondents singled out high legal costs as the major barrier in accessing justice in Namibia. The current legal aid scheme does not consider criteria of marginality such as being a woman, a person with disability, an indigenous person, etc. There is broad consensus that the budget allocation for legal aid is inadequate. There is also no legal obligation on legal practitioners to do pro bono work as yet. A high percentage of respondents reported lack of knowledge and understanding or education about court procedures as barriers in accessing justice.[8]

The study also noted that more women than men cited long distances to justice institutions as a barrier, with this problem predictably being more severe in rural areas than in urban ones. The study also asked about the availability of traditional and informal justice systems, finding that slightly more than 80% of rural households reported that traditional courts are operational in their areas. Yet, the report also noted that media reports suggest that traditional courts do not always adhere to the principles of fair trials.[9]

[6] *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 38.
[7] Id at 39.
[8] Id at 6.
[9] Ibid. The report erroneously reports that lengthy trials were frequently mentioned: "However, the Namibian criminal justice system is characterized by lengthy pre-trial detentions. The lack of qualified magistrates and other court officials, coupled with the high costs of legal representation, results in a serious backlog of criminal cases. The upshot is that delays of up to a year or more between arrest and trial are not uncommon. Unsurprisingly therefore, lengthy trials, as noted in the subsequent chapter, were reported as a major barrier in access to justice in Namibia. As many as 14% of our respondents held this view." (id at 117, 124). In fact, the statistics cited show that this response formed 14% *of the "other responses" category*, being named by only 22 out of 1853 people overall (about 1%) (id at 122, 124). Delays in obtaining justice are a serious concern, but they did not emerge as a priority issue in this survey.

Barriers to access to justice

	N	%
Too expensive	522	28.2
Too formal	58	3.1
Too complicated	166	9.0
Too far away	161	8.7
Need lawyers	381	20.6
Too intimidating	88	4.7
Corrupt	175	9.4
Other	114	6.2
Don't know	188	10.1
Total	1853	100.0

***Source*:** *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 122.

Barriers to access to justice: Breakdown of "other" category

Category	N	%
Barriers at court: procedures & staff	29	24.0
Lack of knowledge/ understanding/ education	28	23.1
Takes too long	17	14.0
Injustice	10	8.3
Discrimination	9	7.4
Language barrier	3	2.5
Culture	3	2.5
No barriers	22	18.2
Total	121	100.0

***Source*:** *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 124. The report does not explain how the total in this table is 121, which the table above included only 114 responses of "other".

About 45% of respondents reporting using alternative dispute resolution techniques, which could include mediation, conciliation, arbitration, or more informal approaches.[10]

A very worrying finding was that almost 42% of the respondents believed that the courts are "very corrupt", while another 36% rated them "not so corrupt", with only 23% responding that they were "not corrupt".[11]

Access to justice issues in Namibia in a nutshell.

- *Access to legal aid at all stages of the criminal justice system is generally unavailable;*
- *Budgetary allocation for legal aid is minimal;*
- *Persons accused of a crime cannot expect legal advice for mounting a defence or informing a plea to a serious charge, nor for representation in cases where conviction could lead to a prison sentence;*
- *Lawyers are few in number and generally unavailable in rural areas;*
- *Law students are under-used;*
- *Community legal services are not available in every district and are not accessible to every person in need of such services;*
- *The Government does not have an overarching legal aid strategy to maximize the use of the resources available;*

[10] *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 125-26.

[11] *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 223. Police, Parliamentarians and civil servants were rated as being even more corrupt.

- *The effect of the strict rules on locus standi can be said to be the main reason why no class action has ever been implemented in Namibia to date. Arguably, the current position on locus standi has the effect of perpetuating substantive inequality at the expense of the poor by denying them practical access to justice;*
- *Lastly, the idea to introduce a small claims court for the country remains but a lofty ideal. Nothing concrete has resulted from the announcement made by Cabinet in 2004 that it had given the Minister of Justice permission to table the Small Claims Courts Bill in the National Assembly. It cannot be overemphasised that small claims courts are an effective means of making justice more accessible.*[12]

Afrobarometer Survey: Afrobarometer is a research project that conducts public attitude surveys democracy and governance. Between 1999 and 2015, six rounds of opinion surveys were conducted.[13] The most recent Afrobarometer survey in Namibia took place in 2014/2015 and involved 1 200 respondents (roughly half men and half women). It included a question about trust in the courts of law, and found that about 74% of the respondents trust courts in Namibia "somewhat" or "a lot".[14]

How much do you trust courts of law?

	Number	%
Not at all	64	5.4%
Just a little	249	20.8%
Somewhat	426	35.5%
A lot	449	37.4%
Don´t know	12	1.0%
Total	1 200	100%

Source: Afrobarometer online analysis tool, available at <http://afrobarometer.org/online-data-analysis/analyse-online>.

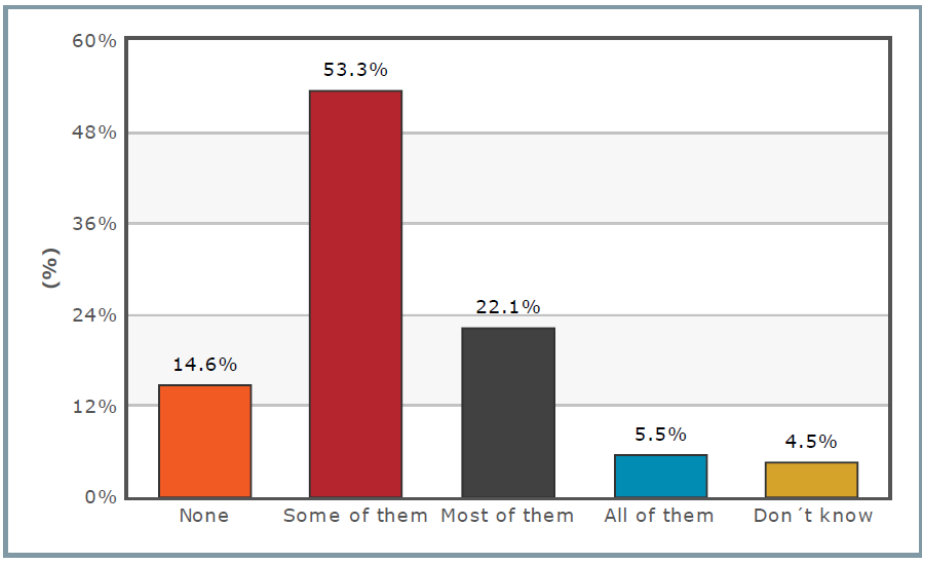
However, somewhat contradictorily, when asked about corruption amongst judges and magistrates, 53% of Namibian respondents thought that "some" were corrupt, 22% thought that "most" were corrupt and 5.5% thought that "all" were corrupt. Only 15% responded that "none" were corrupt (while 4.5% did not know).

[12] *2013 Baseline Study Report on Human Rights in Namibia*, Windhoek: Office of the Ombudsman, 2013 at 126 (footnotes omitted).

[13] The project began in 1999 with 12 countries and had expanded to 35 countries by Round 5 (2011-2013). The most recent Afrobarometer survey was Round 6 which took place in 2014-2015. See Afrobarometer: Perceptions on gender equality, GBV, lived poverty and basic freedoms, IPPR, 13 February 2015 (available at <http://ippr.org.na/wp-content/uploads/2015/02/NAM_R6%20%20Media%20briefing%20for%204th%20release_13Feb15_final%20(2).pdf>).

[14] The comparable percentage in past surveys conducted in recent years were similar: 74% in 2008/09 and 75% in 2011/13. Afrobarometer online analysis tool, available at <http://afrobarometer.org/online-data-analysis/analyse-online>.

How many judges and magistrates do you think are involved in corruption?



Source: Afrobarometer online analysis tool, available at <http://afrobarometer.org/online-data-analysis/analyse-online>.

26.2 Mechanisms for feedback in other jurisdictions

Complaints mechanisms exist in most jurisdictions as part of the disciplinary aspects of the legal profession, but this is not an adequate mechanism for understanding how the legal profession might better serve public needs.

In the **United States**, the American Bar Association conducted a year-long initiative to learn about the challenges faced by the public in accessing legal services. This project sought public input by means of (1) grassroots meetings; (2) a national workshop; (3) comments submitted by members of the legal profession and the public on specific issue papers; (4) testimony at hearings held at ABA forums; (5) input from a series of 'webinars' delivered by experts on emerging issues in legal services delivery and (6) a public opinion survey which also included focus groups. The results informed a report on the future of legal services in the US. [15]

As another form of "feedback", the **European Commission for the Efficiency of Justice (CEPEJ)** has developed statistical indicators for evaluating judicial time management, in order to assess the working practises of the courts:

> The main aim of judicial statistics is to facilitate the efficient functioning of a judicial system and contribute to the steering of public policies of justice. Therefore judicial statistics should enable policy makers and judicial practitioners to get relevant information on court performance and quality of the judicial system, namely the workload of courts and judges, the necessary duration for handling this workload, the quality of courts' outputs and the amount of human and financial resources to be allocated to the system to resolve the incoming workload.[16]

For example, the ***Clearance Rate*** looks at the ratio between resolved cases and new incoming cases in a specific time period. If the Clearance Rate is above 100%, this means there are more completed

[15] *Report on the Future of Legal Services in the United States,* Commission on the Future of Legal Services, American Bar Association, 2016 at 10.
[16] "CEPEJ Guidelines", The European Commission for the Efficiency of Justice, undated at 5 (available at <www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines_en.pdf>).

cases than new cases being submitted to the court, which also indicates that the number of pending cases is decreasing.

$$\text{Clearance Rate}\,(\%) = \frac{\text{resolved cases}}{\text{incoming cases}} \text{x}\,100$$

The ***Case Turnover Ratio*** assesses the number of resolved cases compared to the number of unresolved cases at the end of the year being assessed:

$$\text{Case Turnover Ratio} = \frac{\text{Number of Resolved Cases}}{\text{Number of Unresolved Cases at the End}}$$

The Case Turnover Ratio is then used to calculate ***Disposition Time***, which measures how quickly the court turns over received cases.

$$Disposition Time = \frac{365}{Case Turnover Ratio}$$

In addition, the CEPEJ has identified other indicators which can help to evaluate court performance:

- ***Efficiency Rate*:** an indicator which analyses the relationship between the number of personnel utilised in a court in a given year and the output of cases from the same court.
- ***Total Backlog*:** an indicator of the cases remaining unresolved at the end of the time period being assessed year, defined as the difference between the total number of pending cases at the beginning of the period and the cases resolved within the same period.
- ***Backlog Resolution***: an indicator that determine the time needed to resolve the total backlog in months or days, calculated as the relationship between the number of cases and the clearance time.
- ***Cases per Judge***: an indicator of the number of cases of a particular type per judge in a given time period
- ***Standard Departure***: an indicator of departures from set targets by per type of case in the given period in percentages or days.[17]

*****

[17] "CEPEJ Guidelines", The European Commission for the Efficiency of Justice, undated at 30-31 (available at <www.coe.int/t/dghl/cooperation/cepej/textes/Guidelines_en.pdf>).