



Investigation into Legal Fees

Project 142

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South African Law Reform Commission

The South African Law Reform Commission (the Commission) was established by the South African Law Reform Commission Act 19 of 1973.

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Request for comments

The main object of the South African Law Reform Commission (the Commission) in terms of section 4 of its establishing legislation, the South African Law Reform Commission Act 19 of 1973, is to do research with reference to all branches of the law of the Republic, and to study and investigate all such branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof.

The investigation into legal fees is prescribed by legislation. Sections 35(4) and (5) of the Legal Practice Act 28 of 2014 (LPA), which came into operation with effect from 1 November 2018,¹ set out the parameters of the investigation to be undertaken by the Commission within a period of two years, calculated from the latter mentioned date.

In terms of section 35(4) of the LPA, the Commission is required to investigate and report back to the Minister with recommendations on the following:

- (a) *The manner in which to address the circumstances giving rise to legal fees that are unattainable for most people;*
- (b) *Legislative and other interventions in order to improve access to justice by members of the public;*
- (c) *The desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners;*
- (d) *The composition of the mechanism contemplated in paragraph (c) and the processes it should follow in determining fees or tariffs;*
- (e) *The desirability of giving users of legal services the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism contemplated in paragraph (c); and*
- (f) *The obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services.*

In broad terms, this constitutes the mandate of the Commission, and in giving effect to this mandate, the Commission must, in terms of section 35(5), take the following into consideration:

¹ Proclamation No.R31 of 2018, published in Government Notice No.42003 dated 29 October 2018.

- (a) *Best international practices;*
- (b) *the public interest;*
- (c) *the interests of the legal profession; and*
- (d) *the use of contingency fee agreements as provided for in the Contingency Fees Act, 1997 (Act No.66 of 1997).*

This issue paper is the first document published during the course of this investigation. It aims to announce the investigation, initiate and stimulate debate, and seek proposals for reform; and it will serve as a basis for further deliberation by the Commission. Since this issue paper is the first step in the investigation, the paper does not contain any recommendations for law reform.

On 01-02 November 2018, the Commission hosted an international conference on “Access to Justice, Legal Costs and Other Interventions” in Durban. The conference sought to elicit views and comments from a wide array of stakeholders on access to justice, and on the impact of high legal costs, which impede access to justice for the majority of South Africans. The views, comments, and input made at the conference are incorporated into this issue paper.

The issue paper contains questions aimed at discovering the issues at hand and the extent of the need for law reform. The Commission specifically requests comment on the issue paper as a whole, including the questions that it poses.

Following the issue paper, the Commission will publish a discussion paper setting out preliminary recommendations and, if necessary, draft legislation. The discussion paper will take the public response to the issue paper into account, and will test public opinion on the solutions identified by the Commission. On the strength of these responses, a report will be prepared containing the Commission’s final recommendations. The report (with draft legislation, if necessary) will be submitted to the Minister of Justice and Correctional Services for his consideration.

The Commission will assume that respondents agree to the Commission quoting from or referring to their comments, and to attributing comments to them, unless representations are marked ‘confidential’. Respondents should be aware that the Commission may in any event be required to release information contained in representations under the Promotion of Access to Information Act 2 of 2000.

Respondents are requested to submit written comments, input, or representations to the Commission by **30 August 2019**. Any request for information and administrative enquiries should be addressed for the attention of the Secretary of the Commission or the allocated researcher, Mr L. Mngoma. This document is available on the Internet at <http://salawreform.justice.gov.za>.

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Acronyms

Acronym	
ALRC	Australian Law Reform Commission
AULAI	Association of University Legal Advice Institutions
ADR	Alternative dispute resolution
ATE (insurance)	After-the-event (insurance)
CAO	Community Advice Office
CAOSA	Centre for the Advancement of Advice Offices in South Africa
CBPs	Community-based paralegals
CC	Constitutional Court
CCJ	Centre for Criminal Justice
CFA	Contingency fee agreement
CFCSA	Criminal Tariff; Child Family Community Service Act (British Columbia)
CLRDC	Community Law and Rural Development Centre
Commission	South African Law Reform Commission
CPA	Consumer Protection Act 68 of 2008
CPR	Civil Procedure Rules (United Kingdom)
CSOs	Civil society organisations
DBA	Damage-based agreements
DOJCD	Department of Justice and Constitutional Development
FHR	Foundation For Human Rights
GCB	General Council of the Bar of South Africa
HSRC	Human Sciences Research Council
LCI	Law Commission of India
LEI	Legal expenses insurance
LGCS	Law graduate community service
Legal Aid SA	Legal Aid South Africa
LPA	Legal Practice Act 28 of 2014
LPA Code	Code of conduct for legal practitioners, candidate legal practitioners, and juristic entities published in terms of section 97(1)(b) of the LPA
LPRC	Legal Practitioners Remuneration Committee (Nigeria)
LSSA	Law Society of South Africa
LSS	Legal Services Society (British Columbia)
NGO	Non-governmental organisation

NPO	Non-profit organisation
NADCAO	National Alliance for the Development of Community Advice Offices
MCA	Magistrates' Court Act 32 of 1944
NEMA	National Environmental Management Act 107 of 1985
SAAPIL	<i>South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development</i>
SASAS	South African Social Attitudes Survey
SALPC	South African Legal Practice Council
SALRC	South African Law Reform Commission
SC	Senior Counsel
SCA	Supreme Court of Appeal
SCAT	Social Change Assistance Trust
SER	Socio-economic rights
SRL	Self-represented litigants
RAF	Road Accident Fund
Rules Board	Rules Board for the Courts of Law
UK	United Kingdom
VLRC	Victorian Law Reform Commission
Working Group	Legal Costs Working Group (Ireland)

Chapter 1: Introduction

A. Introduction

1.1 The preamble to the Legal Practice Act 28 of 2014 (LPA) states that access to legal services is not a reality for most South Africans. Thus the aim of introducing the LPA is to ensure that legal services are accessible and affordable to most South Africans.

1.2 The majority of South Africans are unable to access lawyers because of unattainable legal fees, making access to justice a commodity that only the privileged can buy.¹ Many South Africans live in rural areas, making travelling to a lawyer's office a financial battle.²

1.3 Fees and costs are associated with access to justice at every stage of the legal process. Such expenses constitute a major barrier for those who cannot afford them. The cumulative impact of fees and costs is a crucial factor in preventing the poor and marginalised from accessing and benefiting from the justice system.³ A more recent study by the United Nations Commission on Legal Empowerment of the Poor estimates that as many as two-thirds of the people of the world face a gap in their access to justice.⁴ Many of these people find it difficult to deal with the enormous legal challenges they face, such as bail applications, bail appeal, maintenance, domestic violence matters, land matters, evictions, family law matters, labour matters, and many more.

1.4 The Department of Justice and Constitutional Development (DOJCD) commissioned a study that was undertaken by the Human Sciences Research Council (HSRC) to assess the impact of the decisions of the apex courts on the transformation of society. On the subject of legal costs, the HSRC report states that "[C]osts are an essential issue in relation to access to justice in all legal matters. Fifty nine percent of South African Social

¹ Makume, MA, "Is access to justice dependent on one's ability to afford legal fees?", 2. Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018.

² *Idem*. Makume asks the following questions: How will the poor and marginalised people access the court when they do not have the means to do so? What is the role of the profession in ensuring the realisation of this right? How must the state ensure the progressive realisation of this right?

³ Carmona, MA and Donald, K, *Access to justice for persons living in poverty: A human rights approach*. United Nations, 20. <http://socialprotection-humanrights.org/> (accessed on 29 May 2018).

⁴ Carmona, MA and Donald, K, *Access to justice for persons living in poverty: A human rights approach*. United Nations, 7. <http://socialprotection-humanrights.org/> (accessed on 29 May 2018).

Attitudes Survey (SASAS) respondents in the most recent survey on courts in 2014 indicated that they felt that lack of funds to pay legal expenses [was] a significant barrier to accessing justice from the courts”.⁵

1.5 The right of access to courts is a fundamental human right, and is embodied in section 34 of the Constitution.⁶ Access to justice comprises many aspects. These include access to legal information, advice or mediation services, as well as the use of courts and tribunals and the ability to engage legal advocacy services.⁷ The introduction of the LPA signals the view of the Legislature and the Executive that appropriate actions have to be taken in order to address the problem of lack of access to justice for the majority of the people of South Africa. The overall aim of the Commission’s investigation is to find ways to broaden access to justice, and to make legal services more affordable to the people, while taking into account the interests of the public and of the legal profession.

1.6 The current dearth of access to justice in South Africa is causally attributed to at least four factors: (a) the political and institutional legacy of apartheid, (b) state expenditure being largely focused on criminal rather than civil justice, (c) a legal profession that has been unregulated to a great extent, and (d) several foundational rules of the legal system that militate against access to justice.⁸

1.7 The South African legal cost system is characterised by the existence of litigious tariffs prescribed by the Rules Board for Courts of Law (Rules Board), which are tariffs that determine the maximum fees recoverable under taxation, and unregulated tariffs for legal practitioners, which are fees that members of the public pay to, and are charged by, legal practitioners for litigious and non-litigious legal services. Attorneys and advocates have fee arrangements, and tariffs are agreed to between attorney and client. It has been argued that these unregulated fee charges can lead to abuse, in that there is little protection for members of the general public. Law Societies and Bar Councils have set up specialist fee committees, made up of their own members, that determine whether a legal practitioner has over-reached. This fact could create the perception that the legal profession sits as judge and jury in its own members’ affairs.

⁵ Human Sciences Research Council, “Assessment of the impact of decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society: Final report” (November 2015), 159.

⁶ Constitution of the Republic of South Africa, 1996.

⁷ Turner, S, “Regulatory impact statement” 2
<https://www.justice.gov.za/assets/Documents/Publications/Regulatory-Impact-Statement> (accessed on 17 April 2018).

⁸ Klaaren, J, “The cost of justice, Briefing paper for public positions theme event” (March 2014), 4. <http://wiser.wits.ac.za> (accessed on 30 July 2018).

1.8 Legal Aid South Africa also determines its own tariff of fees and disbursements in criminal and civil matters.⁹ The same goes for other institutions providing legal services, such as the Office of the State Attorney, law clinics, and juristic entities. The SALRC's investigation will, among other things, analyse the current mechanisms for determining legal fees and tariffs to see if any of the existing mechanisms could be used for benchmarking purposes.

1.9 The SALRC's investigation will cover both party-and-party costs (fees that may be recovered by litigants at the conclusion of the litigation process) and attorney-and-client costs (fees and tariffs that legal practitioners may charge their clients for litigious and non-litigious legal services rendered). There are at present no statutory tariffs that legal practitioners may charge members of the public for a wide range of litigious and non-litigious matters. Sections 35(1) and (2) of the LPA provide that, until the SALRC's investigation is completed and the recommendations contained therein have been implemented, fees in respect of litigious and non-litigious legal services rendered by legal practitioners, juristic entities, law clinics, or Legal Aid South Africa must be in accordance with the tariffs set by the Rules Board for the Court of Law. This means that the status quo will prevail, and no new rules will be made by the Rules Board until the SALRC's investigation has been completed.

1.10 The SALRC is thus required to investigate how the existing mechanism for the recovery of fees and costs (party-and-party costs) and of attorney-and-client fees payable to legal practitioners for litigious and non-litigious legal services can be improved in order to broaden access to justice by members of the public.

1.11 The determination of maximum tariffs payable to legal practitioners who are instructed by any State department or provincial or local government is, in terms of section 35(6) of the LPA, the responsibility of the Office of the State Attorney (DOJCD).

1.12 Sections 35(4) and (5) of the LPA mandate the SALRC to investigate and report back to the Minister with recommendations on the following:

- (a) *The manner in which to address the circumstances giving rise to legal fees that are unattainable for most people;*
- (b) *Legislative and other interventions in order to improve access to justice by members of the public;*

⁹ See Annexures E (Judicare criminal tariffs from 1 April 2017) and F (Judicare civil tariffs from April 2017) of the Legal Aid Guide (www.legal-aid.co.za, accessed on 30 January 2019).

- (c) *The desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners;*
- (d) *The composition of the mechanism contemplated in paragraph (c) and the processes it should follow in determining fees or tariffs;*
- (e) *The desirability of giving users of legal services the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism contemplated in paragraph (c); and*
- (f) *The obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services.*

1.13 In giving effect to this mandate, the SALRC must, in terms of section 35(5), take the following into consideration:

- (a) *Best international practices;*
- (b) *the public interest;*
- (c) *the interests of the legal profession; and*
- (d) *the use of contingency fee agreements as provided for in the Contingency Fees Act, 1997 (Act No.66 of 1997).*

1.14 The high costs of civil litigation have a direct impact on access to justice and the courts. Section 34 of the Constitution guarantees everyone the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

1.15 Legal fees have risen to exorbitant levels, not only making access to legal services by the public the domain of the wealthy, but also making access to legal services unaffordable to the State. The setting of legal fees has remained largely the domain of the legal profession itself, with little meaningful intervention by the State or consumers of legal services.¹⁰

1.16 The major problems bedevilling the South African civil justice system are that it takes too long to resolve legal disputes, the system excludes those who cannot afford to litigate in the courts, the average time it takes to resolve a legal dispute ranges between three to six years, and legal fees have escalated to a point where the majority of the

¹⁰ Department of Justice and Constitutional Development, "A framework for the transformation of State legal services", 40.

people are excluded from the system of dispute resolution.¹¹ Hussain *et al*, identify the following inefficient and unsustainable features of the South African civil justice system that must be considered by the Commission's investigation:

- (a) *litigation is too adversarial as cases are run by lawyers, not the courts;*
- (b) *the court system is delayed by postponement of interlocutory and trial hearings, particularly when parties consent and cost order is agreed;*
- (c) *court rolls are clogged by largely tactical trivial applications regardless of their overall value;*
- (d) *procedures are highly but unnecessarily technical and incomprehensible to all but the lawyers;*
- (e) *the possibility of settlement is largely ignored by procedural rules and left entirely to the lawyers' discretion;*
- (f) *inadequately controlled legal costs that are often disproportionate to the sums at stake; and*
- (g) *largely unfettered rights to appeal on law and even on fact, so that litigation seems endless.*¹²

1.17 The Chief Justice of the Republic of South Africa pointed out that, among the problems that must be eliminated from the court system, are delays in the finalisation of cases, backlogs, and absenteeism by judicial officers.¹³

1.18 The high cost of litigation in both civil and criminal matters is one of the main barriers to access to justice. Justice Wallis notes that "[t]here can be no doubt that legal services are expensive and out of the reach of most people in South Africa. This is not a problem confined to this country or to the legal profession in South Africa, but it is one that poses particular problems in this country. Yet many of the proposals being advanced to address it seem like placing a small sticking plaster over a gaping wound".¹⁴

1.19 In *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*,¹⁵ the Constitutional Court expressed its discontent with the exorbitant fees that counsel charges. The court noted at paragraphs 10 and 11 as follows:

¹¹ Hussain, I *et al.*, *Case management in our courts* (LEAD 2016), 27.

¹² *Ibid*, 28.

¹³ Chief Justice of the Republic of South Africa, Mogoeng Mogoeng, "The implications of the Office of the Chief Justice for constitutional democracy in South Africa" (April 25 2013), 8. Annual Human Rights Lecture at the University of Stellenbosch's Law Faculty.

¹⁴ Wallis, Judge M, "Some thoughts on the commercial side of practice". *The Advocate* (April 2012) Vol 25(1), 35. See also Hundermark, P, "Access to justice and legal costs" (September 2018) at 14. Settlement rates before judgement are notably high in other jurisdictions – for example, Norway 42%; Switzerland 60-80% in commercial cases, Australia 90%; Ireland 90%; England 90%, and Scotland 93%.

¹⁵ (CCT 76/12) [2012] ZACC, 17.

[10] It is the concept of what it is reasonable for counsel to charge this judgment hopes to influence. We feel obliged to express our disquiet at how counsel's fees have burgeoned in recent years. To say that they have skyrocketed is no loose metaphor. No matter the complexity of the issues, we can find no justification, in a country where disparities are gross and poverty is rife, to countenance appellate advocates charging hundreds of thousands of rands to argue an appeal.

[11] 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, as here. It is with these considerations in mind that we fix the fees as we have.

1.20 The questions that must be asked are: What are the factors that give rise to unaffordable legal services? What interventions can be devised to address these challenges in South Africa? How do we simplify a complicated system? How can the settlement of disputes be promoted? Should there be an incentive for settlement, such as a rebate in fees?¹⁶

B. Important concepts

Access to justice

1.21 Access to justice means much more than improving an individual's access to court, tribunals, and other fora, or guaranteeing legal representation. It includes the development of capacities to ensure that the rights of all people, including the poor and

¹⁶ Hundermark, P, "Access to justice and legal costs" (September 2018), 14. Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018.

marginalised, are recognised, thus giving them entitlement to remedies or redress that are just and equitable.¹⁷

Contingency fees

1.22 These are fixed fees charged by an attorney for legal work done for a client. A contingency fee means that a client in a legal case does not have to pay the attorney's fees – that is, an amount that an attorney earns for his advice, experience, and representation – unless the attorney recovers some expenses/fees for the client by settlement or by obtaining a favourable trial result. The fee usually constitutes 25% of the amount awarded to a client in a court case if the client is successful in his or her case. The fee may not include any costs. Any fee higher than the normal fee may not exceed such normal fees by more than 100%. The agreement between the attorney and the client is on a 'no win no fee' basis.¹⁸

Legal costs / legal fees

1.23 According to Van Loggerenberg,¹⁹ costs fall into two categories: party-and-party costs, and attorney-and-client costs. The terms 'party-and-party' and 'attorney-and-client' costs are not defined in the court Rules. These costs are explained below.

Party-and-party costs

1.24 Kruger and Mostert state that "[p]arty and party costs are costs, charges and expenses which appear to the taxing master to have been necessary or proper for the attainment of justice or for defending the rights of any party".²⁰ According to Francis-Subbiah, "[p]arty and party costs are generally not all the costs incurred by the litigant but

¹⁷ Mkhwebane, B, "The Role of the Public Protector to provide access to administrative justice within the broader justice system as envisaged in section 34 read with section 182 of the Constitution, and the impact of increasingly litigious responses (with escalating legal fees and costs) by state institutions to the investigations of the Public Protector", 3. Paper presented at the international conference on "Access to Justice, Legal Costs and Other Interventions," held in Durban on 01-02 November 2018.

¹⁸ See Contingency Fee Act, 1997.

¹⁹ Van Loggerenberg, DE, *Jones and Buckle, The civil procedure of the Magistrates' Court in South Africa*, 10th Ed. Juta, Service 11, 2015, 23.

²⁰ Kruger, A and Mostert, W, *Taxation of costs in the higher and lower courts: A practical guide*, 2010, 13.

include all the costs provided for in the tariffs of court. This has the effect that a taxing master applies the tariff strictly and allows costs that are necessary and proper”.²¹

Attorney-and-client costs

1.25 Francis-Subbiah states that attorney-and-client costs have a double meaning. Firstly, they refer to costs that an unsuccessful party is ordered to pay to the successful party. Secondly, they refer to costs that a client has to pay to her attorney for legal services rendered.²² The author states that, strictly speaking, the latter type of costs should be called ‘attorney and own client costs’. Thus attorney-and-client costs are fees that a client has to pay to his or her attorney, regardless of the outcome of the case. The position at common law is that the client is liable to pay the attorney reasonable fees for legal services rendered.²³

Costs *de bonis propriis*

1.26 Costs *de bonis propriis* are punitive costs ordered by the court to be paid by a party or his / her legal representative from his / her own pocket for acting in an improper, dishonest, and seriously negligent manner.²⁴

Legal services

1.27 The phrase ‘legal services’ is not defined in section 1 of the LPA. Many services that have historically been provided by legal practitioners, such as labour law matters, are no longer reserved to legal practitioners.²⁵

1.28 Section 33 of the LPA provides that:

- (1) *Subject to any other law no person other than a legal practitioner who has been admitted and enrolled as such in terms of this Act may, in expectation of any fee, commission, gain or reward –*
 - (a) *appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear;*
or

²¹ Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 115 and 85 respectively.

²² *Ibid*, 91.

²³ *Mfengwana v Road Accident Fund* [2016] ZAECGHC 159, par 26.

²⁴ Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 119.

²⁵ Essa, A, “Legal practitioners and non-litigious legal fees”, 2. Paper presented at international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018.

- (b) *draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of civil or criminal jurisdiction with the Republic.*

Mechanism for determining fees and tariffs

1.29 A mechanism for determining fees and tariffs is a system,²⁶ model,²⁷ or framework for determining the cost of legal services payable to legal practitioners.

Non-litigious work

1.30 The Law Society of South Africa (LSSA) *Practice Manual of Legal Costs* describes non-litigious work as legal work that is not civil-litigious.²⁸ Civil-litigious work is work done when action or application procedures are instituted in court, and thus when a summons or application is issued and pleadings and notices are exchanged, or when a summons or application will eventually be issued.

1.31 Non-litigious work can also be identified as work done in terms of statutes and rules, which include, among other things, conveyancing and notarial services, patents, administration of estates, drafting of wills, agreements relating to immovable property, company documents and partnership agreements, and commercial services.²⁹

1.32 Some work, such as insolvent estates, interrogations, maintenance and children's court matters, and arbitration proceedings where no settlement agreement was made an order of court, cannot be categorised as either litigious or non-litigious.³⁰

Paralegals

1.33 Paralegals are providers of free legal advice/ services, accessing grants and entitlement for the poor, lay / basic counselling, human rights awareness, negotiations,

²⁶ Fuesgen, I, "The evolution of legal services-legal costs in the bigger picture of today's realities", Paper presented at international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018, *What are pre-conditions and current opportunities for a 'system' of differentiated legal service costs?* 1.

²⁷ *Idem*, *The 'model' demonstrates the relationship between costs, revenue, linking internal resources to external outputs.*

²⁸ Essa, A, "Legal practitioners and non-litigious legal fees", 2. Paper presented at international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018, 3.

²⁹ *Idem.*

³⁰ *Idem.*

mediation and representation in dispute resolution, facilitating community development, networking, and advocacy for rights promotion.³¹

³¹ Harding, J and Tilley, A, "Paralegals and access to justice: A dream deferred?", 3 Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018.

Chapter 2: Factors and circumstances giving rise to legal fees that are unattainable for most people

A. Introduction

2.1 Section 35(4)(a) of the LPA provides that the Commission must investigate and report back to the Minister on the manner in which to address the circumstances giving rise to legal fees that are unattainable for most people. Chapter 2 identifies some of the factors and circumstances giving rise to unattainable legal fees for most people.¹

2.2 It is not certain why the Legislature used the word “circumstances” and not “factors” in section 35(4)(a). In his review of the rules and principles governing the costs of civil litigation in England and Wales, Justice Jackson uses both “causes” (general causes of excessive costs and how they should be tackled),² and “factors”.³ The Victoria Law Reform Commission’s report also makes use of the word “factors” ([T]o identify the key factors that influence the operation of the civil justice system, including those factors that influence the timelines, cost and complexity of litigation).⁴ The Commission is enjoined by section 35(5)(a) to take into account best international practices when conducting the investigation. Accordingly, both the words “factors” and “circumstances” will be used in this investigation to refer to the causes of legal fees that are unattainable for most people.

2.3 The list of factors and circumstances is by no means exhaustive. For academic purposes, the factors and circumstances are classified under the following categories:

- (a) the legal system;
- (b) fees and costs;
- (c) the litigation process;
- (d) the legal profession;
- (e) court processes and procedures;
- (f) socio-economic factors; and
- (g) other matters, including the following:

¹ The Preamble to the LPA states that “access to legal services is not a reality for **most South Africans** (emphasis added). Section 3 of the LPA further states that “[T]he purpose of this Act is to broaden access to justice by putting in place a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the **citizenry**” (emphasis added).

² Jackson, R, “Review of civil litigation costs: Final report” (December 2009), 42.

³ *Ibid*, 43-51.

⁴ Victoria Law Reform Commission, “Civil Justice Review Report 14” (March 2008), 8.

- (i) legal services provided by commercial juristic entities;
- (ii) legal services provided by non-profit (juristic) entities;
- (iii) legal services provided by law clinics;
- (iv) legal expenses insurance;
- (v) taxation costs and the role of taxing masters;
- (vi) legal costs consultants;
- (vii) debt discovery costs;
- (viii) family matters;
- (ix) personal injury matters;
- (x) class action claims;
- (xi) small claims courts;
- (xii) community courts; and
- (xiii) traditional courts.

2.4 The factors and circumstances giving rise to unattainable legal fees are discussed below.

B. The legal system

1. Complexity of the law

2.5 This refers to the complexity of the legal issues to be dealt with. Generally, the more complex the law, the more time a legal practitioner will spend conducting research, which drives up costs. There may also be a need for expert knowledge in a particular field – for example, tax and intellectual property – and such experts attract higher legal fees.

2.6 Does the complexity of the law in general, and that of specific legal issues such as tax and intellectual property, contribute to unaffordable legal fees or hamper access to justice? If so, in what way and to what extent?

2. Rules of procedure

2.7 Rules of procedure can be overly complex for the lay person, and these rules have been identified as a barrier to access to justice.⁵ Of course, rules of procedure are

⁵ Human Sciences Research Council, “Assessment of the impact of the decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society: Final Report” (November 2015), 178.

necessary for the effective conduct of cases.⁶ However, these rules can also be abused to discourage an opposing party from continuing with litigation because of the cost implications of a long, drawn-out case.⁷ *ProBono.org* has found rules of procedure to be discriminatory towards the poor. The South African civil justice system is characterised by the long period it takes to resolve legal disputes.⁸

2.8 Andrews mentions that secondary legislation and civil procedure rules are by far the largest source of procedural law.⁹ He points out that the heads of the various divisions of the High Courts have inherent powers to issue practice directions and notes.¹⁰ The importance of the decisions made by the High Courts, the Supreme Court of Appeal, and the Constitutional Court in developing rules and principles of customary and statutory law cannot be overemphasised.

2.9 Hodges and Vogenauer remark that the challenge of maintaining fair and equal access to justice remains a problem for many jurisdictions throughout the world.¹¹ The authors explain that the stakeholders responsible for running the courts – that is, judges, lawyers, and government – should respond to these challenges and strive to streamline the procedures in a manner that will bring about more effective and efficient delivery of legal services.¹²

2.10 Delivering his paper on the *Implications of the Office of the Chief Justice for Constitutional Democracy in South Africa*, the Chief Justice stated that the leadership of the judiciary at all levels has resolved to begin a massive project of overhauling all the Rules of the High Court and Magistrates' Courts with a view to do away with all the archaic Rules, as well as progress- and efficiency-retarding Rules.¹³ Among the problems noted by the Chief Justice that must be eliminated from the court system are delays in the finalisation of cases, backlogs, and absenteeism by judicial officers.¹⁴

⁶ *Ibid*, 180.

⁷ *Ibid*, 178.

⁸ Hundermark, P, "Access to justice and legal costs" (September 2018), 14.

⁹ Andrews, Neil, "English civil procedure: A synopsis", 27. <http://www.dca.gov.uk/civil/procrules> (accessed on 25 February 2016).

¹⁰ *Idem*.

¹¹ Hodges, C and Vogenauer, S, *Findings of a major comparative study in litigation funding and costs*, 2010, 1.

¹² *Idem*.

¹³ Chief Justice of the Republic of South Africa, Mogoeng Mogoeng, "The implications of the Office of the Chief Justice for constitutional democracy in South Africa" (April 25 2013), 9.

¹⁴ *Ibid*, 8.

2.11 The Chief Justice pointed out that “this overhauling will facilitate access to justice. When Rules of Court are easy to understand, lay people who can read and write will be able to represent themselves more meaningfully in courts of law. We believe that the successful accomplishment of this self-imposed responsibility would give meaning to our constitutional democracy by making justice accessible even to the poor, because the budgetary constraints do not allow Legal Aid South Africa to fund every indigent litigant”.¹⁵

2.12 How complex are the rules of procedure? Does the complexity of the rules of procedure contribute to unaffordable legal fees or hamper access to justice? If so, in what way? What changes to the rules of procedure could be implemented to render legal fees more affordable and/or increase access to justice?

3. Direct access to the Constitutional Court¹⁶

2.13 Direct access to the Constitutional Court by socio-economically disempowered applicants (and even allowing the Constitutional Court to find direct access cases of its own accord) would allow the court to play an active role in transformation as the “institutional voice of the poor”.¹⁷ Developing countries such as Brazil, India, and Colombia have simplified direct access to the highest courts of the land.¹⁸ It must be noted that this should remain an exceptional measure to avoid “opening the floodgates”.¹⁹

2.14 Does the restricted access to the Constitutional Court have an adverse impact on access to justice? If so, in what way?

4. Strengthening lower courts to which the poor can have access more easily²⁰

2.15 Rather than promoting direct access to the Constitutional Court, it may be more advantageous to strengthen the lower courts to which the poor can (and already do) have

¹⁵ *Ibid*, 9.

¹⁶ Human Sciences Research Council, “Assessment of the impact of the decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society: Final report” (November 2015), 22. According to the HSRC report, “[T]he question of direct access to Constitutional Court (CC) has become increasingly topical. It has been argued by some academics and activists, notably Jackie Dugard, that the CC has failed to live up to its transformative potential and has thus failed to become an institutional voice of the poor as a result of its restrictive interpretation of SERs, 124”

¹⁷ *Ibid*, 124.

¹⁸ *Idem*.

¹⁹ *Ibid*, 128.

²⁰ *Ibid*, 138.

easier access.²¹ It has further been suggested that institutions such as the Commission for Gender Equality, the South African Human Rights Commission, and the Public Protector, as well as the involvement of *amici*, could be used to a greater extent (and strengthened) so that cases involving socio-economic rights do not even need to go to court.²²

2.16 Are poor and middle-income people denied access to the lower courts? If so, to what extent? In what ways could the functioning of the lower courts be strengthened/streamlined in order to make legal fees more affordable?

C. Fees and costs

5. Method of remuneration – billable hours²³

2.17 It would appear that most attorneys charge on the basis of billable hours. They are generally expected to bill a certain number of hours per year in order to maintain or achieve partnership status or to be awarded performance bonuses. This form of remuneration may encourage attorneys to inflate their billable hours and to engage in unethical billing practices.²⁴

2.18 The cost of legal services in South Africa is clearly high.²⁵ Comparing the fees of attorneys' and counsel who service the top band of the population, as well as corporate firms, Klaaren points out that, in the Johannesburg corporate legal sphere, a candidate attorney (for example, an LLB graduate without admission as an attorney) can currently charge more than R1100/hour as a standard rate (excluding VAT and without discount). A professional associate attorney with five years of experience can charge R2400. A director/ partner with ten years of experience can charge R4500. A senior director / partner with twenty years of experience can charge R6000/hour. In the solo and small firms sector for attorneys, the fees may be half as much, but are still substantial.²⁶

²¹ *Idem*. It is anticipated that more evidence on the courts usually used by the poor, at Magistrates' Courts level in particular – for instance, the maintenance, domestic violence and small claims courts – will be available at the discussion paper phase of this investigation.

²² *Idem*.

²³ Toothman, JW and Ross WG Legal Fees Law and Management (2003) 27, 337.

²⁴ *Ibid*, 39.

²⁵ Klaaren, J, "Towards affordable legal services: Legal costs in South Africa and a comparison with other professional sectors", 19 October 2018, 6. The author states that this is rife particularly in the advocates' sector, 7.

²⁶ *Ibid*, 6.

2.19 According to the 2015 report on Public Interest Legal Services in South Africa, “a first year junior advocate charges from approximately R550 per hour or R5500 per day. Counsel of ten years’ standing can charge between R1500 and R2400 per hour (or between R15000 and R24000 a day). Senior counsel who have been given ‘silk’ status by the President charge between R25000 and R35000 per day, with some counsel rumoured to charge up to R60000 per day in high-value commercial matters.”²⁷

2.20 Are the various methods of remuneration used by legal practitioners appropriate in facilitating access to justice?

6. Improper billing practices²⁸

2.21 Improper billing practices may include billing for hours not worked, billing more hours than actually work (bill ‘padding’),²⁹ double billing (billing for work already done for another client, or billing two clients for the same hour),³⁰ cryptic time entries, non-itemised bills, mixed, lumped, or blocked time entries (more than one task is included in the same entry),³¹ overstaffing, and duplicating effort (where the time of two or more practitioners is billed when one would have sufficed).³² Improper billing practices are unethical, but often difficult to police, because the client is usually not aware of the complexity of a matter, or the resources actually expended by a legal practitioner are behind closed doors.

2.22 Do unethical billing practices exist in our law and, if so, to what extent? Other than hourly billing, what methods of remuneration could lead to legal fees generally becoming more affordable? In what ways could the practice of hourly billing be modified to discourage unethical billing practices?

7. Lack of statutory tariff for non-litigious matters

2.23 This matter is dealt with in Chapter 4 of this issue paper.

8. Lack of statutory tariff in criminal matters

2.24 This matter is dealt with Chapter 4 of this issue paper.

²⁷ *Ibid*, 7.

²⁸ Toothman, JW and Ross, WG *Legal Fees Law and Management* (2003) 39.

²⁹ *Ibid*, 52

³⁰ *Ibid*, 60

³¹ *Ibid*, 55

³² *Ibid*, 63.

9. Lack of statutory tariff for advocates' fees

2.25 There are no statutory tariffs for advocates' fees, which are generally treated as disbursements in an attorney's bill of costs.³³ However, Legal Aid SA does provide for an hourly and daily tariff for senior counsel. The constituent Bars of the General Bar Council had published recommended fee guidelines in the past.³⁴ However, the Competition Commission regarded this as an anti-competitive practice.

2.26 Does the lack of statutory tariffs for advocates' fees inhibit access to justice? If so, in what way?

10. Contingency fee agreements

2.27 This matter is dealt with in Chapter 5 of this issue paper.

11. Payment of referral fees³⁵

2.28 Payment of referral fees occurs when an attorney pays a fee to a third party for the referral of work by said third party to the attorney. In his final report to the Master of Rolls, Justice Jackson recommended that lawyers should not be permitted to pay referral fees in respect of personal injury cases.³⁶

2.29 Does a system for payment of referral fees exist in South Africa and, if so, to what extent?

12. Cost-shifting rule

2.30 In *Ferreira v Levin NO and Others*,³⁷ the Constitutional Court articulated the basic principles for the awarding of costs in South Africa. Firstly, "the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer"; and secondly, "the successful party should, as a general rule, have his or her costs".³⁸ This general rule – that the costs follow the event – does not apply in the Constitutional Court.³⁹

³³ Francis-Subbiah, R *Taxation of legal costs in South Africa* (2013), 121.

³⁴ *Ibid*, 203.

³⁵ Jackson, R, "Review of civil litigation costs: Final report" (December 2009), 194.

³⁶ *Ibid*, xvii.

³⁷ 1996 (1) SA 984 (CC).

³⁸ *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC).

³⁹ Woolman, et al. *Constitutional Law of South Africa* (1999), 6-2.

2.31. Unlike in the United States of America, in South Africa only a few statutes provide for a deviation from the above-mentioned general rule. For instance, section 32(2) of the National Environmental Management Act 107 of 1998 (NEMA) and section 21(2)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 authorise a court not to award costs against unsuccessful litigants in certain proceedings aimed at the protection of the environment or in the interest of equity and fairness” respectively.⁴⁰ In *Biowatch*,⁴¹ the court made reference to section 32(2) of NEMA, and confirmed that this section provides a statutory authorisation for a court to deviate from the general “loser pays” rule in matters involving environmental protection in the public interest.

2.32 The precedent laid down in *Biowatch* was followed in *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another*,⁴² involving a challenge of the first respondent’s (Limpopo College of Nursing) admission policy, which excluded from admission into the college students who obtained their school-leaving certificates more than three years from the date of application. In this case, government was ordered to pay the private party’s legal costs. Again, in *Manong and Associates (Pty) Ltd v City of Cape Town and Another*,⁴³ the SCA applied the general principles formulated in *Biowatch* to deny a private party’s legal costs in constitutional litigation in the Equality Court on the basis that the private party’s claim was frivolous, malicious, and vexatious.

2.33 How does the cost-shifting rule operates in practice?

13. Fear of having to pay opponent’s costs⁴⁴

2.34 The fear of having to pay the opponent’s costs in addition to one’s own in the case of an unsuccessful claim may serve as a deterrent, and therefore a potential barrier to

⁴⁰ Erasmus, HJ, *The interaction of substantive and procedural law: The Southern African experience in historical and comparative perspective* (1990) 6.

⁴¹ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC), para 19.

⁴² *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another* 2015 (4) BCLR 396 (CC).

⁴³ *Manong and Associates (Pty) Ltd v City of Cape Town and Another* 2011 (5) BCLR 548 (SCA).

⁴⁴ Human Sciences Research Council, “Assessment of the impact of the decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society: Final report” (November 2015), 164.

justice.⁴⁵ Courts should be mindful of the effects of these cost orders when ordering the unsuccessful party to pay his/her opponent's costs.

2.35 Does the court granting costs in favour of the winning party impede or cause litigants not to litigate for fear of having to pay the opponent's costs? If so, why?

14. The conditional fee agreement regime

2.36 A conditional fee agreement refers to an agreement between a legal practitioner and the client whereby a fee is payable in the event of a successful claim.⁴⁶ Conditional fee agreements are not to be confused with contingency fee agreements. The former refers to a success fee that is not calculated as a percentage of the amount awarded by the court, whereas the latter is calculated as a percentage of an awarded amount.⁴⁷ "No win, no fee" agreements are the most common type of conditional fee agreement.⁴⁸ The negative consequences of conditional fee agreements include litigants showing a lack of interest in controlling the costs incurred by their legal representative, and thus putting the opposing party at risk for being liable for increased costs.⁴⁹

2.37 Do conditional fee agreements operate effectively in practice and, if so, to what extent?

15. Pre-litigation costs

2.38 Pre-litigation costs are costs that are incidental to legal proceedings. Generally, these costs are incurred prior to issuing a summons or notice of application. They sometimes, but not always, result into litigation. According to Kruger and Mostert:

*[t]he test for deciding whether to allow pre-litigation costs is whether those costs were reasonably and necessarily incurred to secure the litigant's position.*⁵⁰

2.39 In the absence of an agreement to that effect, pre-litigation costs are not recoverable until the court has granted an order in the party's favour and the costs have been taxed; and it is not sound practice to attempt to recover such unagreed, unawarded,

⁴⁵ *Idem.*

⁴⁶ Jackson, R, "Review of civil litigation costs: Final report" (December 2009), viii.

⁴⁷ *Idem.*

⁴⁸ *Ibid*, xvi.

⁴⁹ *Ibid*, 43.

⁵⁰ Kruger, A and Mostert, W, *Taxation of costs in the higher and lower courts* (2010), 37.

untaxed costs by framing the claim for them as a damages claim. If a matter is settled prior to the issue of summons, and the settlement includes an agreement that one party will pay costs (either as agreed or as taxed), pre-litigation costs may in appropriate cases be included in a bill of costs submitted for taxation in terms of subrule 33(21) of the Magistrates' Courts Rules.⁵¹

2.40 Some pre-litigation costs are covered by the party-and-party tariff, while others are not. The court in *Van Rooyen v Commercial Union Assurance Co of SA Ltd*⁵² held that the taxing master must not simply assume that pre-litigation costs constitute an exception to the general rule, but has to decide whether they were necessary or properly incurred, and thus are allowable as party-and-party costs. The Commission's investigation will look at the criteria, standards, and guidelines used to determine pre-litigation costs.

2.41 How do pre-litigation costs apply in practice?

16. Cost of factual and expert evidence⁵³

2.42 If witness statements and expert reports are longer than they need to be, or address matters that are irrelevant or at best peripheral or that ought not to be covered at all, it is self-evident that the costs will increase for no useful purpose.⁵⁴

2.43 What is the cost of factual and expert evidence, and how does this impact on access to justice?

17. Court fees⁵⁵

2.44 The risk associated with the implementation of court fees is that it discourages litigants from pursuing not only those matters that should not be brought to court, but also legitimate matters. There is the further difficulty of setting court fees that do not have the effect of hampering access to justice, especially in the case of indigent individuals.

2.45 Do courts in South Africa charge fees to institute or defend legal proceedings, and if so, how are court fees quantified, and what is the impact on access to justice?

⁵¹ Van Loggerenberg, DE *Jones and Buckle, The civil practice of the magistrates' courts in South Africa* 10th Ed. Juta SR, 14/2017.

⁵² 1983 (2) SA 465 (O).

⁵³ Jackson, R, "Review of civil litigation costs: Final report" (December 2009), 375.

⁵⁴ *Idem*.

⁵⁵ *Ibid*, 49.

D. The litigation process

18. Number of parties involved

2.46 The number of parties involved in a case generally drives up legal costs. This can be because of the need to serve process on multiple parties, the increased complexity of the matter brought on by multiple parties, and even the increased difficulty of coming to a negotiated resolution when many parties are involved.

2.47 How does the number of parties involved in a case impact on access to justice?

19. Number of experts involved

2.48 Many cases rely on the opinions of expert witnesses, and retaining experts for purposes of furnishing reports and testimony at trial can be an extremely costly exercise. Needless to say, the more experts are involved in a case, the higher the legal costs will be.

2.49 How does the number of experts involved impact on access to justice?

20. Novelty of the matter

2.50 The novelty of the matter has an implication on the costs associated with that matter. This may be as a result of extensive research being required in order to construct an argument, increased litigation as a result of a lack of precedent or settled law on the matter, and the possible need for specialist knowledge.

2.51 Does the novelty of a legal point taken in a matter impact on the costs of litigation? If so, how?

21. The cost of discovery⁵⁶

2.52 Discovery can have significant implications for the costs of a case, especially where there is a high degree of complexity.⁵⁷ A number of cost-increasing problems are associated with the discovery process, such as late delivery of affidavits, untimely production of documents, excessive requests for information and/or documents,

⁵⁶ Out-law "Electronic Disclosure" available at <http://topic/dispute-resolution-and-litigation/> (accessed on 18 August 2016) 1.

⁵⁷ *Idem*.

difficulties and delays in scheduling discovery, improper refusals to discover documents, delays in the execution of undertakings, disagreements relating to the scope of discovery, incomplete production of documents,⁵⁸ and the improper management of the disclosure of documents (including electronically stored information).⁵⁹ Incomplete discovery may require a second round of discovery with attendant delays and added costs.⁶⁰

2.53 In what ways can the cost of discovery be decreased to render legal fees more affordable? How does the cost of discovery impact on access to justice?

22. Insufficient use of e-discovery

2.54 Electronic discovery (e-discovery) refers to the “collection, processing and review of electronic documents, which are stored in electronic format”.⁶¹ Statistics show that 90% of business communication occurs electronically, and that 35% of those communications are never converted to hard copy. The general approach in South Africa seems to be that electronic documents are printed for purposes of discovery. This is inefficient, and it causes valuable information to be neglected, resulting in increased legal costs.⁶²

2.55 If sufficient use is made of e-discovery, what positive impact, if any, does it have on access to justice? Alternatively, what are the reasons for practitioners making sub-optimal use of e-discovery? In what ways can the courts and the Legal Practice Council (LPC) contribute to encouraging practitioners to make optimal use of e-discovery?

23. Number of court events

2.56 Legal practitioners charge for each court appearance, regardless of the time actually spent in the courtroom.⁶³ As a consequence, the higher the number of court appearances, the higher the costs of litigation. How does the number of court events impact on access to justice?

⁵⁸ “Discovery best practices: General guidelines for the discovery process in Ontario”, 2 http://www.oba.org/en/pdf_newsletter/DTFGeneralDiscoverybest.pdf (accessed 23 October 2018).

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, 4.

⁶¹ Harrison, T, “Bringing advancing technology in litigation – time to explore electronic discovery”. *De Rebus*, July 2018, 22.

⁶² *Ibid.*

⁶³ Attorneys generally charge per hour; thus they will charge for time spent at court. Advocates are generally booked for the day; thus their fee is charged regardless of the time spent in court.

2.57 One of the major causes of excessive legal fees is the inclusion of irrelevant information in affidavits, the attachment of irrelevant annexures to those affidavits, and the inclusion of all possible arguments, however weak they may be – that is, a ‘shotgun approach’ to litigation. There are practitioners and firms who pride themselves on their ability to engulf their opponents in a so-called ‘paper war’ that is aimed more at intimidating their opponents than being of assistance to the court. In this regard, the following questions may be raised:

- (a) Should the length of all affidavits in High Court litigation (possibly also Magistrates’ Court litigation) be limited to a specific number of pages? If so, how can this be achieved? Should the Judge-President of each Division be requested to consider the adoption of practice directives in this regard?
- (b) Should heads of argument in all High Court and Magistrates’ Court matters be limited to a specific number of pages? If so, how can this be achieved? Must the Judge-President of each Division be approached again?
- (c) How is the so-called ‘shotgun approach’ to litigation to be discouraged? Should there be some kind of legislative intervention with the manner in which costs are awarded in the High Court? Alternatively, should judges merely be required to assess the question of costs more comprehensively – that is, not merely to default to the principle that the winner should be reimbursed (at least some of) his or her costs, but that the question of whether the litigation was conducted in a cost-conscious manner should also be considered?

4. Late settlement

2.58 Many cases that should be settled early in the litigation process are in fact settled late or “on the courthouse steps”.⁶⁴ Late settlement is attributable to various reasons, such as the failure of the parties to understand issues timeously, lack of communication between the parties, failure to use alternative dispute resolution (ADR) mechanisms, a lack of understanding of the consequences of rejecting an offer to settle or of the advantages of making a settlement offer, or even simply stubborn litigants in highly emotional cases.⁶⁵

⁶⁴ Jackson, R, “Review of civil litigation costs: Final report” (December 2009), 49.
⁶⁵ *Ibid.*

2.59 What steps can the courts and the LPC take to encourage the timely settlement of litigated matters? What is the effect of late settlement?

25. Insufficient use of alternative dispute resolution mechanisms

2.60 The use of alternative dispute resolution (ADR) mechanisms can result in the early resolution of cases, and can therefore save litigants from incurring the exorbitant costs of litigation. All legal practitioners and judicial officers should be alive to the potential benefits of ADR.

2.61 One of the projects in the Commission's research programme is 'Project 94: ADR'. This project is divided into two sub-projects: one focusing on pure ADR mechanisms, and the other on mediation. Some focus will be placed on court-annexed mediation, but it will also focus on mediation more broadly. The mediation sub-project is a joint venture of the Commission and the Rules Board. The aim of the latter sub-project is, among other things, to investigate the desirability of developing a statute that will institutionalise mediation, and whether the preferred model will be that of mandatory mediation (such as in Namibia, Ghana, and Nigeria) or voluntary mediation. The on-going pilot project, informed by the court-annexed mediation rules made by the Rules Board, will guide the development of a pragmatic approach to the objective of the sub-project.

2.62 An estimated 70% of the matters dealt with by the Public Protector that are classified as 'bread and butter' matters are being resolved through early resolution approaches.⁶⁶ Many of these cases deal with issues affecting service delivery, such as the following:

- (a) Undue delay;
- (b) Miscommunication between the state and the complainant;
- (c) Arbitrary decisions;
- (d) Poor services or failure to rectify defective services (housing);
- (e) Non-payment or delayed payment by the state to service providers;
- (f) Unresponsiveness of state institutions, including municipalities to complaints and grievances about service delivery;
- (g) Failure by the state to rectify *bona fide* mistakes (e.g., Department of Home Affairs); and

⁶⁶ Mkhwebane, B, "The role of the Public Protector to provide access to administrative justice within the broader justice system as envisaged in section 34 read with section 182 of the Constitution, and the impact of increasingly litigious responses (with escalating legal fees and costs) by state institutions to the investigations of the Public Protector", 10. Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018.

- (h) Failure to attend to damage caused by faulty state equipment and infrastructure failure.⁶⁷

2.63 Rule 71 of the Rules Regulating the Conduct of Proceedings of the Magistrates' Courts provides that the purpose of mediation is, among other things, to facilitate an expeditious and cost-effective resolution of a dispute between litigants and potential litigants.⁶⁸ The Rules make provision for voluntary referral of a dispute to mediation prior to and after commencement of litigation, but before judgement. The introduction of mediation rules by government is another attempt to broaden access to civil justice and to make legal services affordable to most people.

2.64 In what ways can the courts and the LPC encourage litigants to make greater use of ADR mechanisms to resolve their disputes? Why is there insufficient use of ADR mechanisms?

26. General conduct of the parties

2.65 The extent to which parties cooperate in legal proceedings has an effect on the time it takes for the matter to be resolved. Parties sometimes engage in delaying tactics to frustrate the opposing party, or they refuse to engage in negotiations (or other ADR mechanisms), or they may even refuse reasonable unconditional settlement proposals. A proposal was made at the SALRC Conference that a penalty be introduced (in the Rules) in order to deter legal practitioners who institute matters in the High Court that actually belong in the Magistrates' Court.

2.66 Should sanctions be introduced in the court rules in order to dissuade legal practitioners from instituting matters in the Higher Courts where the lower courts have jurisdiction over those matters?

E. Court processes and procedures

27. Insufficient use of case management

2.67 Case management requires judicial officers to ensure that trials are not unduly prolonged by the conduct of the parties through the use of voluminous affidavits and heads of arguments, by the introduction of vexatious and unmeritorious claims, by

⁶⁷ *Idem.*

⁶⁸ Notice No. R.183 dated 18 March 2014.

excessively adversarial stances taken by legal practitioners, and by tactical interlocutory applications that may not have substantial value.⁶⁹

2.68 The object of case management is to change lawyers' attitude, to "moving attorneys away from technical points taking and becoming less adversarial".⁷⁰ Litigation is about the client, not the lawyers. Every case must be resolved within a reasonable time, and all the trimmings – such as trivial and tactical interlocutory applications that clog the motion roll and generate unnecessary wasted costs – should be eradicated from the system.⁷¹ The question is: Is judicial discretion as to costs being properly used?

2.69 Hussain *et al.* point out that "the difficulty we have is that the uniform rules do not deal with case management and judges and magistrates in different jurisdictions have different approaches. Accordingly, practitioners should be guided by the practice directives of the court in which the action is brought. The directives are not consistent and differ from one division to the next. The system continues to evolve and change and this will continue until the uniform rules are amended".⁷²

2.70 Section 8(3) of the Superior Courts Act 10 of 2013 empowers the Chief Justice as head of the judiciary to issue written directives and protocols to judicial officers on any matter that affects, among other things, the accessibility, efficiency, and effectiveness of the courts. In February 2014 the Chief Justice published norms and standards for the performance of judicial functions.⁷³ The norms and standards seek to achieve access to quality justice for everyone by ensuring the effective, efficient, and expeditious adjudication and resolution of all disputes through the courts.⁷⁴

2.71. The following norms and standards, among others, were enacted by the Chief Justice under Notice No.147 of 28 February 2014:⁷⁵

Norms

- (a) *Every Judicial Officer must dispose of his or her cases efficiently, effectively and expeditiously.*
- (b) *Judicial Officers should make optimal use of available resources and time and strive to prevent fruitless and wasteful expenditure at all times.*

⁶⁹ SALRC, "Project 142: Preliminary investigation on legal fees: Amended proposal paper: Options for approaching the legal fees investigation" (May 2017), 28-29.

⁷⁰ Hussain, SC *et al.*, *Case management in our courts* (2016), 30-31.

⁷¹ *Idem.*

⁷² *Ibid*, iii.

⁷³ Notice No.147, published in *Government Gazette* No.37390 dated 28 February 2014.

⁷⁴ Judiciary Annual Report 2017/18, 20.

⁷⁵ Notice No.147, published in *Government Gazette* No.37390 dated 28 February 2014 4-7.

Standards

Assignment of judicial officers to sittings

- (a) *The Head of each Court must ensure that there are Judicial Officers assigned for all sittings so that cases are disposed of efficiently, effectively and expeditiously.*
- (b) *Every effort must therefore be made to ensure that an adequate number of Judicial Officers is available in all courts to conduct the court's business.*

Judicial case flow management

- (a) *Case flow management shall be directed at enhancing service delivery and access to quality justice through the speedy finalization of all matters.*
- (b) *The National Efficiency Enhancement Committee, chaired by the Chief Justice, shall co-ordinate case flow management at national level. Each Province shall have only one Provincial Efficiency Committee, led by the Judge President; that reports to the Chief Justice.*
- (c) *Every Court must establish a case management forum chaired by the Head of that Court to oversee the implementation of case flow management.*
- (d) *Judicial Officers shall take control of the management of cases at the earliest possible opportunity.*
- (e) *Judicial Officers should take active and primary responsibility for the progress of cases from initiation to conclusion to ensure that cases are concluded without necessary delay.*
- (f) *The Head of each Court shall ensure that Judicial Officers conduct pre-trial conferences as early and as regularly as may be required to achieve the expeditious finalization of cases.*
- (g) *No matter may be enrolled for hearing unless it is certified trial ready by a Judicial Officer.*
- (h) *Judicial Officers must ensure that there is compliance with all applicable time limits.*

Finalization of civil cases

- (a) *High Court – within 1 year from the date of issue of summons.*
- (b) *Magistrates' Courts – within 9 months from the date of issue of summons.*

Finalization of criminal cases

- (a) *In order to give effect to an accused person's right to a speedy trial enshrined in the Constitution, every effort shall be made to bring the accused person to trial as soon as possible after the accused's arrest and first appearance in court.*
- (b) *The Judicial Officer must ensure that every accused person pleads to the charge within 3 months from the date of first appearance in the Magistrate' court. To this end Judicial Officers shall strive to finalize criminal matters within 6 months after the accused has pleaded to the charge.*
- (c) *All Judicial Officers are enjoined to take a pro-active stance to invoke all relevant legislation to avoid lengthy period of incarceration of accused persons whilst awaiting trial.*

Delivery of judgements

Judgements, in both civil and criminal matters, should generally not be reserved without a fixed date for handing down. Judicial Officers have a choice to reserve judgements sine die where the circumstances are such that the delivery of a judgement on a fixed date is not possible. Save in exceptional cases where it is not possible to do so, every effort shall be made to hand down judgements no later than 3 months after the last hearing.

2.72 The Rules Board is currently seized with drafting new judicial case flow management rules.

2.73 In Australia, the Federal Court of Australia Act, 1976 (Cth) imposes an obligation on judicial officers to ensure the timely resolution of disputes at a cost proportionate to the amount at stake.⁷⁶ In terms of section 37M of this Act, judicial officers must “facilitate the just resolution of disputes according to the law and as quickly, inexpensively and efficiently as possible”. On the other hand, litigants and legal practitioners are also obliged in terms of section 37N of the Act to “conduct the proceeding, including negotiations for settlement of the dispute to which the proceeding relates, in a way that is consistent with the overarching purpose”. Sections 37N(4) and (5) of the Act further provide that:

- “(4) In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).
- (5) If the Court or a Judge orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from his or her client.”

2.74 Is there insufficient use of case management and, if so, to what extent? In what ways can the courts improve case management so as to render the litigation process faster, more efficient, and more effective?

28. Insufficient use of cost management

2.75 Cost management requires legal practitioners to prepare estimates of costs, to share them with the opposing party, and to ensure that the costs of the trial are kept within the budget and are not exceeded. Sub-sections 35(7)-(9) of the LPA introduce a cost management approach to the mechanism that will be responsible for determining legal fees payable to legal practitioners. Case and cost management techniques were introduced in Australia following the investigation conducted by the Australian Law Reform Commission into high costs of litigation in 2000. A similar approach was followed

⁷⁶ Parkinson, P and Knox, B, “Can there ever be affordable family law?” (2018) 92 ALJ, 467.

in England following the review of the Civil Procedure Rules of 1998 by Lord Justice Jackson in 2009.

2.76 The likely effect of the introduction of a Written Cost Estimate in the South African legal costs regime is discussed in Chapter 6 of this issue paper, 'Attorney and own client costs and contractual freedom'.

2.77 Do the courts make effective use of their discretionary power to make cost awards? In what ways could courts more effectively exercise their discretionary power to make cost awards so as to manage the cost of litigation more effectively?

29. Lack of effective and efficient use of court resources and information technology⁷⁷

2.78 The efficient use of court resources implies improved court management and effective use of information technology (IT) by the courts.⁷⁸ The effective use of IT includes the implementation of e-filing and electronic record-keeping, video conferencing, and e-discovery.⁷⁹

2.79 Why is there a lack of effective and efficient use of court resources and information technology?

30. Detailed assessment

2.80 The process of the detailed assessment of costs is "unduly cumbersome" and expensive to operate, causing parties to pay large cost awards if they view it as prohibitively expensive to challenge a bill of costs. The important consideration is that the process a litigant must endure in order to challenge a bill of costs should not be prohibitive or discouraging.

2.81 What is the impact of detailed assessment?

⁷⁷ SALRC, "Project 142: Preliminary investigation on legal fees: Amended proposal paper: Options for approaching the legal fees investigation" (May 2017), 24.

⁷⁸ *Ibid*, 41.

⁷⁹ *Idem*.

F. The legal profession

31. The referral system

2.82 The Commission invited the General Council of the Bar of South Africa (GCB) and the Law Society of South Africa (LSSA) to give input on this topic at the international conference on Access to Justice, Legal Costs and Other Interventions.⁸⁰ This is what the GCB had to say on this topic:

The LPA preserves the status of the referral profession of advocates and maintains the distinction between advocates and attorneys. There is now a new type of legal practitioner under the LPA, namely an advocate with a trust account and fidelity fund certificate. The trust fund advocate can take instructions directly from members of the public and is therefore not [an] advocate who takes instructions only on a referral basis.

Referral advocates spend their time in court running trials, arguing opposed matters, appearing in unopposed matters, and when they are not in court, consulting clients, drafting pleadings and affidavits and furnishing opinions on litigation matters. No one is obliged to brief a referral advocate. It is extremely on a voluntary basis and the fact that it has persisted and continues to exist as a referral system speaks volumes to its performance of a valuable public service and the advantages of a referral profession.

Accordingly, from the cost perspective, if a referral advocate is considered to be too expensive, then the referral advocate will not be briefed. If an impecunious client insists upon instructing an attorney to brief a referral advocate, it is of course possible under the LPA to agree a reduced and / or a contingency fee subject to the Contingency Fees Act.

The referral advocates accordingly do not represent any impediment to access to justice. On the contrary, the continued existence of a referral profession promotes access to justice in that, in particular, having the necessary expertise readily available considerably assists in access to a just and expeditious decision in a particular case.⁸¹

2.83 The LSSA had the following to say about the referral system:

No doubt there are many advocates that have deserved the accolades bestowed on them as SCs. They are respected and have built a reputation of excellent legal services. However, the same can be said of many attorneys.

⁸⁰ The international conference was held in Durban on 01-02 November 2018.

⁸¹ Harpur, GD SC et al., "Transformative costing" Paper presented at international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018 7-10.

*The ability to be able to brief advocates closer to the seats of the courts, enhances the access to justice in that it allows (especially rural attorneys) to open and maintain their practices in close proximity to the clients. But then such practitioners may also instruct attorneys closer to the courts to appear on their behalf. The overlap of services might lead to a duplication of services. There is a perception that the double bar by its very nature will be more expensive.*⁸²

2.84 The introduction of the concept of an advocate who can accept briefs directly from the public may or may not take off unless members of the Bar have a choice to do so. If these members are allowed to take briefs directly from the public, it may have a major impact on the cost of litigation in South Africa.

2.85 Should the GCB and the societies be allowed to require that their members only accept briefs by referral from attorneys?

32. Restrictions on advertising, marketing, and touting

2.86 In 2004, the LSSA filed an application in terms of Schedule 1 to the Competition Act 89 of 1998 (Competition Act) for exemption from its rules on advertising, marketing, and touting from compliance with the provisions of that Act.⁸³ Item 1 of Part A of Schedule 1 of the Competition Act provides that:

A professional association may apply in the prescribed manner to the Competition Commission to have all or part of its rules exempted from the provisions of Part A of Chapter 2 of this Act, provided –

- (a) *The rules do not contain any restriction that has the effect of substantially preventing or lessening competition in a market.*

2.87 In March 2011 the Competition Commission held that the LSSA's rules restricting advertising, marketing, and touting by legal practitioners were anti-competitive and thus unlawful.⁸⁴ Section 4 of the Competition Act 89 of 1998 prohibits agreement or practice by parties in a horizontal relationship if such agreement or practice has the effect of preventing or lessening competition in a market.

⁸² Law Society of South Africa "Fees and costs: Paper on behalf of the Law Society of South Africa to be presented at the international conference on Access to Justice, Costs and Other Interventions" (November 2018), 22.

⁸³ Law Society of South Africa, Case No. 2004, July, 1127.

⁸⁴ Notice 113 of 2011 in *Government Gazette* No. 34051 (4 March 2011), 30.

2.88 Rule 41 of the Rules for the Attorneys' Profession⁸⁵ prohibits members from holding themselves out as experts and specialists in a certain branch of the law without justification for doing so, from distributing verbal and written publications to clients that are made in a such a manner that brings the image of the profession into disrepute, and from comparing and criticising legal services provided by another practising member on the basis of quality.

2.89 According to the study conducted by the Working Group on the Legal Services Market in Scotland, prices for legal services increased when restrictions on advertising were retained, but decreased when restrictions were lifted.⁸⁶ Overall, the study also found that advertising generally increases competition in the legal market, although this only applies to certain legal practitioners, not all of them.⁸⁷

2.90 It is clear from the Competition Commission's decision above that there is no longer a place for any restrictions on advertising, marketing, and touting for legal professional services in the law of South Africa. These rules must be reviewed with a view to improvement and modernisation in accordance with best international practices. The Competition Commission decided not to exempt the LSSA's rules from compliance with the provisions of the Competition Act.⁸⁸ The Competition Commission held that prohibiting a law firm from holding itself out as specialising in a given branch of the law will prevent such firm from disclosing crucial information required by clients.⁸⁹ The Competition Commission further held that advertising should be allowed, "but subject to the general advertising laws of South Africa".⁹⁰

2.91 According to Toothman and Ross, the relaxation of advertising restrictions in the USA has enabled law firms to indulge into more modern methods of advertising such as "printed advertisement, direct solicitation (by mail or in person) and, for some types of services aimed at the general public, broadcast advertisements. The latest vehicle for

⁸⁵ The Law Society of the Northern Provinces, the Cape Law Society, the KwaZulu-Natal Law Society, and the Law Society of the Free State, "Rules for the Attorneys' Profession", 64. <https://www.lssa.org.za/upload/RulesForTheAttorneysProfession2016.pdf> (accessed on 21 April 2019).

⁸⁶ Scottish Executive Report, "The legal services market in Scotland" (April 2006), 78.

⁸⁷ *Idem*.

⁸⁸ Notice 113 of 2011 in *Government Gazette* No. 34051 (4 March 2011), 30.

⁸⁹ *Idem*.

⁹⁰ *Ibid*, 29.

disseminating information about legal services has been the Internet, with some firms now providing their own web-sites”.⁹¹

2.92 To what extent, if any, do current restrictions on advertising, marketing, and touting hamper legal practitioners in providing affordable legal services to the public? Should the GCB and the societies be allowed to prohibit their members from advertising legal services at a certain rate or for a specific overall fee? Arguably, advocates do not really compete with each other because they do not advertise; thus the public – and they themselves – are unable to compare their rates.

33. Reservation of work for legal practitioners

2.93 Until its repeal, Section 83(1) of the Attorneys Act 53 of 1979 provided for the reservation of work for legal practitioners and the control of the affairs of a Law Society by its Council.⁹² Rule 31.1 of the Attorneys’ Profession also prohibits sharing legal fees with any person who is not a legal practitioner.⁹³ There is no doubt that big accounting and auditing firms (such as KPMG and Deloitte & Touche) are providing legal and non-legal services to their clients. In 2011 the Competition Commission held that the legal profession should be opened up to other suitably qualified service providers on condition that these service providers remain publicly accountable by being registered with a relevant body.⁹⁴

2.94 To what extent, if any, would abandoning the reservation of certain work for legal practitioners enhance access to justice and cause legal services to be more affordable?

34. Lack of direct briefing for advocates

2.95 Advocates were previously obliged to take instructions through the medium of an attorney. The LPA⁹⁵ now provides for direct briefing of an advocate by a member of the public or a justice centre.⁹⁶

⁹¹ Toothman, JW and Ross, WG, *Legal fees: Law and management* (2003), 232.

⁹² The Attorneys Act 53 of 1979 has been repealed by Proclamation No. R.31 of 2018, published in Government Notice No.42003, dated 29 October 2018 with effect from 1 November 2018.

⁹³ SALRC, “Project 142: Preliminary investigation on legal fees: Amended proposal paper: Options for approaching the legal fees investigation” (May 2017), 37.

⁹⁴ *Ibid*, 38.

⁹⁵ S34(2) of the Legal Practice Act 28 of 2014.

⁹⁶ SALRC, “Project 142: Preliminary investigation on legal fees: Amended proposal paper: Options for approaching the legal fees investigation” (May 2017), 39.

2.96 Does the lack of briefing of advocates from the public have an adverse impact on access to justice? Should the GCB and the societies be allowed to require that their members may only accept briefs by referral from attorneys?

2.97 Should the GCB and the various societies of advocates be allowed to determine where their members may hold chambers / offices?

35. The silk system

2.98 The granting of silk has been described as contributing to silks' exorbitant fees and to the use of such fees as the benchmark for junior advocates' fees.⁹⁷ The draft Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in terms of the LPA⁹⁸ addresses the question of applications for silk status, and in doing so grants the LPC the power to prescribe the necessary procedure to obtain silk status.⁹⁹ Among the proposals made at the SALRC Conference is that provision should be made in the legislation for attorneys to be granted silk or similar status, and that advocates be allowed to become notaries and conveyancers and to enter into partnerships with other advocates and attorneys so that they can share in the profits generated by the partnerships.

2.99 To what extent, if any, does the silk system influence junior counsel in setting their fees? How does the silk system impact on access to justice?

36. Lack of promotion and/or regulation of *pro bono* legal services¹⁰⁰

2.100 This matter is dealt with in Chapter 6 of this issue paper.

⁹⁷ Rogers, O, "High fees and questionable practices" (April 2012) *The Advocate*, 41.

⁹⁸ S97(1)(b) of the LPA.

⁹⁹ *Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities*, Notice 81 of 2017, 174.

¹⁰⁰ Human Sciences Research Council, "Assessment of the impact of decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society: Final report" (November 2015), 172.

37. Priority afforded to a matter¹⁰¹

2.101 The fact that a legal practitioner may have to grant a certain level of priority to a particular matter, as for example in the case of urgent applications, could imply higher legal fees.

2.102 Are the fees charged for urgent matters justified, given that they are prioritised over other matters by legal practitioners?

38. Agreements with practitioners to limit costs¹⁰²

2.103 This refers to a contractual agreement between legal practitioner and client in which costs are limited – for example, a legal practitioner agrees to limit the costs for necessary expenditures such as expert witnesses. A legal practitioner may also enter into an agreement in which a maximum contingency fee that is below the statutory limit is agreed upon.

2.104 Do agreements with practitioners exist to limit costs, and do these agreements favour or promote access to justice?

G. Socio-economic factors

39. Lack of funds to pay legal expenses

2.105 Lack of funds to pay legal expenses is one of the major reasons for the hampering of access to justice in South Africa.¹⁰³ The South African Social Attitudes Survey (SASAS) conducted in 2014 found that this factor accounted for 59% of the reasons people advanced for their difficulty in accessing the courts.¹⁰⁴

¹⁰¹ Department of Justice and Constitutional Development, “Briefing and Tariff Policy V2” (January 2017), 13.

¹⁰² *Idem*.

¹⁰³ Human Sciences Research Council, “Assessment of the impact of decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society: Final report” (November 2015), 25.

¹⁰⁴ *Ibid*, 25.

2.106 It is reported that clients with a monthly income of R600 are frequently charged fees in the region of R1500 for an initial consultation, R177.50 for a 15-minute consultation, and R50 a page for photocopying.¹⁰⁵

2.107 The study of the Hague Institute for Innovation of Law (HiIL) provides a cross-national empirical evaluation of out-of-pocket expenditures on procedures taken by litigants to resolve legal problems.¹⁰⁶ The study shows that more than 60% of the most serious legal problems are concentrated in the first five problem categories of crime, land, neighbours, family, and employment.¹⁰⁷ The study found that processes involving courts tend to be more expensive than informal procedures, the police's individual initiatives, or resolution through family and friends. People tend to report high levels of stress (anger, frustration, and humiliation) in these (formal) mechanisms. The average level of spending on resolving legal problems tends to be lower than the average annual income in the countries researched.¹⁰⁸ Interestingly, the study found that, for land conflicts in Uganda, many people go to Local Council Courts, where trusted people from the community help to resolve disputes. The study also found that these informal neutrals have higher average scores on some dimensions of fairness than courts and lawyers, but that decisions of formal courts are implemented better¹⁰⁹.

2.108 Legal Aid SA identifies the lack of "costs of starting up a case prior to funding" as one of the factors inhibiting access to justice.¹¹⁰ Where funding is not granted or obtained timeously, litigants might have to incur certain costs simply to be able to proceed with the initial stages of the matter.¹¹¹ The legal system imposes time constraints for the commencement of proceedings, service of documents and return, and replies to notices and other legal steps. It may therefore be necessary to incur these costs under circumstances in which time is of the essence.

2.109 To what extent is the average South African able to pay legal fees?

¹⁰⁵ Klaaren, J, "Towards affordable legal services: Legal costs in South Africa and a comparison with other professional sectors" (19 October 2018), 8.

¹⁰⁶ Nunez, Rodrigo and Barendrecht, Maurits, "Costs as a barrier to justice: Empirical findings. Draft paper to be presented at the South African Law Reform Commission Conference, Durban 2018". Hill collected data on legal needs and satisfaction in 13 countries.

¹⁰⁷ *Ibid*, 4. The countries included in the study are Yemen, Mali, Indonesia, The Netherlands, Uganda, Ukraine, Jordan, Kenya, the UAE, Tunisia, Lebanon, Bangladesh, and Nigeria.

¹⁰⁸ *Ibid*, 1.

¹⁰⁹ *Ibid*, 3.

¹¹⁰ Legal Aid South Africa, "Who qualifies for legal aid?". Available at <https://legal-aid.co.za/how-it-works/> (accessed on 23 October 2018).

¹¹¹ *Ibid*, 162.

40. Transport, accommodation, and other indirect costs of litigation

2.110 A large number of law firms are situated in urban areas, and very few are found in small towns and rural areas. Therefore, the cost and distance required to access legal practitioners makes pursuing litigation a daunting task.¹¹² Indirect costs, such as transport, accommodation, and unpaid leave, are over and above the direct costs associated with the case itself, and may be substantial when it comes to indigent persons.¹¹³

2.111 The costs of participating in the justice system can be prohibitive for persons living in rural areas.¹¹⁴ Extreme poverty, coupled with the fact that they reside outside urban centres, means that indirect costs (such as transport and communication) may be too high for them to participate in litigation.¹¹⁵ SASAS 2014 also found that community courts are not being used to a great extent, as only 7% of people who had contact with the courts had used a community court.¹¹⁶ Community courts might play an important role in enhancing access to justice, reducing legal costs, and reducing the burden on the Magistrates' Courts.

2.112 What is the impact of transport, accommodation, and other indirect costs of litigation on access to justice?

41. Lack of support for vulnerable groups (youth, people with disabilities, and women) with regard to legal costs

2.113 Youth between the ages of 16 and 19 is one of the most affected groups when it comes to legal costs as a barrier to justice (as found by SASAS in 2014.)¹¹⁷ There may therefore be a specific need to support young people who need access to the courts.¹¹⁸

2.114 The added difficulties and costs encountered by disabled individuals in accessing justice must be addressed.¹¹⁹ These added costs might include increased transportation costs and the costs of caretakers.

¹¹² Dugard, J and Drage, K, "To whom do the people take their issues?" (2013), 2.

¹¹³ *Ibid*, 162.

¹¹⁴ *Ibid*, 183.

¹¹⁵ *Ibid*, 183.

¹¹⁶ *Ibid*, 25.

¹¹⁷ *Ibid*, 160.

¹¹⁸ *Ibid*, 160.

2.115 Is there lack of support for vulnerable groups (youth, people with disabilities, and women) with regard to legal costs?

42. Lack of tax funding for necessary legal services¹²⁰

2.116 SASAS 2014 found that 76% of surveyed persons were in favour of the use of tax funding for legal services.¹²¹ This is a policy decision that has, of course, already been implemented through Legal Aid.¹²² However, Legal Aid requires the passing of a 'means test', which means that tax funding for legal services is not available to all.¹²³

2.117 Is there lack of funding from the national fiscus for legal services?

43. Power imbalance in opposing litigants who are wealthier¹²⁴

2.118 Power imbalances are more often than not the reality in litigation. For poorer litigants, this may translate into a lack of bargaining power in negotiation, increased financial sensitivity to delaying tactics, and potential disadvantages in the level of professional assistance available to them.¹²⁵

2.119 Do wealthier litigants have an unfair advantage when litigating, thus creating a power imbalance?

44. Cost of translators and interpreters¹²⁶

2.120 Where English is not the primary language of litigants, the services of interpreters and translators may be necessary. The use of interpreters poses problems of confidentiality, privacy, a lack of legal training, and the risk that the information is not relayed as intended by the litigant.¹²⁷ The costs of a translator or interpreter may also be prohibitive for indigent litigants.¹²⁸ These costs are not limited to court proceedings, but

¹¹⁹ Nyenti, M, "Access to justice in the South African social security system: Towards a conceptual approach" (2013) *De Jure* 914, 44.

¹²⁰ *Ibid*, 25.

¹²¹ *Ibid*, 25.

¹²² Legal Aid South Africa, "Who qualifies for legal aid?". Available at <https://legal-aid.co.za/how-it-works/> (accessed on 23 October 2018).

¹²³ *Ibid*.

¹²⁴ Schetzer, L and Henderson, J, "Access to justice and legal needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW" (August 2003) *Law and Justice Foundation of New South Wales*, 240.

¹²⁵ *Ibid*, 240.

¹²⁶ *Ibid*, 57.

¹²⁷ *Ibid*, 56.

¹²⁸ *Ibid*, 57.

may also include costs associated with the translation of documents in preparation for court proceedings.¹²⁹

2.121 What is the impact of the cost of translators and interpreters on access to justice?

45. Lack of general education

2.122 Lack of general education is another factor that has an adverse effect on access to justice.¹³⁰ SASAS 2014 found that this accounted for 19% of the reasons people gave for their difficulty in accessing justice.¹³¹ A lack of general education can also be the cause of, among other things, a lack of knowledge of laws and rights, and difficulty in understanding court procedures and costs.

2.123 What is the impact of lack of general education on access to justice?

46. Lack of knowledge about laws and legal rights¹³²

2.124 Knowledge of the law and of one's rights is the basis for a person's ability to seek legal advice or redress.¹³³ According to SASAS 2014, this factor was cited by 26.5% of the surveyed persons as hampering their access to justice.¹³⁴ Lack of knowledge of the law and of legal rights is closely related to a general lack of education.

2.125 Is there a lack of knowledge about laws and legal rights and, if so, how can this be rectified?

47. Lack of awareness of available avenues¹³⁵

2.126 There is a lack of awareness in certain communities of their rights, what organisations are willing to take on cases for these communities, and how these rights can be enforced.¹³⁶

¹²⁹ *Ibid*, 57.

¹³⁰ *Ibid*, 25.

¹³¹ *Ibid*, 25.

¹³² *Ibid*, 145. See also Human Sciences Research Council, "Assessment of the impact of decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society: Final report" (November 2015), 145.

¹³³ *Ibid*, 145.

¹³⁴ *Ibid*, 145.

¹³⁵ Human Sciences Research Council, "Assessment of the impact of decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society: Final report" (November 2015), 161.

2.127 Is there a lack of awareness of alternative fora for ADR mechanisms such as judicial/quasi-judicial tribunals, administrative appeal tribunals, and Chapter Nine institutions?

48. Language and culture¹³⁷

2.128 Language can be a barrier to communication; and in cases where the primary language of a litigant is not English, that litigant may find herself at a disadvantage.¹³⁸ Language may also have direct cost consequences because interpreters are required for court proceedings. Differences in culture between the presiding officer and the legal representatives and litigants may be a further barrier to communication.

2.129 Does language and culture act as a barrier to access to justice?

49. What other factors and circumstances give rise to unattainable legal fees for most people?

2.130 What other factors and circumstances give rise to unattainable legal fees for most people?

H. Other matters

50. Legal services provided by commercial juristic entities

2.131 If a firm is a juristic entity, it has partners or directors who are accountable to their clients and who share a responsibility towards their clients. These juristic entities offer legal services to their clients, and they need to ensure that their legal costs are fair and affordable. The partners or directors need to uphold ethical standards, and they need to apply for a Fidelity Fund Certificate to protect their clients' interests. These entities also need to be regulated to ensure accessibility to the general public, and they need to be held accountable to the public.

2.132 Is it desirable to establish a mechanism that will be responsible for determining fees and tariffs payable to a juristic entity in respect of litigious and non-litigious legal services rendered?

¹³⁶ *Ibid*, 161-162. See also Sebei, M and Tooley, J, "Access to justice, legal costs and other aspects", 1.

¹³⁷ *Ibid*, 26.

¹³⁸ *Ibid*, 95.

51. Legal services provided by NPOs and NGOs

2.133 Non-profit and non-governmental organisations strive to resolve challenges and inequalities in South Africa. These organisations are usually led by directors. It is accepted that they have limited funding. They generate their own funds, and they charge a nominal fee for services rendered. Two examples are the Family Life Centre and Families South Africa (“FAMSA”), which deal with family and divorce relationships and mediations, among other things. They also offer training services. They charge affordable rates for their services: their fees are lower than what lawyers charge in practice. These non-profit organisations fill a gap that the state and private sectors do not. They are bound by codes of good practice and ethical standards, and by rules of confidentiality and integrity. They make services more accessible, and they standardise their quality of service. They also have to ensure that the costs of their legal services are fair, reasonable, and affordable to their clients.

2.134 Are legal fees charged by non-profit organisations justifiable and within the reach of the constituency that they are meant to serve? If so, why?

52. Legal services provided by law clinics

2.135 Law clinics provide legal services to the public, and assist the poor and indigent by providing cost-effective legal services. Law clinics are attached to various universities. They are free of charge, although the clinic may recover from the recipient of its services any amount that is actually disbursed by the clinic on behalf of the recipient. The clinics act for successful litigants in litigation, and are entitled to take cession from the litigant of an order for costs in favour of the litigant, and recover the costs for their own account. These costs contribute to the running of law clinics. It is important to look at the content or standard of the legal services provided by law clinics to see whether their services are affordable and accessible to the poor and indigent.

2.136 Is it desirable to establish a mechanism that will be responsible for determining fees and tariffs payable to a law clinic in respect of litigious and non-litigious legal services rendered?

53. Legal expenses insurance

2.137 Legal expenses insurance (LEI) provides funding for legal services for the consumer in exchange for policy payments.¹³⁹ The benefits of LEI vary from one policy to another. However, most LEI policies cover access to telephonic legal advice services.¹⁴⁰ There is no comprehensive legal aid system in South Africa. Although LEI has been available as a product since 1980s, relatively few South Africans have any legal insurance.¹⁴¹

2.138 In Europe, policies cover a limited range of legal matters, and are generally sold to individual consumers.¹⁴² In Canada, it has become possible to insure against the costs of litigation, but the practice is not, or at least not yet, widespread.¹⁴³ Some unions do offer LEI to their members.¹⁴⁴ Furthermore, in Quebec there appear to be more private insurers offering plans than in the common law provinces; and in Quebec, LEI is actively promoted by the Quebec Bar. Some litigation costs are also born by insurers when the contract of insurance imposes an 'obligation to defend' on the insurer.¹⁴⁵

2.139 Does LEI promote access to justice? If so, how?

54. Taxation of costs and the role of taxing masters

2.140 The purpose of taxation is twofold. Firstly, it is to fix the costs at a certain amount so that execution can be levied on the judgement. Secondly, it is to ensure that the party who is condemned to pay the costs does not pay excessive costs, and that the successful litigant does not receive insufficient costs in respect of the litigation that resulted in the order for costs.¹⁴⁶

2.141 The liability for legal costs is determined by the court. However, the amount of the liability is determined by the taxing master.¹⁴⁷ The determination or taxation of legal

¹³⁹ Australian Law Reform Commission, "Managing justice: A review of the federal civil justice system". Report 89, para 5.27.

¹⁴⁰ *Ibid*, para 5. 28.

¹⁴¹ Mlambo, Justice D, "The reform of the costs regime in South Africa: Part 2", 24. Paper delivered at the Middle Temple and SA Conference (September 2010).

¹⁴² *Ibid*, para 5. 29.

¹⁴³ Glenn, HP, "Costs and fees in common law Canada and Quebec", 9. Faculty of Law and Institute of Comparative Law, McGill University.

¹⁴⁴ *Idem*.

¹⁴⁵ *Idem*.

¹⁴⁶ Van Loggerenberg, DE *Jones and Buckle, The civil practice of the magistrates' courts in South Africa*, 10th Ed. Juta SR 16/2017, Rule 33.

¹⁴⁷ Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 56.

fees (bills of costs) is done by court officials known as 'taxing masters' in the High Court and the SCA. In the Magistrates' Courts, this duty is performed by registrars and clerks. Taxation takes place in accordance with the Court Rules and in line with the general principle that costs follow the event and that courts have discretion over costs.¹⁴⁸

2.142 The function of the taxing master, therefore, is to decide whether the services have been performed, whether the charges are reasonable or according to tariff, and whether disbursements properly allowable as between party-and-party have been made. His/her function is to determine the amount of the liability, assuming that liability exists, and the fact that he/she must be satisfied that liability exists before he/she will tax does not show that there is any liability. The question of liability is one for the court to decide, not the taxing master.¹⁴⁹

2.143. Bills of costs are taxed in a variety of litigious matters and in a limited category of non-litigious matters.¹⁵⁰ According to Francis-Subbiah, save for writ bills, the taxing master in the High Court can only tax bills of costs with regard to litigious matters.¹⁵¹

2.144 A taxing official may find himself/herself in a weaker position than that of an experienced attorney or advocate whose bill he/she must tax. He/she may lack the skill or expertise required to execute his/her duties fairly without fear or favour.¹⁵²

2.145 Should taxation be the responsibility of the taxing master, or should the presiding officer provide greater guidance in the judgement to the taxing master as to costs? Are the OCJ & DOJCD putting in place appropriate resources to tax bills of costs? Should taxation be the responsibility of the taxing master or that of the judicial officer?

55. Legal costs consultants

2.146 Many attorneys instruct legal costs consultants to prepare and present their bills of costs. The ever changing socio-economic and legal environment has necessitated the

¹⁴⁸ *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC).

¹⁴⁹ Jones and Buckle, *The civil practice of the magistrates' courts in South Africa*, 10th Ed. Juta SR 16/2017, Rule 33.

¹⁵⁰ Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013) 16.

¹⁵¹ *Idem*.

¹⁵² Buchner, G and Hartzenberg, CJ point out that "[t]axing masters are faced with similar difficulties (of large volume of requests for default judgements) with regard to the taxation of bills of costs and are often ill-equipped in terms of the requisite qualifications and experience to deal with bills of costs in a way that ensures consumers' rights are adequately safeguarded". "Cashing in on collections" (2013), *De Rebus*, 30.

development by service providers of state-of-the-art technology and legal costs billing software solutions for legal practitioners who are in need of this service.

2.147 According to Reinecke, cost consultants (and candidate attorneys) probably draw and settle the bulk of bills of costs produced annually.¹⁵³ Costs consultants often, and over time, accumulate specialist knowledge about costs that serve to expedite matters, render a professional service to the costs debtors and creditors, and generally assist the taxing official's enquiries. They are regularly consulted about large, expensive scope; but their right of audience remains as set out in the combined reading of *Bills of Costs* and *Alberts v Malan*.¹⁵⁴

2.148 In the larger divisions of the High Courts, most bills of costs are dealt with by costs consultants. There is a need to distinguish between costs consultants who are not attorneys, and those who are.

2.149 There is no statutory limit. It seems that anybody may draw a bill of costs, but only a person with right of appearance may present such a bill before a taxing master.¹⁵⁵ The LPA does not make express provision for legal costs consultants, but the issue may very well be sufficiently ventilated by including this group with paralegals, or through the voluntary association clause.

2.150 The inclusion of sub-rule 3(B) in the 2010 amendment to the Rules of Court places additional duties on any objector(s) to a bill of costs, in that the rules now require objectors formally to set out their objections and deliver them to the presenter(s) of the bill within 20 days.¹⁵⁶ As a result, practitioners might have been put in a position where they need to enlist professional assistance in managing the recovery of legal costs.

2.151 Allowing costs consultants to present and oppose bills of costs is conducive to the settling of bills, thereby facilitating access to justice, as more matters may be set down and finalised at any given time.

2.152 The statutory tariff for bills of costs in respect of work done or services rendered by an attorney in terms of the Magistrates' Court Rules, Uniform Rule 70 and SCA Rule 18, is the following:

¹⁵³ Reinecke, AJ, *The legal practitioner's handbook on costs* (2011), 440.

¹⁵⁴ *Idem*.

¹⁵⁵ *Bills of Costs (Pty) Ltd v Registrar Cape N.O* 1979(3) SA 925 (AD).

¹⁵⁶ Notice No. R86 published in *Government Gazette* No.32941, dated 12 February 2010.

- (1) *For drawing the bill of costs, making the necessary copies and attending settlement, 11 per cent of the attorney's fees, either as charged in the bill, if not taxed, or as allowed on taxation.*
- (2) *In addition to the fees charged under paragraph 1, if recourse is had to taxation for arranging and attending taxation, and obtaining consent to taxation, 11 per cent on the first R10 000,00 or portion thereof, 6 per cent on the next R10 000,00 or portion thereof, and 3 percent on the balance of the total amount of the bill.*¹⁵⁷

2.153 Do legal costs consultants' fees contribute to unaffordable legal services? Should the role of legal costs consultants be regulated? If so, why?

2.154 Should legal costs consultants without right of appearance be allowed to continue drawing and possibly presenting bills of costs? If so, will the form of regulation of costs consultants without right of appearance require at least the following: An administrative body with financial resources that prescribes a level of minimum norms and standards to enforce a code of conduct, and thus a disciplinary procedure that is enforceable?

56. Debt recovery costs

2.155 Recovering legal costs in the debt recovery process depends to large extent on the existence of an agreement between a creditor and a debtor. In the absence of an agreement, the court will allow the recovery of legal costs on a party-and-party scale.¹⁵⁸ Court Rules determine the legal costs recoverable in terms of the specified items and a corresponding fee tariff allowed for each such item.¹⁵⁹

2.156 According to the Council for Debt Collectors, it is estimated that more than half the population of the Republic of South Africa cannot meet their financial obligations.¹⁶⁰ It is therefore clear that the collection industry affects, or has the potential to affect, the vast majority of South Africans on a daily basis.¹⁶¹ The National Credit Act 34 of 2005 was enacted, among other things, to assist over-indebted consumers who are unable to fulfil

¹⁵⁷ Notice No. R.1318, published in *Government Gazette* No.42064, dated 30 November 2018.

¹⁵⁸ Searle, JG, "Recovering legal costs in debt recovery process". <http://www.jgs.co.za/index.php/> (accessed on 6 June 2018).

¹⁵⁹ *Ibid.* See Debt Collections Act, 1998; Regulations Relating to Debt Collectors, 2003 Amendment, Notice No. R.623, published in *Government Gazette* No.35573, dated 10 August 2012.

¹⁶⁰ Council for Debt Collectors, *Integrated Report 2016/2017*, 1.

¹⁶¹ *Ibid.*

their monthly repayments on credit agreements to restructure their monthly repayments with credit providers.

2.157 The Act also makes provision for the establishment of a National Credit Regulator to regulate the credit market and to ensure compliance with the Act. In addition, the Act establishes the National Consumer Tribunal as an independent tribunal to adjudicate disputes between consumers and credit providers. Consumers are also protected under the Consumer Protection Act 68 of 2008. This Act makes provision for the protection of the interests of all consumers, and ensures accessible, transparent, and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace.

2.158 The Magistrates' Courts Act 32 of 1944, makes provision for a simplified procedure for administering debts of small estates whose liabilities do not exceed R50 000. Parts I, II, and III of Table B to Annexure 2 of the Rules of the Magistrates' Courts make provision for the scale of costs and fees an attorney or administrator may claim in respect of section 74 debt administration orders. In *Weiner NO v Broekhuysen*,¹⁶² the court held that the total expenses and remuneration an attorney or administrator may claim in respect of section 74L(1)(a) of the Act are capped at 12,5% of the total payments recovered from the debtor, inclusive of the 10% collection costs referred to in item 13 of the General Provisions to Part I of Annexure 2 of the Rules of the Magistrates' Courts.

2.159 Buchner and Hartzenberg state that one of the causes of the exploitation of users of legal services in the area of debt collection is the inclusion in the written fee agreement of an undertaking "by the debtor to pay attorney-and-client or attorney-and-own client costs, as well as collection commission".¹⁶³ The authors point out that "[i]t is the latter type of undertaking that exposes vulnerable consumers to the risk of exploitation. Not all attorneys engaging in this field of practice are guilty of exploiting consumers. However, by virtue of the nature of the business, such exploitation may sometimes be unwitting and be an unintended result".¹⁶⁴

2.160 According to Buchner and Hartzenberg, sections 57 and 58 of the Magistrates' Court Act 32 of 1944 are "the bedrock on which debt collection through the courts is

¹⁶² [2002] 4 All SA 96 (SCA).

¹⁶³ Buchner, G and Hartzenberg, CJ, "Cashing in on collections" (2013) *De Rebus*, 30-33.

¹⁶⁴ *Idem*.

founded and continue to facilitate the exploitation of consumers. Consideration should be given to repealing these provisions”.¹⁶⁵

2.161 Do sections 57 and 58 of the Magistrates’ Courts Act 32 of 1944 give rise to unaffordable legal services and therefore hamper access to justice? Are these sections in conflict with sections 129 to 133 of the National Credit Act 34 of 2005?

57. Family matters

2.162 The Commission is currently seized with three investigations dealing broadly with family matters. One of these investigations is ‘Project 100E: Review of aspects of matrimonial property law’.¹⁶⁶ The aim of this investigation is to review the current law with regard to matrimonial property for greater legislative fairness and justice governing interpersonal relationships between spouses. Broadly speaking, the investigation is looking into matrimonial issues such as the exclusion of accrual sharing in a marriage out of community of property; a change to the matrimonial property system after marriage; the suitability of the current position with regard to customary marriages; and balancing party autonomy and state interference in determining the consequences of intimate relationships.¹⁶⁷

2.163 The second investigation, ‘Project 100D: Family dispute resolution: Care of and contact with children’, aims to develop an integrated approach to the resolution of family law disputes, with specific reference to disputes relating to the care of and contact with children after the breakdown of the parents’ relationship.¹⁶⁸

¹⁶⁵ *Idem*. According to the authors, there is an apparent conflict between sections 55 and 58 of the Magistrates’ Court Act 32 of 1944 and sections 129 to 133 of the National Credit Act 34 of 2005. This conflict is given recognition in section 172(1) of the National Credit Act, which provides as follows:

“If there is a conflict between a provision of this Act mentioned in the first column of the table set out in Schedule 1, and a provision of another Act set out in the second column of that table, the conflict must be resolved in accordance with the result set out in the third column of that table.”

¹⁶⁶ SALRC, “Issue Paper 34: Project 100E: Review of aspects of matrimonial property law” (30 June 2018).

¹⁶⁷ *Ibid*. See Table of Contents.

¹⁶⁸ SALRC, “Issue Paper 31: Project 100D: Family dispute resolution: Care of and contact with children” (December 2015), vi.

2.164 The third investigation is ‘Project 100: Review of the Maintenance Act 99 of 1998’.¹⁶⁹ The following are some of the challenges identified by the Minister of Justice and Correctional Services regarding the implementation of the Maintenance Act:

- (a) The Act is silent as to when an application for future maintenance can be made and whether a maintenance court has jurisdiction to deal with such an application.
- (b) Section 20 of the Act provides that the maintenance court holding an inquiry may make any order as it considers just relating to the costs of the service of process. Representations have been received that this provision must be amended to extend the power of the maintenance court to make any order relating to costs as a result of the abuse of the process by persons against whom maintenance orders have been made.¹⁷⁰

2.165 According to Van Loggerenberg, a court in a divorce action is not bound to make an order for costs in favour of the successful party. However, the court is entitled, having regard to the means of the parties and their conduct insofar as it may be relevant, to make such order as it considers just, including an order that the costs of the proceedings be apportioned between the parties.¹⁷¹

2.166 Family matters are dealt with differently in the lower courts than in High Courts. There are specialised courts, like the Maintenance Court (which deals with children’s matters), and the Domestic Violence Court. Harassment has now also been included in the lower courts. There appear to be more family matters before the lower courts than other civil and criminal matters. Attention must be given to finding a mechanism to enhance access to justice for the majority of indigent people who access these courts on a day-to-day basis.

2.167 Making a presentation at the SALRC workshop,¹⁷² Parkinson indicated that the number of 15-year-old children in Australia who experienced their parents living apart increased from 25% in 1990 to 40% in 2013. 13% of the babies are born without a father in the home. The court system is under severe strain, and is getting worse by the year. *De facto* relationships with children are three to four times as likely to break up.

¹⁶⁹ SALRC, “Issue Paper 28: Review of the Maintenance Act 99 of 1998” (September 2014).

¹⁷⁰ *Ibid*, 1.

¹⁷¹ Van Loggerenberg, DE Jones and Buckle, *The civil practice of the magistrates’ courts in South Africa*, 10th Ed. Juta SR 16/2017, Rule 33.

¹⁷² Professor Patrick Parkinson presented his paper, “Can there ever be affordable family law?”, to the SALRC researchers in Centurion, Pretoria on 13 February 2019.

2.168 Parkinson stressed the need for mediation in family matters.¹⁷³ He stated that, even though it is not a requirement under the Family Law Act of 1975 for parties to provide a statement when commencing litigation of efforts they have made to resolve their dispute through ADR mechanisms, section 60I of the Family Law Act provides that, even where a party claims an exemption from attempting mediation, “the court must still consider making an order that the person attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to that issue or those issues”.¹⁷⁴

2.169 Should it be mandatory for parties in family law matters to attempt mediation or other ADR mechanisms prior to instituting legal action? If so, why, and how should this be regulated?

58. Personal injury matters

2.170 Contingency fee agreements were extensively used in road accident fund claims prior to the introduction of the amendments to the Road Accident Fund Act 56 of 1996, in 2008 which, among other things, capped the annual loss of earnings and loss of support claims to R160 000 per annum, irrespective of the actual loss of earnings and loss of support, and linked medical expenses for emergency treatment to the Health Professions Council of South Africa tariff.¹⁷⁵ Since the coming into operation of the Road Accident Fund Amendment Act 19 of 2005 in August 2008, claims against the Department of Health and the Ministry of Police have increased exponentially each year.¹⁷⁶

2.171 At the medico-legal summit held in March 2015, the Minister of Health made the following remarks:

*The nature of the crisis is that our country is experiencing a very sharp increase – actually an explosion in medical malpractice litigation – which is not in keeping with generally known trends of negligence or malpractice. The cost of medical malpractice claims has skyrocketed and the number of claims increased substantially. [T]he crisis we are faced with is not a crisis of public health care. It is a crisis faced by everybody in the health profession – public or private.*¹⁷⁷

¹⁷³ Parkinson, P, “Can there ever be affordable family law?” (2018), 92 464.

¹⁷⁴ *Idem*.

¹⁷⁵ Road Accident Fund website <http://www.raf.co.za/Documents/> (accessed on 01 December 2018).

¹⁷⁶ Millar, A, “Contingency fees”, 4. Paper presented at the SALRC conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018.

¹⁷⁷ SALRC, “Issue Paper 33: Project 141: Medico-legal claims” (20 May 2017), 3.

2.172 According to Millar, Road Accident Fund claims that provided for the furnishing of an undertaking for future medical care, general damages for serious injuries, and a capped loss of income, have been eschewed by legal practitioners in favour of acting for clients of claims against the Department of Health and the Ministry of Police, in respect of which there are no limits on the amount that can be awarded.¹⁷⁸

2.173 One of the investigations in the Commission's research programme is 'Project 141: Medico-legal claims'. The aim of the investigation is to introduce legislation in South Africa that will address legal claims in the medical field.¹⁷⁹ The negative impact that medical malpractice claims have on the public purse and on the rendering of health services in the public and private sectors means that urgent attention must be given to regulating the system, which will become paralysed if no action is taken.¹⁸⁰

2.174 Should contingency fee arrangements be prohibited in medico-legal claims? If so, how?

59. Class action claims

2.175 The Contingency Fees Act 66 of 1997, introduced legal fee structuring that was dependent on successful litigation as an exception to the common law prohibition of contingency fee arrangements. It is submitted that the introduction of the class action procedure in a consumer protection environment will further facilitate access to justice for consumers.¹⁸¹ This can be achieved through legal fee arrangements, such as contingency fees, that can facilitate access to justice for the poor and indigent.

2.176 According to South African common law, a party to litigation must have a direct and substantial interest in the right that is the subject matter of the litigation, and in the outcome of the litigation.¹⁸² This interest need not be quantifiable in monetary terms, but it must not be merely abstract or academic. It must also be immediate; a right that might arise at some future stage is not viewed as sufficient interest. Class actions are recognised in limited circumstances. The Constitution has altered the common law position when an infringement of or a threat to any fundamental right entrenched in

¹⁷⁸ Millar, A, "Contingency fees", 5. Paper presented at the SALRC conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018.

¹⁷⁹ SALRC, "Issue Paper 33: Project 141: Medico-legal claims" (20 May 2017), 4.

¹⁸⁰ *Idem*.

¹⁸¹ Eisenberg and Miller, "Attorney fees in class action settlements: An empirical study" (2004). *Journal of Empirical Legal Studies*, 26; McQuoid-Mason, "The delivery of civil legal aid services in South Africa" (2000), *Fordham Int'l L.J.*, 30.

¹⁸² *Jacobs v Waks* 1992 (1) SA 521 (A).

Chapter 2 of the Constitution is alleged. In such instances, any of the following persons are entitled to apply to a competent court for relief:

- (a) persons acting in their own interest;
- (b) an association acting in the interest of its members;
- (c) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
- (d) a person acting as a member of or in the interest of a group or class of persons;
- (e) a person acting in the public interest. Such a person is known as an *amicus curiae*, and must obtain the consent of other parties before the court to intervene or, failing that, the permission of the Chief Justice. He or she may lodge written argument, which must raise new contentions that may be useful to the court.¹⁸³

2.177 Class action suits are relevant when considering contingency fees. Class action suits can assist in making the law more affordable and accessible to a majority of the South African population.

2.178 The following sections look at the class action position in Canada.

2.179 All Canadian provinces now allow class actions, but there is considerable diversity in the costs and fees that they generate.¹⁸⁴ Quebec has been described as the 'paradise' of class action funding, since its government established and annually funds a Class Action Fund for purposes of financing class actions. The Fund was felt necessary because of the costs of litigation and the risk of losing class representatives being held liable for (even low) costs awards.¹⁸⁵

2.180 Ontario has also established a Class Action Fund, but without government financing. The resources of the Fund are drawn from the interest on lawyers' trust accounts. The Ontario Fund does not cover lawyers' fees or eventual costs awards, and costs awards have been made against unsuccessful class representatives, although

¹⁸³ Section 38 of the Constitution of the Republic of South Africa, 1996.

¹⁸⁴ Glenn, HP, "Costs and fees in common law Canada and Quebec". Faculty of Law and Institute of Comparative Law, McGill University, 8.

¹⁸⁵ *Idem*.

usually on a lower basis than those awarded against unsuccessful class action defendants.¹⁸⁶

2.181 Do contingency fee arrangements in class action claims facilitate access to justice for the poor and indigent? If so, why?

60. Small claims courts

2.182 Small claims courts are established by the Minister of Justice and Correctional Services in terms of the Small Claims Courts Act 61 of 1984 in the districts in which they are needed. The purpose of the Act is to provide for a speedy and cost-effective resolution of disputes. The monetary jurisdiction of the small claims courts was increased from R15000 to R20000 with effect from 1 April 2019,¹⁸⁷ excluding interest and costs. There are no costs associated with small claims courts, save for paying for the costs of the sheriff for service (if used) and execution. In terms of section 7(2) of the Act, no legal representation is permitted. Thus a small claims court may adjudicate claims for the delivery of movable and immovable property arising from a credit agreement, liquid document, mortgage bond, or lease agreement whose value does not exceed the above-mentioned monetary jurisdiction of the small claims court.

2.183 The Judicial Matters Amendment Act 8 of 2017 amended section 25 of the Small Claims Courts Act 61 of 1984 to empower the Rules Board to make, amend, or repeal the Rules regulating matters in respect of small claims courts.

2.184 A proposal was made at the SALRC conference that the jurisdiction of the small claims court should be increased in order to encourage self-representation. The question is: Should the jurisdiction of the small claims court be increased in order to encourage self-representation? If so, what should the jurisdiction of the small claims court be?

61. Community courts

2.185 Save for the Hatfield Community Courts, community courts are informal dispute resolution structures that may function as independent and impartial tribunals or fora envisaged in section 34 of the Constitution. They are informal dispute resolution structures that are not recognised in terms of South African law. Wherever they function, mostly in the Western Cape, they are used informally by communities. At its meeting held

¹⁸⁶ *Idem.*

¹⁸⁷ Government Notice No.296 in *Government Gazette* No.42282, dated 05 March 2019.

on 20 May 2017, the Commission considered a proposal paper for the inclusion of this investigation in its research programme. The Commission decided that there were outstanding issues that still needed to be clarified before it could decide on this matter. Accordingly, this matter is receiving the attention of the SALRC, albeit as a separate investigation outside of Project 142.

2.186 Do informal dispute resolution mechanisms such as community courts enhance access to justice? If so, how?

62. Traditional courts

2.187 The Traditional Courts Bill of 2017 was tabled in Parliament in February 2017. The Bill strives to integrate the current civil-procedure processes with customary-law customs and practices. The aim of the Bill is to regulate traditional courts and customary law in order to bring them into line with the Constitution, and to seek a peaceful manner of resolving disputes within communities. The introduction of traditional courts will provide litigants with a speedier, cheaper, and more flexible forum for hearing disputes than the more costly formal court system. The new Bill also reflects elements of traditional Western-based civil procedure, such as prohibiting legal representation¹⁸⁸ (similar to the procedure in small claims courts); it focuses on restorative justice measures¹⁸⁹ (similar to court-annexed mediation in Magistrates' Courts); and it affords litigants the right to appeal to a High Court when procedural deficiencies are seen to exist.¹⁹⁰

2.188 Section 7 of the new Traditional Courts Bill of 2017 "...allows parties to be represented by any person of his or her choice and prohibits legal representation".¹⁹¹ Section 7 of the Bill thus precludes legal representation, yet section 35 of the Constitution protects the right to legal representation,¹⁹² and our courts affirm its significance.¹⁹³ The exclusion of legal representation is in line with the traditional courts' role as non-adversarial courts, and lawyers may prolong the process. It is submitted that this should not be the case, particularly in matters such as claims for damages for defamation and seduction. There should not be a blanket preclusion of legal representation: the

¹⁸⁸ See section 7(4)(b) of the Traditional Courts Bill, 2017.

¹⁸⁹ See sections 2 and 3 of the Traditional Courts Bill, 2017.

¹⁹⁰ See section 14 of the Traditional Courts Bill, 2017.

¹⁹¹ See section 7 of the Traditional Courts Bill, 2017.

¹⁹² See section 35 of the Constitution of the Republic of South Africa, 1996.

¹⁹³ See, *inter alia*, *Botha v Pangaker*, Case No. 6499/2012 HC WC, where the court *a quo* granted an order of divorce in the absence of the appellant, and the court referred the matter back to the trial court. The right to have legal representation was also affirmed by the Supreme Court of Appeal in *Legal Aid Board v Pretorius* 332/05 SCA.

circumstances of each case differ, and the traditional court should also consider permitting legal representation in exceptional circumstances.¹⁹⁴ It is suggested that, where traditional leaders permit legal representation, there ought to be legally qualified assessors who come from practice and who have experience with local customary-law practices. These individuals would assist the traditional courts to apply their mind properly and to make a fair and equitable decision. Like experts in civil matters, such individuals should be compensated for their services.

2.189 The new Bill provides for a High Court review of the proceedings for a party who is aggrieved by non-compliance with the provisions in section 11 of the Bill. It also includes a Code of Conduct for officials or parties appearing in the traditional courts, in section 16. Section 14 of the Traditional Courts Bill of 2017 affirms that, where there is a dispute over the jurisdiction of the court, or a party seeks transfer of the matter, the matter may be transferred to a competent civil court.¹⁹⁵

2.190 In terms of the Traditional Courts Bill, a litigant will also have the option to choose the traditional court to hear his or her claim, rather than the formal court system.¹⁹⁶ Apart from procedural considerations, this will also save the litigant costs, as the costs of litigation can be expensive in the formal court system.

2.191 It is submitted that the inclusion of sections in the new Bill affording litigants the right to seek redress in an alternative forum to traditional courts, and the provision addressing the review of procedural shortcomings in the High Court, should be welcome changes.¹⁹⁷ It is further submitted that the new Bill identifies with the court-annexed mediation project in the Magistrates' Courts insofar as it focuses in sections 2 and 3 on restorative justice measures such as compensation and reconciliation. Traditional courts give legal effect to the historical traditions and values of African civilisation in the "spirit of tolerance, dialogue and consultation".¹⁹⁸ Therefore, it is important to finalise the Traditional Courts Bill because of the critical role it will play in South Africa's legal system.

2.192 Traditional courts exist in terms of sections 20 and 21 of the Black Administration Act 38 of 1927, which empowered traditional leaders to resolve disputes and certain

¹⁹⁴ See the discussion in Cassim and Mabeka, "Some observations regarding the Africanisation of South African civil procedure: The way forward" (2017/2018). *Journal of Law, Society and Development*, 1-21. DOI: <https://doi.org/10.25159/2520-9515/1735> (online); ISSN: 2520-9515 (print).

¹⁹⁵ The matter may be transferred to a civil court that is competent to hear the matter.

¹⁹⁶ See section 4 of the Traditional Courts Bill of 2017.

¹⁹⁷ See subsections 4 and 11 respectively of the Traditional Courts Bill of 2017.

¹⁹⁸ See article 29 of the African Charter on Human and People's Rights (ACHPR).

offences in these courts. Although the Act has been repealed, the sections that regulated the traditional courts were kept until new legislation could be enacted. No legal representation was provided for in these sections. The Traditional Courts Bill of 2017 still does not provide for those who participate in traditional courts to be “represented by a legal practitioner acting in that capacity”. This supports the recommendation made in the 2003 Commission Report (RP 209/2003) that legal representation is not appropriate, because this is a process towards dispute resolution.

2.193 Traditional courts give poor and marginalised rural people unfettered access to justice without legal costs implications. Participants in these courts are usually the very poor who cannot afford attorneys’ fees.

2.194 Should clients have an automatic right to legal representation in the proposed traditional courts? If not, what matters may require legal representation in the proposed traditional courts?

I. Questions for Chapter 2

1. Does the complexity of the law in general, and that of specific legal issues such as tax and intellectual property, contribute to unaffordable legal fees or hamper access to justice? If so, in what way and to what extent?
2. How complex are the rules of procedure? Does the complexity of the rules of procedure contribute to unaffordable legal fees or hamper access to justice? If so, in what way? What changes to the rules of procedure could be implemented to render legal fees more affordable and/or increase access to justice?
3. Does the restricted access to the Constitutional Court have an adverse impact on access to justice? If so, in what way?
4. Are poor and middle-income people denied access to lower courts? If so, to what extent? In what ways could the functioning of the lower courts be strengthened/streamlined in order to make legal fees more affordable?
5. Are the various methods of remuneration used by legal practitioners appropriate in facilitating access to justice?
6. Do unethical billing practices exist in our law and, if so, to what extent? Other than hourly billing, what methods of remuneration could lead to legal fees generally

becoming more affordable? In what ways could the practice of hourly billing be modified to discourage unethical billing practices?

7. Does the lack of statutory tariffs for advocates' fees inhibit access to justice? If so, in what way?
8. Does a system for payment of referral fees exist in South Africa and, if so, to what extent?
9. How does the cost-shifting rule operate in practice?
10. Does the court granting costs in favour of the winning party impede or cause litigants not to litigate for fear of having to pay the opponent's costs? If so, why?
11. Do conditional fee agreements operate effectively in practice and, if so, to what extent?
12. How do pre-litigation costs apply in practice?
13. What is the cost of factual and expert evidence, and how does this impact on access to justice?
14. Do courts in South Africa charge fees to institute or defend legal proceedings, and if so, how are court fees quantified and what is the impact on access to justice?
15. How does the number of parties involved in a case impact on access to justice?
16. Does the novelty of a legal point taken in a matter impact on the costs of litigation? If so, how?
17. In what ways can the cost of discovery be decreased to render legal fees more affordable? How does the cost of discovery impact on access to justice?
18. If sufficient use is made of e-discovery, what positive impact, if any, does it have on access to justice? Alternatively, what are the reasons for practitioners making sub-optimal use of e-discovery? In what ways can the courts and the Legal Practice Council contribute to encouraging practitioners to make optimal use of e-discovery?
19. How is the so-called 'shotgun approach' to litigation to be discouraged? Should there be some kind of legislative intervention with the manner in which costs are awarded in the High Court? Alternatively, should judges merely be required to

assess the question of costs more comprehensively – that is, not merely to default to the principle that the winner should be reimbursed (at least some of) his or her costs, but that the question of whether the litigation was conducted in a cost-conscious manner should also be considered?

20. What steps can the courts and the Legal Practice Council take to encourage the timely settlement of litigated matters? What is the effect of late settlement?
21. In what ways can the courts and the Legal Practice Council encourage litigants to make greater use of ADR mechanisms to resolve their disputes? Why is there insufficient use of ADR mechanisms?
22. Should sanctions be introduced in the Court Rules in order to dissuade legal practitioners from instituting matters in the Higher Courts where the lower courts have jurisdiction over those matters?
23. Do the courts make effective use of their discretionary power to make cost awards? In what ways could courts more effectively exercise their discretionary power to make cost awards so as to manage the cost of litigation more effectively?
24. Is there insufficient use of case management and, if so, to what extent? In what ways can the courts improve case management so as to render the litigation process more efficient, faster, and more effective?
25. Why is there a lack of effective and efficient use of court resources and information technology?
26. What is the impact of detailed assessment?
27. Is the lack of briefing of advocates by the public having an adverse impact on access to justice? Should the GCB and the societies be allowed to require that their members may only accept briefs by referral from attorneys?
28. To what extent, if any, do current restrictions on advertising, marketing, and touting hamper legal practitioners in providing affordable legal services to the public? Should the GCB and the societies be allowed to prohibit their members from advertising legal services at a certain rate or for a specific overall fee? Arguably, advocates do not really compete with each other because they do not advertise; thus the public – and they themselves – are unable to compare their rates.

29. To what extent, if any, would abandoning the reservation of certain work for legal practitioners enhance access to justice and cause legal services to be more affordable?
30. Should the GCB and the various societies of advocates be allowed to determine where their members may hold chambers / offices?
31. To what extent, if any, does the silk system influence junior counsel in setting their fees? How does the silk system impact on access to justice?
32. Given that they are prioritised over other matters, are the fees charged by legal practitioners for urgent matters justified?
33. Do agreements with practitioners exist to limit costs, and do these agreements favour or promote access to justice?
34. To what extent is the average South African able to pay legal fees?
35. What is the impact of transport, accommodation, and other indirect costs of litigation on access to justice?
36. Is there lack of support for vulnerable groups (minors, people with disabilities, and women) with regard to legal costs?
37. Is there lack of funding from the national fiscus for legal services?
38. Do wealthier litigants have an unfair advantage when litigating, thus creating a power imbalance?
39. What is the impact of the cost of translators and interpreters on access to justice?
40. What is the impact of the lack of general education on access to justice?
41. Is there a lack of knowledge about laws and legal rights? If so, how can this be rectified?
42. Is there a lack of awareness of alternative fora for ADR mechanisms such as judicial/quasi-judicial tribunals, administrative appeal tribunals, and Chapter Nine institutions?
43. Does language act as a barrier to access to justice?

44. What other factors and circumstances give rise to unattainable legal fees for most people?
45. Is it desirable to establish a mechanism that will be responsible for determining fees and tariffs payable to a legal practitioner, juristic entity, law clinic, or Legal Aid South Africa in respect of litigious and non-litigious legal services?
46. Are legal fees charged by non-profit organisations justifiable and within the reach of the constituency they are meant to serve and, if so, why?
47. Does legal expense insurance promote access to justice? If so, how?
48. Should taxation be the responsibility of the taxing master, or should the presiding officer provide greater guidance in the judgement to the taxing master as to costs? Are the OCJ & DOJCD putting in place appropriate resources to tax bills of costs? Should taxation be the responsibility of the taxing master or that of the judicial officer?
49. Do legal costs consultants' fees contribute to unaffordable legal services? Should the role of legal costs consultants be regulated? If so, why?
50. Should legal costs consultants without right of appearance be allowed to continue drawing and possibly presenting bills of costs? If so, will the form of regulation of costs consultants without right of appearance require at least the following: An administrative body with financial resources that prescribes a level of minimum norms and standards to enforce a code of conduct, and thus a disciplinary procedure that is enforceable?
51. Do sections 57 and 58 of the Magistrates' Courts Act 32 of 1944 give rise to unaffordable legal services and therefore hamper access to justice?
52. Should it be mandatory for parties in family law matters to attempt mediation or other ADR mechanisms prior to instituting legal action? If so, why, and how should this be regulated?
53. Should contingency fee arrangements be prohibited in medico-legal claims and, if so, how?
54. Do contingency fee arrangements in class action claims facilitate access to justice for the poor and indigent? If so, why?

55. Should the jurisdiction of the small claims court be increased in order to encourage self-representation? If so, what should the jurisdiction of the small claims court be?
56. Do informal dispute resolution mechanisms such as community courts enhance access to justice? If so, how?
57. Should clients have an automatic right to legal representation in the proposed traditional courts? If not, what matters may require legal representation in the proposed traditional courts?

Chapter 3: Desirability of establishing a mechanism that is responsible for determining legal fees and tariffs

A. Introduction

3.1 This Chapter considers the interrelationship between section 35(3) and the rest of the provisions of section 35 of the LPA. Arguments for and against the desirability of establishing a mechanism that will be responsible for determining fees and tariffs payable to legal practitioners, the composition of the mechanism, and the process it should follow in determining fees and tariffs are also considered.

B. Interpretation of section 35(3) of the LPA

3.2 It appears that section 35(3) of the LPA allows a legal practitioner to refuse to provide legal services for the fee and/or tariff established by the mechanism and, in doing so, effectively force the client, on his or her own initiative, to voluntarily agree to pay more than the fee and/or tariff determined by the mechanism.

3.3 The LSSA also expressed its concern about the current formulation of section 35(3) of the LPA in its letter to the Minister of Justice and Correctional Services.¹ The LSSA's letter to the Minister states:

We are of the view that the section is vague, unworkable and will hamper access to justice instead of enhancing it. This is also evident from the roadshows that the LSSA has embarked upon throughout the country to apprise practitioners of the provisions of the section. Practitioners raised a number of very valid concerns, including the following:

1. *In terms of section 35(3), only the user of legal services "...on his or her own initiative ..." is allowed to contract out of the tariffs. There is no corresponding provision as regards the legal practitioner.*
 - a. *The limitation of the "initiative" of the consumer impacts on the rights of practitioners in terms of section 22 of the Constitution and particularly the rights to market services at reasonable prices in a fair competition environment.*

¹ LSSA, letter dated 4 July 2018.

- b. *This also leaves open the question as to why the legislature has not included “its” in referring to the user who may contract out. It is unclear whether it is truly intended that juristic persons may not contract out. If so, this could have constitutional implications. In either interpretation, it would be of benefit to the public for the legislature to indicate its intention more clearly.*²

3.4 Section 35(3) could also envisage a situation in which, where there is a cap on the fees, a user of legal services could volunteer to pay more than what is determined by the mechanism. There may be practices where legal practitioners may not want to render legal services according to the fee and/or tariff determined by the mechanism.

3.5 If the Legislature has provided an unlimited capacity for users of litigious and non-litigious legal services to opt out, whatever the mechanism can do in terms of determining a reasonable fee and/or tariff, section 35(3) of the LPA could be a kind of escape.

3.6 Section 35(3) appears also to be inconsistent with the following sections of the LPA:

(a) **Section 35(4)(c)**

This section raises the question whether it is desirable to establish a mechanism that will be responsible for determining fees and tariffs payable to legal practitioners.

(b) **Section 3**, which provides that the **purpose** of this Act is to –

(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.

(c) **Section 5**, which provides that the **objects of the Council** are to –

- (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.

3.7 If legal practitioners are allowed to ‘contract out’ of the rate or fees set by the mechanism, then it is difficult to understand how the purpose of the Act can be achieved. It is also not clear how the Council can ensure that such services are rendered for a fee that is reasonable and that promotes access to legal services and access to justice.

² *Ibid*, 1.

3.8 The Commission also considered whether it is possible to harmonise section 35(3) with the rest of the provisions of the LPA.³ In our constitutional democracy, the issue of contractual freedom is of utmost importance. The question that needs to be answered is: Under what circumstances can a user of legal services ‘contract to opt out’ of the fee and/or tariff set by the mechanism? What are the factors and circumstances that might be taken into consideration? Can this be done in the absence of particular circumstances, such as the benchmarks in the National Credit Act?⁴

3.9 The Commission also considered whether this matter could be addressed by way of regulations made by the Minister in terms of section 94(1)(k) of the LPA. The question is: Can the regulations override the provisions of the Act? Or, put differently, can the regulations take away a right provided to users of litigious and non-litigious legal services in the LPA?

3.10 The LSSA states that “the Act contains no exclusions for large economic corporations, who require no protection and whose access to justice is quite clearly not hampered due to costs. Both the Consumer Protection Act and the National Credit Act have such exclusions in that they exclude from protection juristic persons whose asset value or turnover exceed[s] certain thresholds”.⁵

3.11 The question is: Should section 35(3) be amended in order to qualify the wide exemption it provides to users of legal services?

C. Is it desirable to establish a mechanism to determine legal fees and tariffs?

3.12 The LPA alludes to the fact that legal fees may be an impediment to the public’s access to justice; hence the need for the Commission to investigate possible solutions to address this matter.⁶ On numerous occasions, courts have expressed concern about the

³ Strategic planning session of the Commission and Advisory Committee for Project 142, held on 24-25 January 2019.

⁴ Section 4 (Application of Act) of the National Credit Act 34 of 2005.

⁵ LSSA, letter dated 4 July 2018, 2.

⁶ Phrases in the Preamble such as “ensure that legal services are accessible”; “regulate legal profession, in the public interest”. Section 3 of the LPA states that the purpose of this Act is to “broaden access to justice by putting in place a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry”.

exorbitant fees that legal practitioners charge their clients. For instance, in *Graham and Others v Law Society of the Northern Provinces and Others*,⁷ the court states that –

this application is another Chapter in the saga involving allegations of serious impropriety and misconduct against the firm by erstwhile client. In Pretoria Society of Advocates v Geach and Others,⁸ the court held that “[C]ounsel is entitled to a reasonable fee for all services. In fixing fees, counsel should avoid charges which over-estimate the value of their advice and services, as well as those which undervalue them. A client’s ability to pay cannot justify a charge in excess of the service, though his lack of means may require a lower charge, or even none at all.

3.13 In *Mpambaniso v Law Society of the Cape of Good Hope*,⁹ the Law Society of the Cape of Good Hope brought an application to have the applicant struck from the roll of attorneys due to misconduct. The court held that –

Briefly, the established offending conduct was that the applicant engaged in a pattern of conduct in respect of which he overreached clients and has been convicted of 28 counts of fraud. In relation to one of the instances of overreaching, a former client of the applicant launched an application in which he sought an order setting aside the fee agreement he had entered into with the applicant. The application was heard by Smith J who stated that in his view, the applicant’s attorney and client bill was “grossly exorbitant, unconscionable, and should not be allowed to stand.

3.14 Likewise, Parliament has also raised similar concerns, as evidenced in the various minutes of the Justice and Constitutional Development Portfolio Committee.¹⁰

3.15 To this end, the Commission is inviting input and comments on the following questions, among others:

- (a) Is the present mechanism for determining fees and tariffs in respect of litigious and non-litigious legal services desirable, appropriate, and/or effective? If not, what alternative mechanism may be recommended?
- (b) Would it be desirable to establish a mechanism if legal practitioners may refuse to provide services at the prescribed fee or tariff, and thereby effectively force users to voluntarily offer to pay more, in terms of section 35(3) read with section 35(4)(e) of the LPA? In other words, would it be desirable in

⁷ *Graham and Others v Law Society of the Northern Provinces and Others* 2014 ZAGPPHC 496 par 3.

⁸ 2011 (6) SA 441 par 19.

⁹ 542/ 2014 [2016] ZAECHC 114(3) November 2016 par 8.

¹⁰ Justice and Constitutional Development Portfolio Committee, “Minutes of meeting held on 13 August 2013 on the Legal Practice Bill”. <http://www.pmg.org.za/report/20130813> (accessed on 26 July 2016).

the sense of 'effective' to establish a mechanism if practitioners may simply opt out by insisting on being paid more?

- (c) Would it inhibit competition if practitioners were in principle required to charge no less (unless the user voluntarily offered to pay less) than the determined fee, as appears to be envisaged in section 35(3) and 35(4)(e)? In other words, is there any case to be made for a mechanism that determines minimum (as opposed to maximum) fees and tariffs?
- (d) Should the 'mechanism' envisaged by section 35(4)(c) be a body or bodies of practitioners to which a person may complain if he or she has been charged more than a reasonable rate or tariff?
- (e) Alternatively, should the 'mechanism' be a body or bodies that determine rates and services in respect of each type of legal service to be provided? If so, how should the latter be done? By imposing a cap, based on the seniority of the legal practitioner on the hourly rate? Or by placing a cap on the overall amount that may be charged for a particular type of legal service, having regard to the nature and quantum of the claim?
- (f) What about the 'process' that should be followed in determining the fees or tariffs? This will depend on whether the mechanism is a body or bodies that decide complaints against unreasonable fees (overreaching), or whether it is a body or bodies that determine the fees and tariffs. If the latter, and if caps are to be determined with reference to specific kinds of legal services (rather than merely a cap on the hourly rate), then it would perhaps be appropriate for a pilot project to be done in order to ascertain the reasonableness of the caps for the various kinds of services.

3.16 During August and September 2018, the Commission invited the LSSA, the GCB, and representatives of large corporate business law firms in South Africa, among other stakeholders, to give input at the international conference hosted by the Commission.¹¹

¹¹ The Commission requested the LSSA to prepare input outlining the current costs regime as it pertains to attorneys, and in particular on costs applicable to non-litigious matters and other legal services. The GCB was requested to outline the current costs regime as it pertains to advocates; the referral system and its advantages and disadvantages; bands of seniority at the Bar; and the determination of fees within the framework of the LPA; whether current practices relating to day fee, collapsed fee, and payment of a guaranteed fee percentage to juniors are still justifiable; outcome-based fee payments versus hourly fees; whether advocates are ready for this development; and what the mechanism should be in determining fair and reasonable

3.17 The submissions received from the legal profession, large corporate business law firms, and other stakeholders on the subject of the desirability of establishing a mechanism that would be responsible for determining fees and tariffs payable to legal practitioners are discussed below.

3.18 The GCB made the following submission at the conference.¹²

Litigation, by its very nature, is time and expertise intensive, due to all the necessary steps that must be taken in the process of setting out the competing contentions of each party, the collecting of evidence, the presenting of evidence, arguing as to the correct decision, and the possible appeal against an unsatisfactory judgement.

It inevitably will constitute a comparative[ly] expensive exercise, and South Africa is no exception to the rest of the world in this regard. Notwithstanding these harsh economic realities, it may be assumed that some form of ultimate tariff is the correct answer to the question posed to the Commission by section 35 of the LPA. But is this assumption correct? We venture to suggest not.

There is nothing in section 35 that prescribes that the Commission is obliged to recommend the imposition of a tariff, still less a universal tariff. The Minister similarly is given no power to impose a tariff as a matter of course nor is he obliged to do so. He is enjoined to give effect to the recommendations of the Commission.

The situation should be one of agreement between the parties, failing which a reasonable fee falls to be determined according to the LPA Code.

The fundamental question is: to whom, and what, should the tariff apply? The proposed tariff assumes a universal application, but is this correct?

The GCB is of the view that if there is to be a tariff, then a universal tariff is not required and the following categories (some may overlap) should be excluded:

- (a) All artificial persons;*
- (b) All non-South African citizens; and*
- (c) Those persons in respect of whom legal fees are attainable by virtue of their financial means.¹³*

3.19 The GCB raises an important question as to whether adherence to a tariff by referral advocates would constitute a prohibited horizontal and vertical practice under the

fees payable to advocates. A submission was also received from the Bowmans, Norton Rose Fulbright, and Cliffe Dekker Hofmeyer law firms.

¹² The international Conference on Access to Justice, Legal Costs and Other Interventions was held in Durban on 01-02 November 2018.

¹³ Harpur, GD SC *et al.*, "Transformative costing" Paper presented at international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018 15-22.

Competition Act 89 of 1998 on the basis that it has the effect of substantially preventing or lessening competition in a market without any technological, efficiency or other pro-competitive gain resulting from it?¹⁴

3.20 Likewise, the Commission invited the LSSA to give input on the topic of the desirability of establishing a mechanism that will be responsible for determining fees and tariffs applicable to legal practitioners. This is what the LSSA had to say:

*Pricing legal services can be challenging for a variety of reasons. On the one hand, the price should meet the client expectations and, on the other hand, it should meet the practice bottom line. It should be competitive in order to attract business but, if prices are too low, they can put practice out of business. The latter would not be in the interests of clients and certainly not in the interests of justice. One should accept that clients expect there to be lawyers to assist and represent when needed.*¹⁵

3.21 The Commission also invited large corporate business law firms in South Africa to give input on this topic. This is what large corporate business law firms had to say:

The law firms support the broad objectives of the LPA as outlined in its long title and preamble and the need to provide accessible non-litigious legal services to ordinary private citizens (including indigent ones) which they currently cannot access at all or access with great difficulty.

To that end, the law firms also recognize the need for large corporate and business law firms in South Africa to play an active role in realising the aforementioned objective and to be subjected to the same rules as all other legal practitioners insofar as it relates to the rendering of services to ordinary and indigent clients and, as is currently the case, to also, render non-litigious legal services on a pro bono or pro amico basis where appropriate.

However, from their perspective, any regulatory treatment of the fees (pricing) of non-litigious legal services in terms of Sec 35 of the LPA ought to draw distinctions between the following existing realities –

¹⁴ *Ibid*, 28. Section 4 of the Competition Act 89 of 1998 provides as follows:

Restrictive horizontal practices prohibited

4(1) An agreement between or concerted practice by, firms, or a decision by an association of firms, is prohibited if –

- (a) It is between parties in a horizontal relationship and it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect.”

¹⁵ Law Society of South Africa, “Fees and costs: Paper on behalf of the Law Society of South Africa to be presented at the international conference on Access to Justice, Costs and Other Interventions (November 2018), 7.

- (a) *different types of consumers of non-litigious legal services from the indigent and ordinary private clients at the one extreme, and corporate and business consumers at the other end, and/or*
- (b) *different categories of non-litigious legal services matters, being those that require relatively routine (and perhaps, 'already commoditised') non-litigious legal services on the one hand and complex regulatory or transactional non-litigious legal services, on the other hand, and/or*
- (c) *a nominal value versus a pre-determined excess value such that notwithstanding who the client is, be they ordinary private citizens or corporate/business clients, the value of what is being transacted or is at stake for the client exceeds such predetermined threshold value and therefore does not warrant the 'protection' intended/contemplated by sec 35 of the LP Act.*

In the local South African market for corporate and business consumers of non-litigious legal services (for both locally based and foreign clients), who constitute the majority of the clients (from both number of clients and total fee revenue perspective) serviced by our firms, the notion that these clients' interests (including their access to legal services) are better or best served by fee regulation of the non-litigious services provided to these clients is neither commercially rational nor required from a regulatory perspective. Such clients, instead, deploy very effective competitive corporate and business legal services market, enabling them to make effective mechanism (more often than not on a competitive RFQ basis) and do so in an extremely competitive corporate and business legal services market, enabling them to make effective choices in relation to whom they wish to engage as their preferred legal service provider/s.

On the contrary, the law firms consider the regulation of fees (pricing) charged by the providers of non-litigious corporate and business legal services to corporate and business consumers of those services will have a deleterious effect on South African law firms (not least of which being, the large corporate and business law firms) ability to, inter alia –

- (a) *compete with a range of competitors who are not traditional law firms;*
- (b) *be able to secure and retain the specialist expertise required by firms such as to render the corporate and business legal services which they do;*
- (c) *maintain global best practice in certain non-litigious legal services disciplines and sectors.¹⁶*

3.22 It is apparent from the GCB's submission that the LPA Code 'already' provides for some form of mechanism for the advocates' sector.¹⁷ According to the GCB, there is at

¹⁶ Bowmans, Norton Rose Fulbright and Cliffe Dekker Hofmeyer, "Abstract: Treatment of non-litigious fees of legal practitioners to Sec 35 of the Legal Practice Act 28/2014: Non-litigious corporate and business legal services rendered to corporate and business consumers", 3-6.

¹⁷ "This is already a form of tariff, but one without specific amounts, instead informed and guided by general principles which are flexible in their application" Harpur, GD SC *et al.*, "Transformative costing", 7. The LPA Code provides that counsel shall calculate a reasonable fee by having regard to the following factors, none of which is determinative and all of which are simply guides to a fair calculation:

- (a) The time and labour required;

present no tariff that operates in respect of particular bands of seniority other than the generalised distinction that those briefing senior counsel can expect generally to pay more than those briefing junior counsel. At a broader level, the higher fees charged by senior counsel versus junior counsel are undoubtedly justified.¹⁸ Thus the question that arises is whether any improvement of this is necessary, possible, or desirable.¹⁹

3.23 In *Mahipal Singh Rana v State of U.P.*,²⁰ the Supreme Court of India requested the Law Commission of India to review the regulatory mechanism governing the advocates' profession. The Law Commission of India initiated an investigation to review the provisions of the Advocates Act, 1961 in consultation with all relevant stakeholders.

3.24 While reviewing the Advocates Act, the Law Commission of India (LCI) "felt that the conduct of the advocates, directly as well as indirectly affects the functioning of the courts, and thereby contributes to the pendency of cases".²¹ The LCI noted that there was a huge loss of working days by the calling of unjustified strikes in jurisdictions of various High Courts, resulting in denial of justice to the litigant in public. Such dilatory tactics, including seeking adjournments on unjustified grounds, affect the disposal of cases. The Commission also noted the instances of browbeating the courts for getting favourable orders obstructing administration of justice.²²

3.25 The LCI further noted that "inter-rivalry between professionalism and competition with materialistic approach in a growing society affected by social, political and economic changes has led to the legal profession acquiring a mantle that it did not possess long before. This holistic form of participation in all walks of life, therefore, demands more

-
- (b) The customary charges by counsel of comparable standing for similar services;
 - (c) The novelty and difficulty of the issues involved;
 - (d) The skill and expertise required to properly address the matter;
 - (e) The amount at stake and the controversy; and
 - (f) The importance of the matter to the client.

Furthermore, the LPA Code provides that counsel shall, in calculating a fee, guard against both overvaluing and undervaluing the services rendered; shall not inflate the amount because the client is able to pay generously, and may, on the grounds of the client's lack of means to pay fees charge the client an amount less than would otherwise be reasonable for services rendered, or charge no fee at all" Harpur, GD SC *et al.*, "Transformative costing", 4.

¹⁸ *Ibid*, 11.

¹⁹ *Ibid*, 7.

²⁰ AIR 2016 SC 3302.

²¹ Law Commission of India Report No.22 (March 2017), 12.

²² *Sunitha v The State of Telangana* Criminal Appeal No. 2068 of 2017 para 29.

responsibility and obligations requiring observance of moral and ethical values for preserving the basic ethos of this legal profession”.²³

3.26 In *V.C. Rangadurai v D. Gopalan And Ors*,²⁴ the Supreme Court of India observed that the confidence of the public in the legal profession was integral to the confidence of the public in the legal system. “Nothing should be done by any member of the legal fraternity which might tend to lessen in any degree the confidence of the public in the fidelity, honesty and integrity of the profession”.²⁵

3.27 The court also observed that “the fees charged by some senior advocates are astronomical in character. The corporate sector is willing to retain talent at a high cost. It develops into a culture and it permeates down below. The role of the legal profession in strengthening the administration of justice must be in consonance with the mandate of Article 39A to ensure equal opportunity for access to justice. The legal profession must make its services available to the needy by developing its public sector”.²⁶

3.28 Referring to lawyers’ fees as a barrier to access to justice, it was observed that it was the duty of the Parliament to prescribe fees for services rendered by members of the legal profession. The first step should be taken to prescribe a floor and a ceiling for fees.²⁷

D. What should the composition of the mechanism be?

3.29 The Commission is inviting input and comments on the following questions, among others:

- (a) How should the mechanism be constituted?
- (b) What would the mechanism do?
- (c) Are there any areas of law that must be exempted from the jurisdiction of the mechanism to regulate fees and tariffs, and if so, what are they and on what basis?
- (d) Are there any categories of persons that must be exempted from the jurisdiction of the mechanism to regulate fees and tariffs, and if so, who should those persons be?

²³ Law Commission of India Report No.22 (March 2017), 7.

²⁴ 1979 S (1) 308.

²⁵ *V.C. Rangadurai v D. Gopalan And Ors* 1979 S (1) 308 11.

²⁶ *Sunitha v The State of Telangana* Criminal Appeal No. 2068 of 2017 para 25.

²⁷ *Ibid*, para 26.

1. Current mechanism for determining legal costs

(a) Party-and-party costs

3.30 The Rules Board for Courts of Law Act 107 of 1985 makes provision for the establishment of the Rules Board for Courts of Law. The Rules Board is empowered by the Act to make, amend, and/ or repeal procedural rules for the Magistrates' Court, High Court, and Supreme Court of Appeal. The Act was enacted prior to the advent of democracy. There is a need for the alignment of the mandate, composition, and functioning of the Rules Board with the needs of the post-1994 South African constitutional democracy.²⁸

3.31 Section 6 of the Act gives the Rules Board wide powers to regulate the practice and procedure in connection with litigation in civil and criminal matters in the above-mentioned courts in a number of matters. The matters include:

- (a) the regulation of fees and costs, including the fees payable in respect of the service or execution of process;²⁹
- (b) the regulation of tariff of fees chargeable by advocates, attorneys, and notaries;³⁰ and
- (c) the taxation of bills of costs and the recovery of costs.³¹

3.32 The court rules provide the tariffs for the recovery of legal costs. Justice Mlambo states:

[i]t needs to be mentioned that the costs, which follow the result, are:

- (i) usually party-and-party costs;
- (ii) a right to which the successful litigant becomes entitled by virtue of the court order. The right does not vest in the legal practitioner(s) who represented the successful litigant. However, costs are the costs incurred by the legal practitioner and do not include clients costs.³²

3.33 The statutory party-and-party tariff for legal costs applicable in the Magistrates' Courts (district and regional courts) is provided for in Rules 33-35 of the Magistrates'

²⁸ DOJCD, "Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State" (February 2012), 25.

²⁹ Section 6(1)(l).

³⁰ Section 6(1)(r).

³¹ Section 6(1)(s).

³² Mlambo, D, "Middle Temple and South African Conference" (September 2010), 9.

Courts Rules, read in conjunction with Annexure 2 to the Magistrates' Court Act 32 of 1944 ("MCA").

3.34 The current mechanism makes use of different models to deal with the issue of legal costs. There are tariffs in civil matters from the Small Claims Court right through to the Constitutional Court.³³ There is a somewhat 'complete' mechanism in place in the Magistrates' Courts. The tariff prescribed by the Rules Board makes provision for every task that an attorney carries out, item by item. However, what needs to be simplified is how you make out the claim and who is liable to pay: the plaintiff or the defendant.

3.35 Currently, the statutory party-and-party tariffs for Magistrates' Courts prescribe scaled amounts based on the total amount in dispute. Four scales are provided on these bases, scales A, B, C and D, with corresponding ceilings of the amount in dispute of R7000, R50 000,³⁴ and, in respects of scales C and D, such maximum amounts as are determined by the Minister from time to time.³⁵ The amount of fees payable per item of work or court process per quarter of an hour in line with the four scales mentioned above is provided. The Commission's investigation should not completely disregard what currently exists in the system.

3.36 The Magistrates' Court tariffs do not distinguish between junior and senior attorneys. This enables consumers of legal services from lower income groups to access quality legal services provided by experienced attorneys at lower costs. The right of appearance afforded to candidate attorneys in the Magistrates' Courts has the added advantage of extending affordable legal services to the majority of poor consumers.

3.37 The tariff for legal costs applicable in the High Courts is provided for in Rules 69-70 of the Uniform Rules of Court. The tariff for legal costs applicable in the Supreme Court of Appeal is provided for in Rules 17–19 of the Rules of the Supreme Court of Appeal.

3.38 The statutory party-and-party tariffs for attorneys in the High Court are largely the same as the tariffs in the Supreme Court of Appeal. The rationale underlying the use of the same tariff for attorneys both in the High Court and the SCA is a good one, and should be supported. The drawback of the statutory party-and-party tariffs is, however,

³³ The Constitutional Court applies the Rules of the SCA in respect of taxation and attorneys' fees, with relevant modifications where necessary. Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 11.

³⁴ Van Loggerenberg, DE *Jones and Buckle, The civil practice of the magistrates' courts in South Africa*, 10th Ed. Juta SR 16, 2017, Annex 2-2.

³⁵ Notice No.R.760 dated 11 October 2013 and Notice No.R.216 dated 27 March 2014.

that they do not make provision for advocates' fees.³⁶ It is important that the statutory party-and-party tariffs should also provide for the recovery of advocates' fees in view of the fact that section 34(2)(ii) of the LPA now makes provision for an advocate to receive a brief directly from a member of the public, which was not the case in the past.³⁷

3.39 A court may make an order for either fixed or taxed costs. 'Fixed costs' means that the sum of money payable by one party to another is determined by the court, whereas 'taxed costs' means that the quantification of costs will be done on taxation by the taxing master.

3.40 The rules of the Magistrates' Courts and High Courts distinguish broadly between page-based, time-based, and item-based fees. Rule 70 of the High Court Rules distinguishes between formal and substantive documents. Formal documents are templates that require information to be populated, such as a summons or power of attorney. Substantive documents, on the other hand, are documents that require skill in drafting, such as particulars of claim and affidavit. In terms of Rule 70 of the High Court Rules, these documents are charged on a per-page basis. A 'page' is defined as consisting of at least 250 words in the High Court,³⁸ whereas a folio³⁹ is defined to consist of 100 words in the Magistrates' Court.

3.41 Expenses relating to attendances, such as sorting and paginating and telephone calls, are charged on a time basis, depending on the seniority of the legal practitioner performing the task in question. For instance, a higher fee of R292.00 per quarter of an hour for consultation with a client is allowed for an attorney, compared with R90.50 for a candidate attorney doing the same job.⁴⁰ These tariffs do not reflect what members of the public are paying to their legal practitioners, but the recovery of legal fees expended on litigation.

3.42 The determination or taxation of legal fees (bills of costs) is done by court officials known as taxing masters in the High Court and the SCA. In the Magistrates' Courts, this duty is performed by registrars and clerks. Taxation takes place in accordance with the court rules, in line with the general principle that costs follow the event and that courts

³⁶ Justice Mlambo states that charges of advocates and experts are determined according to what the taxing master considers reasonable. Mlambo, D, "The reform of the costs regime in South Africa" (September 2012), 10.

³⁷ That is, an advocate with a Trust Account and a Fidelity Fund Certificate.

³⁸ Rule 70(9) of the High Court Rules.

³⁹ Item 10 of the General Provisions in Table A of Annexure 2 to the Rules.

⁴⁰ Government Notice No.R.1055 dated 29 September 2017.

have discretion over costs.⁴¹ According to Millard and Joubert, the tariffs do not make provision for agreed fees or contingency fees.⁴²

3.43 Regarding the question whether the court can substitute its decision for that of the taxing master, the court in *City of Cape Town*⁴³ case held that:

Whilst the court will not, in general, substitute its discretion for that conferred upon the Taxing Master, it will interfere with the taxation if it appears that the Taxing Master has not exercised his discretion in the manner contemplated by the Rule.

3.44 The rules made by the Rules Board determine, in the main, statutory tariffs for party-and-party costs for litigious (defended and undefended) matters in the Magistrates' Courts, High Courts and Supreme Court of Appeal, unless otherwise specified by the Rules.⁴⁴ For instance, Rule 33(5)(a) of the Magistrates' Court Rules provides that "[I]n district court civil matters, the scale of fees to be taken by attorneys as between party-and-party shall be that set out in Table A of Annexure 2". Rule 33(5)(c) of the same Rules employs the same language with regard to the application of the prescribed tariffs to regional court civil matters. The same goes for Rules 69 and 70 of the Uniform Rules of the High Court.

3.45 In accordance with the general 'loser pays' principle, Rule 70(3) of the Uniform Rules of High Court makes provision for full indemnity to the successful party. However, in reality it is not possible for the successful party to be indemnified fully for all the legal expenses incurred by him or her in litigation since, in terms of the above-mentioned rule, only costs that appear to the taxing master to be necessary or proper may be allowed on a party-and-party basis. However, costs that cannot be recovered on a party-and-party basis may be recovered on an attorney-and-client basis. The latter basis for assessment of costs is less stringent than the former one.

3.46 Generally, legal costs are determined (taxed) after the court's final judgement. However, depending upon the nature of the case, costs may also be determined when an interim order is given in motion proceedings, where a defendant has agreed in contract to

⁴¹ Rule 33 of the Magistrates' Court Rules, Rules 67-70 of the Uniform Rules of the High Court, Rule 18 of the Rules of the SCA, and the relevant rules of the other specialised courts, such as the Labour Court, Labour Appeal Court, Land Claims Court, Competition Appeal Court, and others.

⁴² Millard, D and Joubert, Y, "Bitter and twisted? On personal injury claims, predatory fees and access to justice", August 2014, *Private Law and Social Justice Conference*, 576.

⁴³ *City of Cape Town v Arun Property Developments (Pty) Ltd* (2014) ZASCA par 14.

⁴⁴ In terms of section 6(1)(l) (fees and costs) and 6(1)(r) (the tariff of fees chargeable by advocates, attorneys and notaries) of the Rules Board for Courts of Law Act 107 of 1985.

pay attorney-and-client costs in undefended actions, where a plaintiff withdraws his or her action and consents to pay the defendant's costs, in terms of a deed of settlement where there is an undertaking to pay the other party's costs, when a client terminates his or her attorney's mandate, and where a party to litigation requests taxation by the taxing master as between attorney and client where there is no costs order or costs agreement.⁴⁵

1.1 Counsel fees

3.47 The general rule is that the High Court has an inherent power to regulate the fees claimed by attorneys and advocates.⁴⁶ Rule 69 of the Uniform Rules provides that "in the exercise of its power the court may direct that an advocate is not entitled to recover any fees from his instructing attorney or client, and allow the advocate a specified period within which written submissions could be delivered as to why the order should not be varied or set aside".

3.48 Counsel's fees are treated as disbursements in an attorney's Bill of Costs.⁴⁷ Disbursements are not attorney's fees, but clients' monies that are paid by an attorney to third parties for the provision of professional services on behalf of clients.⁴⁸

1.2 Counsel fees in the Magistrates' Court

3.49 Part III Defended Actions (and Interpleader Proceedings) and Part IV (Other Matters) of Table A of Annexure 2 to the Magistrates' Court Rules (MCR) provide a tariff for counsel's fees as between party-and-party in limited matters falling within scales B, C, or D of the tariff.⁴⁹ However, the Magistrates' Court tariff only provides for minimum amounts for counsel's fees unless the court orders higher amounts.⁵⁰ According to Francis-Subbiah,⁵¹ maintaining minimum costs in the Magistrates' Court is a further attempt to make access to justice more affordable to indigent persons.

3.50 The statutory tariffs prescribed in the MCR do not provide for the recovery of counsel's fees in a whole range of matters dealt with by counsel that come before the Magistrates' Court. Since the statutory tariffs only provide for fees in limited matters, this means that counsel's fees on matters that are excluded by the tariffs are largely

⁴⁵ *Idem*.

⁴⁶ Rule 69 of the Uniform Rules.

⁴⁷ Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 121.

⁴⁸ *Ibid*, 91.

⁴⁹ Notice No.R.33 dated 23 January 2015.

⁵⁰ Item 6 of the General Provisions in Table A of Annexure 2.

⁵¹ Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 194.

determined by arrangement between the attorney and the advocate, to the exclusion of the client who must bear the costs.⁵²

1.3 Counsel fees in the High Court

3.51 Like Rule 33 of the MCR, the High Court tariffs do not provide for the recovery of counsel's fees, save for the few items set out in Rule 69 of the Uniform Rules.⁵³ Uniform Rule 69 deals with counsel fees that may be recovered at the conclusion of the litigation process.

3.52 There are two distinct methods for taxing counsel's fees as between party-and-party.⁵⁴ The first method is the so-called composite first-day fee, and the second method is that of charging on an hourly basis for work done. The composite first-day fee method, in terms of which the fee charged by counsel includes drafting of heads of argument as well as preparation for argument, appears to be the method preferred by the SCA and the Constitutional Court. In the *President of Republic of South Africa and Others v Gauteng Lions Rugby Union* case,⁵⁵ the respondents stated that "the settled practice of the SCA is to allow a relatively heavy composite first day fee into which is rolled together the fees for all the work done in preparation plus the remuneration for the appearance to argue the matter". The court stated that "the respondents are correct as to the practice of the SCA in regard to (the disapproval of) separate debits for preparatory work and appearance on appeal".⁵⁶ The court held that "of course what underlies this consistent and vehement rejection is that such piecemeal charging often serves to camouflage excessive fees".⁵⁷

3.53 Criticism levied against the hourly fee method is that it is inappropriate for services such as drafting of heads of argument, and may place a premium on slow and inefficient work that is totally out of proportion to the value of work actually performed.⁵⁸ However, in *City of Cape Town v Arun Property Developments*,⁵⁹ the court held that "there are and will be cases where the time spent by counsel will be a very good indication of the value of the matter, whereas in others it will not".

⁵² Rogers, O, "High fees and questionable practices", *Advocate* (April 2012), 40.

⁵³ Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 203.

⁵⁴ *Ibid*, 205.

⁵⁵ *President of Republic of South Africa and Others v Gauteng Lions Rugby Union* [2002] (2) (SA 64 CC par 31.

⁵⁶ *Ibid*, para 32.

⁵⁷ *Ibid*, para 32.

⁵⁸ *Ibid*, para 46.

⁵⁹ *City of Cape Town v Arun Property Developments (Pty) Ltd* [2014] ZASCA 56 para 28.

3.54 In its submission to the Commission on the question of whether current practices relating to day fee, collapse fee, and payment of a guaranteed fee percentage to juniors are still justifiable, the GCB points out that “current practice has moved away from charging a combined fee for preparation and first day of the trial or opposed motion in favour, instead, of separate charges for preparation and appearance, in the interests of transparency and ease of explanation to client. These fees are usually calculated, as a starting point, on an hourly rate which is expressly, impliedly, or tacitly agreed”.⁶⁰

3.55 Furthermore, “the day fee charged for the appearance itself is usually calculated on a 10 or 8 hour day in respect of trials on the basis that the time actually spent during court hours when a trial is running, represents only a portion of the total time required by counsel. Time is required in preparation for the appearance, on a daily basis, so too preparation after hours in assessing the evidence and preparing for the events of the next day”.⁶¹

3.56 The test for attorney-and-client costs is reasonableness.⁶² What is ‘reasonable’ depends upon the circumstances of each case. Section 26.6.3 of the LPA Code stipulates that no amount agreed upon shall exceed a reasonable fee. The GCB points out that, under section 26 of the LPA Code, it is apparent that fees may be agreed to between an attorney and counsel. There is an obligation for counsel in respect of every brief to expressly agree with the instructing attorney the fee to be charged, unless there is a tacit understanding between counsel and the instructing attorney about the fees or rate of fees usually charged by counsel for the particular kind of work mandated by the brief.⁶³

3.57 The LSSA also confirms the legal position that only a reasonable fee may be charged by a legal practitioner.⁶⁴ However, in reality fees are also based on other factors, such as what other legal practitioners in the area charge for similar work.⁶⁵

⁶⁰ Harpur, GD SC *et al.*, “Transformative costing” Paper presented at international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018 12.

⁶¹ *Idem.*

⁶² *President of Republic of South Africa and Others v Gauteng Lions Rugby Union* [2002] (2) SA 64 CC par 51.

⁶³ Harpur, GD SC *et al.*, “Transformative cost” Paper presented at international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018 5.

⁶⁴ “Currently (pre-Chapter 3 of the LPA) our law accepts that if no price is agreed or estimated, a legal practitioner may charge a reasonable fee. What is regarded as a reasonable price for a service can be proved by experts with reference to market value, supply and demand and other relevant factors”. LSSA, “Fees and costs”, 9.

(b) Attorney-and-client costs

3.58 There are no statutory tariffs for litigious and non-litigious matters that regulate what legal practitioners may charge their clients.

3.59 Sections 69(d) and (h) respectively of the repealed Attorneys Act⁶⁶ empowered the council of each law society to –

- (d) *prescribe the tariff of fees payable to any practitioner in respect of professional services rendered by him in cases where no tariff is prescribed by any other law;*
- (h) *prescribe the manner of assessment of the fees payable by any person to a practitioner in respect of the performance of any work other than litigious work and in respect of expenses reasonably incurred by such practitioner in connection with the performance of that work and, mero motu or at the request of such person or practitioner, assess such fees in the prescribed manner.*

3.60 Rule 7 of the Rules of Professional Conduct of the GCB provides that –

*Council is entitled to a reasonable fee for all services. In fixing fees, counsel should avoid charges which over-estimate the value of their advice and services, as well as of those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his lack of means may require a lower charge, or even none at all.*⁶⁷

3.61 In May 2003, the Association of Pretoria Attorneys had to pay a penalty of the amount of R223000 to the Competition Commission, after its guidelines for attorneys and own client fees were found to be in contravention with the Competition Act.⁶⁸ The Competition Commission held that –

*Recommended fees operate against public policy. Consumers must be allowed to choose between goods and services in a competitive economy – one important choice is price. Competition between suppliers charging the same fee is necessarily diminished.*⁶⁹

⁶⁵ According to Matthews, “[t]here is also a ‘going rate’ that most lawyers in a particular locality charge for a certain type of job”. Matthews, J, *Attorneys’ fees: The basics*, <http://www.nolo.com/legal-encyclopedia/> (accessed on 4 July 2016).

⁶⁶ 53 of 1979.

⁶⁷ General Council of the Bar of South Africa, “Uniform rules of professional conduct”, Rule 7.1.2, introduced vide 1989 AGM resolution.

⁶⁸ Act 89 of 1998. The case is *Competition Commission vs Association of Pretoria Attorneys* 2002 August 157.

⁶⁹ Competition Commission, “Application for an exemption in terms of Schedule 1 of the Competition Act 1998 (December 2009), 24.

3.62 In 2004, the LSSA filed an application in terms of Schedule 1 to the Competition Act 89 of 1998 for exemption of its rules on advertising, marketing, and touting from compliance with the provisions of the said Act.⁷⁰ Item 1 of Part A of Schedule 1 of the Competition Act provides that –

“A professional association may apply in the prescribed manner to the Competition Commission to have all or part of its rules exempted from the provisions of Part A of Chapter 2 of this Act, provided –

- (a) The rules do not contain any restriction that has the effect of substantially preventing or lessening competition in a market.”

3.63 In March 2011, the Competition Commission held that the LSSA’s rules restricting advertising, marketing, and touting by legal practitioners were anti-competitive and thus unlawful.⁷¹ Section 4 of the Competition Act of 1998 prohibits agreement or practice by parties on a horizontal relationship if such agreement or practice has the effect of preventing or lessening competition in a market.

3.64 Francis-Subbiah states that the minimum and maximum fee guidelines previously published by Bar Councils are no longer freely available, as there is a notion that this displays anti-competitiveness.⁷²

3.65 Justice Mlambo states that the “current norm between attorneys and their clients is to agree in writing in advance to exclude the operation of the statutory tariff and to stipulate for a rate(s) per hour. The gap between such a rate of remuneration and what the successful litigant might expect to recover on a party-and-party basis will vary from attorney to attorney, from case to case and according to when the Minister of Justice last adjusted the applicable statutory tariff”.⁷³

3.66 Speaking at the Law Society of Northern Provinces workshop, Dr Fourie pointed out that the Legal Practice Bill “will probably bring an end to the long tradition of self-regulation by the legal fraternity. He added that government insists however, that the 120-clause Bill is vital for transformation and improving access to justice”.⁷⁴

⁷⁰ Law Society of South Africa, Case No. 2004 July 1127.

⁷¹ Notice 113 of 2011 in *Government Gazette* No.34051 (4 March 2011), 30.

⁷² Francis-Subbiah, R *Taxation of legal costs in South Africa* (2013) 203.

⁷³ Mlambo, D. “The reform of the costs regime in South Africa”, 2012, 11.

⁷⁴ Fourie, CP, “The Legal Practice Bill, costs and fees scrutinised at LSNP workshop” (August 2014), *De Rebus*, 6.

2. Composition of the mechanism for determining legal fees

3.67 Assuming that the Commission answers section 35(4)(c) in the affirmative, the next question that it must determine is the composition of the mechanism contemplated in that section. In other words, what must be the determinants of the mechanism? What must it consist of?

3.68 Although section 6 of the Rules Board for the Court of Law Act 107 of 1985 endows the Rules Board with wide powers to regulate the practice and procedure in connection with litigation in civil and criminal matters in the Magistrates' Court, High Court, and Supreme Court of Appeal, as pointed out above, the drawback of the statutory party-and-party tariffs is that they do not make provision for recovery of advocates' fees in a number of matters, save where otherwise provided by the rules. Secondly, the LPA now makes provision for the trust fund advocate in section 34(2)(ii). Thirdly, the tariffs only cover a limited category of non-litigious matters.

3.69 Promulgation of sections 35(1) and (2) of the LPA has been held in abeyance, pending the investigation by the Commission into the desirability of establishing a mechanism for determining fees and tariffs in respect of litigious and non-litigious legal services rendered by legal practitioners, juristic entities, law clinics, or Legal Aid South Africa.⁷⁵

3.70 Another important question to be answered by the Commission is: To whom must the tariff apply? In what type of criminal and civil litigious and non-litigious legal services should the tariff apply?⁷⁶

2.1 Elements of the mechanism

3.71 The mechanism could ideally consist of the following elements:

(a) Bases for determining fees and tariffs

3.72 Three bases for determining fees (prices) could be identified. These are cost-based pricing;⁷⁷ competition-based pricing⁷⁸ and value-based pricing.⁷⁹

⁷⁵ Sections 35(1) and (2) of the LPA maintain the status quo pending the completion of the investigation by the Commission contemplated in sections 35(4) and (5).

⁷⁶ Essa states that "a discussion on fees for non-litigious work should traverse the intention of the legislature to promote access to justice on the one hand, and on the other hand, consider the reality of the client that is prepared to pay market-related fees for specialised legal services, which fees may not be affordable to the vast majority of the populace". Essa, A, "Legal practitioners and non-litigious legal fees", 1.

(b) Methods of billing for legal services

(i) Hourly

3.73 This is the most common method used for billing according to the time spent for work performed. In the United States of America, hourly billing is universally the default billing method.⁸⁰ In the leading case of *Hensley v Eckerhart*,⁸¹ the U.S. Supreme Court held that –

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on litigation multiplied by a reasonable hourly rate.

(ii) Fixed fees / flat fees

3.74 Fixed fees and/or flat fees are a billing method in terms of which prices are predetermined. Only unforeseen items are billed on an hourly basis.

(iii) Contingency fees

3.75 The Contingency Fees Act 66 of 1997 makes provision for two types of contingency fee agreements. The first type is the ordinary “no-win no-fee” agreement, in terms of which a legal practitioner charges his or her normal fees subject to a successful conclusion of the matter. In the second type, the legal practitioner is entitled to double his or her normal fee, or 25% of the claim sounding in money, whichever is the lowest.

⁷⁷ “The practitioner should calculate the break-even point, which is the point at which the operating expenses of the practice are recovered. Cost-based pricing underlines why it is difficult to determine a tariff for all legal practitioners. The break-even point is different for different practices and hence different prices are required to be sustainable and to make a profit or grow the practice.” LSSA, “Fees and costs”, 8.

⁷⁸ “A firm that charges too little will have problems sustaining its brand. A firm that charges too much, could lose business to the competition. Competition thus drives prices down for the consumer. Competition-based pricing underlines the effect of competition on prices. Price fixing is regarded as anti-competitive because it prevents competition in a free market system which prevents prices from decreasing due to increased supply of services. This is probably the strongest argument against fixed tariffs.” *Idem*.

⁷⁹ “Where clients perceive the services rendered as having value, they are willing to pay for such services according to the value. Here the practitioner should focus on uniqueness of service or product. Once that is established, a price in accordance with the value is determined.” *Ibid*, 9.

⁸⁰ Toothman, JW and Ross, WG, *Legal fees law and management* (2003), 27.

⁸¹ 461 U.S. 424 (1988).

(iv) Percentage fees / value-added fees

3.76 Where there is a specific value involved in the transaction or litigation, a percentage of that value can easily be calculated. This is a simplified system, as it merely entails calculating a percentage amount of the capital value or award.⁸²

(v) Volume-based discount

3.77 Legal practitioners may offer discounts to clients based on rational criteria, such as the value of the instructions received.

(vi) Monthly / annual retainer

3.78 Some clients prefer to have constant access to certain lawyers, and are willing to pay for their availability. The client then negotiates with the lawyer to pay a monthly or annual retainer.⁸³

(i) Hybrid / mixed rates

3.79 Different rates or pricing structures may apply to different types of work, even within the same firm. It might be good to charge at percentage rates for immovable property transactions or processes, while charging hourly fees for litigation and/or fixed fees for corporate and other commercial work.⁸⁴

(ii) Expenses

3.80 Expenses are disbursements such as sheriff's fees, photocopying charges, and taxes.

2.2 Factors to be taken into account

3.81 Section 35(2) of the LPA provides a list of the main factors to be taken into consideration when determining fees and tariffs. These factors are the following:

- (a) the importance, significance, complexity, and expertise of the legal services required;

⁸² Law Society of South Africa, "Fees and costs: Paper on behalf of the Law Society of South Africa to be presented at the international conference on Access to Justice, Costs and Other Interventions (November 2018), 14.

⁸³ *Ibid*, 15.

⁸⁴ *Idem*.

- (b) the seniority and experience of the legal practitioner concerned,⁸⁵ as determined in this Act;
- (c) the volume of work required and time spent in respect of the legal services rendered; and
- (d) the financial implications of the matter at hand.

3.82 Other factors that could possibly be included in the mechanism for determining fees are the following:

- (a) the fee customarily charged in the locality for similar legal services;⁸⁶
- (b) the reputation of the lawyer performing the services;⁸⁷
- (c) the conduct of the parties, including the efforts made, if any, before and during the proceedings to resolve the dispute;⁸⁸ and
- (d) the principle of proportionality should apply.⁸⁹

3.83 Other issues that must be considered by the Commission regarding the question of the composition of the mechanism responsible for the determination of legal fees are the following:

- (a) Whether to have uniform /universal and all-inclusive tariffs for all legal matters, be they litigious or non-litigious matters; or, put differently, whether there should be uniform tariffs for attorneys and advocates in respect of party-and-party costs and attorney-and-client costs.
- (b) Which parties or institutions should be involved in the determination of the tariff. Should they be :
 - (i) The Legal Practice Council,
 - (ii) The Rules Board,
 - (iii) The Minister,

⁸⁵ The GCB states that “the more senior and experienced a particular advocate is, the less time that advocate is likely to expend on a particular task, by virtue of his or her knowledge and experience. Therefore, seniority plays a vital role in determining fees, and is a sought-after quality by litigants, in the appropriate cases”, “Transformative Costs” Paper presented at international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018 11.

⁸⁶ This factor is derived from the American Bar Association Model Rules of Professional Conduct, 1.5.

⁸⁷ *Idem*.

⁸⁸ Rule 44.5(1) of the United Kingdom Civil Procedure Rules.

⁸⁹ “Any fee determined by applying an hourly or daily rate must nonetheless be reasonable having regard to the complexity of the work, the importance of the issues, seniority and expertise of the legal practitioner, the amounts in issue and the value of the service being rendered to the client.” LSSA. “Fees and costs”, 16.

- (iv) Civil society organisations, or
- (v) Representatives of the above-mentioned institutions?
- (c) Whether legal matters should be classified, as they are in the United Kingdom, into small claims, fast-track, and multi-track claims based upon the type and value of the matter. Specifically, should the low-value small claims, family matters, personal injury claims, and nuisance matters go to the lower court?
- (d) Whether the mechanism should be flexible enough to enable legal practitioners and clients alike to independently negotiate fees for professional services, and provide broad monetary parameters within which negotiation of fees may take place.
- (e) Whether the mechanism should use a combination of fee models such as fixed costs, hourly / daily rates, capped or uncapped fees; and, if so, in what types of legal matter?

3.84 The attorney-client relationship is governed by a set of rules and procedures designed to achieve an expected level of conduct and professionalism.⁹⁰ The delivery of future legal services will not be restricted to work that is presently reserved for legal practitioners.⁹¹ However, an increasingly larger share of legal work is, and will be, performed by non-legal practitioners who are not necessarily bound by the provisions of the LPA.⁹²

3.85 Fuesgen believes that the debate about effective access to justice must move away from an input-based approach to one that is output-based. The appropriate question to ask is whether the client receives the legal services that address his/her need, and whether the legal service concerned is affordable.⁹³ In the absence of a tariff, attorneys use the 'cost-plus' model to determine costs and the charge-out rates.⁹⁴ "This model considers the direct and indirect costs per hour and adds a certain profit margin".⁹⁵

⁹⁰ Fuesgen, I, "The evolution of legal services – Legal costs in the bigger picture of today's realities". Paper presented at international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018, 2.

⁹¹ *Ibid*, 5.

⁹² *Idem*.

⁹³ *Ibid*, 1.

⁹⁴ *Ibid*, 7.

⁹⁵ *Idem*.

3.86 According to Fuesgen, the system or model for determining costs for legal fees and tariffs must establish a relationship between ‘affordability’, ‘legal costs’, ‘benefit’, and ‘the notion of a value’.⁹⁶

E. What process should be followed by the mechanism in determining legal fees and tariffs?

3.87 The Commission is inviting input and comments on the following question, among others:

- (a) What process should be followed by the mechanism in determining fees and tariffs?

3.88 When making new rules, or amending or repealing existing ones, the Rules Board receives representations from users of the rules – that is, judges, attorneys, advocates, magistrates, litigants, and a wide variety of civil society organisations.⁹⁷ Research is conducted, and a draft working document is developed and submitted to the relevant committee of the Rules Board for consideration. The committees established by the Rules Board are the (1) Magistrates’ Court Committee, (2) High Court Committee and (3) Costs Committee. Should the relevant committee decide that the representation by the initiator has merit, a working document containing a summary of the representation and the research conducted is distributed for general information and comment to all the above-mentioned stakeholders.

3.89 Public comment and input received is incorporated into a working document that is then submitted to the relevant Committee for deliberation. Should the Committee decide that a new rule must be made, or an existing rule be amended or repealed, the Secretariat prepares a draft new Rule or amendment/repeal, as the case may be, for consideration and approval by the Committee. The Committee’s approval is thereafter referred to the Rules Board for consideration and, if appropriate, for ratification. The draft new Rule or amendment/repeal of an existing Rule ratified by the Rules Board is thereafter distributed to all the role players and stakeholders for comment. Comments received are referred to the relevant Committee for deliberation. If approved, the draft new

⁹⁶ *Ibid*, 1.

⁹⁷ The letter from the Secretary of the Rules Board (dated 2 July 2018) requesting comment on the tariffs in terms of sections 35(1) and (2) of the LPA states: “[A]s part of its consultative process in rule making and amendment, the Rules Board invites your comment on ...”, 3.

Rule or amendment/repeal of an existing Rule is submitted to the Rules Board for consideration and approval.

3.90 In terms of section 6(1) of the Act, the new Rules, amendment, or repeal of existing Rules approved by the Board are submitted to the Minister of Justice and Correctional Services for approval. Once approved, the Rules are published in the *Government Gazette* at least one month before the day upon which such Rule, amendment, or repeal is determined to commence. Section 6(5) of the Act provides that every such Rule shall be tabled in Parliament within 14 days after it has commenced.

3.91 In comparison with section 6 of Act 107 of 1985, Section 276 of the Legal Profession Act 2008 of Western Australia provides that the Legal Costs Committee must review each costs determination in force at least once in the period of two years after it was made and in each two-year period after that period. Section 277 of the latter Act further provides that the Legal Costs Committee must give public notice of its intention to make or review the determination, if the determination is to be made or reviewed in respect of proceedings before a court, consult with that court, and make such other inquiries as it considers necessary to facilitate the making or review of the determination.

3.92 Should the mechanism adopt a consultative process of all the stakeholders involved prior to determining fees and tariffs? Which stakeholders must be consulted? If the Rules Board increased the tariffs, what would inform such a decision, and what benchmark would they use? How would they come to the conclusion that that is an acceptable tariff?

3.93 The sections that follow look at mechanisms responsible for determining legal fees and tariffs in place in foreign jurisdictions.

F. Position in other jurisdictions

1. The United Kingdom

3.94 Prior to the introduction of the Civil Procedure Rules of 1998 (CPR) in the United Kingdom, the English civil justice system was characterised by Allen and Overy as being largely “too slow, too expensive, too complex and too inaccessible”.⁹⁸ The aim of the CPR of 1998, which were implemented in United Kingdom in April 1999 following Lord Woolf’s investigation into the causes of the high costs of civil litigation, was to promote a speedy

⁹⁸ Allen and Overy, “The impact of the Woolf reforms in U.K.”. <http://www.allenoverly.com/publications/en-gb/Pages/> (accessed on 22 February 2016).

resolution of disputes and provide cost-effective and efficient access to justice. It would appear that the objective of the CPR 1998 was not achieved to the extent that the right of access to justice remained largely too expensive and inaccessible. In 2009, Justice Jackson conducted a review of the CPR 1998 in order to make recommendations for more affordable and expeditious right of access to justice.

3.95 English courts have discretion over which party has to pay the costs of another party, the amount to be paid, and the date of payment.⁹⁹ The general rule is that the unsuccessful party is required to pay the costs of the prevailing party.¹⁰⁰ This position was confirmed by Nourse LJ in *Re Elgindata Ltd*,¹⁰¹ where the court stated that “[C]osts are in the discretion of the court. They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made”.

3.96 The ‘loser pays’ principle applies as a point of departure. In instances where the receiving party is not successful in respect of all the issues raised by him/her, the court is empowered to shift the costs of litigation proportionally from the receiving party to the paying party. For example, in *Burchell v Bullard*,¹⁰² the court held that the plaintiff was only entitled to 60% of the costs of the proceedings on the basis that the defendant was also successful in her counterclaim.

3.97 According to Jackson, the term ‘costs’ is defined broadly in Part 44 of the General Rules About Costs of the CPR to include “fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant-in-person, [and] any additional liability incurred under a funding arrangement”.¹⁰³

3.98 The test used by English courts from 1959 to 1986 to assess costs was “[A]ll such costs as were necessary or proper for the attainment of justice or enforcing or defending the rights of the party whose costs are being taxed”.¹⁰⁴

3.99 From 1986 to 1999, two bases for assessment of recoverable costs were introduced: the standard basis and the indemnity basis. The standard basis meant that the receiving party was entitled to “a reasonable amount in respect of all costs reasonably

⁹⁹ Rule 44.3(1) of the Civil Procedure Rules 1998.

¹⁰⁰ The general rule is called the ‘English rule’; the ‘loser pays’ principle; or the ‘costs follow the event’ principle.

¹⁰¹ Nourse, LJ, in *Re Elgindata Ltd* (No.2) [1992] 1 WLR 1207.

¹⁰² *Burchell v Bullard* [2005] EWCA Civ 358.

¹⁰³ Jackson, R, “Review of civil litigation costs: Preliminary report” (May 2009), 18.

¹⁰⁴ Jackson, R, “Review of civil litigation costs: Final report” (December 2009), 28.

incurred. On the indemnity basis, the test was similar, but any doubt was resolved in favour of the receiving party”.¹⁰⁵

3.100 Since 1999, Rule 44.4(2) of the CPR has provided that, when assessing costs on a standard basis, the court will “(a) only allow costs which are proportionate to the matters in issue; and (b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party”.¹⁰⁶

3.101 The court in *Lownds v Home Office*¹⁰⁷ had to give guidance on the meaning and relationship between the requirements of proportionality and reasonableness. The court held that:

There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having regard to the considerations which the CPR R44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand, the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary, and if necessary, that the cost of the item is reasonable.

3.102 Two approaches are used for the assessment of costs other than fixed costs. These are summary assessment and detailed assessment. According to Grainger and Fealy,¹⁰⁸ summary assessment takes place at the conclusion of a fast-track trial or at the conclusion of any hearing that did not last for longer than one day. The authors state that the purpose of summary assessment is to bring to the attention of the litigants at a very early stage the actual costs of litigation, in the hope that such knowledge would lead to a speedy and cost-effective resolution of their dispute.¹⁰⁹ Detailed assessment generally takes place at the conclusion of a marathon trial.

3.103 The CPR distinguishes between two types of fixed cost. The first type is fixed costs recoverable in certain specified categories of uncontested cases defined in Part 45 of the CPR. The second type is predictable recoverable costs in low value road traffic accident cases, where the amount of the claim does not exceed £10,000. Generally,

¹⁰⁵ *Idem.*

¹⁰⁶ *Idem.*

¹⁰⁷ *Lownds v Home Office* [2002] EWCA Civ 365.

¹⁰⁸ Grainger, I and Fealy, M, *The civil procedure rules in action* (2000), 133.

¹⁰⁹ *Idem.*

cases are distinguished broadly between two categories according to their value: fast-track litigation, and litigation above the fast track, also called multi-track litigation. Jackson states that “[C]ases in the fast track are those up to a value of £25,000, where the trial can be concluded within one day”.¹¹⁰ According to Jackson, the concept of a fast-track trial was introduced in order to remove uncertainty about excessive costs with the object of promoting access to justice.¹¹¹

3.104 Hourly rates differ by type of firm and level of solicitor’s experience. Law firms operate at city, regional, or national level. According to Jackson’s preliminary report, “partners’ hourly rates in 2007 were £625–£700 at ‘magic circle’ firms;¹¹² £400–£495 at top London firms; and £350–375 at major and national law firms. In 2008, the rates were £600–£750 at ‘magic circle’ firms, £375–£495 at top London firms, and £300–£375 at major and national law firms”.¹¹³ Prices seem to escalate annually in order to factor in the costs of inflation.

3.105 Small claims are claims up to the value of £5,000. However, personal injury claims that exceed £1,000 are excluded from the small claims track. According to Jackson, “small claims track offers a speedy process from issue to trial. The trial is relatively informal and the rules of evidence are relaxed. Parties present their cases without assistance of lawyers”.¹¹⁴

3.106 Following his investigation into the costs of civil litigation in England and Wales, Justice Jackson made the following recommendations in his final report to the Master of Rolls in December 2009:

- (a) *The key drivers of costs under conditional fee agreements, being the success fees and after-the-event (ATE) insurance premiums should cease to be recoverable from unsuccessful opponents in civil litigation.*¹¹⁵
- (b) *Lawyers should not be permitted to pay referral fees in respect of personal injury cases.*¹¹⁶
- (c) *Qualified one-way cost shifting be introduced at least for certain categories of litigation in which it is common for ATE insurance to be*

¹¹⁰ Jackson, R, “Review of civil litigation costs: Final report” (December 2009), (n33), xviii.

¹¹¹ *Idem*.

¹¹² According to Jackson, ‘magic circle firms’ refers to law firms such as Clifford Chance, Slaughter & May, Allen & Overly, Freshfields, and Linklaters; *ibid*, 85.

¹¹³ Jackson, R, “Review of civil litigation costs: Final report”, 85.

¹¹⁴ *Ibid*, 499.

¹¹⁵ *Ibid*. xvi.

¹¹⁶ *Ibid*. xvii.

*taken out, like in personal injury litigation, clinical negligence, judicial review and defamation claims.*¹¹⁷

2. Western Australia

3.107 In Western Australia, section 275 of the Legal Profession Act 2008 empowers the Legal Costs Committee, which is the equivalent of the South African Rules Board, with a mandate to “make legal costs determinations regulating the costs that may be charged by law practices in respect of –

- (a) non-contentious business; and
- (b) contentious business before –
 - (vi) the Supreme Court; or
 - (vii) the District Court; or
 - (viii) the Magistrates Court; or
 - (ix) a court of summary jurisdiction; or
 - (x) the State Administrative Tribunal; or
 - (xi) the Family Court of Western Australia; or
 - (xii) any other court declared by the Attorney General under subsection (7) to be a court to which this section applies”.

3.108 Unlike the Rules Board for Courts of Law Act of 1985, section 275(2) of the Legal Profession Act 2008 of Western Australia provides that:

“[A] costs determination may provide that law practices may charge –

- (a) according to a scale of rates of commission or percentages; or
- (b) a specified amount; or
- (c) a maximum amount; or
- (d) in any other way or combination of ways.”

3.109 Furthermore, section 275(34) of the Legal Profession Act 2008 provides that “a costs determination may differ according to different classes of legal services”. The Legal Costs Committee’s Report of 2016, made under Division 5 of Part 10 of the Legal Profession Act 2008, makes a distinction between four categories of practitioners under the attorney’s profession:

- (e) Clerk/Paralegal;
- (f) Restricted Practitioner;
- (g) Junior Practitioner; and
- (h) Senior Practitioner.

3.110 A further distinction is made between two categories of counsel:

- (a) Counsel (C);

¹¹⁷ *Idem.*

(b) Senior Counsel (SC).

3.111 The (party-and-party) tariff for contentious business, with the exception of the remuneration of law practices based on written agreements as to costs, makes provision for maximum allowable hourly and daily rates for the different categories of legal practitioners, as well as fixed amounts for certain specified items such as memorandum of appearance, notice requiring discovery, and many more. The tariff makes provision for a separate dispensation in respect of motor vehicle personal injury claims and catastrophic personal injury claims.

3. Germany

3.112 Fees and expenses for attorneys' professional services are governed by the Law on the Remuneration of Attorneys (Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte – "RVG"). Section 2 [English translation] of the RVG states that:

- (1) *Fees shall be calculated according to the value of the subject of the attorney's professional activity (value of the claim) unless this Law specifies otherwise.*
- (2) *The amount of the remuneration shall be determined by the Remuneration Schedule in annex 1 of this Law. Fees shall be rounded up or down to the nearest cent. 0.5 cents shall be rounded up.*

3.113 The RVG provides for a uniform and comprehensive tariff of fees and costs in civil matters, criminal matters, and administrative proceedings. It is divided into eight parts. Part 1 is general provisions; Part 2: Fee provisions, Part 3 defines matters (whether it is the same matter, different matter, special matter, and the level of jurisdiction); Part 4: Value of the claim; Part 5: Out-of-court advice and representation; Part 6: Court proceedings; Part 7: Criminal and regulatory fining cases as well as certain other proceedings; and Part 8: Attorneys assigned or appointed as counsel, advisory assistance.

3.114 Section 22 of Part 4: Value of a claim provides that the value of one matter shall be a maximum of €30 million, unless a lower maximum value has been determined by law. The section also provides that, in the same matter, the values of several claims shall be added together.

3.115 Section 23 right through to section 32 of the RVG provides for values of claims in a variety of matters. Section 33 provides for assessment of value (court fees) for attorneys' fees. Section 42 under Part 7: Criminal and regulatory fining cases as well as

certain other proceedings provides for a general flat-rate ad valorem (value-based) fee in criminal matters, unless the special scope or difficulty of the matter demands otherwise.

3.116 Annexure 1 of the RVG provides a structure for the remuneration for attorneys in out-of-court activities, including representation in administrative proceedings, in civil matters, and in criminal matters. Part 4 of Annexure 1 makes provision for defence counsel's fees.

3.117 The general rule is that the losing party bears all the costs for bringing the action, including the winning party's costs and any court fees incurred. However, depending on the outcome of the proceedings, costs can be imposed on both parties at a rate determined by the court.¹¹⁸ The court decides on the rate of party-and-party costs payable. A registrar will calculate the actual costs, and add any fixed costs that are applicable.¹¹⁹ In criminal matters, the reimbursement of costs depends on whether the costs can be refunded in terms of section 465 [Duty of convicted persons to pay costs] of the German Code of Criminal Procedure. This section [English translation] provides that:

- a) *The defendant shall bear the costs of the proceedings insofar as they were caused by the trial for an offence of which he has been convicted or for which a measure of reform and prevention has been ordered. A conviction for the purposes of this provision shall also be deemed to have been pronounced where the defendant has been warned with sentence reserved or where the court has dispensed with punishment.*
- b) *If particular expenses have been caused by investigations conducted to clear up certain incriminating or exonerating circumstances and if the outcome of such investigations was in the defendant's favour, the court shall charge the expenses in part or in full to the Treasury if it would be inequitable to charge them to the defendant. This shall apply in particular where the defendant is not convicted for individual severable parts of an offence or is not convicted of one or more of a number of violations of the law. The preceding sentences shall apply mutatis mutandis to the defendant's necessary expenses.*
- c) *If a convicted person dies before the judgment enters into force his estate shall not be liable for the costs.*

3.118 According to Polten *et al.*, the RVG applies to all branches of law so that the amount of legal fees and costs in civil cases, criminal cases, or contentious administrative

¹¹⁸ Polten, EP, Weiser, C and Klunspies, D, "Rules of costs and fees for lawyers – A comparison of German law and the law of the Province of Ontario/Canada" (February 2011), 10.

¹¹⁹ *Ibid*, 5.

matters are all provided for.¹²⁰ The authors point out that, in order to bill a client, the lawyer will have to consult Appendix 1, where all services provided are connected to either a concrete amount or a fee ratio. A fee ratio has to be multiplied by the specific rate of legal fees stated in Appendix 2, which corresponds to the value of the matter in dispute.¹²¹

4. Canada

3.119 Canada is a federation of provinces that exercise sovereign legislative authority within their areas of jurisdiction.¹²² Part I of Schedule 6 of the Constitution of 1867, with Amendments effected in 2011, contains a Charter of Rights and Freedoms. The Charter of Rights and Freedoms guarantees people's fundamental freedoms, democratic rights, mobility rights, equality rights, and legal rights, which include proceedings in criminal and penal matters.

3.120 Legislative power is shared between the provinces and the federal government.¹²³ Criminal law and procedure lies with the federal legislative authority, although prosecutions and civil procedures are performed by the provinces.¹²⁴ Regulation of the professions, including the legal profession, is the responsibility of provinces. Provinces also have jurisdiction over most family matters, although divorce is a federal competency.¹²⁵

3.121 Canada has a unitary court system. Judges of the superior courts of each province are appointed and remunerated by federal government, whereas judges of the inferior provincial courts and administrative tribunals are appointed and remunerated by the provinces.¹²⁶ According to Richter, this arrangement creates a more unitary court system than in the United States of America.¹²⁷

¹²⁰ *Idem.*

¹²¹ *Idem.*

¹²² Richter, MC, "What non-Canadian attorneys should know about the Canadian legal system" (May 2007). Woods, Montreal, 4.

¹²³ Sections 17 and 22 of the Constitution of Canada. Section 22 of the Constitution of Canada provides that the Senate of Canada shall be deemed to consist of four provinces: (1) Ontario; (2) Quebec; (3) The Maritime provinces, Nova Scotia and New Brunswick, and Prince Edward Island; (4) The Western provinces of Manitoba, British Columbia, Saskatchewan, and Alberta.

¹²⁴ Richter, MC, "What non-Canadian attorneys should know about the Canadian legal system" (May 2007), Woods, Montreal, 6.

¹²⁵ *Idem.*

¹²⁶ *Ibid*, 7.

¹²⁷ *Ibid*, 7.

3.122 Canada has a Federal Court and Federal Court of Appeal. The Supreme Court of Canada is the final court of appeal from Federal Courts.¹²⁸

3.123 Canada follows the 'world rule' of the 'loser pays' principle, subject to the discretion of the Court.¹²⁹ This rule rests on the justification that a successful party should not have to bear the cost of establishing their right against an unjust claim or defence.¹³⁰ Glenn contrasts Quebec with the rest of the Canadian provinces which, according to him, follow the common law tradition inherited from England. He says that Quebec's position is closer to the American rule that each party bears his/her own costs, as well as the French position that lawyers' fees are not recoverable.¹³¹

3.124 In the common law provinces, the winner will recover more than in Quebec, but the amount will vary depending on the level of costs fixed by the court, which may vary from full through substantial to only partial indemnity, and by the further element affecting the discretion of court. Costs on appeal are fixed by the appellate court according to the same principles. The appellate court enjoys a wide discretion in fixing costs at its own level, but also in adjusting costs awards made in the lower courts.¹³²

3.125 Court costs and costs for taking of evidence are treated as disbursements recoverable by the winning party in the course of the litigation, subject to the court's discretion. About 95% of the cases are settled.¹³³ Parties may agree on costs and fees as part of the settlement.¹³⁴

3.126 There are a few statutory exceptions to the general 'loser pays' principle. Unlike in the USA, where many statutes shift fees, there is no need in Canada for fee-shifting statutes because this is dealt with through the exercise of the discretion of the court.¹³⁵ There are cases where a court refuses to shift costs and fees when the matter in dispute is of constitutional or public importance and the plaintiff has lost.¹³⁶

3.127 Parties are allowed to represent themselves. Because of the high costs of litigation, this has become a frequent occurrence, with an estimated up to 30% of cases

¹²⁸ *Ibid*, 9.

¹²⁹ Glenn, HP, "Costs and fees in common law Canada and Quebec". Faculty of Law and Institute of Comparative Law, McGill University, 1.

¹³⁰ *Idem*.

¹³¹ *Ibid*, 2.

¹³² *Idem*.

¹³³ *Idem*.

¹³⁴ *Idem*.

¹³⁵ *Ibid*, 5.

¹³⁶ *Ibid*, 3.

now involving self-representing parties.¹³⁷ Parties will provide a retainer to their counsel for use towards disbursements and for down payments due to counsel. The retainer will be replenished on an ongoing basis. In extended litigation billing, the retainer is replenished on a monthly basis.

3.128 “Lawyers’ fees are subject to market forces and there is no statutory or regulatory control of them. Empirically fees vary according to province, rural or urban environment, and large or small firm size. A recent survey (The Canadian Lawyer, June 2009) gave average hourly fees for a lawyer with 10 years of experience of \$383 in Ontario and \$467 in the western provinces. In Ontario, fees are said to range up to \$900 per hour.”¹³⁸

3.129 Three models for recovering legal costs and fees in Canada can be identified. In the first model, which Glenn calls the ‘Quebec’ model, there is an established tariff of recoverable costs and fees; but it has been neglected, such that recoverable costs are very low. In the second model, which he terms the ‘traditional common law’ model, there is a tariff of costs and fees, which bears a closer relationship to market amounts, and the costs order made by the court will be followed by taxation or verification of precise items before an assessor, a master, or a taxing officer. Depending on the frequency of the tariff, the recoverable costs will be significant. They may be made more significant if the presiding judge orders not simply ‘party-and-party’, as they are traditionally known, but ‘solicitor-client’ costs, which are still higher. Party-and-party costs are usually estimated at 50-60% of lawyers’ actual fees; solicitor-client costs will cover up to 90% of such fees. There is even a further category of ‘solicitor-own-client’ fees, which requires full compensation of the opposing side’s counsel. The type of award varies on the presiding judge’s appreciation of the conduct of the litigation.¹³⁹

3.130 The third model, which Glenn terms the ‘Ontario’ model, has recently abandoned the idea of a tariff or ‘grill’ of costs in favour of the presiding judge ruling on costs, generally after submissions by the parties on the complexity of the case, time actually spent, hourly rates, and other factors. The assessment may be made on a ‘partial indemnity’, ‘substantial indemnity’, or ‘full indemnity’ basis, which largely corresponds with the prior distinction between party-and-party costs, solicitor-client costs, and solicitor-own-

¹³⁷ *Ibid*, 11.

¹³⁸ *Ibid*, 4.

¹³⁹ *Ibid*, 6.

client costs. Here a global amount will be fixed, although a judge may also order a 'line-by-line' assessment to be undertaken by a taxing officer.¹⁴⁰

G. Questions for Chapter 3

1. Should section 35(3) be amended in order to qualify the wide exemption it provides to legal practitioners and clients to pay fees in excess of any tariff that may be determined by the mechanism?
2. Is the present mechanism for determining fees and tariffs in respect of litigious and non-litigious legal services desirable, appropriate, and/or effective? If not, what alternative mechanism may be recommended?
3. Would the mechanism for determining fees and tariffs be undermined if legal practitioners could simply opt out by agreeing with clients in writing to do so? In other words, would it be desirable in the sense of 'effective' to establish a mechanism if practitioners may simply opt out by insisting on being paid more?
4. Would it inhibit competition if practitioners were in principle required to charge no less (unless the user voluntarily offered to pay less) than the determined fee, as appears to be envisaged in sections 35(3) and 35(4)(e)? In other words, is there any case to be made out for a mechanism that determines minimum (as opposed to maximum) fees and tariffs?
5. Should the mechanism envisaged by section 35(4)(c) be a body or bodies of practitioners to which a person may complain if he or she has been charged more than a reasonable rate or tariff?
6. Alternatively, should the mechanism be a body or bodies that determine rates and services in respect of each type of legal service to be provided? If so, how should the latter be done?
 - (a) By placing a cap with reference to the seniority of the legal practitioner on the hourly rate?
 - (b) By placing a cap on the overall amount that may be charged for a particular type of legal service, having regard to the nature and quantum of the claim? If so, how should it be done? or
 - (c) Any other alternative suggestion.

¹⁴⁰

Idem.

7. What about the process that should be followed in determining the fees or tariffs? This will depend on whether the mechanism is a body or bodies that decide complaints against unreasonable fees (overreaching), or whether it is a body or bodies that determine the fees and tariffs. If the latter, and if caps are to be determined with reference to specific kinds of legal services (rather than merely a cap on the hourly rate), then it would perhaps be appropriate for a pilot project to be carried out in order to ascertain the reasonableness of the caps for the various kinds of services. What is your view about this proposal?
8. To whom, and what, should the tariff apply? The proposed tariff assumes a universal application, but is this correct?
9. Would adherence to a tariff by referral advocates constitute a prohibited horizontal and vertical practice under the Competition Act 89 of 1998, on the basis that it has the effect of substantially preventing or lessening competition in a market without any technological, efficiency, or other pro-competitive gain resulting from it?
10. Are there any areas of law that must be exempted from the jurisdiction of the mechanism to regulate fees and tariffs; and, if so, what are they and on what basis?
11. Are there any categories of persons that must be exempted from the jurisdiction of the mechanism to regulate fees and tariffs; and, if so, who should those persons be?
12. Who will appoint the persons in charge of or responsible for the mechanism?
13. Should there be uniform/universal and all-inclusive tariffs for all legal matters, be they litigious or non-litigious? Or, put differently, should there be uniform tariffs for attorneys and advocates in respect of party-and-party costs and attorney-and-client costs?
14. Which parties or institutions should be involved in the determination of the tariff? Should it be:
 - (a) The Legal Practice Council,
 - (b) The Rules Board,
 - (c) The Minister,
 - (d) Civil society organisations, or
 - (e) Representatives of the above-mentioned institutions?

15. Should legal matters be classified, like in the United Kingdom, into small claims, fast-track, and multi-track claims based upon the type and value of the matter? Specifically, should low-value small claims, family matters, personal injury claims, and nuisance matters go to the lower court?
16. Should the mechanism be flexible enough to enable legal practitioners and clients alike independently to negotiate fees for professional services and provide broad monetary parameters within which the negotiation of fees may take place?
17. Should the mechanism use a combination of fee models such as fixed costs, hourly / daily rates, capped or uncapped fees; and, if so, in what type of legal matters?

Chapter 4: Litigious and non-litigious matters

A. Introduction

4.1 There are no statutory tariffs for litigious and non-litigious matters that regulate what legal practitioners may charge their clients for legal services rendered. The statutory party-and-party tariffs prescribed by the Rules Board relate only to the fees that may be recovered by litigants in the event that they are awarded costs.

4.2 Until the coming into operation of the LPA, costs in respect of a number of non-litigious matters were assessed by the law societies using the criteria derived largely from Rule 3(b) of the Law Society of the Transvaal, published in *Government Gazette* No.5804 (Government Notice R2365) dated 18 November 1977. The Law Societies also published tariff guidelines in conveyancing- and property-related matters; and these tariffs were amended from time to time by notice in the *Government Gazette*. The various committees established by the law societies were also tasked with reviewing any complaints received from users in the event of a dispute between the provider of such legal services and the client to whom the services are provided.

4.3 Section 35(1) of the LPA provides that, until the investigation by the SALRC contemplated in section 35(4) has been completed, fees in respect of litigious and non-litigious legal services rendered by legal practitioners, juristic entities, law clinics, or Legal Aid South Africa must be in accordance with the tariffs made by the Rules Board. Section 35(2) of the LPA lays down the criteria to be taken into consideration by the Rules Board when it determines tariffs contemplated in section 35(1). Sections 35(1) and (2) of the LPA are not operational yet.

4.4 The Rules Board proposed that the tariff referred to in section 35(1) of the LPA should state that “the tariff for Legal Aid South Africa matters shall be in accordance with the Legal Aid Manual in section 24 of the Legal Aid South Africa Act, 2014 (Act No.39 of 2014)”.¹

¹ Rules Board, letter dated 2 July 2018, 2.

B. How should fees and tariffs in non-litigious matters be determined?

4.5 Civil law includes, among other things, the following areas of specialisation: personal injury litigation; clinical negligence; taxation; provision of legal opinion and advice; drafting of contracts, wills, and memoranda of incorporation; consumer protection and debt administration; alternative dispute resolution; maintenance matters; forensic investigations; intellectual property; commercial litigation (small and large business disputes); nuisance cases (including defamation and related claims); and class actions.

4.6 Although there are tariffs in respect of certain non-litigious matters such as administration of trusts and deceased estates and conveyancing,² there are no statutory tariffs in a whole range of matters that are not litigated, such as legal drafting, obtaining legal advice, negotiation of agreements, curatorships, and collections.³ Fee guidelines are prescribed and approved by each provincial law society, as well as by State Litigation Services, law clinics, and Legal Aid SA.⁴

4.7 With regard to non-litigious civil matters where no tariffs exist, the Commission aims to investigate the following questions:

- (a) Why are there no tariffs in non-litigious civil matters?
- (b) Should there be tariffs in non-litigious civil matters?
- (c) What impact would this have on the current system?
- (d) What are the dangers or potential sources of mischief in the current system?

4.8 Assessment of costs in non-litigious matters that is done by committees of the various law societies in terms of the repealed section 69(h) of the Attorneys Act 53 of 1979 can be reviewed in the High Court, as provided for in section 74(5) of that Act.⁵ Thus some form of protection does currently exist for clients who brief legal practitioners in non-litigious matters, since clients who are not happy with the fee charged by a legal

² The Master of the High Court and the conveyancing profession set the tariff of fees in administration of estates and conveyancing matters respectively.

³ Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 23.

⁴ *Ibid*, 32.

⁵ Section 74(5) of the Attorneys Act 53 of 1979 provides that “[A]ny assessment of fees in terms of a rule contemplated in section 69(h) shall be subject to review in all respects as if it were a determination by such officer of a provincial division or high court as is charged with the taxation of fees and charges”.

practitioner may lodge an appeal with the relevant law society for recourse, failing which the client may approach the court for appropriate relief.

4.9 Essa states that a discussion of non-litigious matters should start with the definition of the concept of non-litigious legal matters. The starting point is to consider what is included and/or excluded from the definition.⁶ Furthermore, it is important that the topic of non-litigious work be considered in the context of work that is not reserved for legal practitioners. This has implications for the computation of a fair and reasonable fee, having regard to the fact that certain services are rendered by non-legal practitioners.⁷

4.10. The LSSA explains the concept of non-litigious legal matters as all matters that do not involve litigation.⁸ These would include, among other things, the following:

- (i) Corporate and commercial work (other than commercial litigation);⁹
- (ii) labour law matters (excluding labour litigation in the courts);¹⁰
- (iii) other forms of alternative dispute resolution;
- (iv) conveyancing;
- (v) notarial services;
- (vi) drafting of wills;
- (vii) estates and trust law;¹¹
- (viii) intellectual property law;
- (ix) patents;
- (x) agreements relating to immovable property;¹²
- (xi) company documents;¹³
- (xii) partnership agreements;
- (xiii) debt collection and counselling;
- (xiv) environmental law;
- (xv) shipping law;
- (xvi) sports law; and
- (xvii) law applicable to mining and minerals.

⁶ Essa, A, "Legal practitioners and non-litigious legal fees" (paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018), 3.

⁷ *Ibid*, 6.

⁸ Law Society of South Africa, "Fees and costs: Paper on behalf of the Law Society of South Africa to be presented at the international conference on Access to Justice, Costs and Other Interventions" (November 2018), 16.

⁹ Corporate and commercial work such as banking law; tax law; financial regulatory advice; business rescue; competition law; contracts administration.

¹⁰ Employment law such as retrenchments, dismissals; business restructuring; and employment contracts.

¹¹ Estates and trust law such as administration of deceased estates and trusts; advice on estate planning.

¹² Such as acquisition and disposal of property; sectional title schemes; and registration of mortgage bonds.

¹³ Company documents including licensing of facilities; e-mail and internet policies for workplaces; privacy policies.

4.11 The LSSA's Practice Manual makes reference to what is called 'grey areas', which, according to Essa, cannot be classified as either litigious or non-litigious work. These include the following:

- (i) work in respect of criminal law;
- (ii) (administration side of) insolvent estates;
- (iii) interrogations;
- (iv) child and family law such as maintenance;
- (v) Children's court matters; and
- (vi) mediation and arbitration proceedings where no agreement was made an order of the court.¹⁴

4.12 The criteria to be taken into account when determining a fee or tariff for non-litigious legal work could include the following:¹⁵

- (i) the market reality, having regard to empirical data;
- (ii) the amount involved or the value of the property forming the subject matter of the service;
- (iii) the importance of the matter to the client;
- (iv) the seniority and experience of the practitioner;
- (v) the complexity, difficulty, and novelty of the services rendered;
- (vi) the number of documents perused or drafted;
- (vii) the time spent on the matter;
- (viii) the amount of research involved;
- (ix) the geographical location of the legal practitioner;
- (x) the extent of resources, disbursements and personnel involved in the completion of the task;
- (xi) the circumstances in which the services were rendered;¹⁶
- (xii) the quality of work done;¹⁷ and
- (xiii) the skill, labour, specialised knowledge, and responsibility involved on the part of the legal practitioner.¹⁸

4.13 Vorster cautions that pre-determined tariffs for non-litigious matters may not necessarily be an equitable assessment of the work done by attorneys.¹⁹ The research contemplated in Sections 35 (4)(c) and (d) of the LPA will no doubt determine the way

¹⁴ Essa, A, "Legal practitioners and non-litigious legal fees" (paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018), 3.

¹⁵ *Ibid*, 6.

¹⁶ Rule 3(b) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of the Law Society of the Transvaal under Government Notice R2366 in *Government Gazette* 5804 dated 18 November 1977.

¹⁷ *Idem*.

¹⁸ *Idem*.

¹⁹ Vorster, Henry, *De Rebus*, August 1979, 416.

forward, with the ultimate objective of ensuring access to legal services for all. However, any recommendations emanating from the investigation must consider the competition laws governing South Africa, with due cognisance being given to competition tribunal rulings.

(a) Criminal matters

4.14 Criminal law involves consulting with clients, drafting documents or pleadings, and court appearances on behalf of clients. Pricing should be treated in the same way as civil litigation.

(b) Administration of deceased estates

4.15 Section 51 of the Administration of Estates Act 66 of 1965 sets out the remuneration of executors and interim curators as follows:

- (1) *Every executor (including an executor liquidating and distributing an estate under subsection (4) of section thirty-four) shall, subject to the provisions of subsections (3) and (4), be entitled to receive out of the assets of the estate –*
 - (a) *such remuneration as may have been fixed by the deceased by will; or*
 - (b) *if no such remuneration has been fixed, a remuneration which shall be assessed according to a prescribed tariff and shall be taxed by the Master.*
- (2) *An interim curator appointed under section twelve shall, subject to the provisions of subsection (3), be entitled to receive out of the assets of the estate a remuneration which shall be so assessed and taxed.*
- (3) *The Master may –*
 - (a) *if there are in any particular case special reasons for doing so, reduce or increase any such remuneration;²⁰*
 - (b) *disallow any such remuneration, either wholly or in part, if the executor or interim curator has failed to discharge his duties or has discharged them in an unsatisfactory manner; and*
 - (c) *if the deceased had a limited interest in any property which terminated at his death, direct that so much of such remuneration as the Master considers equitable, or the whole thereof if there are no other assets available for the payment of such remuneration, shall be paid in such proportion as he may determine by the persons who became entitled to the property at the death of the deceased.*
- (4) *An executor shall not be entitled to receive any remuneration before the estate has been distributed as provided in section 34(11) or 35(12), as the case may be, unless payment of such remuneration has been approved in writing by the Master.*

4.16 An executor is entitled to remuneration.²¹ The remuneration may be fixed by the will and, where it is not so fixed, it is calculated according to a prescribed tariff, currently 3.5%

²⁰ *Collie NO v The Master* 1972 (3) SA 623 (A) par 5.

of the gross value of the assets (subject to a minimum remuneration of R350).²² In either case, the master may reduce or increase this remuneration. Where the master increases or reduces the remuneration, his or her decision is subject to review by the court at the instance of an aggrieved person.²³ The following tariff of remuneration of executors is prescribed in the regulations:

- (a) on the gross value of assets: 3.5 per cent;
- (b) on income accrued and collected after the death of the deceased: 6 per cent, provided the remuneration in respect of any deceased estate is not less than R350.²⁴

(c) Company and insolvency matters

4.17 Company work is much like litigation, and should be treated as such.²⁵

(d) Labour law

4.18 Labour law has different components. The drafting of employment contracts should be treated like other commercial work. Consulting, advice, appearances at the CCMA or in labour court structures are closer to litigation.²⁶

(e) Conveyancing matters

4.19 Conveyancing fees are not legislated. The LSSA has provided guidelines in which conveyancers can charge in order to perform their duties as described in the Deeds Registries Act 47 of 1937. These fee guidelines apply to instructions received from 1 June 2018 onwards. The fee guidelines cover, in broad terms, conventional deeds registered in terms of the Deeds Registries Act and the Alienation of Land Act 68 of 1981; sectional

²¹ Erasmus, HJ and De Waal, MJ, *Wills and succession, administration of deceased estates and trusts* (Volume 31 – second edition, 2011).

²² *Law Society of the Northern Provinces v Morobadi* [2019] JOL 40677 (SCA) par 6; Lamprecht, I “How to reduce the costs in an estate – Ensure that sufficient cash is available to avoid a forced sale of assets”, *Personal Finance Newsletter* (2017), 8.

²³ *Collie NO v The Master* 1972 (3) SA 623 (A) par 5.

²⁴ Chief Master’s Directive 4 of 2011 at par 2.2; Erasmus, HJ and De Waal, MJ, *Wills and succession, administration of deceased estates and trusts* (Volume 31 – second edition, 2011).

²⁵ Rule 3(b) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of the Law Society of the Transvaal under Government Notice R2366 in *Government Gazette* 5804 dated 18 November 1977, 17.

²⁶ *Idem*.

titles registered in terms of the Sectional Titles Act 95 of 1986; and the apportionment of fees with regard to wasted costs.

4.20 The current system gives certainty, but could be made simpler. Costs structures could be simplified by the use of a base cost coupled with a percentage system.²⁷

(f) Commercial work

4.21 Fixed or percentage fees should be encouraged with, for example, the drafting of contracts; but one should always be mindful of the fact that some industries that render such services are not regulated as lawyers are.²⁸

(g) Wills and Trusts

4.22 The Wills Act defines a will as including “a codicil and any other testamentary writing”.²⁹ A will has been described as a legal document concerning the disposition of assets after the death of the testator.³⁰ The requirements of a will are set out in section 2(1) (a) of the Wills Act.³¹

4.23 Within the confines of a valid will, a testator may create a testamentary trust with the purpose of benefiting someone – either without transferring ownership and control of the assets, or with the transferring of ownership, but without control of the assets. Where ownership does not pass on to the beneficiary, the trustee becomes the owner of the asset, but only on behalf of the beneficiary.³²

4.24 Trusts are defined in terms of section 1 of the Trust Property Control Act 57 of 1988. The Trust Property Control Act defines a ‘trust’ to mean:

the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed –

(a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit

²⁷ Rule 3(b) of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of the Law Society of the Transvaal under Government Notice R2366 in *Government Gazette* 5804 dated 18 November 1977.

²⁸ *Idem*.

²⁹ Section 1 of the Wills Act 7 of 1953; Corbett, MM, Hofmeyer, GYS and Kahn, E, *The law of succession in South Africa*, 51.

³⁰ Nel, E, “The testamentary trust: Is it a trust or a will? *Hanekom v Voigt* 2016 1 SA 413 (WCC)”. *Potchefstroom Electronic Law Journal*, 2018, Volume 21, 2.

³¹ Wills Act No.7 of 1953.

³² Nel, E, “The testamentary trust: Is it a trust or a will? *Hanekom v Voigt* 2016 1 SA 413 (WCC)”. *Potchefstroom Electronic Law Journal*, 2018, Volume 21, 2.

- of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or*
- (b) *to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument,*

but does not include the case where the property of another is to be administered by any person as executor, tutor or curator in terms of the provisions of the Administration of Estates Act, 1965 (Act No. 66 of 1965).

4.25 A trust contract is created for the benefit of a third party or beneficiary who acquires an absolute right under the trust.³³ The creation and cancellation of trusts and the acquisition of the beneficiary's rights are governed by the principles of the law of contract.³⁴

4.26 The key role players in the effective administration of a trust are the following:

- (a) the founder is the creator of the instrument, and disposes of property to the trustee;³⁵
- (b) the trustee administers the trust, and has to conform to the provisions of sections 6(1)³⁶ and 7(1)³⁷ of the Trust Act.³⁸
- (c) The beneficiary is the person, whether born or unborn, natural or juristic, who will benefit from the trust.³⁹

4.27 In terms of section 22 of the Trust Property Control Act, the remuneration of the trustee should be set out in the Deed of Trust. Where no provision for remuneration is made, the trustee will be entitled to a reasonable remuneration. In the event of a dispute, the remuneration will be set by the Master.

³³ Honoré, T and Cameron, E, *Honoré: The South African Law of Trusts* (1992). Juta and Co., 26.

³⁴ *Idem*.

³⁵ Kgole, DD, "A comparative analysis of the fiduciary duties of trustees in South Africa and Namibia" (May 2018), North West University, 21.

³⁶ Section 6(1) of the Trust Property Control Act provides that "any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master".

³⁷ Section 7(1) of the Trust Property Control Act provides that "if the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee".

³⁸ Kgole, DD, "A comparative analysis of the fiduciary duties of trustees in South Africa and Namibia" (May 2018), 22-23.

³⁹ *Ibid*, 21-22.

(h) Liquidation and Insolvency

4.28 The remuneration of a trustee or *curator bonis* is governed by section 63(1) of the Insolvency Act,⁴⁰ which reads as follows:

Every trustee or curator bonis shall be entitled to a reasonable remuneration for his services, to be taxed by the Master according to tariff B in the Second Schedule to this Act: Provided that the Master may, for good cause, reduce or increase his remuneration, or may disallow his remuneration either wholly or in part on account of any failure of or delay in the discharge of his duties or on account of any improper performance of his duties.

4.29 The remuneration of trustees according to tariff B (remuneration of trustee) (section 63 of Second Schedule of the Insolvency Act 24 of 1936) is as follows:

1. On the gross proceeds of movable property (other than shares or similar securities) sold, or on the gross amount collected under promissory notes or book debts, or as rent, interest or other income	10 per cent
2. On the gross proceeds of immovable property, shares or similar securities sold, life insurance policies and mortgage bonds recovered and the balance recovered in respect of immovable property sold prior to sequestration	3 per cent
3. On – (i) money found in the estate; (ii) the gross proceeds of cheques and postal orders payable to the insolvent, found in the estate; and (iii) the gross proceeds of amounts standing to the credit of the insolvent in current, savings and other accounts and of fixed deposits and other deposits at banking institutions, building societies or other financial institutions	1 per cent
4. On sales by the trustee in carrying on the business of the insolvent, or any part thereof, in terms of section 80	6 per cent
5. On the amount distributed in terms of a composition, excluding any amount on which remuneration is payable under any other item of this tariff	2 per cent

⁴⁰ Insolvency Act 24 of 1936.

<p>6. On the value at which movable property in respect of which a creditor has a preferential right, has been taken over by such creditor: 5 per cent: Provided that the total remuneration of a trustee in terms of this tariff shall not be less than two thousand five hundred rand.</p>	<p>5 per cent</p>
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4.30 A *curator bonis* and provisional trustee are entitled to reasonable remuneration as determined by the Master, but it is not to exceed the rate of remuneration of a trustee under this tariff.⁴¹

4.31 These tariffs are minimum tariffs that a liquidator can claim. In *Klopper NO v Master of the High Court*,⁴² the trustee in an insolvent estate applied to the master for an increased fee in terms of section 63(1) of the Insolvency Act 24 of 1936, in respect of his remuneration for the administration of the insolvent estate.⁴³ According to the trustee, the minimum fee set in the tariff was insufficient when regard was had to the work performed by insolvency practitioners. He maintained that the duties of a trustee have increased since the promulgation of the Act.⁴⁴

4.32 The application was refused, and the applicant appealed against that decision.⁴⁵ The question was whether the Master had erred in refusing to conclude that good cause existed for increased remuneration on the facts of this case. The court could not make such a finding, and the appeal was dismissed.⁴⁶

4.33 Referring to previous case law, De Waal *et al.*⁴⁷ point out that:

Where there is no express agreement regarding remuneration, the rates of 5 per cent on gross income and 1 per cent on capital distributed have been mentioned as appropriate guidelines. A trustee who is paid a fixed remuneration may not claim professional fees unless empowered by the court or authorised by the trust instrument. It has been suggested that a

⁴¹ Tariff B (Remuneration of Trustee: section 63 of Second Schedule of the Insolvency Act 24 of 1936).

⁴² *Klopper NO v Master of the High Court* [2008] JOL 22824 (SCA).

⁴³ *Ibid*, para 7.

⁴⁴ *Idem*.

⁴⁵ *Ibid*, para 8.

⁴⁶ *Ibid*, para 7.

⁴⁷ *Adendorff v Executor Estate Martens* 1910 NPD 100; *Jamieson v Board of Executors* (1859) 3 S 250; *Volkwyn v Clarke & Damant* 1946 WLD 456 469; *Minister of Internal Affairs & Banner v Albertson* 1941 SR 240; *Edmeades, De Kock & Orffer v Die Meester* 1975 2 All SA 541 (O); 1975 3 SA 109 (O); *McNamee v Executors Estate McNamee* 1913 NPD 428 435; but see Honoré, 293.

trustee directed to manage a business for the benefit of the trust is entitled to a salary as manager.

C. Position in other jurisdictions

1. Uganda

4.34 The Advocates (Remuneration and Taxation of Costs) Rules, made under the Advocates Act of 2000, make provision for statutory tariffs in respect of selected non-litigious matters.⁴⁸ Schedules one to five of the Rules provide for statutory tariffs in respect of the following non-litigious matters:

<i>First schedule</i>	<i>Scales of charges on sales of purchases, mortgages, and debentures and for commission on sales, purchases and loans affecting certain land.</i>
<i>Second schedule</i>	<i>Scales of charges for leases or agreements of leases at rack rent and for building leases, reserving rent, etc.</i>
<i>Third schedule</i>	<i>Floatation of companies.</i>
<i>Fourth schedule</i>	<i>Trademarks, patents and chattels transfer.</i>
<i>Fifth schedule</i>	<i>Scale of fees in respect of business the remuneration for which is not otherwise prescribed.</i>

4.35 Rule 4 of the Advocates (Remuneration and Taxation of Costs) Rules provides that:

[n]o advocate shall accept or agree to accept remuneration at less than that provided by these Rules except where the remuneration assessed under these Rules would exceed the sum of twenty thousand shillings, and in that event the agreed fee shall not be less than twenty thousand shillings.

2. Kenya

4.36 Like Uganda, the Advocates (Remuneration) (Amendment) Order, 2014 of Kenya also makes provision for statutory tariffs in respect of selected non-contentious matters. Order 18 provides for tariffs in the following non-contentious legal matters:

<i>Schedule 1</i>	<i>remuneration in respect of sales and purchases of immovable property, and in respect of debentures, mortgages and charges, and in respect of negotiating commissions on sales and mortgages.</i>
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⁴⁸ Section 2 of the Advocates Act of 2000 (Uganda) provides that “[t]he remuneration of an advocate of the High Court by his or her client in contentious and non-contentious matters, the taxation of that remuneration and the taxation of costs as between party and party in contentious matters in the High Court and in magistrates courts shall be in accordance with these Rules”.

<i>Schedule 2</i>	<i>remuneration in respect of leases, agreements for lease or conveyances reserving rents or agreements for the same.</i>
<i>Schedule 3</i>	<i>remuneration in respect of business in connection with the formation, incorporation and registration of a company.</i>
<i>Schedule 4</i>	<i>remuneration for business in connection with registration of and proceedings concerning trademarks.</i>
<i>Schedule 5</i>	<i>remuneration for business which is not completed, and in respect of which other deeds or documents, including settlements, deeds of gift inter vivos, assents instruments vesting property in new trustees, and any other business of a non-contentious nature.</i>
<i>Schedule 10</i>	<i>remuneration for business in connection with probate and the administration of estates.</i>
<i>Schedule 12</i>	<i>remuneration for business in connection with the registration of patents, designs and utility models as well as proceedings concerning patents, designs and utility models.</i>

3. Ireland

4.37 The payment of fees for non-litigious matters in Ireland is regulated under an Act in terms of which “general orders” are issued for different types of non-litigious matters setting out the tariffs for each type of matter.⁴⁹ However, there has been increasing concern about rising legal costs, which in turn are impeding access to justice. While the concern was raised about civil cases, it was specifically targeted at commercial matters, which had the potential of being traded in to ensure recovery in the event that it became necessary.⁵⁰

4. Nigeria

4.38 Section 15(1) of the Legal Practitioners Act (Chapter 207 of the Laws of the Federation of Nigeria) of 1975 establishes a committee, known as the Legal Practitioners Remuneration Committee (LPRC), comprising the Attorney-General of the Federation of Nigeria, who is the chairperson of the committee; the Attorneys-General of the States; the President of the Nigerian Bar Association; and three other members of the Nigerian Bar Association. Subsection 15(3) of the Act provides that the LPRC “shall have power to make orders regulating generally the charges of legal practitioners...”

4.39 Likewise, the LPRC made the following order regulating the remuneration of advocates in non-contentious matters:⁵¹

⁴⁹ Section 2, Solicitors Act, 1881.

⁵⁰ *The Irish Times*, 31 July 2018.

⁵¹ Section 1 of the Legal Practitioners (Remuneration for Legal Documentation and other Land Matters) Order 1991 (Nigeria).

<i>Scale I of Schedule</i>	<i>remuneration for sale, purchase or mortgage that is completed.</i>
<i>Scale II of Schedule</i>	<i>remuneration for lease and agreement for lease in which the transactions have been completed.</i>
<i>Scale III of Schedule</i>	<i>remuneration in respect of all other legal documents not provided for in scales I and II.</i>

5. The United Kingdom

4.40 In the United Kingdom, Justice Jackson was tasked to investigate and draft extensive cost reforms. That investigation culminated in the *Civil Procedure Rules* in April 2013.⁵² While the reforms look primarily at litigation costs, particularly in personal injury claims, extensive research was conducted into the fixed costs regime, which could assist as guidelines in any decision to regulate tariffs governing non-litigious matters.

4.41 The criteria set out in Rule 3(b) of the Law Society of the Transvaal mentioned above have their origins in English law, and have been considered in cases before the English courts. Furthermore, the adoption of the guidelines in South Africa has thus far influenced the various law societies' considerations and deliberations when adjudicating complaints received in respect of disputes about fees in non-litigious matters.

6. Questions for consideration

1. Are there sound reasons for not having statutory tariffs in non-litigious civil matters?
2. Should there be tariffs in non-litigious civil matters?
3. What impact would the introduction of tariffs have on the current system?

D. How should fees and tariffs in litigious matters be determined?

4.42 As stated in chapter 4, there are no statutory tariffs for litigious and non-litigious matters that regulate what legal practitioners may charge their clients for legal services rendered. The statutory party-and-party tariffs prescribed by the Rules Board relate only to the fees that may be recovered by litigants in the event that they are awarded costs.

⁵² Jackson, R, "Review of civil litigation costs: Final report" (2010).

1. Section 342A(3)(e) of Criminal Procedure Act 51 of 1977

4.43 Section 342A(3)(e) of the Criminal Procedure Act 51 of 1977 makes provision for an order for wasted costs against either the State or the accused or his/her legal adviser in criminal matters, incurred as a result of the other party having caused an unreasonable delay. This section is not operational. The lack of tariffs for items such as bail applications means that legal practitioners can charge any amount for such unregulated legal matters – a factor that impacts negatively on the right of access to justice.

4.44 Can the tariffs used by Legal Aid SA and the State Attorney's Office in criminal and civil matters be used as a benchmark for tariffs in general? Would poor and indigent people have more access to justice if these tariffs were used for benchmarking purposes?

2. Section 300 of Criminal Procedure Act 51 of 1977

4.45. In terms of section 300 of the Criminal Procedure Act 51 of 1977, any convicted person who caused damage and/or loss to another person through crime, may on request by the victim in certain circumstances be ordered to compensate the victim.⁵³ The amount awarded to the victim will depend on the court that heard the case.⁵⁴ This provision requires that an application be made by the injured person. Using the provisions of this section would prevent victims of crime from appearing twice in court, thus saving them from paying high legal fees that they cannot afford in the first place.

4.46 How can the provision of section 300 of the Criminal Procedure Act 51 of 1977 be employed in order to reduce legal costs for parties?

3. Legal Aid South Africa fees and tariffs

4.47 State-funded legal aid is provided by Legal Aid SA, an autonomous body regulated by the Legal Aid South Africa Act 39 of 2014. Legal Aid South Africa's stated mission is to make legal aid and legal advice available, provide legal representation at State expense, and provide education and information about legal rights and obligations.

4.48 According to the Act, the Legal Aid Board is obliged to provide legal representation at State expense, as envisaged in the Constitution. In criminal matters, a court must take

⁵³ Makume, MA, "Is access to justice dependent on one's ability to afford legal fees?" Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018, 6.

⁵⁴ *Idem*.

into account the personal circumstances of the person concerned and the nature and gravity of the charge.⁵⁵ The Act is silent on the criteria to be applied in civil cases. In general, the Act gives Legal Aid SA wide discretion by merely providing that it has the authority to set the conditions subject to which legal aid is rendered.⁵⁶ The directives of Legal Aid SA are contained in the Legal Aid Manual, and consist of rules made in terms of the Act. Legal Aid SA employs a number of legal practitioners who operate as Legal Aid SA Local Offices and provide legal assistance.⁵⁷ In other instances, it refers indigent persons to practitioners in private practice who are prepared to act at a reduced tariff of fees.⁵⁸ Recipients of legal aid are allowed to deal with an attorney of their choice, provided that he or she is willing to act at the set tariff.

4.49 The current manual provides that, in civil matters, Legal Aid SA must be satisfied that there are merits in the case, and that there is a reasonable prospect of success and recovery. In line with the requirements placed on it by the Constitution, the Legal Aid SA has identified certain priorities for rendering assistance. These are to provide legal aid to:

- (a) children in civil matters affecting them where substantial injustice would otherwise result;⁵⁹
- (b) children in conflict with the law;⁶⁰
- (c) every detained person (including sentenced prisoners);
- (d) every person accused of a crime;⁶¹
- (e) those who wish to appeal or review a decision of a court in a higher court;
- (f) women, particularly in divorces, maintenance, and domestic violence cases; and
- (g) the landless, especially with regard to evictions.⁶²

4.50 The Legal Aid Manual covers all legal fees from 1st April 2017 onwards; prior to that date, the Legal Aid Guide (2014) is applicable. It would be necessary to examine Legal Aid SA's tariff system to understand how to proceed with setting up a tool that would regulate legal costs once a decision has been made whether or not it is desirable to have such a mechanism.

⁵⁵ Section 22 of the Legal Aid South Africa Act 39 of 2014.

⁵⁶ Sections 3(a) and 4(1) of the Legal Aid South Africa Act 39 of 2014.

⁵⁷ See Legal Aid South Africa Integrated Annual Report 2015/2016, 22.

⁵⁸ In terms of section 24 (1)(c) of the Act.

⁵⁹ Regulation 22 of the Regulations to the Legal Aid South Africa Act 39 of 2014.

⁶⁰ *Idem*. See also paragraph 4.1.1 of the Legal Aid Guide, 2014.

⁶¹ Regulation 2 of the Regulations to the Legal Aid South Africa Act 39 of 2014.

⁶² Regulation 18 of the Regulations to the Legal Aid South Africa Act 39 of 2014.

4.51 Legal Aid SA Tariff of Fees and Disbursements in Criminal Matters covers matters in district, regional, and high courts, and in the Supreme Court of Appeal (SCA).⁶³ It was in this context that Legal Aid SA took a decision to develop tariffs for both criminal and civil matters, as this was going to enable the organisation to manage resources for litigation. The tariffs cover the pre-litigation and litigation stages. The tariff in criminal matters also covers appeals. Disbursements are also covered in the tariff, as they pose a problem unless they are properly controlled and managed.

4.52 Legal Aid SA applies a means test to determine who qualifies for legal aid at State expense.⁶⁴ The income and assets of the applicant, and his or her spouse where applicable, are considered, and a calculated income is determined that may not exceed a specified amount. This amount is revised periodically. Depending on his or her calculated income, an applicant may be required to make an initial contribution to Legal Aid SA's costs. Any rights to costs to which an applicant becomes entitled are deemed to have been ceded to Legal Aid SA. When an applicant becomes entitled to any financial benefit as a result of a settlement or a judgement at any stage after legal aid was granted, a percentage of this benefit must be deducted and paid to Legal Aid SA.

4.53 Generally, people who qualify for legal aid at State expense are people who cannot afford to pay for their own legal representation. Legal aid is provided through salaried legal practitioners, or Judicare practitioners, who are paid in terms of the Legal Aid manual prescribed in section 24 of the Legal Aid South Africa Act 39 of 2014. The manual contains the tariff of fees and disbursement for legal services rendered by commissioned practitioners in criminal and civil matters.⁶⁵

4.54 An applicant for legal aid may appeal to the director and thereafter to the Chairman of the Legal Aid Board in the event that legal aid is refused. Decisions on the provision of legal aid in criminal matters may be subject to review by the High Court after internal appeals have been exhausted.

4.55 In criminal cases, legal aid is available to all indigent persons who are physically resident in South Africa. In civil cases, legal aid is available to all indigent people who are physically resident in South Africa and who are citizens or permanent residents of the country. In exceptional circumstances, the director may grant legal aid in a matter that is

⁶³ Legal Aid South Africa, "Legal Aid manual", Annexure B (undated).

⁶⁴ *Ibid*, 26. To qualify for legal aid at State expense, an individual person must earn less than R7400 per month after tax, and less than R8000 per month after tax for households (<https://legal-aid.co.za/how-it-works> (accessed on 18 April 2019)).

⁶⁵ See also page 47 of the Legal Aid manual.

justiciable in a South African court, even though the applicant does not meet the residence requirement. The 'physical residence' requirement does not apply to asylum seekers under the Hague Convention. However, the Act contains no definition of the term 'indigent'. It merely states that a person seeking legal aid bears the onus of showing that he or she is unable to afford the cost of legal representation, has made full disclosure of all relevant facts, and has a lifestyle that is consistent with the alleged inability.

4.56 There is a strong case for setting tariffs for criminal matters. Because they do not exist, the investigation may show that there is no justification for disparity based on one's economic standing in life. The mechanism for determining tariffs would be guided by the principles contained in the Commission's report. If the Commission were to say that there should be tariffs in criminal matters, it would have to provide guidance about how much a practitioner who has been practising for two years might charge, compared with a practitioner who has been in practice for ten years. In other words, to what extent would the tariffs be flexible? If legal fees were to be negotiable, on what basis would such negotiation take place?

4.57 The Constitution has placed a heavy burden on Legal Aid SA, as it provides that detained persons, including sentenced prisoners, and accused persons, are entitled to be provided with the services of a legal practitioner at State expense if substantial prejudice would otherwise result (see sections 35(2)(c) and 35(3)(g)).⁶⁶ Although this is only relevant in criminal matters, it has had the effect that fewer funds are available to assist civil litigants. For this reason, Legal Aid SA has begun to create Legal Aid South Africa Local Offices, staffed by their own employees; and it cooperates with legal aid clinics attached to various universities to provide more cost-effective legal services. In addition, a number of advice and legal information centres are administered by various non-governmental organisations, in an effort to make these services more accessible and to standardise their quality. Legal Aid SA also has cooperation agreements with some of these centres.

4.58 The concept of what is reasonable for a legal practitioner to charge is an international phenomenon that has compelled many governments around the world to look at how they address the issue of exorbitant litigation costs in order to broaden access to justice. In the South African context, criminal litigation is mostly affected by high costs, since there is no limitation on the amounts that lawyers may charge, given the lack of tariffs for criminal matters.

⁶⁶ See also section 4(1)(f) of the Legal Aid South Africa Act 39 of 2014.

4.59 In South Africa, an accused person who wishes to be legally represented in a criminal trial is represented by a legal practitioner at his/her own cost; or has State-funded representation; or is unrepresented (self-represented), although State-funded representation is always arranged on such occasions.⁶⁷ The right of an accused person to be represented at State expense is provided for in section 35(3)(g) of the Constitution.⁶⁸ However, limitations to the right are provided for in section 35(3)(g) of the Constitution. The limitations are the following:

- a) The accused person has no right to choose the legal practitioner to be assigned to him/her, although the assigned legal practitioner must be able to provide competent legal representation. The overwhelming majority of criminal matters are dealt with by salaried attorneys, advocates, and candidate attorneys employed by Legal Aid SA.
- b) Legal aid is means tested. While the ultimate test is whether substantial injustice would otherwise result, and while persons who cannot afford the cost of their own legal representation are given legal aid even if they exceed the means test, legal aid remains largely for the poor.⁶⁹

4.60 It is vital to look at Legal Aid South Africa Local Offices to ascertain whether they are providing cost-effective legal services to the poor and the indigent. It is also important to ensure that lawyers to whom legal aid matters have been referred are acting with integrity and professionalism, and that they are not abusing the aim of legal aid, which is to provide competent legal advice and representation to those who cannot afford it.

4.61 The current legal costs regime in South Africa pertaining to criminal proceedings has been criticised because resources are wasted on unacceptable delays and postponements.⁷⁰ An accused person is often faced with being held in an overcrowded awaiting trial prison for a long period of time after his matter has been postponed.⁷¹ In

⁶⁷ Hundermark, P, "Access to justice and legal costs" (September 2018), 9. See also Mlambo, D, "The reform of the costs regime in South Africa" (September 2010), 3.

⁶⁸ "Every accused person has the right to a fair trial, which includes the right (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial justice would otherwise result, and to be informed of the right promptly."

⁶⁹ Mlambo, D, "The reform of the costs regime in South Africa: Part 1". Paper delivered at the Middle Temple and SA Conference, September 2010 (April 2012), *The Advocate*, 51.

⁷⁰ Mlambo, D, "The reform of the costs regime in South Africa: Part 1". Paper delivered at the Middle Temple and SA Conference, September 2010 (2012), 28.

⁷¹ *Idem*.

addition, the court-enforced provision of legal aid in lengthy and complex criminal matters poses a risk for Legal Aid SA with its limited funding and lack of reserves.⁷²

4.62 Legal Aid SA primarily focuses on criminal matters due to lack of resources.⁷³ In 2014, criminal matters accounted for 90% of Legal Aid SA's work.⁷⁴ The HSRC has asked whether Legal Aid SA's area of operation needs to be extended.⁷⁵

4. Legal aid position in Canada

4.63 In Canada, legal aid is limited by areas of practice and by financial criteria.⁷⁶ According to Glenn, legal aid is generally available in criminal law matters, immigration and refugee law, family law, and housing matters.⁷⁷ The author states that to be eligible for legal aid, a single person must generally be earning under \$17,000, and in some provinces well under that – often as little as \$12,000.⁷⁸ He states that eligibility may be maintained at slightly higher figures if the applicant makes a contribution to the legal costs. There are also maximum rates for capital assets.⁷⁹ Section 2 of the Legal Services Society Act, 2002 of British Columbia established the Legal Services Society (LSS) with the object of assisting individuals to resolve their legal problems and facilitate access to justice, and to administer an effective and efficient system for providing legal aid to individuals in British Columbia.⁸⁰

4.64 In remunerating lawyers who perform legal services on behalf of the Society, the LSS makes use of tiered rates or differential tariff rates based on the lawyers' exact date on which they were called to the Bar in Canada. There are three tiers:

Tier 1 Less than 4 years' call,

Tier 2 4 or more years and less than 10 years' call, and

⁷² *Idem.*

⁷³ Human Sciences Research Council, "Assessment of the impact of decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society: Final report" (November 2015), 169.

⁷⁴ *Ibid.*

⁷⁵ Human Sciences Research Council, "Assessment of the impact of the decisions of the Constitutional Court and Supreme Court of Appeal on the transformation of society: Final report" (November 2015), 169.

⁷⁶ Glenn, HP, "Costs and fees in common law Canada and Quebec". Faculty of Law and Institute of Comparative Law, McGill University, 9.

⁷⁷ *Idem.*

⁷⁸ *Idem.*

⁷⁹ *Idem.*

⁸⁰ Section 9 of the Legal Services Act, 2002.

*Tier 3 10 or more years' call.*⁸¹

4.65 The guide to how the LSS compensates lawyers for their work on legal aid contracts makes provision for, among other things, the Disbursements Tariff; Family Tariff; Criminal Tariff; Child Family Community Service Act (CFCSA) Tariff; Immigration Tariff; and Appeals and Judicial Review Tariff.⁸²

5. Questions for consideration

1. Why are there no tariffs in non-litigious criminal matters? Should there be tariffs in non-litigious criminal matters? What impact would the introduction of tariffs have on the current system?
2. Why are there no tariffs in litigious criminal matters? Should there be tariffs in litigious criminal matters? What impact would the introduction of tariffs have on the current system?

E. State legal services

4.66 Like private legal services, State legal services are also categorised into litigation and non-litigation legal services. Litigious legal services are further categorised into criminal and civil litigation. The National Director of Public Prosecutions is responsible for the State prosecutorial service, whereas State civil litigation is the responsibility of the State Attorney.⁸³

4.67 According to the DOJCD Framework for the Transformation of State Legal Services ("Framework policy document"), the most common forms of litigation involving the state include the following:

- (a) *diverse types of civil litigation including appeals in the SCA and High Courts and Specialised Courts with the statutes of a High Court;*
- (b) *State defence of officials in various forums in relation to criminal and civil cases and inquests;*
- (c) *Labour matters; and*
- (d) *Legal services and applications to the High Court in terms of The Hague Convention on International Civil Court Child Abduction.*⁸⁴

⁸¹ Legal Services Society Tariffs, "General Terms and Conditions".
<https://lss.bc.ca/lawyers/tariffGuide.php> (accessed on 11 August 2018).

⁸² *Idem.* Also the Legal Aid Ontario "Disbursement Handbook" (April 2016).

⁸³ DOJCD, "A framework for the transformation of the State Legal Service", 14. See also section 35(6) of the LPA.

⁸⁴ *Idem.*

4.68 Non-litigious legal services performed by State Legal Services (State Attorney and State Law Advisers) include the following:

- (a) *drafting and/or settling of all types of agreements, both simple and complex, on behalf of various client departments;*
- (b) *rendering of legal opinions to internal and external role-players;*
- (c) *certification of bills in terms of parliamentary rules;*
- (d) *contract administration, which involves the drafting, negotiation, approval, implementation and oversight of contracts; and*
- (e) *conveyancing and notarial services.*⁸⁵

4.69 The Framework policy document outlines various mechanisms to be adopted and implemented by the DOJCD with the aim of transforming State legal services in order to bring them in line with the ethos and values of the Constitution. The approach adopted in the Framework policy document is two-pronged:

- (a) *Firstly, it seeks to articulate the policy and regulatory framework necessary to transform state legal services to be consistent with the broad reform of the justice system as mandated by the Constitution.*
- (b) *Secondly, it provides for the implementation of immediate interventions for the comprehensive consolidation and coordination of state legal services as part of a broader process of organisational reform to enhance institutional efficiency.*⁸⁶

4.70 Section 35(6) provides that:

The Minister may by notice in the Gazette determine maximum tariffs payable to legal practitioners who are instructed by any State Department or Provincial or Local Government in any matter.

4.71 The State Attorney's office is presently working on a national legal services protocol and the development of uniform maximum tariffs for the procurement of legal services by State departments and provincial and local government. Among the problems bedevilling State legal services are fraudulent practices and fee overreaching. The *Pretoria Society of Advocates v Geach and Others*⁸⁷ matter dealt with disciplinary proceedings of thirteen members of the Pretoria Society of Advocates who were charged for violating the Uniform Rules of the GCB against double-briefing and overreaching in road accident fund matters. There is a need for more effective ways to settle disputes involving the State faster and more cheaply.

⁸⁵ *Idem.*

⁸⁶ *Ibid*, 12.

⁸⁷ 2011 (6) SA 441. The court defined 'overreaching' to mean "taking unfair commercial advantage of another, especially by fraudulent means, cheat, deceive, defraud, dupe, exceed, outsmart, outwit, mislead, trick", para 17.

F. Questions for Chapter 4

1. Are there sound reasons for not having statutory tariffs in non-litigious civil matters? What impact would statutory tariffs have on the current system? What are the advantages of having statutory tariffs in non-litigious civil matters?
2. Is there a lack of statutory tariffs for litigious civil matters? If so, should statutory tariffs be introduced in all litigious civil matters?
3. Can the tariffs used by Legal Aid SA and the State Attorney's Office in criminal and civil matters be used as benchmark for tariffs in general? Would poor and indigent people have more access to justice if these tariffs were used for benchmarking purposes?
4. How can the provision of section 300 of the Criminal Procedure Act 51 of 1977 be employed in order to reduce legal costs for parties?
5. Does Legal Aid SA's area of operation need to be extended?
6. Why are there no tariffs in non-litigious criminal matters? Should there be tariffs in non-litigious criminal matters? What impact would the introduction of tariffs have on the current system?
7. Why are there no tariffs in litigious criminal matters? Should there be tariffs in litigious criminal matters? What impact would this have on the current system?

Chapter 5: Attorney-and-client costs and contractual freedom

A. Introduction

5.1 Three topics are discussed under this Chapter. First, two questions are discussed: whether it is desirable to give users of legal services the option of voluntarily agreeing to pay for fees for legal services less than or in excess of any amount that may be set by the mechanism; and what the position in other jurisdictions is. Second, mandatory fee arrangements are discussed. The two principal questions in respect of which comment and input is invited are: (1) whether every legal practitioner who deals with a client should be obliged to conclude a fee arrangement with that client prior to the commencement of the provision of legal services; and (2) what the consequences should be if there is no mandatory fee arrangement.

5.2 Third, contingency fee arrangements are discussed, looking the scope of the problem, an analysis of case law, the impact of class action claims on contingency fees, and the position in other jurisdictions. The recovery of costs by legal practitioners rendering free legal services is also discussed under this chapter.

B. Desirability of giving users of legal services the option of voluntarily agreeing to pay fees for legal services less than or in excess of any amount that may be set by the mechanism

5.3 Section 35(3) of the LPA provides that:

Despite any other law to the contrary, nothing in this section precludes any user of litigious or non-litigious legal services, on his or her own initiative, from agreeing with a legal practitioner in writing, to pay fees for the service in question in excess of or below any tariff determined as contemplated in this section.

5.4 The Commission invites input and comments on the following question, among others:

- (a) Is it desirable to give users of legal services the option of voluntarily agreeing to pay fees for legal services less than or in excess of any amount that may be set by the mechanism?

5.5 The interpretation of section 35(3) of the LPA is discussed in detail in Chapter 3 of this issue paper. Section 35(3) provides that the user of legal services can, on his or her own initiative, also suggest that they pay less for the service than the set fee or tariff. The mechanism, it seems, should not merely determine a maximum fee or tariff, but also a minimum one. It is not clear why there is a need to determine a minimum fee or tariff. Surely competition between legal practitioners should be allowed? The question is how to curb excessive fees and not to prevent so-called “undercharging”.

5.6 The process to initiate legal proceedings commences with the selection of a legal practitioner, negotiation about legal fees, and confirmation of the decision to represent the client. Toothman and Ross state that:

At first glance, one might assume that the lawyer-client relationship is no different from the contractual relationship between any master and servant. The legal relationship between lawyer and client is, however, unique in law. While the lawyer-client relationship begins as a contractual relationship for the provision of professional services, that does not end the matter. Seldom does a client stand on equal footing with an attorney in the bargaining process. Necessarily, the layman must rely upon the knowledge, experience, skill and good faith of the professional. Only the attorney can make an informed judgment as to the merit of the client's legal rights and obligations, the prospects of success or failure, and the value of the time and talent which he must invest in the undertaking.¹

5.7 Section 2 of the Competition Act provides that the purpose of the Act is, among other things, to provide consumers with competitive prices and product choices.²

5.8 In her submission to the Department of Justice and Correctional Services on the LPB, Ms Makhaya of the Competition Commission states that:

The Bill is, however, silent on whether legal practitioners can discount below the fees set by legislation. The adoption of the (Bill) as is will mean that legal practitioners, juristic entities and justice centres would be prohibited from accepting remuneration for professional services other than at the tariff prescribed by law. This would practically mean that legal

¹ Toothman, JW and Ross, WG, *Legal fees law and management* (2003), 11.
² Competition Act 89 of 1998.

*practitioners would not be able to charge fees below the recommended minimum tariffs (fee structure) where prescribed.*³

5.9 Concerns have been raised by the Competition Commission about anti-competitive practices and the question of whether legal practitioners can discount their fees below the fees set by legislation.⁴ Section 2(1)(b) of the Contingency Fees Act and item 12.3(2) of the Schedule to the regulations in terms of that Act only provide that the agreement may stipulate that the legal practitioner shall be entitled to fees equal to or higher than his/her normal fees. Could it be that section 35(4)(e) of the LPA is intended to cure the defect in the Contingency Fees Act by ensuring that market forces play a major role in determining the amount of legal fees payable to legal practitioners?⁵

5.10 Rautenbach states that Rule 7.2.3 of the Uniform Rules of Professional Ethics permits the reduction of fees marked by counsel by agreement within one month of marking of the brief by counsel.⁶ If there is to be any alteration of the brief more than a month after it has been marked by counsel, the Bar Council's consent must be obtained.⁷ Rule 7.2.3 of the Uniform Rules of Professional Ethics provides as follows:

*7.2.3 Once marked, the fee may not be increased or reduced by reason of the result of the case, nor may a fee in any circumstances be altered later than one month after it has been marked unless the consent of the Bar Council to make such alteration is obtained.*⁸

5.11 In Uganda and Kenya, the practice of 'undercutting' by legal practitioners is prohibited. Rule 4 of the Advocates (Remuneration and Taxation of Costs) Rules of Uganda provides as follows:

No advocate shall accept or agree to accept remuneration at less than that provided by these Rules except where the remuneration assessed under these Rules would exceed the sum of twenty thousand shillings, and in that event the agreed fee shall not be less than twenty thousand shillings.

³ Makhaya, T, "Competition Commission's submission to the Department of Justice and Constitutional Development on the Legal Practice Bill" (21 May 2013), 5.

⁴ In her submission to the Department of Justice and Constitutional Development on the LPB, Ms Makhaya stated that the Bill does not provide for legal practitioners to enter into a contingency fee arrangement as provided for in the Contingency Fees Act. According to the Commission, contingency fees may be anti-competitive. The Commission is concerned that the absence of provisions in the Bill dealing with the fate of contingency fees as far as the permission and review of such are concerned may cause unnecessary confusion in the profession at a later stage.

⁵ Section 35(4)(e) should be read together with section 35(12) of the LPA, which provides that "[T]he provisions of this section do not preclude the use of contingency fee agreements as provided for in the Contingency Fees Act, 1997 (Act No.66 of 1997)".

⁶ Rautenbach, F, "Compromising counsel's fees" (April 2012), *The Advocate*, 49.

⁷ *Idem*.

⁸ *Idem*.

5.12 The scope of the Ugandan Advocates (Remuneration and Taxation of Costs) Rules covers both contentious and non-contentious matters.⁹ Similarly, Order 36 of the Kenya Advocates Remuneration Order provides as follows:

36. Undercutting

- (1) *Any advocate who holds himself out or allows himself to be held out, directly or indirectly and whether or not by name, as being prepared to do professional business at less than the remuneration prescribed, by order, under this Act shall be guilty of an offence.*
- (2) *No advocate shall charge or accept, otherwise than in part payment, any fee or other consideration in respect of professional business which is less than the remuneration prescribed, by order, under this Act.*¹⁰

C. Mandatory fee arrangements

5.13 Section 35(4) of the LPA provides that the SALRC must investigate *the obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services.*

5.14 This Chapter considers the following principal questions:

- (a) Should every legal practitioner who deals directly with a client be obliged to conclude a fee arrangement with that client prior to the commencement of the provision of legal services? What should that agreement deal with? What more needs to be covered other than the matter set out in section 35(7) of the LPA – that is, the written cost estimate notice?
- (b) What should the consequences be if there is no mandatory fee arrangement? Must the sanction be that the legal practitioner cannot demand payment for any service rendered in the absence of such an agreement?
- (c) What is the position in other jurisdictions?

1. Should legal practitioners be obliged to conclude mandatory fee arrangements with their clients?

5.15 In recent years, government has enacted two pieces of legislation with the purpose of establishing a legal framework for achieving and maintaining a consumer market that is

⁹ See Rule 2 of the Advocates (Remuneration and Taxation of Costs) Rules of Uganda.
¹⁰ The statutory tariffs for fees in respect of non-litigious matters in Kenya are dealt with in Chapter 4 of this issue paper.

fair, accessible, efficient, sustainable, and responsible for the benefit of consumers generally.¹¹ The National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008 enhance the social and economic welfare of South Africans by promoting equity in the credit market, balancing the respective rights and responsibilities of credit providers and consumers,¹² improving consumer awareness and information, and encouraging responsible and informed consumer choice and behaviour.¹³

5.16 Section 35 of the LPA follows a similar approach: it *introduces two compulsory documents that are to be provided to the client at the start of the mandate, namely:*

- (a) *the written costs estimate; and*
- (b) *the written agreement to appoint the attorney and pay the estimated costs.*¹⁴

5.17 Section 35(7) of the LPA provides that:

When an attorney or advocate referred to in section 34(2)(b) first receives an instruction from a client for the rendering of litigious or non-litigious legal services, or soon as practically possible thereafter, that attorney or advocate must provide the client with a cost estimate notice, in writing, specifying all particulars relating to the envisaged costs of the legal services, including the following:

- (a) *the likely financial implications including fees, charges, disbursements and other costs;*
- (b) *the attorney's or advocate's hourly fee rate and an explanation to the client of his or her right to negotiate the fees payable to the attorney or advocate;*
- (c) *an outline of the work to be done in respect of each stage of the litigation process, where applicable;*
- (d) *the likelihood of engaging an advocate, as well as an explanation of the different fees that can be charged by different advocates, depending on aspects such as seniority or expertise; and*
- (e) *if the matter involves litigation, the legal and financial consequences of the client's withdrawal from the litigation as well as the costs recovery regime.*

5.18 The compulsory documents to be provided by an attorney or advocate referred to in section 34(2)(b) of the LPA are discussed below:¹⁵

¹¹ See section 3(1) of the Consumer Protection Act 68 of 2008 and section 3 of the National Credit Act 34 of 2005.

¹² Section 3(d) of the National Credit Act, 2005.

¹³ Section 3(1)(e) of the Consumer Protection Act, 2008.

¹⁴ Hussain, I *et al.*, *Case management in our courts* (2016), 85.

¹⁵ *Ibid*, 85.

(a) Written agreement to appoint an attorney and section 34(2)(b) advocate

5.19 The agreement to appoint an attorney or an advocate referred to in section 34(2)(b) of the LPA must be in writing. The section 34(2)(b) advocate is one who renders legal services in expectation of any fee, commission, gain, or reward as contemplated in the LPA or any other applicable law, upon receipt of a request directly from a member of the public or from a justice centre for that service. The written agreement must be entered into in respect of litigious and non-litigious legal services.

5.20 Section 50 of the Consumer Protection Act (CPA) provides that:¹⁶

- (1) *The Minister [member of the Cabinet responsible for consumer protection matters] may prescribe categories of consumer agreements that are required to be in writing.*
- (2) *If a consumer agreement between a supplier and a consumer is in writing, whether as required by this Act or voluntarily –*
 - (a) *it applies irrespective of whether or not the consumer signs the agreement; and*
 - (b) *the supplier must provide the consumer with a free copy, or free electronic access to a copy, of the terms and conditions of that agreement, which must –*
 - (i) *satisfy the requirements of section 22; and*
 - (ii) *set out an itemized break-down of the consumer's financial obligations under the agreement.*

5.21 Section 22 of the CPA deals with the right to information in plain and understandable language. Section 22(2) of the CPA provides that:

- (2) *For the purpose of this Act, a notice, document or visual representation is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the notice, document or visual representation is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the notice, document or visual representation without undue effort, having regard to –*
 - (a) *the context, comprehensiveness and consistency of the notice, document or visual representation;*
 - (b) *the organization, form and style of the notice, document or visual representation;*
 - (c) *the vocabulary, usage and sentence structure of the notice, document or visual representation; and*
 - (d) *the use of illustrations, examples, headings or other aids or reading and understanding.*

5.22 It goes without saying that a written agreement to appoint an attorney or a section 34(2)(b) advocate must comply with the requirements of section 22(2) of the CPA. In *Tjatji*

¹⁶ Act 68 of 2008.

v Road Accident Fund,¹⁷ the court set aside the contingency fee agreement on the grounds that the agreement was silent on what would constitute success or partial success, and that the amount payable and the method of payment were all decided after the legal practitioner had commenced with his work. The court held that such a procedure is contrary to the provisions of the Act.

5.23 In the *Dumse v Mpambaniso* matter,¹⁸ a 64-year-old pensioner who left school after completing Sub-B [Grade 2] was seriously injured in a motor vehicle collision. His right foot was crushed in the collision, as a result of which his leg had to be amputated below the knee. He instructed his attorney to pursue his claim against the RAF. He entered into a fee arrangement with his attorney that resulted in his being charged about 84% of the amount that the attorney recovered from the RAF.¹⁹ During the course of his instructions to the attorney, he was presented with various documents that he was required to sign. He assumed that his attorney was bona fide, and signed the documents, although he was not certain about their contents.²⁰ He stated that the question of fees was not discussed with him. However, when he enquired, he was told that this “would be discussed later”.²¹

(b) Written cost estimate notice

5.24 In terms of section 35(7) of the LPA, a written cost estimate notice must comply with the following requirements:

- (a) It must be provided in litigious and non-litigious matters;

5.25 The requirement that a written costs estimate notice be provided not only in contentious matters but also in non-contentious matters is a step in the right direction. The CPA defines an ‘estimate’ to mean *a statement of the projected total price for any service to be provided by a supplier, including any goods or components to be supplied in connection with that service*.²²

- (b) It must be provided at the earliest available opportunity – that is, at first consultation with the client or as soon as possible immediately thereafter;

¹⁷ *Tjatji v Road Accident Fund* [2013] (2) SA 632 (GSJ).

¹⁸ [2012] SA 974 (ECD).

¹⁹ *Ibid.* para 3.

²⁰ *Ibid.* para 6

²¹ *Ibid.* para 7.

²² Section 1 of the Consumer Protection Act 68 of 2008.

5.26 The so-called ‘Section 68 Letter’ of the Solicitors’ (Amendment) Act 1994 (Ireland) prohibits solicitors from commencing with their legal work without having provided a cost estimate notice to their clients. Section 68(1) clearly states that the Letter must be provided upon *taking of instructions to provide legal services to a client, or as soon as is practicable thereafter*.

- (c) It must be in writing;

5.27 Toothman and Ross point out that “the best way to begin a lawyer-client relationship is with a written retention agreement. A fair agreement builds trust between lawyer and client and creates expectations that, so long as those expectations are being met, also reassure[s] the client that all is going according to plan. Without an agreement or other reassurance, the client’s anxiety about the case and fear of the unknown fees may grow to the point that it poisons the relationship, for no good reason”.²³

- (d) It must specify all the particulars relating to the envisaged costs, including the following:
 - (i) the likely financial implications, including fees, charges, disbursements, and other costs.

5.28 Section 68(9) of the Solicitors’ (Amendment) Act, 1994 (Ireland) states that, in this section, “charges” includes *fees, outlays, disbursements, and other expenses*. The intention of the Legislature is to include as many actions and activities with financial implications as possible in the written cost estimate.

- (ii) the attorney’s or advocate’s hourly fee rate, and an explanation to the client of his or her right to negotiate the fees payable to the attorney or advocate;

5.29 It is important that the written cost estimate notice include counsel’s fees, since counsel fees are treated as disbursements in an attorney’s bill of costs,²⁴ and therefore clients are usually not involved in the negotiation of counsel fees. In Victoria (Australia), a practitioner is required to provide a client with the right to negotiate a costs agreement.²⁵

- (iii) an outline of the work to be done in respect of each stage of the litigation process, where applicable;

²³ Toothman, JW and Ross, WG, *Legal fees law and management* (2003), 16.

²⁴ Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 121.

²⁵ Australian Law Reform Commission, “Managing justice: A review of the federal civil justice system”, Report 89, para 4.28.

5.30 Hussain *et al.*²⁶ provide the following outline of the stages involved in a litigation process:

- (a) **Stage 1: Preliminary research**
[Consultations with the client or primary witnesses, other witnesses and experts; disbursements; drafting of power of attorney to litigate; drafting letters of authority; relevant communication; copies, file administration; legal advice; fact investigation; perusal of documents; consideration of evidence; case analysis; determination of court jurisdiction; pre-litigation correspondence; settlement exchanges or meetings; alternative dispute mechanisms]
- (b) **Stage 2: The official commencement of litigation for the client**
[Drafting of summons, particulars of claim, or declaration; founding papers; counter claim, third party claim, or defending the claim]
- (c) **Stage 3: The exchange of pleadings or papers**
[Perusal or drafting of notice of intention to defend; notice of opposition; opposing provisional sentence summons; drafting heads of argument; paginating and preparing court file; research; appearing at the hearing for provisional sentence, plea, counter claim, plea to counter claim, replication, rejoinder, surrejoinder, rebutter, surrebutter; opposing papers in motion proceedings, replying papers in application; any further sets of papers in application]
- (d) **Stage 4: Interlocutory issues**
[Drafting application for summary judgement; opposing summary judgement; paginating and preparing court file; research; drafting heads of argument to present during hearing of application; appearing at the hearing; appeal where summary judgement is granted; calling for security; refusing or providing security; application to enforce notice or founding; opposing or other papers; paginating and preparing court file; drafting heads of argument to present during hearing of application; appearing at hearing; irregular step proceedings; exceptions; applications to strike out; other applications and attendances; applications for interim payments; applications for orders suspending execution; applications for curatorship; notice of bar or related steps; removal of bar; condonation; settlement negotiations; offers to settle; court-annexed mediation; edictal citation or substituted service; joinder process; applications to intervene; drafting and making submissions as amicus curiae; process to change parties; making settlements an order of court; applying for or opposing postponements; applications to review taxation; process to authenticate documents executed outside South Africa for use in South Africa; delivering documents throughout; correspondence and communications]
- (e) **Stage 5: The close of pleadings and set-down**
[checking court file and attending to update; drafting or perusing agreement that pleadings are closed; filing of agreement with registrar or clerk of court; obtaining hearing date from registrar or clerk; draft notice of set-down; delivering notice of set-down]
- (f) **Stage 6: Exchange of information before trial**
[Discovery; medical examinations; inspection of things, plans, diagrams, models, photographs]
- (g) **Stage 7: Preparation for trial or hearing**
[subpoena for witnesses and documents]
- (h) **Stage 8: The hearing**

²⁶

Hussain, I *et al.*, *Case management in our courts* (2016), 87-92.

- (i) **Stage 9: Recovery of costs and execution; and**
- (j) **Stage 10: Appeals and reviews.**

- (iv) the likelihood of engaging an advocate, as well as an explanation of the different fees that can be charged by different advocates, depending on aspects such as seniority or expertise;

5.31 This is in line with section 68(1) of the Solicitors' (Amendment) Act, 1994, which provides that, where the legal services involve contentious business, the solicitor must furnish the client *with particulars in writing of the circumstances in which the client may be required to pay costs to any other party or parties, and the circumstances, if any, in which the client's liability to meet the charges that will be made by the solicitor of that client for those services will not be fully discharged by the amount, if any, of the costs recovered in the contentious business from any other party or parties.*

- (v) if the matter involves litigation, the legal and financial consequences of the client's withdrawal from the litigation as well as the costs recovery regime.

5.32 The Working Group recommended that the Section 68 Letter should "contain a 'cooling off' provision, showing costs incurred or unavoidable and those which will ensure if the case is proceed with".²⁷

5.33 The LSSA is of the view that the provisions of subsection 7 are unworkable and unfair for the following reasons:²⁸

- a. "The section places the obligation to render cost estimates only on attorneys and section 34(2)(b) advocates. There is no such obligation on referral advocates. This approach is unfair as it does not sufficiently address the following:
 - i. Before the promulgation of the Legal Practice Act, the Constitutional Court highlighted the fact that counsel (as opposed to attorneys) sometimes overcharge in an unacceptable manner and this should be addressed:

"[O]ur judgement affects only what the winning party may recover, in party and party costs, from the loser. The winner remains liable, as between attorney and client, for counsel's full fees, to the extent that these are reasonable. It is the concept of what is reasonable ...to charge that this judgement hopes to influence. We feel obliged to express our disquiet at how counsel's fees have burgeoned in recent years. To say that they have skyrocketed is no loose metaphor, in a country where disparities are gross and poverty is rife, to

²⁷ *Ibid*, 40.

²⁸ LSSA, letter to the Minister of Justice and Correctional Services dated 4 July 2018.

countenance appellate advocates charging hundreds of thousands of rands to argue an appeal.

"...skilled professional work deserves reasonable remuneration, and...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 goes beyond what the market can bear. Many counsel...are accomplished and hard working. Many take cases pro bono, and some in addition make allowance for indigent clients in setting their fees. We recognize this and value it. But those beneficent practices should find a place even where clients can pay, as here. It is with these considerations in mind that we fix the fees as we have."²⁹

- ii. Attorneys (who qualify to do so) have for a long time had the right of appearance in the High Court. The section unfairly discriminates against such attorneys who are instructed by their colleagues or correspondents to appear in the High Court. In terms of the section in its current form, the briefed attorneys are required to provide the estimates while advocates who appear in the same forum are not required to do so.
- b. The information required to be specified to the client in writing and verbally, could amount to an information overload, in that:
 - i. In respect of litigation, each stage of the litigation process needs to be outlined. This raises many questions. Where should the outline start and where should it end? For example, does it end on judgement, execution or appeal? In respect of the latter, an appeal can have various levels. Should the estimate at the lowest court level include all levels up to the Constitutional Court? The sub-section should be clarified.
 - ii. How does one deal with the variations in litigation due to the many possible interlocutory applications that may be required to protect the client's rights? Should the estimate include every type of interlocutory possible, irrespective of the likelihood that such interlocutory will only be required if the opponent's conduct necessitated it?
 - iii. The cost estimate envisaged in the current subsection will lead to a lengthy document. Bearing in mind that the information should be in plain language and useful to the consumer, the legislature and the Rules Board should consider to call for input on whether the requirement for an estimate should not be limited to one aspect or stage of the process at a time, with possible reference to what else might occur.
- c. The requirement in subsection 7(a) for attorneys to estimate disbursements, requires knowledge that the attorney might not possess at the outset of the matter.
- d. In terms of subsection 7(d) an attorney or section 34(2)(b) advocate needs to explain the "different fees that can be charged by different advocates." This provision is onerous and requires information which is outside the control or domain of the attorney.
4. The requirement of subsection 8 to explain "any other relevant aspect" is vague and could complicate an already complicated document.
5. We have received comment that practitioners who currently provide estimates due to corporate contractual requirements, spend thousands of rands per cost estimate in order to provide detailed estimates. This aspect of providing estimates, if enforced in respect of all matters, might be counter-productive to the goals of enhancing access to justice (by making matters more affordable).

²⁹

Camps Bay Ratepayers and Residents Association v Harrison and Another (cct 76/12) [2012] ZACC 17 para 10 and 11.

6. The vague reference to contingency fee arrangements do[es] not sufficiently deal with the relationship between this section and the Contingency Fees Act. To what extent should practitioners who assist the public on a contingency fee basis apply section 35?"

5.34 Section 35(7) is not operational yet. This section is intended to strengthen the control of legal services fee agreements by the controlling bodies and the courts. According to Millard and Joubert,³⁰ the implications of the new section 35(7) of the LPA are that legal practitioners will, in future, be required to supply costs-estimates notices in addition to written contingency fee agreements, and that the fees reflected in both documents must reconcile.

2. What should the consequences be in the absence of a mandatory fee arrangement?

5.35 The other provisions of section 35 of the LPA provide as follows:

- (8) *Any attorney or advocate referred to in section 34(2)(b) must, in addition to providing the client with a written cost estimate notice as contemplated in subsection (7), also verbally explain to the client every aspect contained in that notice, as well as any other relevant aspect relating to the costs of the legal services to be rendered.*
- (9) *A client must, in writing, agree to the envisaged legal services by that attorney or advocate referred to in section 34(2)(b) and the incurring of the estimated costs as set out in the notice contemplated in subsection (7).*
- (10) *Non-compliance by an attorney or advocate referred to in section 34(2)(b) with the provisions of this section constitutes misconduct.*
- (11) *If any attorney or an advocate referred to in section 34(2)(b) does not comply with the provisions of this section, the client is not required to pay any legal costs to that attorney or advocate until the Council has reviewed the matter and made a determination regarding amounts to be paid.*

5.36 Among the recommendations made by the Working Group to the Minister for Justice, Equality and Law Reform is that *failure on the part of a solicitor to issue a letter in accordance with the relevant legislative provisions should be subject to a meaningful penalty*. The Working Group recommended that *costs should only be certified as recoverable with reference to the valid section 68 letter or update and that costs which have not been so specified should not be recoverable*.³¹

³⁰ Millard, D and Joubert, Y, "Bitter and twisted? On personal injury claims, predatory fees and access to justice", August 2014, *Private Law and Social Justice Conference*, 135.

³¹ Haran, P, "Report of the Legal Costs Working Group" (November 2005), 41.

5.37 It is submitted that the requirement of a cost estimate notice in the LPA will assist in improving the assessment process of contingency fees, and help address the abuse of normal fees. The LPA mechanisms will require legal practitioners to furnish particulars of the risk and costing in advance to their clients. Clients will also learn in advance the expectations and the cost implications of the impending legal actions. This will assist them in making a more informed decision about whether or not to proceed with the legal action/s. The mechanisms in the LPA will, it is hoped, reduce the abuse and exploitation of indigent clients by their lawyers. Similarly, the introduction of a mandatory fee arrangement between clients and legal practitioners is long overdue. Clients need to know up front what their legal costs/fees are, and such an agreement would set the parameters. Lawyers and clients would be bound by this agreement, and there would need to be safeguards in this agreement to protect clients from abuse and exploitation by their legal practitioners.

5.38 Section 35 of the LPA is a step in the right direction towards achieving access to justice for all clients and reducing the exploitation and abuse of clients by their legal practitioners.

3. Position in other jurisdictions

3.1 Australia

5.39 In 1995, the Australian Law Reform Commission (ALRC) conducted a review of the federal civil justice system, looking at, among other things, the causes of excessive costs of legal services with a view to bring about a simpler, cheaper, and more accessible legal system. In its Report, which was completed in 2000,³² the ALRC states that:

*All Australian jurisdictions regulate the contractual arrangements between lawyers and their clients. Legislation variously provides for lawyers to inform clients about potential costs and allows costs agreements to be cancelled or varied, or prevents enforcement of costs agreements which are unfair or unreasonable.*³³

*Fee agreements between lawyers and clients specify the amount and manner of payment of lawyers' fees, inform clients of the basis on which they will be billed, the fee rates to be charged, and in certain jurisdictions, provide an estimate of the total bill likely to be charged by the lawyer. The disclosure requirements are set out in legal practice rules and legislation.*³⁴

³² Australian Law Reform Commission, "Managing justice: A review of the federal civil justice system", Report 89.

³³ *Ibid*, para 4.24.

³⁴ *Ibid*, para 4.25.

*In Queensland, it is mandatory to have a costs agreement with a client. In New South Wales a practitioner must disclose to the client the basis of calculating costs, billing arrangements, the client's rights to receive a bill and to obtain a review of costs. Where costs cannot be quantified in this way the practitioner must provide an estimate of the likely total amount of the costs.*³⁵

*In Victoria a practitioner must give the client details of the method of costing, billing intervals and arrangements, the clients right to negotiate a costs agreement, an estimate of total costs or a range of estimates, and the client's avenues of complaint.*³⁶

*Practice rules in Tasmania, South Australia and the Australian Capital Territory require disclosure of an estimated range of costs and disbursements, the method of calculating costs and the billing arrangements.*³⁷

3.2 Ireland

5.40 In September 2004, the Irish Minister for Justice, Equality and Law Reform established the Legal Costs Working Group ('Working Group') to examine the level of legal fees and costs arising in civil litigation, and to make recommendations that, in the Working Group's view, would lead to a reduction in the costs associated with civil litigation.³⁸

5.41 The Working Group noted that the Section 68 Letter provides useful information to clients in respect of legal fees. Section 68 of the Solicitors' (Amendment) Act 1994 provides that solicitors must furnish their clients with written particulars regarding the fees that will be charged for the legal services. It provides as follows:

- 68(1) *On the taking of instructions to provide legal services to a client, or as soon as is practicable thereafter, a solicitor shall provide the client with particulars in writing of –*
- (a) the actual charges, or*
 - (b) where the provision of particulars of the actual charges is not in the circumstances possible or practicable, an estimate (as near as may be) of the charges, or*
 - (c) where the provision of particulars of the actual charges or an estimate of such charges is not in the circumstances possible or practicable, the basis on which the charges are to be made, by that solicitor or his firm for the provision of such legal services and, where those legal services involve contentious business, with particulars in writing of the circumstances in which the client may be required to pay costs to any other party or parties and the circumstances, if any, in which the client's liability to meet charges which will be made by the solicitor of that client for those services will not be fully discharged by the amount, if any, of*

³⁵ *Ibid*, para 4.27.

³⁶ *Ibid*, para 4.28.

³⁷ *Ibid*, para 4.29.

³⁸ Haran, P, "Report of the Legal Costs Working Group" (November 2005), 7.

the costs recovered in the contentious business from any other party or parties (or any insurer of such party or parties).

5.42 The Working Group recommended to the Minister for Justice, Equality and Law Reform that the Section 68 Letter should:

- (a) *be furnished to the client within a stated timeframe;*
- (b) *contain details of the work to be done and the estimated costs thereof or the daily or hourly charges applicable;*
- (c) *contain a 'cooling off' provision;*
- (d) *be regularly updated;*
- (e) *give clients the opportunity to cease their action before an material increase in expenditure is incurred.³⁹*

D. Contingency fee agreements

1. Introduction

5.43 The position in common law was that legal practitioners could not enter into contingency fee agreements (CFAs) with their clients without the court's permission. The independence of the legal profession and the duty of legal practitioners to the court precluded their interest in the outcome of their client's case except in exceptional circumstances. The advent of the Contingency Fee Act in 1997 introduced legal fee structuring that was dependent on successful litigation as an exception to the common law prohibition of the CFA.

5.44 Contingency fees are prohibited in criminal and family matters, but are commonly used in civil cases such as personal injury cases, medical negligence matters, and other non-litigious matters.⁴⁰ The risk is that, without proper monitoring of the cap on these CFAs, overreaching may occur.⁴¹ This type of fee arrangement is usually used for accident claims from the Road Accident Fund or medical negligence claims (third party claims). This fee regime is not used in the drafting of a will or in criminal cases in South Africa. CFAs are popular in that they afford injured people the opportunity to try to recover monetary damages for their injuries without having to pay attorney fees up front. The injured person receives money through a settlement or a court order, and pays the attorney a percentage of that money. If the injured person does not recover any money, he or she does not have to pay the attorney's fees. CFAs may be 'risky' for attorneys who will have to work hard to win the case, and if they do not succeed then they will not

³⁹ *Ibid*, 40.

⁴⁰ *Idem*.

⁴¹ *Ibid*, 34.

receive payment for their services. However, the injured person in a CFA is responsible for the attorney's costs irrespective of the result, such as court filing expenses, discovery expenses, and fees for the use of court stenographers or experts or witnesses.

5.45 CFAs are readily used in personal injury matters.

5.46 Thus, with contingency fees, a client pays the lawyer if the lawyer handles the case successfully. They are used in cases where money is claimed, such as cases involving personal injury or worker's compensation. Therefore, contingency fees provide people with an instrument to assist those who do not have a choice but to litigate and to see that justice is done. A CFA has been described as a "poor man's key to the courthouse".⁴²

5.47 Although the Contingency Fee Act was intended to expand the right of access to courts and justice to indigent persons, it became the instrument whereby practitioners who could not distinguish between the commercial interests of their practices and their professional obligations exploited their clients. The abuse of CFAs occurs mostly in cases of significant value. The question is whether there is any risk, and if so, the level and extent of that risk, in any contingency litigation. In many cases there is no real and substantial risk; but the practical difficulty exists for the arranging for the payment of fees and disbursements.

5.48 The question is: Should contingency success fees be discontinued? Contingency fee arrangements have encouraged and facilitated access to justice by people who otherwise would have been excluded. Rather, the problem rests not with the Act or the fees themselves, but with the culture of those legal practitioners who have allowed their own commercial interests to take priority over their relationship with and professional obligations to their clients.

5.49 It is submitted that there are strict requirements in the Contingency Fee Act 66 of 1997 for a valid agreement. In terms of that Act, there must be an explicit agreement between attorney and client, which must be in writing and be signed by both parties.⁴³ The client must also receive a copy. The attorney is entitled to fees and services if the matter is successful. If it is unsuccessful, the attorney works 'for free', and the client only pays for the expenses. If the client wins the case, the attorney is entitled to a fixed amount according to the amount awarded to the client. If the attorney receives a higher fee, he or

⁴² Law Council of Australia, "Percentage based contingency fee agreements – Final report" (May 2014), 5.

⁴³ See section 3 of the Contingency Fees Act 66 of 1997..

she cannot charge a fee exceeding the normal fee by more than 100%. The attorney's fee must not be higher than 25% of the total amount awarded to the client. The attorney must advise the client of ways or options to finance their legal fees for litigation.

5.50 Clarity about the right to withdraw from a CFA must be provided to the client. Settlement procedures must be followed when required or when an offer of settlement is made. The affidavit must contain, *inter alia*, the full terms of the agreement, estimates of the amount and chances of success, an outline of the lawyer's fee, and reasons for settlement.⁴⁴ The client who feels aggrieved by the agreement may refer it to the law society for redress.⁴⁵ The CFA offers two forms of contingency fee agreement:

- (a) 'no win, no fee' agreement in section 2(1)(a), and
- (b) an agreement in terms of which a legal practitioner is entitled to fees higher than a normal fee if the client is successful (section 2 (1)(b)).

5.51 However, this is subject to limitations in section 2 (2). The first type of agreement in terms of section 2(1)(a) is not contentious, because the fees are assessed by a Bill of Costs that can be taxed by the taxing master. However, the second type of agreement poses a 'risk' for legal practitioners. Section 7 of the Contingency Fee Act requires such agreements to be controlled. The interpretation of the Contingency Fee Act has led to many legal practitioners having to weigh the competing interests of the commercial concerns of their practices against their professional obligations to their clients. This has led to abuse.

5.52 In terms of sections 35(4)(e) and (f) of the LPA, the Commission is required to conduct an investigation into the desirability of giving users of legal services the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism contemplated in paragraph (c), and the obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services.⁴⁶ According to section 35(5) of the LPA, the SALRC's investigation must consider the use of CFAs as provided for in the Contingency Fees Act 66 of 1997.

⁴⁴ See section 4 of the Contingency Fees Act. The client has 14 days after signing the agreement to withdraw, in writing to the legal practitioner, from the agreement.

⁴⁵ Right of review in terms of section 5 of the Contingency Fees Act. However, it is rarely used in practice.

⁴⁶ See sections 35(4)(e) and 35 (4)(f) respectively of the LPA.

5.53 Research must be conducted into the CFA regime applicable in South Africa since the coming into operation of the Contingency Fees Act in April 1999. The research must highlight the regime's actual and perceived problems and advantages, and identify any areas that require law reform.

5.54 The goal is to look at the contingency fee regime's actual and perceived problems and advantages; to identify the features that enhance or prejudice contingency fees; to identify any areas that require law reform; and to make the system more efficient and equitable.

2. Scope of the problem

5.55 The basic problems are that the 25% cap apparently does not include reimbursements, such as advocate fees and experts; and that the 25% is seen as an entitlement by attorneys rather than as an overall limit of a fee that must still be reasonable in relation to the work done. Against this background, the following questions are asked:

- (a) Should the applicable legislation be amended, if necessary, to ensure that the 25% cap includes every expenditure incurred as part of the contingency litigation, including experts, counsel, and so on?
- (b) Should a mechanism be created specifically to deal with allegations of excessive fees being charged in contingency litigation in order to ensure that those fees remain reasonable in the light of the circumstances of a case? In other words, should there be a body focusing specifically on preventing the abuse of contingency fee arrangements?

5.56 The determination of fees and tariffs for legal services payable to legal practitioners in terms of the mechanism referred to in section 35(4)(c) of the LPA is a novel phenomenon that is not provided for in the Contingency Fees Act. The Contingency Fees Act makes provision for the determination of a success fee payable to a legal practitioner, and the circumstances and conditions under which the success fee is payable. Currently, in terms of section 2(1) of the Contingency Fees Act, a legal practitioner may charge for legal fees only in the event that the client is successful. The amount of success fees

payable in terms of section 2(2) is limited to 100% of the legal practitioner's normal fees, or not more than 25% of the total amount awarded, whichever amount is the lowest.⁴⁷

5.57 A preliminary literature review of case law on the subject of CFAs reveals that a lack of ethical conduct (dishonesty) on the part of legal practitioners appears to be the major factor contributing to overreaching with clients' fees.⁴⁸ The problem of dishonesty appears to be prevalent in, among others, Road Accident Fund and medical malpractice matters. Plasket J makes an important observation about what appears to be a widespread abuse of the CFA system by legal practitioners: "[A]necdotal evidence within the legal profession points towards wide-spread abuses. This is all cause for grave concern and, if I am correct, a manifestation of endemic corruption embedded in the attorney's profession".⁴⁹

5.58 Despite the clarity provided by the court in *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development*⁵⁰ (SAAPIL), to the effect that a CFA that does not comply with the requirements of the Act is unlawful and invalid, conflicts of interest and excessive fees remain the central problems afflicting the system. These problems could be attributed to a failure by the controlling bodies adequately to monitor compliance with the requirements of the Contingency Fees Act. Although CFAs are generally prohibited in criminal and family law matters,⁵¹ the application of CFAs in personal injury matters, medical negligence claims, and, presumably, in a number of non-litigious matters, provides sufficient reason for the review of the Contingency Fees Act. In the SAAPIL case mentioned above, the court reprimanded the controlling body for failing to monitor the compliance of its members with the provisions of the Act, when it held that:

The Law Society of the Northern Provinces has to date not put in place rules aimed at addressing the pertinent risk of overreaching by its members which may result from contingency fee arrangements. It has also not promulgated a cap to the percentage of the capital that may be recovered by attorneys. Nor has it promulgated a cap on the uplift of the normal fees. The only guideline of any note promulgated by the Law

⁴⁷ In the *Mfengwana v Road Accident Fund* [2016] ZAECGHC 159 matter, Plasket J states that "[t]he practitioner's fee is limited, on a proper reading of the section, to (i) 25% of the amount awarded in the judgement, or (ii) double the normal fee of that practitioner, whichever is the lower", para 52.

⁴⁸ In the *Pretoria Society of Advocates v Geach and Others* 2011 (6) SA 441 (par 17) matter, the court defined 'overreaching' to mean "taking unfair commercial advantage of another, especially by fraudulent means, cheat, deceive, defraud, dupe, exceed, outsmart, outwit, mislead, trick", para 17.

⁴⁹ *Mfengwana v Road Accident Fund*, para 28-29.

⁵⁰ [2013] (2) SA 583 (GNP).

⁵¹ The prohibition is contained in the Schedule to the Regulations (that is, prescribed form of Contingency Fee Agreement) made by the Minister of Justice.

*Society of the Northern Provinces is that the attorney's remuneration must be fair. However, in my view, what is to be regarded as fair, in the context of contingency fee arrangements between attorney and client, is not easily determinable in the absence of proper guidelines relating to the nature and form of contingency fee agreements.*⁵²

5.59 Section 3(3) of the Contingency Fees Act provides that the contingency fee agreement must be in writing and sets out the form and content with which the agreement must comply. This section provides for a number of process issues. These are, among other things, that before the agreement is entered into, the client:

- (a) is advised of any other ways of financing litigation, and of their respective implications;
- (b) is informed of the normal rule that, in the event of his, her or it being unsuccessful in the proceedings, he, she or it may be liable to pay the taxed party-and-party costs of his, her or its opponent in the proceedings; and
- (c) is informed of either the amount payable or the method to be used in calculating the amount payable.

5.60 This investigation will explore whether the process issues currently contained in the Contingency Fees Act are sufficient, or whether more process issues need to be considered and added.

5.61 Millard and Joubert point out that there is an overlap between the LPA and the Contingency Fee Act,⁵³ and contend that the format of the Contingency Fees Act contained in the Schedule to the Regulations is not user-friendly and is written in “archaic” language. No distinction is drawn between two types of agreement, namely (1) an agreement between attorney and client, and (2) an agreement between attorney and counsel.⁵⁴ The authors propose that the template of the agreement must be reviewed.

3. Review of the case law

5.62 Notwithstanding the strict requirements, CFAs have often been circumvented by attorneys. South African case law has proved to be invaluable in protecting clients against abuse and exploitation by the legal profession. In *Price Waterhouse Coopers Inc & Others v National Potato Co-operative Ltd*,⁵⁵ the court examined the origins of contingency fees.

⁵² *South African Association of Personal Injury Lawyers V Minister of Justice and Constitutional Development and Another* [2013] (2) (SA) 583 (GNP).

⁵³ *Ibid*, 577.

⁵⁴ *Ibid*, 566.

⁵⁵ [2004] (9) BCLR 930 (SCA).

The court held that the legislature allowed legal practitioners to undertake speculative action for their clients through increasing fee agreements. However, the court confirmed that the only valid contingency agreement that could be entered into by a legal practitioner was one that was entered into in compliance with the Act. In *De la Guerre v Ronald Bobroff*,⁵⁶ the attorneys charged clients a 30% fee instead of the prescribed 25%. The court confirmed that a contingency fee agreement that does not comply with the Act is invalid. This case is said to have debunked the fiction of a common law contingency fee agreement.

5.63 In *Masango M Nelson v Road Accident Fund and Others*,⁵⁷ the court held that a CFA is an agreement between the attorney and client up front, subject to a two week “cooling off” period, in terms of the Consumer Protection Act. Vat is levied on the legal practitioner and not on the client. This case also held that CFAs are allowed and recognised as being valid, subject to the provision that they will be supervised strictly by the courts to ensure that the rights of the clients in litigation are protected and not compromised. In *Mfengwana v Road Accident Fund*,⁵⁸ the court looked at the impact of section 2 of the Contingency Fee Act. In *Glodo*,⁵⁹ the CFA was scrutinised when the applicant requested that the CFA that he had signed be declared unlawful.

5.64 In *Graham v Law Society of the Northern Provinces*,⁶⁰ the applicants were awarded around R2 million by the Road Accident Fund. However, the attorneys deducted almost half of the award for contingency fees and party-and-party costs. The applicant (Graham) alleged that the respondents (Ronald Bobroff and Partners Inc.) used the so-called

⁵⁶ 22645/2011 [2013] ZAGPPHC 33 13 February 2013. This case also demonstrates the use of multiple different fee agreements by law firms to favour their interests over their clients’ interests.

⁵⁷ [2016] (6) SA 508.

⁵⁸ [2017] (5) SA 445 (ECG). The attorneys profession was criticised for widespread abuse of CFAs.

⁵⁹ The facts were that Mr S Glodo lost a leg as a result of a police shooting. He successfully sued the Minister of Police for R 7.8 million in damages. He accused his former attorney, Mfingwana, of charging more than 60% of his award. He also sought judicial clarity on what lawyers are allowed to claim under contingency fee agreements. According to the Contingency Fees Act, legal practitioners cannot demand payment that exceeds 25% of the total award. Mr Glodo instructed a new attorney, David Shaw, who secured an order in the KZN High Court (Durban) directing that the money that was in Mfingwana’s trust account be paid to Shaw with a full breakdown of the fee claims. Glodo requested a finding that the contingency agreements that he signed were unlawful, and accused Mr Mfingwana of flouting the previous court order because he withheld R1.8m, and he did not pay any interest earned. Glodo sought an order that the 25% should be a “collective limit” for all legal practitioners. He also requested that his previous lawyers should be investigated by their professional bodies. See Broughton, T, “Lawyers eye big bonus after false arrest”, *Sunday Times*, 8th July 2018.

⁶⁰ [2014] ZAGPPHC 496.

'common-law contingency fee agreements' to reverse illegal splits of Road Accident Fund payments.⁶¹ They further alleged that the respondents used these agreements and fraudulent file notes to disguise exorbitant fees that bore little resemblance to the work actually performed.⁶² The Law Society found that this was a *prima facie* case of unprofessional, dishonourable, or unworthy conduct against the attorneys. The *Graham* case is another example of CFAs being concluded contrary to the provisions of the Contingency Fee Act. In *Mathimba and Others v Nonxuba and Others*,⁶³ the attorneys charged their client an amount above the 25% cap. The advocate claimed an amount of 62% of the original pay-out of the amount of R 9 100 000,00. The court found that the 25% cap should be a global amount in all CFAs, and that the CFAs with the legal practitioners were invalid for non-compliance with the Act.⁶⁴ The case of *Van der Merwe & Another v The Law Society of the Northern Provinces and Others*⁶⁵ discussed the question of whether or not the 25% cap includes the fees of an advocate. It was contended that most attorneys do not consider the 25% cap to include advocates' fees. The advocate's fees are regarded as 'disbursements', and these fees are usually borne by the client. It has been mooted by Gert Nel that guidance should be given about the qualification of what constitutes a 'reasonable fee', and what should be regarded as 'overreaching', which is always subject to the scrutiny of either the professional controlling body or the courts.⁶⁶

5.65 The *Pretoria Society of Advocates v Geach and Others*⁶⁷ case dealt with disciplinary proceedings of thirteen members of the Pretoria Society of Advocates who were charged for violating the Uniform Rules of the GCB against double-briefing and overreaching in Road Accident Fund matters. Van Dijkhorst J states that:

When counsel mount the steed of greed and attempt to clear the hurdle of their professional rules their fall inevitably dents the reputation of the profession. In this case the proud reputation of the Pretoria Bar. We write this judgment in sorrow and lament the loss of integrity, in the past the hallmark of the profession of advocates. We sit in judgment on 13 senior members of the Bar, among them two silks, who by their action have brought the good name of their profession into disrepute. They are not

⁶¹ *Ibid.*

⁶² *Idem.*

⁶³ [2018] (85) SA (ECGHC).

⁶⁴ Also see "Court slashes large contingency fees in EC Health and RAF lawsuit", available at [https://www.medicalbrief.co.za/archives/...](https://www.medicalbrief.co.za/archives/) (accessed on 27 November 2018).

⁶⁵ (32616/06) [2008] ZAGPPHC 4 (20 June 2008).

⁶⁶ Nel, G, "Decoding s 2(1)(a) and (b) of the Contingency Fee Act", *De Rebus* (June 2018), 14-18.

⁶⁷ [2011] (6) SA 441.

*novices. They are experts in their particular field of litigation, which is claims against the Road Accident Fund (RAF).*⁶⁸

5.66 It should be noted that the question of whether the Prevention of Organised Crime Act 121 of 1998 and the Prevention and Combatting of Corrupt Activities Act 12 of 2004 apply to dishonesty, fraud, and corruption committed by members of the legal profession was not decided in the *Pretoria Society of Advocates v Geach and Others* case.⁶⁹

5.67 In the *SAPPIL* case,⁷⁰ the Gauteng South High Court dismissed the applicant's contention that the limitation of fees contained in section 2(2) of the Contingency Fees Act is inconsistent with the right of access to justice provided for in section 34 of the Constitution. Furthermore, the court held that any contingency fee agreement that does not comply with the provisions of the Contingency Fees Act is invalid and unlawful. However, despite the watershed judgement delivered by the court in the *SAPPIL* case, there still appear to be problems of CFAs that are concluded contrary to the provisions of the Contingency Fees Act.

5.68 The *Dumse v Mpambaniso*⁷¹ case is another example of an unlawful contingency fee agreement that does not comply with the requirements of the Contingency Fees Act. The agreement, in which the client was a 64-year-old pensioner, provided as follows:

- (a) that the client would be the principal debtor in respect of all legal services rendered in terms of the agreement;
- (b) that the success fees was 84.5% of the normal fees;
- (c) 15% annual increase on hourly rates;
- (d) administrative services were charged at the same rate as attorneys; and
- (e) 2% interest per month on all outstanding disbursements.

5.69 The court set aside the agreement on the basis that it was not capable of alignment with the parameters of the Contingency Fees Act. Similarly, in *Tjatji v Road Accident Fund*,⁷² the court set aside the CFA on the grounds that the agreement on what would constitute success or partial success, the amount payable, and the method of payment were all decided after the legal practitioner had commenced his work. The court held that such a procedure is contrary to the provisions of the Act.

⁶⁸ *Ibid.*

⁶⁹ [2011] (6) SA 441. Also see sections 1 and 2 of the Prevention of Organised Crime Act 121 of 1998, which deal with racketeering.

⁷⁰ [2013] (2) SA 583 (GNP).

⁷¹ [2012] SA 974 (ECD).

⁷² [2013] (2) SA 632 (GCJ).

5.70 According to Justice Mlambo, “[v]ery few agreements in terms of the Contingency Fees Act have been registered with the provincial law societies”.⁷³ There are various reasons why some of the agreements are not registered with the provincial law societies. These include the fact that some of the agreements are probably not in writing – an act that constitutes a breach of the material provision of the Contingency Fees Act.⁷⁴

5.71 The above discussion demonstrates that courts are intervening in cases of abuse of the CFAs by the legal profession.

4. Recovery of costs by legal practitioner rendering free legal services

5.72 Section 92 of the LPA provides as follows:

- (1) *Whenever in any legal proceedings or any dispute in respect of which legal services are rendered for free to a litigant or other person by a legal practitioner or law clinic, and costs become payable to that litigant or other person in terms of a judgement of the court or a settlement, or otherwise, that litigant or other person must be deemed to have ceded his or her rights to the costs to that legal practitioner, law clinic or practice.*
- (2) (a) *A litigant or person referred to in subsection (1) or the legal practitioner or law clinic concerned may, at any time before payment of the costs referred to in subsection (1), give notice in writing to –*
 - (i) *the person liable for those costs; and*
 - (ii) *the registrar or clerk of the court concerned, that the legal services are being or have been rendered for free by that legal practitioner, law clinic or practice.*
- (b) *Where notice has been given as provided for in paragraph (a), the legal practitioner, law clinic or practice concerned may proceed in his or her or its own name, or the name of his or her practice, to have those costs taxed, where appropriate, and to recover them, without being formally substituted for the litigant or person referred to in subsection (1).*
- (3) *The costs referred to in subsection (1) must be calculated and the bill of costs, if any, must be taxed, as if the litigant or person to whom the legal services were rendered by the legal practitioner, law clinic or practice actually incurred the costs of obtaining the services of the legal practitioner, law clinic or practice acting on his or her or its behalf in the proceedings or dispute concerned.*

5.73 In *Thusi v Minister of Home Affairs and Another and 71 other cases matter*,⁷⁵ Goodway & Buck, attorneys for indigent applicants who were not in a position to contribute towards their legal costs, sought an order against the respondents to pay for

⁷³ Mlambo, D, “The reform of the costs regime in South Africa: Part 2”. Paper delivered at the Middle Temple and SA Conference (September 2010), 24.

⁷⁴ Section 3 of the Contingency Fees Act provides that a contingency fee agreement shall be in writing and in the form prescribed by the Minister of Justice.

⁷⁵ [2011] (2) SA 561 (KZP).

the costs of the applications. All amounts claimed by Goodway & Buck were to be paid directly to them and retained as fees. The arrangement between Goodway & Buck and their clients is described as follows in the memorandum:

The bringing by such an Applicant of an application against the Respondents in the High Court is only made possible by the fact that Goodway & Buck are prepared, entirely at their own risk to:

- (a) *without the expectation or requirement of payment by the indigent applicant, prepare and bring the application;*
- (b) *accept the fact that if the application is unsuccessful, not only will they forfeit any costs, but will also forfeit any and/or all disbursements incurred by them in pursuance of the unsuccessful matter;*
- (c) *accept as their payment for the bringing of such applications, only those fees which are recovered by way of taxation or agreement which fees bears no resemblance whatsoever to the substantially increased fees which would in normal circumstances be charged by Goodway & Buck for the rendering of such services.*⁷⁶

5.74 It is clear from the memorandum that the applicants were not obliged to pay their attorneys for the legal services rendered, nor were they obliged to pay for the disbursements incurred by their attorneys in rendering the services. The question before the court was that, if the applicants were not in fact incurring any liability in respect of the costs, should they be awarded any costs? Referring to *Price Waterhouse Meyernel v Thoroughbred Breeders' Association of South Africa*,⁷⁷ the court explained the application of the indemnity principle in the law of costs as follows:

*A costs order – it is trite to say – is intended to indemnify the winner (subject to the limitations of the party and party costs scale) to the extent that it is out of pocket as a result of pursuing the litigation to a successful conclusion. It follows that what the winner has to show – and the Taxing Master has to be satisfied about – is that the items in the bill are costs in the true sense, that is to say, expenses which actually leave the winner out of pocket.*⁷⁸

5.75 The court noted that there are exceptions to the general indemnity principle. The first one is in the High Court rules,⁷⁹ and the second in statutes.⁸⁰ The statutory exceptions include provisions of the Legal Aid Act and section 79A of the Attorneys Act,

⁷⁶ *Ibid*, para 95.

⁷⁷ [2003] (3) SA 54 (SCA) par 18.

⁷⁸ *Thusi v Minister of Home Affairs and Another and 71 other cases* [2011] (2) SA 561 (KZP), para 99.

⁷⁹ Rule 40(7) of the Uniform Rules, in terms of which, when an indigent applicant qualifies for assistance in *forma pauperis*, the attorney can upon successful conclusion of the matter submit the bill for taxation as though the fees would have been entitled.

⁸⁰ *Thusi v Minister of Home Affairs and Another and 71 other cases* [2011] (2) SA 561 (KZP), para 108.

which entitle the Legal Aid Board and a law clinic as defined in the Act respectively to recover costs.

5.76 The Court held that the constitutional right of access to courts “favours the recognition of an exception” under these circumstances. It held that “allowing an exception does not appear to give rise to any greater scope of abuse than exists in other instances where attorneys are permitted to act on a speculative or contingency basis”.⁸¹

5.77 The exception to the indemnity principle was, however, confined by the court to the following categories of cases:

- (a) *where the litigant is indigent and is seeking to enforce constitutional rights against an organ of State;*
- (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.*⁸²

5.78 Section 92 of the LPA involves the cession of costs by a successful party to a legal practitioner, law clinic, or practice that provides legal services for free to the litigant. The legal practitioner, law clinic, or practice may proceed in his, her, or its name to have costs taxed and to recover costs without formal substitution for the party. The bill of costs is taxed as if the party actually incurred the costs of obtaining the services of the legal practitioner, law clinic, or practice. Thus this section allows the legal practitioner, law clinic, or practice to appear ‘on spec’, and he, she, or it can only claim payment of that which he, she, or it can recover from the other side. The costs order made in favour of the client now accrues to the legal practitioner, law clinic, or practice. This section, which can also be open to abuse, may encourage legal practitioners, law clinics, or practices to assist indigent litigants to enforce their rights.

5.79 The question is, would there be any danger in the proposed section 92 of the LPA, which provides that, in circumstances where a legal practitioner, law clinic, or practice appears on behalf of a party, and will only claim payment of that which he, she, or it can recover from the other side, the costs order made in favour of the client is deemed to accrue to the legal practitioner, law clinic, or practice?

⁸¹ *Ibid*, para 110.
⁸² *Ibid*, para 111.

5. Impact of class action claims on contingency fees

5.80 As stated earlier, the advent of the Contingency Fees Act introduced legal fee structuring that was dependent on successful litigation as an exception to the common law prohibition of contingency fee arrangements. According to McQuoid-Mason, “[c]ontingency fees are an exception to the general rule in South Africa that a lawyer should not acquire a proprietary interest in the cause of action or subject matter of litigation that he or she is conducting for a client”.⁸³ Under South African common law, contingency fee arrangements were frowned upon as “traffic in litigation”.⁸⁴

5.81 The CFA was regarded as a “champertous agreement” that funds third party litigation, and this was also found to be unprofessional.⁸⁵ Therefore, concern was raised about the need for contingency fee arrangements to be “carefully watched” to avoid their being “extortionate and unconscionable”, “inequitable”, *mala fide* with the object of “abetting and encouraging unrighteous suits, such as to be contrary to public policy”.⁸⁶ It is submitted that the introduction of the class action procedure in a consumer protection environment will further facilitate access to justice for consumers.⁸⁷ This can also be achieved through legal fee arrangements such as contingency fees.⁸⁸ South African common law requires that a party to litigation must have a direct and substantial interest in the right that is the subject matter of the litigation, and in the outcome of the litigation.⁸⁹

⁸³ See McQuoid-Mason, D, “The delivery of civil legal aid services in South Africa”, 2000, *Fordham Int’l L.*, 111, 137.

⁸⁴ See *Campbell v Welverdiend Diamond Ltd*, [1930] TPD 287.

⁸⁵ See *Lekeur v Santam* [1969] (3) SA 1 (C) 6C-D, and *Law Society v Tottentam and Longinotto* [1904] TS 802.

⁸⁶ See comments of Rose-Innes CJ in *Patz v Salzburg* [1907] TS 526.

⁸⁷ See McQuoid-Mason, D, “The delivery of civil legal aid services in South Africa”, 2000, *Fordham Int’l L.*, 111, 137. The writer argues that “[c]ontingency fees are another method of giving indigent people access to justice in civil cases”. See also Cameron AJA in *De Freitas and Another v Society of Advocates of Natal*, 2001 3 SA 752 (SCA). For a comprehensive and analytically detailed study on the issue of attorney fees in class action cases, see Eisenberg and Miller, “Attorney fees in class action settlements: An empirical study”, 2004, *Journal of Empirical Legal Studies*, 27-78. See also Eisenberg & Miller, “Attorneys fees in class action settlements: An empirical study”, 2004, *Journal of Empirical Legal Studies*, 32.

⁸⁸ The contingency fee arrangement was regarded as an “champertous agreement”. See *Lekeur v Santam*, [1969] (3) SA 1 (C) 6C-D. They were regarded as unprofessional. See *Law Society v Tottenham and Longinotto* [1904] TS 802. For case law on contingency fee arrangements and the common law, see, *inter alia*, *Schweizer’s Claimholders’ Rights Syndicate Ltd v Rand Exploring Syndicate Ltd* [1896] 3 OR; *Hugo and Möller v Transvaal Loan Finance and Mortgage Co* [1894] 1 OR 336; *Green v De Villiers and Others* [1895] 2 OR 289; *Schweizer’s Claimholders’ Rights Syndicate Ltd v The Rand Exploring Syndicate Ltd* [1896] 3 OR 140.

⁸⁹ *Jacobs v Waks* [1992] (1) SA 521 (A).

5.82 The Constitution addresses class actions, providing that any of the following persons are entitled to apply to a competent court for relief: persons acting in their own interest; an association acting in the interest of its members; a person acting on behalf of another person who is not in a position to seek such relief in his or her own name; a person acting as a member of or in the interest of a group or class of persons; a person acting in the public interest.⁹⁰

6. Position in other jurisdictions

5.83 The following jurisdictions will be considered: the United States of America, the United Kingdom, Australia, Canada, India, Brazil, Nigeria, Kenya, and Uganda.

5.84 The purpose of conducting comparative research is to ascertain whether South Africa can learn from these jurisdictions. Specifically: Is our law in line with these international jurisdictions, or does our law exceed the international trends? What can South Africa learn from other jurisdictions? How can our present contingency regime system be improved/amended to increase access to justice?

6.1 The United States of America

5.85 It has been accepted that contingency fee agreements have existed since the 18th century.⁹¹ Such agreements have been described as “the poor man’s key to the courthouse”.⁹² The law in the United States is governed by federal and state law, with each state adopting its own rules for charging contingency fees. The term ‘contingency fee’ is also known as a ‘contingent fee’. If the case is successful, the attorney will receive a specific percentage of any money she has recovered for the injured client or a percentage of the damages recovered by the client. This percentage is usually 33%. Contingency fees are usually used in personal injury cases, but are rarely used in other

⁹⁰ Section 38, Constitution of the Republic of South Africa, Act 108 of 1996; Constitutional Court Rule 10. Such a person is known as an *amicus curiae*, and must obtain the consent of the other parties before the court to intervene or, failing that, the permission of the Chief Justice. He or she may lodge written argument, which must raise new contentions that may be useful to the court. Where other rights are threatened, the High Court must be approached to certify a class action before it may be instituted. The following seven requirements must be satisfied: a class definition; a cause of action raising a triable issue; common issues of fact or law; the relief sought must be ascertainable and capable of determination; an appropriate procedure for the allocation of damages; a suitable representative; and the class action must be the most appropriate means of determining the claims. Also see *Children’s Resource Centre Trust v Pioneer Foods (Pty) Ltd* [2013] (2) SA 213 (SCA), para 26, 28.

⁹¹ See *Wylie v Cox* 56 US 415 [1853].

⁹² *Matter of Estate of Weeks* 627 NE 2D 736 [1994].

types of litigation. Most jurisdictions prohibit the use of contingency fees in criminal cases or certain family cases.⁹³

5.86 US courts allow the client and his or her attorney to agree on a reasonable percentage to compensate the attorney for his time and services rendered. Contingency fees guarantee access to courts for the greatest number of citizens by transferring the risks to legal firms.⁹⁴ However, courts have been known to strike down a contingency fee agreement that favours the attorney with an unreasonably large payment in comparison with the actual work put into the case.⁹⁵ In most jurisdictions, contingent fees are required to be reasonable. This results in a fee of 33-45% in any recovery. It is rare that the contingency fee is equal to or more than 100% of the recovered damages.

6.2 The United Kingdom

5.87 There is a distinction between contingency fee agreements and conditional fee agreements. Lawyers enter into a conditional fee agreement or arrangement with their clients. It is a fee for services that is payable only if there is a favourable result. Such fees are usually calculated as a percentage of the client's net recovery. In England and Wales, a conditional fee agreement (CFA) is used by lawyers where there is a 70% chance of success on the merits.⁹⁶ The solicitor takes on the case on the understanding that if he or she loses the case, there is no payment. If the case is won, the lawyer receives a normal fee based on hourly billing and a success fee. The percentage is not greater than 100% of the fee.⁹⁷ Conditional fee agreements are not allowed in family proceedings or criminal cases.⁹⁸ The attorney can calculate the usual hourly fee, which is deducted from the total recovery amount. This amount and a small percentage comprise the 'success fee'. The client will not pay up front fees nor cover their lawyer's costs if the case is lost. If they win, they pay the 'success fee', which is capped at 25%. In Scotland, it is lawful to agree that the lawyer will receive payment only if the case is won. Although the parties cannot

⁹³ Rule 1.5(d) of the Model Rules of Professional Conduct of the American Bar Association.

⁹⁴ Albert, J *et al.*, "Study on the transparency of costs of civil judicial proceedings in the European Union" (2006), 324. This project examines the costs of civil judicial proceedings in each member state.

⁹⁵ *Ibid.*

⁹⁶ Cassim, F, "Contingency fees – International perspectives". Paper presented at international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018. See also Di Stefano, M, "Study on the transparency of costs of civil judicial proceedings in the European Union" (December 2007).

⁹⁷ *Idem*, 44.

⁹⁸ International newsletter 1/2018/2019: *High cost of legal services as barrier to access to justice*, 11.

determine a percentage of the client's winnings to be the amount of the fee payable, they may agree to a percentage increase in the lawyer's fee if the action is successful.

5.88 It should be noted that the Jackson reforms introduced contingency fees for English civil litigation in April 2013. They are known as "damaged based agreements", or DBAs, in commercial dispute work. In terms of the English DBA, a lawyer is entitled to a percentage of the amount recovered, with a cap of 50%. The agreement may provide that the lawyer will receive no fee if his or her client's case is dismissed. Otherwise, fees can only be increased by 100% of the basic hourly rate usually charged by the lawyer.⁹⁹ Contingency fee agreements are not permitted in family law and criminal law matters. DBAs became widely available in England and Wales in April 2013. However, this system is not without criticism.¹⁰⁰ According to Gert Nel, UK law has incentivised attorneys to allow practitioners who were willing to risk speculative litigation to charge a normal fee (hourly billing plus profit element) and a statutory capped success (bonus or uplift fee) if the case was successful.¹⁰¹

5.89 Thus lawyers have been charging contingency fees in England and Wales since 2013. These fees are used only when they provide clear financial advantage for lawyers that is equal to the risk taken. However, evidence shows a reluctance by the legal profession to use contingency fees, possibly due to confusion about regulation and the impact of cost-shifting.¹⁰²

6.3 Australia

5.90 In Australia, there is no fee agreement to fix the lawyer's payment as a percentage of the court's award to the client. Although contingency fees are prohibited, attempts are being made to change this to increase access to justice. The Law Council of Australia has recommended in a recent report that percentage-based contingency fee agreements should be introduced in Australia.¹⁰³ It is submitted that a percentage-based contingency fee agreement means that the law practice is paid a percentage of the amount recovered by the client in a matter. It has been contended that a contingency-based funding model

⁹⁹ EU cost study, 128-129.

¹⁰⁰ See "UK contingency fees: A user's guide for the in-house lawyer", Jan 2015. <http://financierworldwide.com> (accessed January 2018).

¹⁰¹ Nel, G, "Decoding s 2(1)(a) and (b) of the Contingency Fees Act". *De Rebus* (June 2018), 14-18, 16.

¹⁰² Victoria Law Commission, "Contingency fees", available at <http://www.lawreform.vic.gov.au/content/introduction-24> (accessed on 23 July 2018).

¹⁰³ Law Council of Australia, "Percentage-based contingency fees agreements" (May 2014), 1-44.

can no longer be regarded as being contrary to modern public policy, and that the introduction of a percentage-based contingency fee agreement would be beneficial to users of legal services.¹⁰⁴ The report proposes that a percentage-based contingency fee regime be used in personal injury matters, and that it provide no cap, or set a cap at 35% or 40%. However, it should not apply to family law, criminal law, or migration law matters.

5.91 The Victorian Law Commission was requested to report on whether removing the prohibition on law firms charging contingency fees would mitigate issues presented by litigation funding.¹⁰⁵ The Commission had to consider whether allowing lawyers to charge contingency fees would broaden the types of claim that would be funded, thereby enabling greater access to justice. The Commission concluded that only large law firms with significant capital reserves would have the financial capacity to conduct large-scale litigation on a contingency basis. They would also need litigation funders to underwrite large scale litigation.¹⁰⁶ While it is possible that increased competition from lawyers charging contingency fees would lead to an increase in the volume of claims, lifting the ban on lawyers charging contingency fees would not necessarily create competition for the same services that litigation funders currently provide. Law firms operating under a 'no win, no fee' agreement do not provide indemnity for any adverse costs, whereas litigation funders do provide security for costs orders or adverse costs.¹⁰⁷

5.92 The Victorian Law Commission has also advocated a balanced approach when considering the interests of clients and the legal profession.

5.93 Access to funding is an important component of class action cases in Australia. There is a lack of a licensing regime in Australia for litigation, and contingency fees are regarded as illegal. Litigation funding in Australia works in the following way: The funder enters into an agreement with one or more potential claimants. The funder agrees to pay the litigation costs, such as the lawyer's fees and expert witness fees, and promises that the claimant will pay the defendant's costs if the claim fails. If the claim is successful, then the funder will receive a fee from the funds recovered by settlement or judgement. The funder is reimbursed the litigation costs. This is problematic, as there is a need for action to regulate losing litigation funders to protect claimants and defendants.

¹⁰⁴ *Ibid.*

¹⁰⁵ Litigation funding refers to the agreement between a third party and one or more claimants regarding litigation costs. It is common in class actions. See further, by Victoria Law Commission, "Contingency fees", available at <http://www.lawreform.vic.gov.au/content/introduction-24> (accessed on 23 July 2018).

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

6.4 Canada

5.94 Contingency fee agreements are allowed in some Canadian provinces, such as Ontario, British Columbia, and Quebec. Each province has its own set of rules, although they are basically similar. Contingency fees have been used in Ontario since 2004. However, contingency fee agreements are prohibited in criminal and family matters. Safeguards have been introduced to determine the appropriate percentage or other basis of the contingency fee, such as, *inter alia*, the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing the claim, the amount of the expected recovery, who is to receive an award of the costs, and the amount of the costs awarded.¹⁰⁸ It has also been held that a contingency fee agreement is void for not being fair and reasonable, as there was no evidence that the lawyers had indemnified the client for an adverse cost order or their own legal expenses if the proceedings were unsuccessful.¹⁰⁹ Thus the test is one of reasonableness. The Law Society of Ontario, which regulates legal professionals in Ontario, has also ruled out using a cap on contingency fees, as such an action would restrict access to legal services.¹¹⁰ It should be noted that the Law Society believes in protecting consumers and promoting the public interest; hence their decision.

6.5 India

5.95 It should be noted that lawyers in India are prohibited by the Bar Council of India rules from charging contingency fees.¹¹¹ According to Rule 20, “an advocate shall not stipulate for a fee contingent on the results of litigation or agree to share the proceeds thereof”.

5.96 The above Rule was upheld in the case of *Ganga Ram v Devi Das*.¹¹² The use of contingency fees is considered to infringe the professional ethics of lawyers. It is also regarded as a contract that opposes public policy; hence the prohibition.

¹⁰⁸ Law Society of Ontario, “Contingency fees”, available at <https://lso.ca/getdoc/e6b83846-07d7-43f4-9865-da7e7a2755ac/contingency-> (accessed on 15 October 2018).

¹⁰⁹ Victoria Law Commission, “Contingency fees”, available at <http://www.lawreform.vic.gov.au/content/introduction-24> (accessed on 23 July 2018).

¹¹⁰ “Canada rules out capping contingency fees”, available at <https://litigationfinancejournal.com/Canada-rules-capping-contingency-fees/> (accessed on 15 October 2018).

¹¹¹ Part IV, Chapter II, Section II, Rule 20.

¹¹² 61 PR [1907].

5.97 In *Sunitha v The State of Telangana*,¹¹³ the Supreme Court of India dealt with a claim for advocate's fee based on a percentage of the result of the litigation. Counsel for the appellant argued that charging a percentage of the decretal amount by an advocate is contrary to section 23 of the Contract Act, being against professional ethics and public policy. "[T]he cheque issued by the appellant could not be treated as being in discharge of any liability by the appellant. No presumption arose in favour of the respondent that the cheque represented legally enforceable debt. In any case, such presumption stood rebutted by settled law that claim towards Advocates fee based on percentage of result of litigation was illegal".¹¹⁴

6.6 Brazil

5.98 Contingency fees are allowed in Brazil, where attorneys receive a percentage of the proceeds in exchange for services that are unpaid until the final decision is made. They are usually used for smaller claims. Usually the judge will fix a contingency fee for the successful attorney, awarding a percentage of the total monetary award as a reward, despite the attorney being paid his regular hourly fees.¹¹⁵ However, the Brazilian Bar Association is not in favour of contingency fees, as they represent a potentially harmful practice leading to the depreciation of the work of attorneys. The Brazilian Bar Association favours the use of hourly fees over contingency fees. However, the Superior Court of Justice recently ruled that lawyers may be paid a fixed percentage of the final amount received by their clients.¹¹⁶

¹¹³ Criminal Appeal No. 2068 of 2017. The Court heard an appeal by a woman who claimed she was compelled to sign a cheque for Rs 10 lakh by a lawyer, although she had already paid the fee as demanded. The bench observed a serious misconduct on the part of the lawyer, who wanted the money on the grounds that his share was 16 per cent of the total compensation received by the woman in a motor accident case. After the cheque was dishonored, the lawyer initiated a cheque bounce case against her, and she came to the apex court to quash it. The Court said that a fee conditional on the success of a case had been repeatedly condemned as unworthy of the legal profession because, if an advocate has interest in the success of litigation, he may tend to depart from ethics. "[19] The claim of the respondent advocate being against public policy and being an act of professional misconduct, proceedings in the complaint filed by him have to be held to be abuse of the process of law and have to be quashed," the bench held in its final order.

¹¹⁴ *Sunitha v The State of Telangana* Criminal Appeal No. 2068 of 2017, para 9.

¹¹⁵ See Brazilian Civil Procedure Code.

¹¹⁶ See STJ Resp No 805919 of October 2015, available at <https://thelawreviews.co.uk/chapter/11522/brazil> (accessed on 18 October 2018). A limit of 30% would be considered. See STJ No 1155200 of March 2011, where a limit of 50% was rejected as being excessive and unreasonable.

6.7 Nigeria

5.99 Lawyers are entitled to reasonable compensation for their services. Lawsuits are resorted to where there is injustice, imposition, or fraud. Corrupt or dishonourable conduct of legal practitioners is frowned upon in terms of the Laws of Professional Conduct for Legal Profession.¹¹⁷ Legal counsel who accept briefs in court profess to practise for a professional fee that is dependent on the length and difficulty of the case.¹¹⁸ Although third party funding is not recognised or regulated, it is not prohibited. CFAs are prohibited in Nigeria in terms of the common law, as they are regarded as contrary to public policy.¹¹⁹ However, an amendment to the Rules of Professional Conduct for Legal Practitioners Act in 2017 allows lawyers to enter into CFAs, provided that they do not bear the costs of the litigation. In exceptional cases, lawyers can advance costs of litigation as a matter of convenience and subject to reimbursement.

6.8 Kenya

5.100 The Code of Ethics and Conduct of Advocates Act, 2016 ('The Code') regulates the legal profession. Both undercutting of fees and overcharging of fees by advocates are regarded as professional misconduct in terms of the rules.¹²⁰ The reason is that these practices undermine the legal profession and the administration of justice. The Advocates Remuneration Order contains schedules that prescribe the minimum legal fees that can be charged by an advocate for work done. Advocates and their clients can agree on the fee to be charged for legal work to be carried out. However, the agreed fee must comply with the fee guidelines fixed in the Advocates Remuneration Order. Contingency fees are not permitted, and the funding of litigation (champerty cases) are regarded as illegal in Kenya. Lawyers are encouraged to enter into agreements with clients up front so that clients are aware of what the legal costs or fees will be.¹²¹ Case law has confirmed the prohibition of contingency fees.¹²²

6.9 Uganda

5.101 In terms of the common law, litigation funding by a third party is prohibited. The Advocates Act regulates the legal profession. Advocates are prohibited from entering into

¹¹⁷ 25/9/1979.

¹¹⁸ See Rules of Professional Conduct, Legal Practitioner Act, chapter 207.

¹¹⁹ See *Oyo v Mercantile Bank (Nigeria) Ltd* Court of Appeals case.

¹²⁰ See Rule 4 of the Code.

¹²¹ See section 71, "Professional fees", in the Code.

¹²² *JMM v Mohammed Ismael Jin and 2 Others* [2005] eKLR.

contingency fee agreements. They may not enter into any agreement to share a proportion of the proceeds of a judgement, whether by a percentage or otherwise, either as part of the entire amount of his or her professional fees or in consideration of advancing funds to the client for disbursements.¹²³

5.102 In summary, contingency fees are intended to assist poor clients so that they can pursue their rights without worrying about the high cost of litigation. On the other hand, such a fee regime poses a high risk for lawyers who have to bear the expenses and costs until and if the case is won. It is accepted that contingency fees allow people access to justice who would not be able to afford legal representation. However, it is subject to criticism for allowing lawyers to pursue cases unnecessarily, and for inflating claims to increase their allocation. It is also submitted that the CFA is being abused by lawyers, and that it is not being implemented and applied correctly. It has been mooted that lawyers are unduly benefitting from the CFA by adding administrative costs in addition to fees prescribed under the Act. Therefore, contingency fees have been criticised because they allow lawyers to support conflict financially; they encourage 'undesirable' trials and result in excessive fees; and the lawyer's profit-sharing generates a conflict of interest with the client, thus preventing a negotiated solution.¹²⁴

5.103 It has been mooted that one can regulate the costs of justice by regulating lawyer's fees, as this will facilitate the transparency of all costs.¹²⁵ However as the comparative study demonstrates, clients should be protected against unfair, exploitative, and harmful practices of overcharging by the legal profession, and measures should be introduced to increase access to justice. It is submitted that the use of contingency fees, with proper safeguards built in, could protect clients against harmful practices, promote the public interest, and facilitate access to justice. The mechanism in the LPA is also a step in the right direction towards facilitating access to justice for all clients and reducing abuse and exploitation by the legal profession.

E. Questions for Chapter 5

1. Is it desirable to give users of legal services the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism?

¹²³ See section 26 of the Advocates Act.

¹²⁴ EU cost study, 324.

¹²⁵ *Ibid*, 54.

2. Should every legal practitioner who deals directly with a client be obliged to conclude a fee arrangement with that client prior to the commencement of the provision of legal services? If so, what should that agreement deal with?
3. What would the consequences be if the parties failed to conclude a mandatory fee arrangement? Would it be appropriate as a sanction to deprive a legal practitioner of his or her right to demand payment for any service rendered if they failed to conclude such an agreement?
4. Do you think that the provisions of section 35(7) of the LPA are reasonable and workable in practice?
5. Does the requirement in subsection 35(7)(a) that attorneys estimate disbursements require knowledge that the attorney might not possess at the outset of the matter? Or are attorneys, because of their experience, able to provide such an estimate?
6. In terms of subsection 35(7)(d), an attorney or a section 34(2)(b) advocate needs to explain the different fees that can be charged by different advocates. Is this provision unduly onerous? Does it require information that is outside the control or domain of the attorney? Or are attorneys and advocates able to ascertain this information relatively easily?
7. Will the enforcement of the written cost estimate notice in respect of all matters be counter-productive, or will it assist in the goal of enhancing access to justice by making legal fees more affordable?
8. To what extent should legal practitioners who assist the public on a contingency fee basis apply section 35 of the LPA?
9. Should the applicable legislation be amended, if necessary, to ensure that the 25% cap includes every expenditure incurred as part of the contingency litigation, including experts, counsel, and so on?
10. Should a mechanism be created specifically to deal with allegations of excessive fees being charged in contingency litigation in order to ensure that those fees remain reasonable in the light of the circumstances of a case? In other words, should there be a body focusing specifically on preventing the abuse of contingency fee arrangements?

11. Are we justified in retaining the Contingency Fees Act 66 of 1997 and our contingency fee regime?
12. Are the monetary limits of 25% set too high? If so, give reasons and/or proposed limits.
13. Do the principles enshrined in the contingency fee regime favour or promote access to justice, or contribute to frivolous litigation against the State?
14. Is the Contingency Fee Act being abused by both legal practitioners and litigants, and, if so, to what extent? What can be done to protect the public, especially the indigent, in matters where a contingency fee agreement is applicable?
15. Do contingency fee agreements increase access to justice and promote efficiency and the early resolution of disputes?
16. Do contingency fee agreements adequately address the fees/remuneration of advocates and the costs of engaging the services of medical experts/third parties?
17. Should advocates' fees be borne by the instructing attorneys or separately by clients?
18. What is the impact of sections 35(4), 35(7) and 92 of the LPA on contingency fees?
19. What impact do contingency fees have on the institution of class actions?
20. Does section 92 of the LPA promote access to justice, or does it have the potential to prejudice litigants?
21. Would there be any danger in the proposed section 92 of the LPA, which provides that, in circumstances where a legal practitioner, law clinic, or practice appears on behalf of a party, and will only claim payment of that which he, she, or it can recover from the other side, the cost order made in favour of the client is deemed to accrue to the legal practitioner, law clinic, or practice?
22. Should the courts be encouraged to impose appropriate monetary limits on contingency fees, and differ from the agreement reached by the parties, in the exercise of their discretion and in the interest of justice?
23. Should courts play a more interventionist role in setting caps for contingency fees?

24. Is there an overlap between the LPA and the Contingency Fee Act, and, if so, to what extent?

Chapter 6: Legislative and other interventions to improve access to justice by members of the public

A. Introduction

6.1 Section 35(4)(b) of the LPA provides that the Commission must investigate and report back to the Minister on legislative and other interventions in order to improve access to justice by members of the public. In this chapter, the following questions are asked:

- (a) What legislative and other interventions may be recommended to the Minister to address the factors and circumstances identified in Chapter 2; and
- (b) What other interventions may be recommended to address the factors and circumstances identified in Chapter 2?

6.2 What can government do to ensure that legal costs are not a barrier for litigants to have equitable access to justice? According to Klaaren, one way to operationalise an economic analysis of the cost of legal services is to divide the population of interest (such as the national population of South Africa) into three bands: poor, middle-class, and rich. Such a three-part division can be justified as a relatively rough but also relatively accurate and effective method of understanding how to increase access to justice. This division is not intended or argued to be a precise one, nor is it not subject to change. It is perhaps just as much qualitative as it is quantitative.¹

6.3 Klaaren points out that such a three-banded analysis fits well with the provision of at least state-funded legal services to the poor. While such funding is a constitutional right in South Africa, there is often statutory provision for at least some state-funded legal services for the poor.² Klaaren asks whether the ‘missing middle’ should become a significant part of the policy debate on achieving access to justice in South Africa, in the

¹ Klaaren, J, “Towards affordable legal services: Legal costs in South Africa and a comparison with other professional sectors” (19 October 2018), 4.

² *Idem*.

same way that the ‘missing middle’ has become an important part of the policy debate about the provision of higher education.³

6.4 The next section looks at some possible solutions that might assist in reducing legal costs and enhancing access to justice for the people of South Africa.

(a) Simplification of court processes

6.5 Maintenance, divorce, and domestic violence matters have been simplified for parties to litigate without the assistance of a legal practitioner.⁴ Although the system has assisted litigants, systematic failures have made it cumbersome for litigants to access maintenance, divorce, and protection orders.⁵

6.6 One of the abstracts received by the Commission in preparation for the conference proposed the introduction of an inquisitorial approach to dispute resolution, and the amendment of the Superior Courts Act 10 of 2013 and Magistrates’ Court Act 32 of 1944 to include a new section to follow the inquisitorial approach, as opposed to the adversarial approach that currently operates in the South African legal system.⁶

6.7 Jivan provides a summary of the proposed inquisitorial approach as follows:

- (a) *Each litigant files a summary of their cases, their list of witnesses and testimony on affidavit and the documents confirming their claim or defense;*
- (b) *The judicial officer then hears the case based on the summaries, the witnesses and the documents, and listens to oral evidence from the witnesses where necessary or called by the litigants to elaborate on their evidence on affidavits;*
- (c) *The judicial officer then makes a decision, order or ruling and an order of costs based on the principles of justice and equity;*
- (d) *An appeal can follow to another court if any party is dissatisfied with the decision, order or ruling by the first judicial officer.*⁷

6.8 Jivan points out that the inquisitorial approach cuts out several rules, speeds up the process of reaching finality with the list of interventions regarding documents, expert testimony, and discovery, and saves costs.⁸

³ *Ibid*, 5.

⁴ Makume, MA, “Is access to justice dependent on one’s ability to afford legal fees?” Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018, 3.

⁵ *Idem*.

⁶ Jivan, U, “Abstract submission for the SALRC”. E-mail dated 31 July 2018.

⁷ *Idem*.

⁸ *Idem*.

(b) Promotion and/or regulation of *pro bono* legal services

6.9 *Pro bono* initiatives enhance access to legal services for those who are not able to afford them. The Legal Practice Act 28 of 2014 aims to create a greater responsibility on the part of lawyers in private practice to devote a portion of their time to *pro bono* work. The Act provides for regulations to prescribe the requirements for “community service”, which “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”.⁹

6.10 A number of organisations employ persons to provide legal representation in both the public and the private sectors. These include various services offered by the Department of Justice, including Legal Aid SA. There are also sectors such as the public interest law community services, consisting of both donor-funded NGOs such as the Legal Resources Centre and *pro bono* units of commercial law firms, university law clinics, and a number of other NGOs. Apart from this, there is also a network of community advice offices and paralegals providing legal advice, called the Centre for the Advancement of Advice Offices in South Africa.¹⁰

6.11 Holness states that, in South Africa, *pro bono* legal services are theoretically part of the rules of the constituent provincial law societies and the various bar councils.¹¹ He points out that this is because there has been very little enforcement of this requirement by the various controlling bodies. In terms of the current draft Legal Services Charter, the legal profession is only required to devote at least 5% of its total billing hours per month to *pro bono* work.¹²

6.12 The legal community of South Africa needs to commit to providing *pro bono* legal services to needy and marginalised people who are unable to afford them.¹³ If mandatory *pro bono* work is to be successfully implemented in South Africa, then the regulation of *pro bono* legal services and an enforcement mechanism need to be in place to ensure

⁹ See section 29 of the Legal Practice Act.

¹⁰ Klaaren, J, “Towards affordable legal services: Legal costs in South Africa and a comparison with other professional sectors” (19 October 2018), 9.

¹¹ Holness, D, “Recent developments in the provision of *pro bono* legal services by attorneys in South Africa” (2013), 137.

¹² *Ibid*, 142.

¹³ Makume, MA, “Is access to justice dependent on one’s ability to afford legal fees?” Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018, 5.

that the quality of the legal service provided is of a sufficient standard to enhance access to justice to needy and poor people.¹⁴

6.13 The LSSA states in its abstract to the Commission that, following consultative workshops with members of the legal profession and a diverse range of stakeholders, the following key recommendations emanated from the workshops:

- (a) The need for clarity in the LPA whether *pro bono* services fall within the ambit of community service;
- (b) Participants recommended that the LPA should be amended to make specific provision for *pro bono* services to fall within the ambit of community service;
- (c) Alternatively, the Minister should, pursuant to section 29 of the LPA, approve *pro bono* services as part of community service.¹⁵

6.14 Should *pro bono* legal services be regulated in South Africa? If so, how?

(c) Recognition of community-based paralegals

6.15 Community-based paralegals (CBPs) are part of civil society organisations (CSOs).¹⁶ CSOs play an important role in facilitating access to quality justice for members of the public in the light of the many systemic and structural challenges that the government cannot address on its own.¹⁷ The work of CSOs involves paralegal work. Paralegals provide a crucial link to justice services and legal redress in South Africa, particularly for poor and vulnerable people.¹⁸

6.16 According to the Foundation for Human Rights (FHR), the main reasons for the non-recognition and non-regulation of paralegals in the LPA, as expressed by the various constituencies of the legal profession, include the following:

- (a) *Paralegals do not enjoy specialist legal expertise and skills that would enable them to give legal advice and services to the community or public;*

¹⁴ *Idem.*

¹⁵ LSSA, "Access to justice and pro bono legal services" (10 August 2018), 2.

¹⁶ According to Holness, two main types of paralegals may be distinguished: those who work in commercial law environments, and those who are community-based and work with and serve poor rural communities. "Improving access to justice in South Africa in civil matters through community-based paralegals and some considerations as to possible law graduate post-study community service". Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018, 6.

¹⁷ Foundation for Human Rights, "A policy framework for engagement between CSO's and government" (undated), 3. Paralegals operate in a number of sectors. These include community advice offices, trade unions, law firms, service organisations, government departments, and commercial and business entities; *idem.*

¹⁸ Dugard, J and Drage, K, "To whom do the people take their issues?" *Justice and Development* (2013), 1.

- (b) *There is no governing body that is representative of paralegals' interests and which controls, disciplines and sets minimum standards for entry and education;*
- (c) *There are no standards of ethical conduct and performance for paralegals;*
- (d) *There is no system of continuous refresher legal education and training for paralegals; and*
- (e) *There is no monitoring and evaluation of legal services that are provided by paralegals.*¹⁹

6.17 Section 34(9) of the LPA, which makes provision for the statutory recognition of paralegals, provides as follows:

The Council must, within two years after commencement of Chapter 2 of this Act, investigate and make recommendations to the Minister on –
(b) the statutory recognition of paralegals.

6.18 Chapter 2 of the LPA, with the inclusion of section 34(9), came into operation on 31 October 2018.²⁰

6.19 Holness argues that community-based paralegals and law graduate community service (discussed below) must be used to enhance access to justice in civil matters, especially in poorly resourced rural areas.²¹ There is a constitutional justification for the provision of free legal services in civil matters. Section 34 of the Constitution promises a fair trial, which has application in civil matters and includes legal representation in certain civil matters, although this is “less directly stated” than the legal aid provision at State expense in criminal matters provided for in section 35(3)(g) of the Constitution.

6.20 CBPs deal with day-to-day legal problems that people face. They play an important role in enhancing access to justice in civil matters. Based on international best practices, the role of CBPs includes the following:

- (a) *Provide legal advice (using pamphlets and manuals);*
- (b) *Link local people with legal practitioners;*
- (c) *Take client statements and follow-up on existing cases;*
- (d) *Refer people to health and welfare agencies;*
- (e) *Build networks with other CBPs and NGOs;*

¹⁹ Foundation for Human Rights, “A policy framework for engagement between CSO’s and government” (undated), 15.

²⁰ Proclamation R.31 of 2018, published in *Government Gazette* No.42003 dated 29 October 2018.

²¹ Holness, D, “Improving access to justice in South Africa in civil matters through community-based paralegals and some considerations as to possible law graduate post-study community service”. Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018, 2.

- (f) *Train local people as to their legal rights and remedies available;*
- (g) *Publicise local legal events and problems; and*
- (h) *Lobby for improvements in the justice system.*²²

6.21 Dugard and Drage analyse twelve studies of paralegal-assisted cases to demonstrate the role played by CSOs in filling the gap in justice services and legal redress faced by their clients on a daily basis.²³ Most of the CSOs are affiliated to the then National Alliance for the Development of Community Advice Officers (NADCAO), now the Centre for the Advancement of Advice Offices in South Africa (CAOSA). These CSOs include the Community Advice Offices (CAOs); the Community Law and Rural Development Centre (CLRDC); the Centre for Criminal Justice (CCJ); the Association of University Legal Advice Institutions (AULAI); and the Social Change Assistance Trust (SCAT).

6.22 The cases dealt with by paralegals include the following:

- (a) pension claims (State);
- (b) unemployment benefit claims (State);
- (c) child custody disputes (family);
- (d) family disputes over provident fund benefits (family);
- (e) access to health care and social security (State);
- (f) social security grant for migrants (State);
- (g) access to housing (state);
- (h) disability grants (State);
- (i) contractual disputes (private);
- (j) debt claims (private); and
- (k) inheritances (family).²⁴

6.23 Legal aid law in Sierra Leone, adopted in May 2012, makes provision for CBPs to complement the provision of legal aid.²⁵ The Malawi Law Commission created a formal recognition of CBPs in their legal aid legislation.²⁶

6.24 In South Africa, CAOs assist their clients in providing legal advice, resolving community conflict, dealing with labour disputes, job-seeking, counselling, filling out

²² *Ibid*, 7.

²³ Dugard J, and Drage, K, "To whom do the people take their issues?" (2013), 25.

²⁴ *Ibid*, 26-31.

²⁵ *Ibid*, 16.

²⁶ *Idem*.

forms, and helping in the process of documentation and providing assistance with transport to access government services.²⁷

6.25 The Mabopane Advice Office covers the communities of Mabopane, Winterveldt, Soshanguve, Brits, Ga-Rankuwa, and Hammanskraal. Many poor and vulnerable people from these communities who cannot afford to go to court come to the Mabopane Advice Office for assistance.²⁸ For many of them, the Advice Office is their only hope for justice, as they are excluded from both private and government services owing to their socio-economic status.²⁹

6.26 There is at present a lack of formal recognition of CBPs.³⁰ Nor is a legal qualification required for a person to act as a paralegal, let alone a CBP.³¹ Although this is a clear *lacuna* in the current legal framework, one must be careful of implementing a ‘one size fits all’ rule that requires specific qualifications, failing which one cannot serve as a CBP.³² However, it is imperative that adequate training be provided to CBPs in order to enable them to provide sound legal advice to clients.³³

6.27 There are two Draft Bills currently in the pipeline that deal with the proposed legislative framework for the recognition and regulation of CAOs and CBPs in particular. One is from CAOSA, the other from the DOJCD. The Draft Bills deal with a number of issues affecting the day-to-day operation of CAOs and paralegals in the sector. These include, among other things, the definition of ‘paralegal’; the regulatory institution for CAOs and CBPs; registration of CAOs and CBPs; training; monitoring and evaluation; standards of ethical conduct; and the proposed funding model for CAOs and CBPs.

6.28 The question is: Should CBPs be formally recognised in South Africa? If so, how? What kind of support must be provided by government and other institutions to CAOs and CBPs? What types of legal service are provided by CAOs and CBPs?

²⁷ Mnguni, S, “Dealing with costs of access to justice, legal costs and other interventions through community advice offices”. Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018, 1.

²⁸ *Ibid*, 8.

²⁹ *Idem*.

³⁰ *Ibid*, 12.

³¹ *Ibid*, 11. Holness states that there is no legislation governing the requisite qualifications, type of work they may do, and legislated oversight body to quality control the type of work performed by CBPs; 12.

³² *Idem*.

³³ *Idem*.

(d) Implementation of law graduate community service

6.29 Law graduate community service (LGCS) is provided for in section 29 of the LPA, which provides as follows:

Community service

29(1) The Minister must, after consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister, and such requirements may include –

- (a) Community service as a component of practical vocational training by candidate legal practitioner; or*
- (b) A minimum period of recurring community service by practising legal practitioners upon which continued enrolment as a legal practitioner is dependent.*
- (c) Community service for the purposes of this section may include, but is not limited to, the following:*
 - (i) Service in the State, approved by the Minister, in consultation with the Council;*
 - (ii) Service at the South African Human Rights Commission;*
 - (iii) Service, without any remuneration, as a judicial officer in the case of legal practitioners, including as a commissioner in the small claims courts;*
 - (iv) The provision of legal education and training on behalf of the Council, or on behalf of an academic institution or non-governmental organisation; or*
 - (v) Any other service which the candidate legal practitioner or the legal practitioner may want to perform, with the approval of the Minister.*

6.30 Section 29 of the LPA came into operation on 1 November 2018. According to Holness, it follows that any law graduate community service (LGCS) must focus on civil legal matters, particularly in rural areas and urban townships, where the need for expanded free civil legal aid services is most needed.³⁴

6.31 Should there be a law graduate community service programme in South Africa? If so, how and why?

(e) Role of the courts

6.32 What role should courts play in order to reduce legal costs for parties or to protect litigants from high legal costs, and to ensure equality of arms in the litigation process?

³⁴ *Ibid*, 24.

6.33 Makume points out that a full bench of the High Court sitting in Tshwane recently found that banks were clogging the justice system by instituting actions in the High Court about matters that properly belonged to the Magistrates' Court.³⁵ The case involved eight defendants who were being sued by all four major banks for loan arrears of between R7 000.00 and R20 000.00.³⁶ The High Court ruled that those cases belonged in the lower court, where legal costs are much lower.³⁷

(f) Role of legal practitioners

6.34 What can legal practitioners do to reduce high legal costs?

6.35 Legal practitioners must use pre-trial conferences and Rule 37, not to debit further fees, but to limit issues so as not to lengthen trials unnecessarily at great expense to clients.³⁸ In many instances, settlement is reached on the day of the hearing, when counsel and attorney should have met long before the day of the trial in order to reach settlement and save legal costs.

6.36 In September 2006, the Attorney-General directed the Victorian Law Reform Commission (VLRC) to conduct an investigation into the rules of civil procedure in order to streamline litigation processes. The VLRC was asked to identify, among other things, the key factors that influence the operation of the civil justice system, including those factors that influence the timelines, cost, and complexity of litigation.³⁹

6.37 The VLRC recommended a number of pre-action procedures (protocols) that sought to encourage early and full disclosure of relevant information and documents; early settlement; where settlement is not achieved, identification and narrowing of the real issues in dispute in order to reduce the costs and delays involved in litigation.⁴⁰

³⁵ Makume, MA, "Is access to justice dependent on one's ability to afford legal fees?" Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018, 6. The case is *Nedbank Limited v Thobejane*, Case No 84041/15; *First National Bank v Malatji and another*, Case No 93088/15; *Standard Bank v Mpongo*, Case No 9956/15; *Absa Bank Limited v Van der Merwe and Others*, Case No 36/16; *Standard Bank of South Africa v Wooditadpersad*, Case No 1114/16; *Nedbank Limited v Sonko*, Case No 1429/16; *First National Bank v Langbehn and Another*, Case No 359/16.

³⁶ *Idem*.

³⁷ *Idem*.

³⁸ Makume, MA, "Is access to justice dependent on one's ability to afford legal fees?" Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018, 8.

³⁹ Victorian Law Reform Commission, "Civil Justice Review Report 14" (March 2008), 7.

⁴⁰ *Ibid*, 9.

6.38 According to the VLRC, the pre-action protocols do not bar any party from initiating legal proceedings in the event of non-compliance with such protocols.⁴¹

(g) Use of alternative dispute resolution mechanisms

6.39 Traditional forms of dispute resolution, other than court determinations, have been in existence in rural South Africa for a long time. Many State institutions have, over the years, attempted to address the question of integrating, acknowledging, and formalising these traditional mechanism for dispute resolution.⁴² A major paradigm shift took place in labour relations during the 1970s, when the need for more appropriate forms of dispute resolution was realised by the introduction of mediation and arbitration for the resolution of workplace disputes. The success of this initiative has been borne out by the extensive reliance on mediation and arbitration in the Labour Relations Act, and the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA).⁴³

6.40 The Public Protector Act enables the Public Protector to resolve administrative disputes through appropriate dispute resolution mechanisms such as conciliation, mediation, negotiation, and any other means deemed appropriate by the Public Protector.⁴⁴ The Human Rights Commission is also required by section 184(2) of the Constitution to take appropriate steps to secure appropriate redress when human rights have been violated.

6.41 ADR mechanisms aim to relieve court congestion and undue costs and delays, enhance community involvement in the dispute resolution process, facilitate access to justice, and provide a more effective resolution of disputes.⁴⁵

6.42 Various other methods are used to resolve disputes. Relatively few civil disputes are resolved by judicial decision.⁴⁶ 'Alternative dispute resolution' is defined as an umbrella

⁴¹ *Idem.*

⁴² South African Law Reform Commission, "Issue Paper 8: Project 94: Alternative dispute resolution" (15 July 1997), 16.

⁴³ *Ibid*, 17.

⁴⁴ Mkhwebane, B, "The role of the Public Protector to provide access to administrative justice within the broader justice system as envisaged in section 34 read with section 182 of the Constitution, and the impact of increasingly litigious responses (with escalating legal fees and costs) by state institutions to the investigations of the Public Protector". Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018, 9. Section 7(1) of the Public Protector Act 23 of 1994 provides that the procedure to be followed in conducting an investigation shall be determined by the Public Protector with due regard to the circumstances of each case.

⁴⁵ *Idem.*

term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.⁴⁷ Some methods, such as mediation, involve seeking resolution by agreement reached between the parties. Other methods, such as arbitration, may involve a binding determination by a third party.⁴⁸ There are also a variety of 'alternative' means by which judicial officers may involve independent third parties to assist in the resolution of cases that are being litigated.⁴⁹

6.43 Somaru points out that *Lok Adalat* (which means 'People's Court') is the most important structure in the ADR mechanism that ensures restorative justice in India.⁵⁰ This ADR mechanism, which does not exist in the South African legal system, is formalised in the Legal Services Authorities Act 39 of 1987. Section 19 of that Act provides that district, high, and state courts may organise the *Lok Adalat* at such intervals and in such places for exercising such jurisdiction and for such areas as they may deem fit. In terms of subsection 19(2) of the Act, the *Lok Adalat* may be composed of serving or retired judicial officers and such other persons as prescribed in the Act.⁵¹

6.44 Parties in the *Lok Adalat* are entitled to legal representation. However, if they cannot afford to pay legal fees charged by legal practitioners, free legal aid is provided.⁵² In *Afcons Infrastructure Ltd v Cherian Varkey Construction*,⁵³ the Supreme Court of India held that the following cases are suitable for the *Lok Adalat*:

- (a) Cases involving contracts, trade, and commerce;
- (b) All cases involving familial and marital disputes;
- (c) All cases requiring the reparation of pre-existing relationships;
- (d) All cases involving disputes between neighbours, friends, and other members of the community;
- (e) All consumer-related disputes;
- (f) All road accident claims; and
- (g) All claims arising from tortuous liability.

⁴⁶ Victorian Law Reform Commission, "Civil justice review report 14" (March 2008), 212.

⁴⁷ *Idem*.

⁴⁸ *Idem*.

⁴⁹ *Idem*.

⁵⁰ Somaru, N, "The *Lok Adalat* as an ADR instrument in South African criminal law". Ismail Mahomed Legal Essay Writing Competition (2017), 4. Somaru states that the *Lok Adalat* promotes the restoration of harm suffered by the complainant rather than seeking a punitive outcome; 5.

⁵¹ *Ibid*, 7.

⁵² *Ibid*, 8.

⁵³ [2010] (8) SCC; *Ibid*, 9.

(h) Role of Chapter Nine institutions

6.45 The latter part of the 20th century has seen a rapid expansion of the ombudsman enterprise across the public and private sectors.⁵⁴ Section 181 of the Constitution provides for the establishment of independent State institutions to strengthen constitutional democracy in South Africa. Institutions supporting constitutional democracy are the following:

- (a) The Public Protector;
- (b) The South African Human Rights Commission;
- (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
- (d) The Commission for Gender Equality;
- (e) The Auditor-General; and
- (f) The Electoral Commission.

6.46 Ombudsmen, or institutions supporting constitutional democracy, are a significant alternative dispute resolution mechanism, outside of the courts.⁵⁵ Their role is to:

- (a) assist disadvantaged complainants to obtain redress for violations of their rights through conducting investigations and ADR mechanisms such as negotiation and mediation;
- (b) monitor, assess, and make findings on the observance of human rights; and
- (c) promote human rights awareness and education.⁵⁶

6.47 Section 182(4) of the Constitution provides that the Public Protector must be accessible to all persons and communities. While evidence indicates that more and more people are aware of the services of the Public Protector, the key concern is that there are still communities in some parts of the country who are unable physically to access those services.⁵⁷

⁵⁴ Mkhwebane, B, "The role of the Public Protector to provide access to administrative justice within the broader justice system as envisaged in section 34 read with section 182 of the Constitution, and the impact of increasingly litigious responses (with escalating legal fees and costs) by state institutions to the investigations of the Public Protector". Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018, 3.

⁵⁵ *Ibid*, 7.

⁵⁶ *Ibid*, 6.

⁵⁷ Mkhwebane, B, "The role of the Public Protector to provide access to administrative justice within the broader justice system as envisaged in section 34 read with section

6.48 In *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*,⁵⁸ the Constitutional Court had to determine the legal effect of the Public Protector's remedial action as provided for in section 182(1)(c) of the Constitution. The court held that:

*the power to take remedial action is primarily sourced from the supreme law itself. And the powers and functions conferred on the Public Protector by the Act owe their very existence or significance to the Constitution.*⁵⁹ *The words "take appropriate remedial action" do point to a realistic expectation that binding and enforceable remedial steps might frequently be the route open to the Public Protector. These operative words are essential for the fulfilment of the Public Protector's constitutional mandate.*⁶⁰

6.49 What role should constitutional institutions and ombudsmen play to broaden access to justice for the majority of the people of South Africa?

(i) Establishment of independent and impartial tribunals for review and/or appeal against administrative decisions of organs of State

6.50 In the area of administrative law, the public's access to justice could be immediately and considerably improved by providing for a general appeal or review tribunal regarding administrative decisions, as provided for in sections 10(2)(a)(ii) and (iii) of the Promotion of Access to Administrative Justice Act 3 of 2000 (PAJA).⁶¹ This section provides as follows:

10(2) *The Minister may make regulations relating to –*

- (a) the establishment, duties and powers of an advisory council to monitor the application of this Act and to advise the Minister on –*

182 of the Constitution, and the impact of increasingly litigious responses (with escalating legal fees and costs) by state institutions to the investigations of the Public Protector". Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018, 14. (CCT 143/15; CCT 171/15) [2016] ZACC 11.

⁵⁸

⁵⁹

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⁶¹

Ibid, para 64.

Ibid, para 67.

Act 3 of 2000.

- (ii) *any improvements that might be made in respect of internal complaints procedures, internal administrative appeals and judicial review by courts or tribunals of administrative action;*
- (iii) *the appropriateness of establishing independent and impartial tribunals, in addition to the courts, to review administrative action and of specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of states, to hear and determine appeals against administrative action.*

6.51 While there are some exceptions, the various internal appeals provided for in legislation, such as the appeal envisaged by section 62 of the Local Government: Municipal Systems Act 32 of 2000, are generally not very effective, as the appeal bodies form part of the same institution as the decision-makers of first instance.⁶² A measure of independence and impartiality will hugely increase the effectiveness of these internal appeals.

⁶² Section 62 of the Municipal Systems Act 32 of 2000 provides as follows:

- (1) *A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision.*
- (2) *The municipal manager must promptly submit the appeal to the appropriate appeal authority mentioned in subsection (4).*
- (3) *The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.*
- (4) *When the appeal is against a decision taken by –*
 - (a) *A staff member other than the municipal manager, the municipal manager is the appeal authority;*
 - (b) *The municipal manager, the executive committee or executive mayor is the appeal authority, or, if the municipality does not have an executive committee or executive mayor, the council of the municipality is the appeal authority; or*
 - (c) *A political structure or political officer bearer, or a councillor –*
 - (i) *the municipal council is the appeal authority where the council comprises less than 15 councillors; or*
 - (ii) *a committee of councillors who were not involved in the decision and appointed by the municipal council for this purpose is the appeal authority where the council comprises more than 14 councillors.*
- (5) *An appeal authority must commence with an appeal within six weeks and decide the appeal within a reasonable period.*

6.52 Sebei and Tooley confirm that communities are able to take environmental decisions of organs of State to court for judicial review under the PAJA.⁶³ The authors point out that, in order for environmental justice to be achieved, it must be premised on access to legal services, technical support from the scientific community, and specialised ADR mechanisms to enable the expedient adjudication of environmental grievances.⁶⁴

6.53 Not only will access to justice be improved as affected companies and individuals become able to lodge and argue these internal appeals or reviews themselves, but the government will arguably also save millions of Rands in costs when unmeritorious decisions are set aside by an appeal tribunal rather than through the court system.

(j) Unbundling legal services to enable self-represented litigants to better manage their cases

6.54 The Constitution provides everyone with the right of access to courts and the right of every accused person to choose and be represented by a legal practitioner.⁶⁵ No person, other than a legal practitioner, may, subject to any other law, in expectation of a fee, commission, gain or reward, appear in any court of law or before any board, tribunal or similar institution in which only legal practitioners are entitled to appear.⁶⁶

6.55 Court rules, legal ethical guidelines, principles of judicial impartiality and legal practice models in Australia, USA, Canada and the UK, save in the case of small claims courts, are based on the traditional proposition that litigants will conduct litigation, from start to finish, through the medium of a lawyer.⁶⁷ Although the phenomenon of unbundling legal services has been on the access to justice agenda in the above mentioned jurisdictions for many years and has attracted in principle support from many stakeholders, it would appear that moving away from this traditional legal practice model to the provision of unbundled legal services poses many practical challenges.⁶⁸

⁶³ Sebei, M and Tooley, J, "Access to justice, legal costs and other aspects". Paper presented at the SALRC Conference on Access to Justice, Legal Costs and Other Interventions, held in Durban on 01-02 November 2018, 6.

⁶⁴ *Ibid*, 1.

⁶⁵ Sections 34 and 35(3)(f) respectively of Constitution of the Republic of South Africa, 1996.

⁶⁶ Section 33(1)(a) of the Legal Practice Act 28 of 2014.

⁶⁷ Castles M "Barriers to unbundled legal services in Australia: Canvassing reforms to better manage self-represented litigants in courts and in practice" Adelaide Law School Research Paper No.2016-28 240.

⁶⁸ *Ibid*, 238. The American Bar Association Model Rules of Professional Conduct introduced practice rules for unbundled legal services in 2002; law societies of five provinces in Canada provide for unbundling with detailed ethical and practice guidelines in place. The approach to

6.56 In 2013, the Australian Government mandated the Productivity Commission to undertake an inquiry into the Australian system of civil dispute resolution with the aim of constraining legal costs and promoting access to justice and equality before the law. In its report on access to justice arrangements, the Productivity Commission describes ‘unbundling’ of legal services as a half-way house between full representation and no representation in terms of which the lawyer and the client agree that the lawyer will undertake some, but not all, of the legal work involved.⁶⁹

6.57 In an era where legal fees are unattainable for most people, many litigants face the challenge of running their own case in a complex legal environment.⁷⁰ High costs of legal services; lack of legal aid funding; previous poor experience with lawyers and the perception that lawyers will not adequately present their arguments, are some of the reasons why litigants choose to represent themselves.⁷¹

6.58 Research conducted in Australia shows that self-represented litigants (SRLs) are a diverse group of people, a substantial proportion of whom are socially and economically disadvantaged.⁷² There tends to be a higher proportion of SRLs in tribunals and lower courts than in superior and appellate courts.⁷³ Furthermore, SRLs have varying experience of interaction with court and tribunal staff, judges and tribunal members.⁷⁴

6.59 In Ghana, New Zealand, and Australia, the right of a party to self-representation is enshrined in legislation. Article 19(2)(f) of the Constitution of the Republic of Ghana, 1992 provides that “a person charged with a criminal offence shall be permitted to defend himself before the court in person or by a lawyer of his choice.” Moreover, Order 2 of the High Court (Civil Procedure) Rules, 2004 also provides that a person can commence an action or sue in person him or herself. Section 11 of the Criminal Procedure Act, 2011 of

unbundled legal services in Australia lags behind other jurisdictions in developing policy and practical guidance.

⁶⁹ Australian Government Productivity Commission “Access to Justice Arrangements Inquiry Report” No. 72 September 2014 20.

⁷⁰ Castles M “Barriers to unbundled legal services in Australia: Canvassing reforms to better manage self-represented litigants in courts and in practice” Adelaide Law School Research Paper No.2016-28 237.

⁷¹ France E “Litigants in person-no single response” Paper presented at Commonwealth Law Conference held in Zambia on 8-12 April 2019.

⁷² Richardson L, *et al*, “The Impacts of Self-represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice” Australian Institute of Judicial Administration Incorporated ii.

⁷³ *Idem*.

⁷⁴ *Idem*.

New Zealand provides that a defendant's case may be conducted by a lawyer or the defendant personally. In Australia, Section 78 of the Judiciary Act 1903 (Cth); the Federal Court Rules 2011 (Cth); and Rule 41.10 of the High Court Rules 2004 (Cth) all contain specific provisions regarding SRLs.

6.60 There are as many challenges to self-representation as there are benefits. Self-representation poses problems for the court, the opposing party and the litigants themselves.⁷⁵ More time and resources are required from judges and court staff dealing with SRLs. The result of a lack of legal representation means that court staff are required to help litigants with procedural as well as substantive issues.⁷⁶

6.61 Proceedings involving SRLs may be longer and more expensive for the other party because of challenges SRLs may experience in cross-examining witnesses or arguing on a point of law. Judges are required to take a more active role to ensure a level playing ground. They are obliged to explain the proceedings and ensure that a SRL has basic information about the procedure before the court.⁷⁷

6.62 The Productivity Commission recommended that special measures be adopted by courts, tribunals and the legal profession to ensure that SRLs clearly understand how to better manage their cases. These measures include drafting all court and tribunal forms in plain language; ensuring that court and tribunal staff assist SRLs to understand all time critical events in their case; working together to develop guidelines for judges, court staff and lawyers on how to assist SRLs; and considering the introduction of qualified immunity for court staff so that they can assist SRLs with greater confidence and certainty.⁷⁸

B. Questions for Chapter 6

1. Will different methods to settle disputes enhance access to justice?
2. Would a more inquisitorial approach, as opposed to an adversarial approach, be practicable in current circumstances, and would it lead to greater access to justice?
3. Should *pro bono* legal services be regulated in South Africa? If so, how?

⁷⁵ Barth V "Self-represented litigants, the real cost to parties and society" Paper presented at Commonwealth Law Conference held in Zambia on 8-12 April 2019.

⁷⁶ *Idem.*

⁷⁷ *Idem.*

⁷⁸ Australian Government Productivity Commission "Access to Justice Arrangements Inquiry Report" No. 72 September 2014 56.

4. Should CBPs be formally recognised in South Africa? If so, how? How do you view the role of CAOs and CBPs?
4. Should there be a law graduate community service (LGCS) programme in South Africa? If so, how and why?
5. What can legal practitioners do to reduce unaffordable legal costs?
6. What role should constitutional institutions and ombudsmen play to broaden access to justice for the majority of the people of South Africa?
7. Should a general appeal or review tribunal be established in terms of section 10(2)(a)(iii) of the Promotion of Access to Administrative Justice Act 3 of 2000 in order to deal with appeals and reviews of administrative decisions against organs of State? If so, why?
8. Should legal services be unbundled in order to enable SRLs to better manage their cases? If so, how?

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