South African Law Reform Commission

REPORT

PROJECT 142

INVESTIGATION INTO LEGAL FEES – INCLUDING ACCESS TO JUSTICE AND OTHER INTERVENTIONS

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To: Mr R Lamola, MP

Minister of Justice and Correctional Services

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act 19 of 1973 (as amended), for your consideration, the Commission's report on Project 142: Investigation into legal fees, including access to justice and other interventions.

MR JUSTICE N J KOLLAPEN

CHAIRPERSON: SOUTH AFRICAN LAW REFORM COMMISSION

28 MARCH 2022

South African Law Reform Commission

The South African Law Reform Commission (the Commission) was established by the South African Law Reform Commission Act, 1973 (Act No.19 of 1973).

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The vision of the SALRC is to be a centre of excellence producing ground-breaking research pivotal to the improvement and renewal of the legal system.

Mission

The mission of the SALRC is the continuous reform of the law of South Africa, in an open and inclusive manner, in accordance with the principles and values of the Constitution to meet the needs of a changing society operating under the rule of law.

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In the execution of its duties, the Commission strives to uphold the Constitution, the rule of law, and the values of equality, integrity, inclusiveness, professionalism, impartiality, responsiveness, efficiency, and respect for the dignity of others.

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Professor Mpfariseni Budeli-Nemakonde
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Professor Wesahl Domingo
Advocate Tshepo Sibeko SC
Advocate HJ de Waal SC
Advocate Anthea Platt SC
Advocate Hendrina Magaretha Meintjes SC

The members of the Commission's Advisory Committee for this Project are:

Ms Rochelle Francis-Subbiah, Magistrate, Pretoria Magistrates' Court (Deputy Chairperson)
Dr Fawzia Cassim, Associate Professor, Department of Criminal and Procedural Law, UNISA
Dr Willem Hendrik Gravett, Senior Lecturer, Department of Procedural Law, University of Pretoria
Mr Vela Mdaka, Regional Operations Executive, Legal Aid South Africa
Advocate Thobeka Nkabinde, Office of the Chief State Law Adviser, DOJ&CD
Ms Trudy Zeelie, Registrar and Taxing Master, Office of the Chief Justice, High Court of South Africa
Dr Morne Oosthuizen, Deputy Director: Development Policy Research Unit, University of Cape Town

The Secretary of the SALRC is Mr Nelson Matibe. The Commission's offices are situated at Spooral Park Building, 2007 Lenchen Avenue South, Centurion, Pretoria.

Correspondence should be addressed to:

The Secretary
South African Law Reform Commission
Private Bag X668
Pretoria
0001

Telephone: (012) 622 6349
E-mail: LMngoma@justice.gov.za
Website: http://www.justice.gov.za/salrc/index.htm

The Project Leader for this investigation is Judge Narandran Kollapen. The SALRC official assigned to this investigation is Mr Linda Mngoma.

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Acknowledgement

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Glossary

Access to justice

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 marginalised, are recognised, thus giving them entitlement to remedies or redress that are just and equitable.[1] Access to justice is broadly concerned with the ability of the people to obtain just resolutions to justiciable problems through impartial formal and informal institutions with appropriate legal support.[2]

Alternative dispute resolution

Alternative dispute resolution means a process, in which an independent and impartial person assists parties to attempt to resolve the dispute between them, either before or after the commencement of litigation.[3]

Contingency fees

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.[4]

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1 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.

2 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 6.

3 DOJ&CD "Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa" Notice R.183 published in *The Government Gazette* No.37448 dated 18 March 2014.

4 See Contingency Fee Act, 1997.

Fee guidelines

These are flexible fee parameters for legal services determined by taking into account several factors such as the importance, complexity and expertise of the legal service required; the seniority and experience of the legal practitioner; the volume of work required and the time spent in rendering the legal service in question; and the financial implications of the matter at hand. Fee guidelines act as a yardstick to determine a reasonable fee and could be adjusted taking into account the factors enumerated above.[5]

Legal costs/legal fees

According to Van Loggerenberg,[6] 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

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".[7] According to Francis-Subbiah, "[p]arty and party costs are generally not all the costs incurred by the litigant but 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".[8]

Attorney-and-client costs

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.[9] 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 total fees,

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5 Law Society of South Africa "Submissions on Issue Paper 36 Regarding the Investigation into Legal Fees-Project 142" 19.

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

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

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

9 *Ibid,* 91.

including counsels' 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.[10]

Costs *de bonis propriis*

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 pocket for acting in an improper, dishonest, and seriously negligent manner.[11]

Legal empowerment

Legal empowerment refers to a process of systemic change through which the poor and excluded become able to use the law, the legal system, and the legal services to protect and advance their rights and interests as citizens.[12]

Legal services

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 advice matters, are no longer reserved to legal practitioners.[13]

Section 33 of the LPA (**authority to render legal services**) provides that:

> *(1) Subject to any other law no person other than a practicing 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*
>
> *(b) draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other*

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10 *Mfengwana v Road Accident Fund* [2016] ZAECGHC 159, par 26.
11 Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 119.
12 Open Society Institute "Legal Empowerment: A statement of Principles for International Engagement" (September 2009).
13 Essa, A, "Legal practitioners and non-litigious legal fees", 2. Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018.

proceedings in a court of civil or criminal jurisdiction within the Republic.

(3) No person may in expectation of any fee, commission, gain or reward, directly or indirectly, perform any act or render any service which in terms of any other law may only be done by an advocate, attorney, conveyancer or notary, unless that person is a practicing advocate, attorney, conveyancer or notary, as the case may be.

Mechanism for determining fees and tariffs

A mechanism for determining fees and tariffs is a system,[14] model,[15] or framework for determining the cost of legal services payable to legal practitioners.

Non-litigious work

The Law Society of South Africa's (LSSA) *Practice Manual of Legal Costs* describes non-litigious work as legal work that is not civil-litigious.[16] 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.

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.[17]

Paralegals

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

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14 Fuesgen, I, "The evolution of legal services-legal costs in the bigger picture of today's realities", Paper presented at the 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.

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

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

17 *Idem*.

representation in dispute resolution, facilitating community development, networking, and advocacy for rights promotion.[18]

Pro bono legal service

The concept of *pro bono* legal service means professional work that is undertaken by legal practitioners, without remuneration, as a public service and general to the marginalised, poor and needy.[19]

Tariff

A tariff is a system of fixed fees, dependent on the amount at stake and the type of case, established either by statute or by some other instrument regulating the provision of legal services. The tariff can cover cost-shifting or lawyer-client arrangement.[20]

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18 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.

19 NADEL "*Pro bono* and Community Service. Report on Section 29 of the Legal Practice Act 28 of 2014" 19.

20 Hodges C, Vogenauer S and Tulibacka M: *The Costs and Funding of Civil Litigation: A Comparative Perspective* 2010 Hart Publishing 114.

Abbreviations and acronyms

Statutes	
Competition Act	Competition Act, 1998 (Act No.89 of 1998)
Contingency Fees Act	Contingency Fees Act, 1997 (Act No.66 of 1997)
CPA	Consumer Protection Act, 2008 (Act No.68 of 2008)
ESTA	Extension of Security of Tenure Act, 1997 (Act No.62 of 1997)
LPA	Legal Practice Act, 2014 (Act No.28 of 2014)
MCA	Magistrates' Court Act, 1944 (Act No.32 of 1944)
NEMA	National Environmental Management Act, 1998 (Act No.107 of 1998)
NCA	National Credit Act, 2005 (Act No.34 of 2005)
PAJA	Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000)
PPB	Public Procurement Bill [B-2020]
RABS	Road Accident Benefit Scheme Bill [B17B-2017]
RAF Act	Road Accident Fund Act, 1996 (Act No.56 of 1996)
SALRC Act	South African Law Reform Commission Act, 1973 (Act No.19 of 1973)
TCB	Traditional Courts Bill [B1B-2017]
Other abbreviations and acronyms	
ALRC	Australian Law Reform Commission
AULAI	Association of University Legal Advice Institutions
ADR	Alternative dispute resolution
BASA	Banking Association of South Africa
BLCM	Board of Legal Costs Mediators
CALRAs	Commonwealth Association of Law Reform Agencies
CALS	Centre for Applied Legal Studies
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
CCMA	Commission for Conciliation, Mediation and Arbitration
CFA	Contingency fees agreement
CLRDC	Community Law and Rural Development Centre
Commission	South African Law Reform Commission
CPI	Consumer Price Index
CPR	Civil Procedure Rules (United Kingdom)
CSG	Community service graduate
CSOs	Civil society organisations
DBA	Damage-based agreements
DHA	Department of Home Affairs
DOJ&CD	Department of Justice and Constitutional Development
DTI	Department of Trade and Industry
ESI	electronically stored information
FHR	Foundation for Human Rights
GCB	General Council of the Bar of South Africa
GCIS	The Government Communication and Information System
GPSJS	Governance, Public Safety and Justice Survey
HMI	Health Market Inquiry
HSRC	Human Sciences Research Council
JP	Judge President
JSA	Johannesburg Society of Advocates
LCI	Law Commission of India
LEI	Legal expenses insurance
LGBTQI+	Lesbian, Gay, Bisexual, Transgender, Queer, Intersex
LGCS	Law graduate community service
Legal Aid SA	Legal Aid South Africa
LPC	(South African) Legal Practice Council
LSO	Legal Services Ombud
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)
MPS	Medical Protection Society

NBCSA	National Bar Council of South Africa
NCA	National Credit Regulator
NCT	National Consumer Tribunal
NGO	Non-the governmental organisation
NDP	National Development Plan
NPA	National Prosecuting Authority
NPO	Non-profit organisation
NADCAO	National Alliance for the Development of Community Advice Offices
NEDLAC	National Economic Development and Labour Council
OCJ	Office of the Chief Justice
PIPLA	Personal Injury Plaintiff Lawyers Association
PRASA	Passenger Rail Agency of South Africa
PPP	Public Procurement Regulator
RSA	Republic of South Africa
SAAPIL	*South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development*
SAMMLA	South African Medical Malpractice Lawyers' Association.
SASAS	South African Social Attitudes Survey
SASSA	South Africa Social Security Agency
SALRC	South African Law Reform Commission
SC	Senior Counsel
SCA	Supreme Court of Appeal
SCAT	Social Change Assistance Trust
SDG	Sustainable Development Goals
SER	Socio-economic rights
SERI	Socio-Economic Rights Institute
SOE	State-Owned Entity
SRL	Self-represented litigants
Stats SA	Statistics South Africa
RAF	Road Accident Fund
Rules Board	Rules Board for the Courts of Law
RSA	Republic of South Africa
RVG	German Law on the Remuneration of Attorneys
UK	United Kingdom
(UIF)	Unemployment Insurance Fund

VLRC	Victorian Law Reform Commission
VOCS	Victims of Crime Survey
Working Group	Legal Costs Working Group (Ireland)

Executive Summary

1. The right to access to courts is a fundamental human right embodied in section 34 of the Constitution. 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 in legal advocacy services. The introduction of the Legal Practice Act, 2014 (Act No.28 of 2014) (LPA) signals the intention of the Legislature and the Executive that appropriate actions have to be taken to address the problem of lack of access to justice for the majority of the people of South Africa.

2. Legal 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 majority of South African people are unable to access lawyers because of unattainable legal fees. Many South Africans live in rural areas, making travelling to a lawyer's office a financial battle.

3. A more recent study conducted by the Hague Institute for Innovation of Law (HiiL) found that legal needs occur in times of crisis when people are faced with traumatic life events like when a person loses a job, income, is in hospital after an accident, is indebted, jailed, evicted, has mental health issues or separates from his or her spouse. To avoid the risk of not being paid, understandably providers of legal services ask their clients to pay upfront. Unfortunately, this increases the pressure on individuals who are already struggling financially.

4. In the third quarter of 2019, there were 16.4 million employed South Africans, while 6.7 million were unemployed. This means that the unemployment rate was 29.1 percent and that only 42.4 percent of the population aged 15 to 24 years was in employment, an exceedingly low figure by international standards and very concerning. Trends over the past five years indicate that, although the economy has been adding jobs at a rate of 1.6 percent per year, this has been insufficient to absorb the growing number of work seekers as the labour force grows by 2.7 percent per year. From the perspective of the affordability of legal fees, this poses various challenges. Not least of these is the fact that incomes for the vast majority of the population are very low, leaving very little if any disposable income available for expenses such as legal fees.

5. Sections 35(4) and (5) of the LPA, which came into operation with effect from 1 November 2018, set out the parameters of the investigation to be undertaken by the South African Law Reform Commission (Commission or SALRC) within two years,

calculated from the latter mentioned date. Section 35(4) of the LPA mandates the Commission 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*.

6. In giving effect to this mandate, the Commission 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).*

7. Section 34 of the LPA distinguishes an attorney and an advocate. This came as a result of arduous lobbying by the legal profession that the whole Legal Practice Bill to be premised on the continuation of the two categories of legal practitioners, despite challenges inherent in the divided bar that the Legal Practice Bill is trying to address. The disparity in legal fees charged between attorneys and advocates (some attorneys charge more than advocates) on the one hand, and the effect of the divided bar in the development of the party-and-party tariffs and attorney-and-client fees, on the other hand, has always been a contentious matter. The referral rule that an attorney instructs an advocate at times undoubtedly has the effect of increasing costs.

8. Although the LPA retains to a large degree the structure of the divided bar with its origins in both the Roman-Dutch and English law, however, section 34(2)(b) of the LPA has introduced a third category of a legal practitioner, that is, an advocate that can accept a brief directly from a member of the public or a justice centre for that service, provided that she/he is in possession of a Fidelity Fund Certificate and has notified the Legal Practice Council (LPC) of her/his intention of doing so. Section 3(c) of the LPA provides that the purpose of this Act is to "create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession."

9. If legal practitioners are to be encouraged to strive to work together, and if fostering of a team spirit is consistent with the purpose of the LPA, the development of service-based tariffs and attorney-and-client fee guidelines, instead of practitioner-based tariffs and fee guidelines, providing a narrative of the services to be rendered and the cost thereof, regardless of which practitioner will provide the service in question, will go a long way towards achieving this objective.

10. The Commission's investigation encompasses consideration of the effectiveness and desirability of retaining, with or without amendment, the current scheme of permissible contingency fees in terms of the Contingency Fees Act, 1997 (Act No.66 of 1997). A question is asked whether it is justifiable that the Contingency Fees Act, 1997 should be retained as is, or whether the monetary limits of 25% are set too high and therefore the courts should play an interventionist role in setting caps for contingency fees agreements (CFAs). Put differently, the question is whether CFAs advance the course of access to justice and whether they are being used in matters where if the LPA was not in place, litigation could still have taken place.

11. The Commission is required to investigate how the existing mechanism for the recovery of fees and costs (party-and-party costs) and 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. 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 the legal profession.

12. The Commission's final proposals as set out in this Report and the accompanying Justice Laws General Amendment Bill can be summarised as follows:

13. In line with the categorisation of legal costs as provided in Chapter 1 of this Report, the Mechanism contemplated in section 35(4) of the LPA is divided into two components, that is:

(a) A mechanism for party-and-party costs; and
(b) A mechanism for attorney-and-client fees.

14. The mechanism for party-and-party costs will be discussed first, and thereafter, the mechanism for attorney-and-client fees will be discussed.

A. Mechanism for party-and-party costs

(a). The desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners

15. Section 3(b) of the LPA provides that:

[T]he purpose of this Act is to-

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;

16. As discussed in paragraphs 54-59 below, the Commission is of the view that there is no need for another mechanism to be established when an existing mechanism for determining party-and-party costs can be adapted for this purpose.

(b) Composition of the mechanism (institutionally)

17. The Commission is of the view that the Rules Board, as presently constituted institutionally in terms of section 3 of the Rules Board for Courts of Law Act, 1985, read with section 5(1) of the Act, is the appropriate existing mechanism for determining recoverable legal fees and tariffs payable to legal practitioners and juristic entities in litigious matters.

(c) Process to be followed by the mechanism in determining legal fees or tariffs

18. It is recommended that the mechanism (Rules Board) must adopt an effective consultative process of all the stakeholders involved before determining legal fees and tariffs. The following stakeholders and role players, among others, must be consulted:

(a) the LPC;
(b) consumers of legal services;
(c) members and representatives of the legal profession;
(d) members and representatives of the judiciary;
(e) representatives of civil society organisations;
(f) the Minister, or his/ her representative;
(g) the Competition Commission;
(h) Legal Aid SA;
(i) Law clinics;
(j) Juristic entities;
(k) NEDLAC; and
(l) Human Sciences Research Council.

B. Mechanism for attorney-and-client fees

(a) Desirability and composition of the mechanism which will be responsible for determining fees and tariffs payable to legal practitioners

B1. The context for attorney-and-client fees

19. Four scenarios to deal with attorney-and-client fees are discussed. These scenarios are the following:

(a) Current status quo (no tariffs and no fee guidelines);
(b) Universal compulsory tariff;
(c) Tariff with limited targeting; and
(d) Service-based attorney-and-client fee guidelines.

20. The Commission is of the view that the current status quo in terms of which there is neither a statutory tariff nor fee guidelines for legal services is contrary to the purpose of the LPA as envisaged in section 3(b)(i) and therefore undesirable. Furthermore, it is clear from the representations received, that the current status quo is denying a large number of people access to justice. For the reasons advanced in Chapter 7 of this Report, the Commission concurs with the view of many respondents who submitted that the imposition of a universal and compulsory tariff is undesirable not only for the legal profession but for the economy of South Africa too.

21. The proposal of having attorney-and-client fees pegged at the same level and determined on the same tariff as party-party costs in litigious matters in respect of users of legal services in the lower and middle-income bands might at first glance not find favour with many legal practitioners. However, there are credible arguments in favour of this option. First, this proposal is limited to a certain category of users of legal services, and second, only to certain fora (district and regional/ Magistrates' Courts), where it is not in dispute that legal fees will be lower compared to other fora. Third, the fact that a successful litigant in all respects is still required to pay legal (attorney-and-client) fees despite his/her or its success in the matter seem unreasonable to many potential users that legal fees are payable regardless of the outcome of the case. Fourth, considering that courts only grant costs on the attorney-and-client scale in exceptional circumstances, these factors taken as a whole may serve as a deterrent to anyone contemplating litigation, notwithstanding the advice a user may obtain to the effect that the prospect of winning the case are high. This cannot be in the interest of justice that someone who has an imminently winnable case is deterred from going to court or other fora by the prospect, even in the event of success, of having to pay attorney-and-client fees.

22. It is against this background that the proposal to equate attorney-and-client fees with party-and-party costs in litigious matters in respect of users of legal services in the lower and middle-income bands is made. The alternative proposal that if attorney-and-client fees should be higher than the party-and-party tariff, and that this must be in terms of a fixed percentage so that it is predictable and determinable upfront, did not enjoy majority support from many of the stakeholders who were consulted. Consequently, this alternative proposal is not recommended by the Commission. Taking away the option to pay fees in excess of the fee determined by the mechanism in respect of the users in the lower and middle-income bands to be determined by the Minister by notice in the Gazette will create greater confidence in this category of users of legal services.

B2. Options for attorney-and-client fees

23. The options for attorney-and-client fees presented below are premised on the division of users of legal services into three socio-economic bands, namely: the lower-income; middle-income; and upper-income bands. This three-tier distinction is based largely upon the submissions received and public consultations and workshops held in response to Issue Paper 36, which point out clearly that users of legal services who fall

within the lower to middle-income bands have problems with access to justice and the cost of legal services is a prohibitory factor to them. According to information before the Commission, middle-income users of legal services struggle to pay legal fees and do not qualify for free or nominal charge legal service through Legal Aid South Africa and university law clinics. The Commission also took into account the interests of the legal profession and arguments made in this regard when considering the categorisation of users of legal services as outlined above. The Commission has identified three options for attorney-and-client fees as follows:

1. Option 1: Use of Rules Board's litigious tariff with limited targeting

24. This Option entails that:

(a) the litigious tariff determined by the Rules Board for use in the Magistrates' Courts be extended by default or operation of law as a basis for determining service-based attorney-and-client fees payable to legal practitioners;

(b) this will be in respect of the users of legal services whose total income/turnover per annum is below the maximum threshold to be determined by the Minister by notice in the Gazette; and

(c) the user will have no option of voluntarily agreeing to pay such fees less or in excess of any amount that may be determined by the mechanism (Rules Board).

25. This option does not apply to all other users of legal services and all juristic persons. The effect of Option One is that attorney-and-client fees will be the same as the party-and-party tariff in respect of the users of legal services who fall within the lower and middle-income bands in litigious matters.

26. This option is supported by a majority of community members as well as other stakeholders identified in this Report, save for some members and representatives of the legal profession. The stakeholders who are opposed to Option 1 are of the view that, if approved, implementation of the Commission's recommendation may have the following unintended consequences:

(a) Option 1 is arbitrary, irrational and unjustifiable;
(b) Absence of an opt-out provision is contrary to the provisions of the LPA;

(c) Option 1 will lead to a significant reduction in access to legal services, a decline in the quality of legal services provided and a possible closing down of law practices and firms;
(d) The proposal does not represent a reasonable fee for services rendered;
(e) The proposal will detract from the principles of independence of the legal profession and contractual freedom;
(f) Option 1 will become the floor price and may significantly lessen or prevent competition;
(g) Option 1 may present administrative challenges for legal practitioners to implement.

(a) Option 1 is arbitrary, irrational and unjustifiable

27. In *City Council of Pretoria v Walker*,[21] Langa DP held that the rationality criterion adopted in *Prinsloo* should "be equally applicable whether we are dealing with "equality before the law" or "equal protection of the law." In this case, the majority judgement agreed that the difference in treatment regarding levying of rates and service charges did not constitute unfair discrimination. According to Langa DP, "what is clear is that not all differentiation amounts to discrimination as envisaged" in the equality provision of the Constitution, that "cross-subsidisation is an accepted, inevitable and unobjectionable aspect of modern life" and that "cross-subsidisation will occur even where uniform tariffs exist."[22]

28. In *Hoffman v South African Airways*,[23] Ngcobo J held that challenges to statutory provisions and government conduct alleged to infringe the right to equality involve the following three basic enquiries:

> "[F]irst, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of section

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21 1998 (2) SA 363 (CC) par 27.
22 *Ibid*, pars 26; 63; and 61 respectively.
23 [2000] 12 BLLR 1365 (CC) par 24.

> 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application."

29. The purpose of the LPA is, among others, 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."[24] It is submitted that the proposed measure is rationally connected to the legitimate government purpose as provided for in the LPA and is accordingly justifiable for the same reason. The LPA is a law of general application. The SALRC is mandated by sections 35(4) and (5) of the LPA to investigate and report to the Minister on, inter alia, "the desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners" "that are within the reach of the citizenry."

(b) Absence of an opt-out provision is contrary to the provisions of the LPA

30. Section 35(4)(e) of the LPA invites the Commission to express a view on "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)." Having identified the recoverable tariffs determined by the Rules Board in litigious matters as the mechanism envisaged in Section 35(4)(c), the Commission is of the view that it is not desirable that users of legal services whose total income/turnover per annum does not exceed the maximum threshold to be determined by the Minister be given the option of voluntarily agreeing to pay fees for legal services less or in excess of the amount so determined by the mechanism for the reasons provided under Recommendation 6.15 of this Report.[25]

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24 Section 3(b) of the LPA.

25 The reasons are the following:

(a) If the Legislation provides an unlimited capacity for users of legal services to opt out, this could have the effect of emasculating and seriously undermining the mechanism put in place to determine a reasonable fee and/or tariff for the protected category of users;

(b) Mandatory fee agreements with pre-populated opt-out clauses will simply be the order of the day; and

(c) Option 1 will lead to a significant reduction in access to legal services, a decline in the quality of legal services provided and a possible closing down of law practices and firms

31. First, the proposed tariff will have limited application in that it will apply to users in the lower and middle-income bands in the Magistrates Courts only. All juristic persons, as well as persons who can afford to pay for legal services, will be excluded from the operation of the proposed measure. Legal fees in the Magistrates' Courts are generally lower compared to other fora. It is clear from the provincial workshops held with community members that the majority of the users in these categories do not, in any event, afford to pay the fees charged by legal practitioners.

32. Second, it is not immediately clear as to why the proposed measure will on its own lead to a reduction in access to justice and legal services for users in the lower and middle-income categories in the light of a whole range of other interventions proposed by the Commission to promote access to justice as contained in this Report. These interventions include taking legal matters on contingency fees arrangements; recovery of costs by legal practitioners rendering free legal services in terms of section 92 of the LPA; and ADR mechanisms, to mention but a few.

33. Third, the GCBSA (Johannesburg Society of Advocates) submits that a mandatory tariff "would directly infringe on the livelihoods of the younger members of the Bar, particularly since work done by these members in the local and regional Magistrates' Courts is largely for individuals in what would be the lower and middle-income bands as determined by the Minister.[26] However, junior members of the Bar equally provide services to users in the upper-income band too. They also appear in other fora, like the Small Claims Courts, HC, SCA, and Constitutional Court. The same applies to the majority of attorneys who operate as sole proprietors within small firms referred to in the submission from the LSSA. Langa DP confirmed that "cross-subsidisation will occur even

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(c) These consequences will not be avoided by requiring the protected category of users of legal services who agree to pay above the fee determined by the mechanism to have such agreement reduced to writing and to provide reasons for doing so.

26 JSA, "Response to the SALRC Discussion Paper 150" par 4.

where uniform tariffs exist. Cross subsidisation between different categories of consumers and within the same category is unavoidable."[27]

34. Fourth, the GCBSA (Society of Advocates of KwaZulu-Natal) submits that "[i]f there is to be a tariff, then option 1 should be preferred, provided that it is limited to operation in the Magistrates' Courts, and excludes from its ambit artificial (juristic) persons, and persons who can afford to pay for legal services."[28] The Commission supports this view.

35. Fifth, the argument that the proposal may lead to a reduction in the quality of services rendered appears to fly in the face of clause 3.3 of the Code of Conduct which provides that "[l]egal practitioners, candidate legal practitioners and juristic entities shall treat the interests of their clients as paramount, provided that their conduct shall be subject always to the maintenance of the ethical standard prescribed by this code, and any ethical standards generally recognised by the profession."[29]

(d) The proposal does not represent a reasonable fee for services rendered

36. It is general knowledge that all legal practitioners are entitled to a reasonable fee for services rendered.[30] This is an internationally accepted norm. The proposed measure does not necessarily deviate from this widely recognised norm. Much as the gap that exists between party-and-party tariffs and attorney-and-client costs is currently unknown owing to lack of empirical evidence in this regard, the gap itself is acknowledged in this Report. It is on the basis of the gap between these two scales that the Commission recommends that the party-and-party tariffs must be reviewed annually and updated to keep up with inflation. It is also important to note that clause 29.5 of the Code of Conduct provides that "[c]ounsel may, in calculating a fee, on the grounds of a client's lack of means to pay fees, charge the client an amount less than would otherwise be reasonable for the services rendered, or charge no fee at all."

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27 *City Council of Pretoria v Walker supra,* par 61.

28 Society of Advocates of KwaZulu-Natal "Memorandum on the SALRC Discussion Paper 150" par 74. The Respondent submits that "[t]his is because it is relatively easy to set up company structures to render a company's financial position such that it has so few assets and annual profit that it would fall within the means test to qualify for the beneficial tariff in its favour," *idem*.

29 Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in *The Government Gazette* No.42337 dated 29 March 2019.

30 See clauses 3.12 and 29.1 of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in the Government *Gazette* No.42337 dated 29 March 2019.

(e) The proposal will detract from the principles of independence of the legal profession and contractual freedom

37. The Commission concurs with the LPC's view that legal practitioners are not compelled to agree to the provision of legal services at the tariff amount. Legal practitioners have a right to refuse to accept a mandate subject to the tariff amount. Compulsion is certainly not a contract. The subject of independence of legal practitioners and contractual freedom is sufficiently provided for in the Code of Conduct. The Code of Conduct provides in the relevant sections as follows:

> 3 Legal practitioners, candidate legal practitioners and juristic entities shall-
> 3.7 respect the freedom of clients to be represented by a legal practitioner of their choice;
> 3.11 use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner;
> 26. Acceptance of briefs and the cab-rank rule
> 26.1 Counsel are at liberty to limit in what areas of practice, and in which courts, they wish to accept briefs and to appear, and to profess to practice in such limited areas and courts.[31]

(f) Option 1 will become the floor price and may significantly lessen or prevent competition

38. Sections 4(1) and 5(1) of the Competition Act provide as follows:

> **4 Restrictive horizontal practices prohibited**
>
> (1) An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-
>
> (a) 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; or
>
> (b) it involves any of the following restrictive horizontal practices:
>
> (i) directly or indirectly fixing a purchase or selling price or any other trading condition;

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31 Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in the Government *Gazette* No.42337 dated 29 March 2019.

(ii) dividing markets, by allocating customers, suppliers, territories, or specific types of goods or services; or
(iii) collusive tendering.

5. Restrictive vertical practices prohibited

(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.

39. It is submitted that based on the definitions of "horizontal relationship" and "vertical relationship" contained in section 1 of the Competition Act, 1998,[32] neither section 4(1) nor section 5(1) of the latter mentioned Act will apply to the proposal. Furthermore, there is no credible argument supported by evidence that the proposal will substantially lessen or prevent competition in the market. If anything, the proposal will facilitate expediency and provide certainty for the client as well as the legal practitioner. The Commission is of the view that having users of legal services in the lower to middle-income bands represented in the Magistrates' Courts is actually pro-competitive.

40. If the view that Option 1 does not represent a reasonable fee is anything to go by, then certainly it should be able to promote competition below the so-called maximum ceiling price, provided that it is updated annually to keep up with inflation as recommended by the Commission.

(g) Option 1 may present administrative challenges for legal practitioners to implement

41. Personal Injury Plaintiff Lawyers Association (PIPLA) submits that "the provisions may encourage some litigants to be less honest about their incomes so as to bring themselves within the definition of low or middle-income earners. To determine which income brackets litigants fall under will present an administrative nightmare to legal practitioners and the staff of the LPC."[33]

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32 In terms of section 1 of the Competition Act, "horizontal relationship" means a relationship between competitors. "Vertical relationship" means relationship between firms and its suppliers, its customers or both."

33 PIPLA "SALRC's Discussion Paper 150 Regarding Project 142" 9.

42. It is submitted that the Rules Board will determine the monetary value of the socio-economic three-tier distinction among the users of legal services in the lower, middle and upper-income bands. The application of the means test by legal practitioners to users in the lower to middle-income bands could be emulated from the approach and the system adopted by the Legal Aid SA and improved upon.

2. Option 2: Use of Rules Board's litigious tariff with limited targeting subject to an additional surcharge to be approved by Minister

This Option entails that:

(a) the litigious tariff determined by the Rules Board for use in the Magistrates' Courts be extended by default or operation of law as the basis for determining service-based attorney-and-client fees payable to legal practitioners;
(b) this will be in respect of the users of legal services whose total income/turnover per annum is below the maximum threshold to be determined by the Minister by notice in the Gazette;
(c) the user will have no option of voluntarily agreeing to pay such fees less or in excess of any amount that may be determined by the mechanism (Rules Board); and
(d) subject to allowing not more than 20% surcharge, or such percentage as may be approved by the Minister acting upon the recommendation of the Rules Board, on the tariff amount to be determined at taxation by the registrars and clerks.

43. This option does not apply to all other users of legal services and all juristic persons. The effect of Option Two is that attorney-and-client fees will not be the same as the party-and-party tariff in respect of the users of legal services who fall within the lower and middle-income bands in litigious matters.

44. The Commission invited comment and input on the question of whether either Option One or Option Two should be recommended as an interim arrangement pending the development of service-based attorney-and-client fee guidelines by the LPC and further review by the SALRC; or whether either of these options should be recommended as a permanent arrangement.

45. It is to be noted that the existing recovery (party-and-party) tariff is applicable in litigious matters only as the mandate of the Rules Board does not at present incorporate

non-litigious matters. Thus, Options One and Two do not address the *lacuna* that exists at present. This *lacuna* is, however, addressed by Option Three, which calls for the development of guidelines in litigious and non-litigious matters as discussed in Chapter 7 of this Report.

46. Options One and Two will bring about a significant reduction in legal fees payable by users of legal services in the lower and middle-income categories in litigious matters, taking into account that party-and-party costs constitute in the region of about 30%-60% of the attorney-and-client fees.[34]

47. Given the objections against Option One by members of the legal profession, it is recommended (**Recommendation 6.11**) that, for the sake of certainty, this proposal be adopted as an interim arrangement pending the development of service-based attorney-and-client fee guidelines by the LPC in all the branches of the law. The adoption of Option One as an interim arrangement will make room for undertaking a detailed economic analysis in respect of what effect the proposed fees regime will have on legal practitioners and a model of the impact on access to justice before such far-reaching changes are implemented. Such a study could be commissioned by the DOJ&CD to a research organisation such as the HSRC.

48. Option 2 is generally not supported by many stakeholders. According to Legal Aid SA, allowing a 20% surcharge could in itself become quite expensive given that on a R20 000 party-and-party bill, it will cost a litigant R4000 more, which is substantial for a low to the middle-income litigant.[35] Likewise, the LPC submits that "[i]f there is to be a tariff then Option 1 should be preferred."[36]

3. Option 3: Development of service-based fee guidelines by the LPC in litigious and non-litigious matters

48. The Commission is of the view that the LPC, as the regulatory body for the legal profession in the Republic, is the appropriate body to develop service-based attorney-

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34 The view was expressed at the Commission meeting held on 30 June 2020. Laurens M submits that "the gap between party-and-party costs and attorney-and-client costs had increased from 30% to 70% over the years", "Submission to the South African Law Reform Commission" (12 August 2019) 6.

35 Legal Aid SA, "Response to Questions Raised and Recommendations made by the SALRC in Discussion Paper 150" 38.

36 LPC, "Project 142: Discussion Paper 150" 14.

and-client Fee Guidelines for determining legal fees in respect of all branches of the law. Section 18(1)(ii) of the LPA empowers the LPC to establish a committee comprising of members of the LPC and any other suitable persons except employees of the LPC, to assist the LPC in the exercise of its powers and performance of its functions. Section 18(2)(a)–(b) of the LPA empowers the LPC to determine the powers and functions of a committee and to appoint a member of a committee as chairperson of such committee. It is recommended that the LPC must establish a Committee to be responsible for determining service-based attorney-and-client fee guidelines. The Committee should comprise of fit and proper persons drawn from the following sectors of society:

(a) Legal profession;
(b) Judiciary;
(c) Government; and
(d) Civil society.

49. The detail about the composition of the Committee and the number of members who may constitute such a Committee are all matters to be decided by the LPC. The Commission is of the view that there is no need for another mechanism to be established when an existing mechanism can be adapted for this purpose.

Proposed legislative intervention:

50. Section 95(1) of the LPA empowers the LPC to make rules by publication in the Gazette relating to a wide variety of matters. Save for paragraph 95(1)(zO) which provides that rules must be made in respect of "any other matter in respect of which rules may or must be made in terms of this Act", there is no other provision that directly empowers the LPC to make rules in respect of fees and tariffs payable to legal practitioners. The Attorneys Act 53 of 1979, which empowered the council of a law society to prescribe the tariff of fees payable to any practitioner in respect of professional services rendered in cases where no tariff is prescribed by any other law, was repealed as a whole by section 119 of the LPA with effect from 1 February 2015.

51. It is recommended that the LPA be amended by the insertion of a new paragraph-preceding paragraph 95(1)(zO) to read as follows:

95.(1) The Council may, and where required in the circumstances, must by publication in the Gazette, make rules relating to-

"(zNA) fees and tariffs payable to legal practitioners and juristic entities in respect of litigious and non-litigious legal services;"

52. The service-based attorney-and-client Fee Guidelines may be developed based on the factors enumerated under section 35(2) of the LPA. Fee guidelines will serve as a yardstick to determine a reasonable fee. Parties will be able to deviate from the fee guidelines in justifiable circumstances.

53. A summary of these three options is presented in the table below.

Table 1: Possible options for attorney-and-client fees

Options	Attorney & Client Fee		
	Users of legal services in the lower & middle-income bands to be determined by the Minister		All other users of legal services
	Litigious matters	Non-litigious matters	Litigious and non-litigious matters
Option 1	• Party-and party tariff (in litigious matters) to apply as a default position (that is, the attorney-and-client fee to be same as a party-and-party tariff); • without choice to opt-out in the Magistrates' Courts	Not applicable	Not applicable
Option 2	• Party-and-party tariff (in litigious matters) to apply as default position; • without choice to opt-out in the Magistrates' Court; • not more than 20% surcharge on the tariff amount to be determined by the registrar or clerk	Not applicable	Not applicable
Option 3	Development of service-based attorney-and-client fee guidelines by the LPC	Development of service-based attorney-and-client fee guidelines by the LPC	Development of service-based attorney-and-client fee guidelines by the LPC

Question for comment	• Whether option 1 or 2 should be a permanent arrangement?	Not applicable	Not applicable
Question for comment	• Whether option 1 or 2 should be an interim arrangement pending the development of fee guidelines by the LPC and further review by the SALRC?	Not applicable	Not applicable

54. **Recommendation 6.12**: The Commission recommends it is desirable that the existing mechanism for determining recoverable (party- and- party) legal fees and tariffs in litigious matters in the Magistrates' Courts should be extended by default, without the opt-out option as provided for in section 35(3) of the LPA, for use as a basis for determining attorney-and-client fees payable to legal practitioners by users of legal services whose total income/turnover per annum does not exceed the maximum threshold determined by the Minister by Notice in the Gazette,[37] subject to the following modifications:

(i) that the party-and-party tariffs must be reviewed annually and updated to keep up with inflation;[38]

(ii) that the party-and-party tariffs in respect of attorneys' and counsels' fees must be reviewed in relation to each other and in respect of the various hierarchies of court to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Court level right up to the Supreme Court of Appeal and Constitutional Court. A tariff for counsels'

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37 Section 5(2)(b) of the Consumer Protection Act, 2008 provides that:
"This Act does not apply to any transaction-
(b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister (Cabinet member responsible for consumer protection matters) in terms of section 6."
According to Eeden and Barnard, the Minister must at intervals of not more than five years, determine by notice in the Gazette, a monetary threshold applicable to the value of transactions for the purposes of section 5(2)(b) of the Act, *Consumer Protection Law in South Africa* (2017) 53.

38 Legal Aid SA submits that "these tariffs should, however, in accordance with the SALRC's recommendation, be reviewed annually (and not every 2 years as current) to provide for inflation-based increases," *op cit*, 30.

fees is required to guide taxing masters in the taxation of counsels' fees and to establish uniformity in the taxation of counsels' fees with those of attorneys with the right of appearance in the High Court.

55. The Commission is of the view that there is no need for another mechanism to be established when an existing mechanism can be adapted for this purpose.

Alternatively:

56. **Recommendation 6.13**: The Commission recommends that it is desirable that the existing mechanism for determining recoverable (party- and- party) legal fees and tariffs in litigious matters in the Magistrates' Courts should be extended by default, without the opt-out option as provided for in section 35(3) of the LPA, as a basis for determining attorney-and-client fees payable to legal practitioners by users of legal services whose total income/turnover per annum does not exceed the maximum threshold determined by the Minister by Notice in the Gazette, subject to the following modifications:

(i) additional surcharge of not more than 20%, or such percentage as may be determined by the Minister, on the tariff amount to be determined at taxation by the registrar or clerk;
(ii) that the party-and-party tariffs must be reviewed annually and updated once every two years to keep up with inflation;
(iii) that the party-and-party tariffs in respect of attorneys' and counsels' fees must be reviewed in relation with each other and in respect of the various hierarchies of court to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Court level right up to the Supreme Court of Appeal and Constitutional Court. A tariff for counsels' fees is required to guide taxing masters in the taxation of counsels' fees and to establish uniformity in the taxation of counsels' fees with those of attorneys with the right of appearance in the High Court.

57. Since **recommendation 6.13** goes hand in hand with Option 2, which is generally not supported by many stakeholders, it follows that **recommendation 6.13** falls to be dismissed.

Proposed legislative intervention

58. Should the recommendation be approved by the Minister, section 35(1) of the LPA could be amended to read as follows:

> "35(1**) [Until the investigation contemplated in subsection (4) has been completed and the recommendations contained therein have been implemented by the Minister, [f]**Fees in respect of litigious **[and non-litigious]** legal services rendered by legal practitioners[**,**] and juristic entities, **[law clinics or Legal Aid South Africa referred to in section 34]** must be in accordance with the tariffs made by the Rules Board for the Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No.107 of 1985)."

59. Furthermore, it is recommended that in order to give effect to the Commission's recommendation, the Rules Board for the Courts of Law Act, 1985 (Act No.107 of 1985) must also be amended to empower the Rules Board to advise the Minister on the legal fees and tariffs payable by users of legal services in the lower and middle-income categories for legal services rendered. It is recommended that section 6 of Act 107 of 1985 be amended by the substitution for subsections 6 and 7 of the following subsections 6 and 7 respectively:

> "(6) The Board may advise the Minister on the monetary jurisdiction limits of lower courts, the limitation of the costs of litigation, the tariff of legal fees applicable to users of legal services in the lower and middle-income bands, and any other matter referred to the Board by the Minister.
>
> (7) The power to make, amend or repeal rules under subsection (1) shall include the power to make, amend or repeal rules in order to give effect to the provisions of sections 2 and 3 of the Foreign Courts Evidence Act, 1962 (Act No.80 of 1962)[**.**] and section 3(b)(i) of the Legal Practice Act, 2014 (Act No.28 of 2014)."

(b) Process to be followed by the mechanism in determining fees or tariffs

60. It is recommended that the mechanism (LPC) must adopt an effective consultative process of all the stakeholders involved before determining fees and tariffs. The following stakeholders and role players, among others, must be consulted:

(a) the Rules Board;
(b) consumers of legal services;
(c) members and representatives of the legal profession;
(d) members and representatives of the judiciary;
(e) representatives of civil society organisations;
(f) the Minister, or his/ her representative;
(g) the Competition Commission;
(h) Legal Aid SA;
(i) Law clinics;
(j) Juristic entities;
(k) NEDLAC; and
(l) Human Sciences Research Council.

B3. Opting-out of a fee determined by the mechanism

(c) 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**.**

61. Section 35(3) of the LPA provides a user of litigious or non-litigious legal services with the option to voluntarily agree in writing with a legal practitioner to pay for the services in question in excess of or below any fee or tariff determined by the mechanism. From the wording of this section, it appears that the “opt-out” option is one-sided as there can only be an “opt-out” at the instance of the client, to the exclusion of the provider of legal services. This section is not operational yet.

62. Section 35(4)(e) invites the Commission to make a determination on 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. Thus, the question before the Commission is under what circumstances can a user of legal services contract to opt-out of the fee and/or tariff set by the mechanism? Should this option not be extended to the providers of legal services as well and what are the implications of the opt-out provision on the principle of contractual freedom?

63. The implications of the opt-out provision on the principle of contractual freedom (*pacta sunt servanda*) are discussed under section E: Policy Questions of Chapter 1 of this Discussion Paper. In *Barkhuizen v Napier*,[39] Ngcobo J had this to say on the subject of contractual autonomy:

> *I do not understand the Supreme Court of Appeal as suggesting that the principle of contract pacta sunt servanda is a sacred cow that should trump all other considerations. That it did not, is apparent from the judgement. The Supreme Court of Appeal accepted that the constitutional values of equality and dignity may, however, prove to be decisive when the issue of parties' relative bargaining positions is an issue. All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle pacta sunt servanda is, therefore, subject to constitutional control.*

64. The proposed mechanism must recognise and protect contractual freedom; independence of the legal profession and the right to choose trade, occupation or profession freely. However, there are a number of other factors that must be taken into consideration and balanced against each other, such as the need to broaden access to justice to ensure that legal services rendered are within the reach of the citizenry; and the state's obligation to respect, promote and fulfil the rights in the Bill of Rights as contemplated in the Constitution.

65. Accordingly, the Commission invited input and comment on the following two Options concerning the proposed operation of the opt-out provision contained in section 35(3) of the LPA:

Option 1

66. Whether all users of legal services should have the choice to opt-out (pay fees for legal services less or in excess) of the fee determined by the mechanism. For users in the lower and middle-income bands to be determined by the Minister, this choice refers to the litigious tariff as determined by the Rules Board, which will apply to them by default or operation of law as the basis for determining attorney-and-client fees payable to legal practitioners. For all other users of legal services, this choice refers to service-based

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39 [2007] (5) SA 323 CC par 15.

attorney-and-client fee guidelines to be determined by the LPC in litigious and non-litigious matters.

Option 2

67. Whether all users of legal services should have no choice to opt-out (pay fees for legal services less or in excess) of the fee determined by the mechanism. For users in the lower and middle-income bands to be determined by the Minister, this choice refers to the litigious tariff as determined by the Rules Board, which will apply to them by default or operation of law as the basis for determining attorney-and-client fees payable to legal practitioners. For all other users of legal services, this choice refers to service-based attorney-and-client fee guidelines to be determined by the LPC in litigious and non-litigious matters.

68**.** **Recommendation 6:15**: The Commission recommends that it is not desirable that users (natural persons) of legal services whose total income/turnover per annum does not exceed the maximum threshold to be prescribed by the Minister by notice in the Gazette, be given the option of voluntarily agreeing to pay fees for legal services in excess of any amount that may be set by the Mechanism (tariffs prescribed by the Rules Board) in the Magistrates' (district and regional) Courts on the following grounds:

(a) If the Legislation provides an unlimited capacity for users of legal services to opt-out, this could have the effect of emasculating and seriously undermining the mechanism put in place to determine a reasonable fee and/or tariff for the protected category of users;
(b) Mandatory fee agreements with pre-populated opt-out clauses will simply be the order of the day; and
(c) These consequences will not be avoided by requiring the protected category of users of legal services who agree to pay in excess of the fee determined by the mechanism to have such agreement reduced to writing and to provide reasons for doing so.

69. **Recommendation 6:16**: However, the Commission recommends that it is desirable that all other users of legal services, including users of litigious legal services in the HC; SCA and Constitutional Court and non-litigious legal services whose total income/turnover per annum does not exceed the maximum threshold to be prescribed by the Minister by notice in the Gazette*,* be given 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 (service-based attorney-and-client Fee Guidelines to be developed by the LPC). Parties who opt to pay in excess of the fee determined by the mechanism will have to reduce their agreement into writing and provide reasons for doing so. Since it is the responsibility of the LPC to promote access to justice, to promote and protect the public interest, it follows that the implementation of the limited tariff as determined by the Mechanism will be overseen by the LPC as part of the complaints handling mechanism.

70. In light of recommendation 6.15 above, section 35(3) of the LPA could be amended to read as follows:

> "**[Despite any other law to the contrary]**, Save for the users of legal services in Magistrates' Court matters whose total income/turnover per annum does not exceed the maximum threshold to be determined by the Minister by Notice in the Gazette, nothing in this **[section]** Act precludes any user of litigious or non-litigious legal services, on his**, [or]** her or its own initiative, from voluntarily agreeing with a legal practitioner in writing, to pay fees for the service in question in excess of or below any tariffs determined as contemplated in this **[section]** Act."

71. **Recommendation 7.5**: The Commission recommends that, with regard to service-based attorney-and-client fee guidelines, it is desirable that users of legal services should be given 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 (LPC).

(e) Obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services

72. The Commission recommends that it should be obligatory for all legal practitioners to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services.

73. It is recommended that the LPC, as the regulator for the legal profession, is the appropriate mechanism to deal with allegations of excessive legal fees in terms of section 5(b) of the LPA. The LPC has adopted the Contingency Fee Tribunals established in terms of section 5 of the Act by the former Law Societies and their functions. Additional tribunals will be established by the LPC for each of the nine provinces of the Republic. Furthermore, it is recommended that section 6 of the Contingency Fees Act, which provides for rules to be made in order to give effect to the provisions of the Act, be amended as proposed in Chapter 5 of this Discussion Paper.

C. Other proposed amendments to the Legal Practice Act, 2014

74. The Commission recommends that section 29(2) of the LPA be amended by the substitution for subparagraphs (b) and (e) of the following subparagraphs (b) and (e); and the addition of the following subparagraphs:

Community service

(2) Community service for the purposes of this section may include, but is not limited, to the following:

(a) Service in the State, approved by the Minister, in consultation with the Council;

(b) service at **[the South African Human Rights Commission]** <u>any of the institutions supporting constitutional democracy referred to in Chapter 9 of the Constitution</u>;

(c) service, without remuneration, as a judicial officer in the case of legal practitioners, including as a commissioner in the small claims courts;

(cA) s<u>ervice at a community advice office</u>;

(d) The provision of legal education and training on behalf of the Council or on behalf of an academic institution or non-government organisation; **[or]**

(dA) s<u>ervice on a *pro bono* basis in compliance with the rules made by the Council; or</u>

(e) any other service <u>that broadens access to justice</u> which the candidate legal practitioner or the legal practitioner may want to perform, with the <u>prior</u> approval of the Minister.

75. Paragraph (e) of section 29(2) must be amended as proposed above to align community service with the purpose of the LPA as provided for in section 3(b) of the LPA, that is, "to broaden access to justice" and not to confine the concept to the provision of legal services only. It is submitted that the above-mentioned proposed amendment of the LPA will enable the Minister to make regulations, and the LPC to make rules, regulating community service and *pro bono* legal services on the model as provided for under rule 25 of the attorneys' profession.

D. Proposed amendments to the Rules Board for the Courts of Law Act, 1985

76. Section 3(b) of the LPA provides that:

> *[T]he purpose of this Act is to-*
>
> *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*;

77. To give effect to the recommendations of the Commission, it is recommended that the Rules Board for the Courts of Law Act, 1985 be amended so as to empower the Rules Board to advise the Minister on the legal fees and tariffs payable by users of legal services in the lower and middle-income bands for legal services rendered. It is recommended that section 6 of Act 107 of 1985 be amended by the substitution for subsections 6 and 7 of the following subsections 6 and 7 respectively:

> "(6) The Board may advise the Minister on the monetary jurisdiction limits of lower courts, the limitation of the costs of litigation, the tariff of legal fees applicable to users of legal services in the lower and middle-income bands, and any other matter referred to the Board by the Minister.
>
> (7) The power to make, amend or repeal rules under subsection (1) shall include the power to make, amend or repeal rules in order to give effect to the provisions of sections 2 and 3 of the Foreign Courts Evidence Act, 1962 (Act No.80 of 1962)[**.**] and section 3(b)(i) of the Legal Practice Act, 2014 (Act No.28 of 2014)."

E. Proposed amendments to the Contingency Fees Act, 1997

78. The following is recommended:

(a) that the definition of "professional controlling body" in section 1 of the Act be deleted;

(b) that section 1 of the Act be amended by the inclusion of the following definition of success fee:

Success fee means "a fee contemplated in section 2(1)(b) read together with section 2(2) of this Act, comprising of all legal fees collectively, that is, attorneys' fees; advocates' fees and correspondent attorneys' fees, which is in addition to the normal fee."

(c) that section 2 of the Contingency Fees Act be amended by the substitution for subsection (1) of the following subsection (1):
"Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there is some foreseeable risk in the matter and there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed-

(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;

(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.

(d) that section 4(1) of the Act be amended as follows:
"Any offer of settlement made to any party who has entered into a contingency fees agreement may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the **[professional controlling body]** Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), if the matter is not before court, stating-
"

(e) that 5(1) of the Contingency Fees Act be amended as follows:
"A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), **[professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the**

Minister of Justice may designate by notice in the Gazette for the purposes of this section]."

(f) that section 6 of the Contingency Fees Act be amended as follows:
The Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), **[Any professional controlling body]** or **[, in the absence of such body,]** the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No.107 of 1985**)**,] may make rules as **[such professional controlling body or the Rules Board]** it may deem necessary in order to give effect to this Act.

79. Objections to the proposed amendment of sections 1 and 2 of the Contingency Fees Agreement Act, 1997 are discussed in detail in Chapter 5 of this Report.

F. Proposed amendments to the Criminal Procedure Act, 1977

(a) Section 300 of Criminal Procedure Act 51 of 1977 – Public awareness about sentencing options

80. It is recommended that the Department of Justice and Constitutional Development (DOJ&CD) should consider amending section 300 of the Criminal Procedure Act to compel the State to inform complainants and injured parties of the existence of the compensation options where it is relevant. Although the provisions of the Criminal Procedure Act do not assist the accused in reducing her/his legal costs, however, this may assist the injured party in not having to institute civil action to recover his/her damages from the accused and thus prevent the expenditure of further legal fees.

(b) Section 191(3) and (4) of the Criminal Procedure Act, 1997

81. It is recommended that the DOJ&CD should consider amending section 191 of the Criminal Procedure Act to include a provision that will provide for a bi-annual review or an automatic annual adjustment of the allowances payable to witnesses in criminal proceedings including witnesses for the accused or any other person necessarily required to accompany a witness for the accused in line with inflation as per the consumer price index.

G. Proposed non-legislative interventions

82. The Commission has identified four broad categories of factors and circumstances as giving rise to legal fees that are unattainable for most people. The categories are the

following: (1) Legal system; (2) court processes and procedures (3) legal profession; and (4) socio-economic factors.

83. Under the legal system the following factors and circumstances have been identified:

(a) the complexity of the law;
(b) rules of procedure;
(c) strengthening lower courts to which the poor can have access more easily;
(d) direct access to the Constitutional Court;
(e) cost-shifting rule; and
(f) fear of having to pay opponent's costs.

84. Under the court processes and procedures, the following factors and circumstances have been identified:

(a) number of parties and number of experts involved;
(b) the novelty of the matter;
(c) number of court events;
(d) late settlement;
(e) the general conduct of the parties;
(f) insufficient use of case management;
(g) insufficient use of cost management;
(h) urgent/prior matters;
(i) lack of effective and efficient use of court resources and information technology;
(j) insufficient use of e-discover; and
(k) functioning of the courts.

85. Respondents have identified several factors and challenges relating to the daily operation of the courts in particular, and the government departments in general, which affect access to justice and have an impact on legal fees. These factors are the following:

(a) inefficient, failing and/or faltering court structures, court services and administration;
(b) unavailability of court officials during office hours;
(c) shortage of staff;
(d) lack of training;

(e) non-existent telephone and elevator services;
(f) shortage of filing space at courts;
(g) problems with the court filing system which results in files being lost and matters being postponed as a result of court files not being available;
(h) limited amount of taxing masters allocated to a specific court; and
(i) unavailability and, in some instances, inexperience, of the taxing masters at the various courts.

86. Under the legal profession, the following factors and circumstances have been identified:

(a) method of remuneration-billable hours;
(b) improper and unethical billing practices;
(c) payment of referral fees;
(d) court fees;
(e) agreements with practitioners to limit costs;
(f) the referral system;
(g) restrictions on advertising and marketing;
(h) lack of direct briefing of advocates;
(i) the silk system; and
(j) the role of technology in the legal profession.

87. Under socio-economic factors, the following factors and circumstances have been identified:

(a) lack of funds to pay legal expenses;
(b) transport, accommodation and other indirect costs of litigation;
(c) lack of support for vulnerable groups;
(d) lack of tax funding for necessary legal services;
(e) the power imbalance in opposing wealthier litigants;
(f) cost of translators and interpreters;
(g) lack of general education;
(h) lack of knowledge about laws, legal rights and available avenues; and
(i) language and culture;
(j) corruption; and
(k) breakdown in service delivery.

88. The Commission notes that the leadership of the Judiciary has taken steps to address some of the operational challenges affecting the day-to-day operation of the courts. In his 2017/18 annual report, the Chief Justice of the Republic of South Africa, Mogoeng Mogoeng, said that a number of committees have been set up to identify and address challenges relating to, among others, court infrastructure, security, and court order integrity.

89. An artificial line is occasionally drawn between legislative and non-legislative interventions. The line should not be drawn too rigidly, at least at a conceptual level. The high costs of litigation are materially affected by two sets of factors, that is, fees and tariffs, on the one hand, and inefficiencies in the court system, on the other hand. Both these factors must be meaningfully addressed to make legal fees more affordable. Recommendations around improving the efficiency of the court system are as material as the recommendations made in respect of fee guidelines and tariffs. An impression should not, therefore, be created that the non-legislative interventions are less important. If anything in the long term, non-legislative interventions could become as important as legislative interventions. The Commission makes the following non-legislative recommendations:

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

The complexity of the law:

90. **Recommendation 2.1**: The SALRC concurs with the following recommendations, which have been put forward by the respondents: The law should be written in a less complex and technical manner for the citizens to understand their rights and responsibilities, and to find solutions to their legal disputes with much ease. This could be done by drafting laws in plain and straightforward language to ensure that any person can use the law to protect and advance their rights and interests as citizens.

Rules of procedure:

91. **Recommendation 2.2**: The SALRC concurs with the following recommendations, which have been put forward by the respondents:

(a) The court rules and practice directives should be made uniform across all courts;
(b) They should be more straightforward in wording;

(c) They should use plain language and eliminate *Latin* words;

Strengthening lower courts to which the poor can have access more easily:

92. **Recommendation 2.3**: The SALRC concurs with the respondents' views that it may be more advantageous to strengthen the lower courts to which the poor and middle-income group can and already do have easier access to justice. Accordingly, the following is recommended:

(a) Magistrates' Courts should manage cases more effectively so that cases that deserve more than one day are allocated more days. Conducting litigation on a piecemeal basis over an extended period is not cost-effective.
(b) Lower courts must continue to be strengthened by the appointment of competent judicial officers with appropriate experience and expertise, particularly in commercial matters.
(c) More judicial officers should be appointed and steps be taken to optimise their efficiency. Vacancies that exist must be filled since matters can often not proceed on the date set down because of the unavailability of presiding officers.

Number of court events:

93. **Recommendation 2.4**: A distinction must be drawn between affidavits and heads of argument. It is recommended that-

(a) unless exceptional circumstances dictate otherwise, affidavits and heads of argument in all High Court and Magistrates' Court matters be limited to a reasonable number of pages to be determined by the heads of court; and
(b) training be provided to legal practitioners on the preparation of heads of argument to eliminate the inclusion of unnecessary information which may lead to an increase in legal fees

Late settlement

94. **Recommendation 2.5**: The Commission concurs with the respondents' recommendation that the following actions/steps be taken:

(a) Ensuring that parties are obligated to provide complete discovery at the earliest opportunity;

(b) Ensuring that a robust court timetable is imposed, with parties having to complete all steps before a trial date can be allocated; and

(c) Making a referral to ADR mandatory, except where a good cause can be shown. The LSSA notes that, although this is primarily up to the parties, it does present challenges to getting the various institutions, for example, the Road Accident Fund, the Department of Health, and others, to settle matters timely. Late settlement leads to congestion of the court rolls and an increase in litigation costs.

Insufficient use of case management:

95. **Recommendation 2.6**: The Commission concurs with the respondents' submission that judicial case management should also be extended to the Magistrates' Courts.

Urgent/priority matters:

96. **Recommendation 2.7**: The Commission agrees with the recommendation that the relevant rules (tariff provisions) must be introduced to ensure that there is a uniform approach permitted at the taxation of fees to be recovered in respect of urgent/priority matters.

Lack of effective and efficient use of court resources and information technology

97. **Recommendation 2.8**: The SALRC takes note of the OCJ E-Filing Court Modernisation Project, which is presently in the process of being rolled out to superior courts and, over time, to the lower courts. Furthermore, it is recommended that:

(a) the current paper-based legal process should be transformed into a digital process to reduce legal fees. Court clerks and sheriffs should receive proper training to be able to receive and process digital legal documents by utilising an electronic court filing system separate from the digital court system;

(b) court rules need to be amended to make provision for digital court legal process;

(c) an electronic platform should be introduced to enable litigants and their legal representatives to file documents at court without the need for physical attendance. E-filing may also be utilised to submit applications such as unopposed, non-contentious interlocutory applications and applications to

compel discovery, for consideration by a Magistrate or Judge without the necessity of an appearance at court.[40] According to the Chief Justice, Mogoeng Mogoeng, the main challenges faced by the courts are that they handle hard copies throughout the court processes. These include dockets, case files and judgements.[41] On 23 November 2018, the Chief Justice announced plans to pilot an e-Filing system, which, if successful, will be rolled out to all the courts. The e-Filing system will enable law firms and litigants to file documents to the court electronically over the internet. The objective is to improve efficiency and the quality of service rendered to the public;[42] and

(d) a helpdesk should be installed at all courts to assist litigants, including self-represented litigants, who make use of the e-Filing system.

Method of remuneration-billable hours:

98. **Recommendation 2.10**: The Commission concurs with the respondents' recommendation that the remuneration method mainly used by legal practitioners, that is, billable hours and contingency fee agreements do facilitate access to justice. However, other methods of remuneration like fixed and/or flat fees and "milestone" billing should be considered. Flat fees will discipline lawyers to leave irrelevant stuff out and avoid interlocutory skirmishes.

Improper and unethical billing practices:

99. **Recommendation 2.11**: Many respondents are of the view that, like in any other profession, improper and unethical billing practices exist within the legal profession. It is accordingly recommended that the LPC as the regulator of the legal profession should address such improper and unethical practices.

Payment of referral fees:

100. **Recommendation 2.12**: To reduce legal fees, it is recommended that referral fees must not be recoverable from the client in all legal matters. The LPC must prohibit all forms of payment and receipt of referral fees by all legal practitioners, that is, candidate attorneys, attorneys, referral and non-referral advocates, and juristic entities alike, by

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40 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 6.
41 Office of the Chief Justice "We the People" (July 2019 Issue) 20.
42 *Idem*.

making this an act of misconduct in the Code of Conduct provided for in section 36 of the LPA.

Court fees:

101. **Recommendation 2.13**: The SALRC recommends that interventions to reduce sheriffs' fees, as well as alternative means to deliver and execute court orders, should be explored by the Rules Board.

The referral system

102. **Recommendation 2.14**: The Commission concurs with the respondents' view that until such time that there is a sophisticated electronic court digital system in place, it will be imprudent to dismiss the role of correspondent attorneys.

Restrictions on advertising and marketing:

103. **Recommendation 2.15**:

(a) In line with the Competition Commission's decision above that advertising should be allowed subject to the general advertising law of South Africa, it is clear that there is no longer a place for any restrictions on advertising and marketing 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 of permitting ethical and not misleading advertisements.[43]

(b) The Commission concurs with the LSSA's recommendation that the practice of touting by legal practitioners must be eradicated. The payment of money or an offer of any financial reward to third parties in the form of touting by legal practitioners increases the cost of legal services and thus hampers access to justice.

Reservation of work for legal practitioners:

104. **Recommendation 2.16**: Section 34(9) of the LPA mandates the LPC to conduct an investigation and make recommendations to the Minister on the creation of other forms of legal practice, including limited liability and multi-disciplinary practices. It is

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43 The recommendation is supported by Legal Aid SA, *op cit*, 9.

recommended that this matter be dealt with by the LPC in terms of its mandate provided for in the LPA.

Lack of direct briefing for advocates:

105. **Recommendation 2.17**: The Commission concurs with the respondents' view that the introduction of section 34(2)(b) of the LPA regarding receipt by an advocate of a request (briefing) directly from a member of the public or from a justice centre for a legal service will enhance access to justice by members of the public. On the question of whether the various societies of advocates be allowed to determine where their members may hold chambers/offices, it is recommended that the LPC is the relevant body to make a determination in this matter.

The silk system:

106. **Recommendation 2.18**: To the extent that a junior counsel's fee is determined as a percentage of a senior counsel or silk's fee (for example, one third, or two thirds or 50% of senior counsel of a silk's fee), the system negatively influences the setting of a junior advocate's fee and gives rise to unattainable legal fees. It is not clear why a junior counsel should be entitled to a higher fee when briefed along with senior counsel or silk than would ordinarily be the case when he/she is not briefed along with senior counsel. This (general) rule cannot constitute a blanket rule, especially in cases where the junior is relatively inexperienced. It is also not clear why the client should be liable for the increased fees. Against this background, it is recommended that when a junior counsel is briefed along with senior counsel, there is no rational justification for pegging the junior counsel's fees against those of senior counsel. The junior counsel's fees must be determined in terms of the tariff applicable to junior counsel.

107. **Recommendation 2:19**: It is recommended that the requirement that an attorney must be present when a matter is argued must be gradually phased out. The Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic entities does not require the presence of attorneys at all times. It suffices if an attorney can be immediately accessible when required by a referral advocate. This could be done telephonically, by email or any other means of electronic communication.

Role of technology in the legal profession:

108. **Recommendation 2.20:** The Commission concurs with the respondents' recommendation that the relevant provisions in the Magistrates' Courts Rules and

Uniform Rules requiring the appointment of an office within specified kilometres of the address of court as an address for notice and service of documents should be amended to make provision for digital court legal process.

109. **Recommendation 2.21**: The Commission concurs with the respondents' recommendation that the general acceptance and use of Information Technology (digital legal services) in the provision of legal services will result in the reduction of legal fees. The providers and consumers of legal services will all benefit from automation in the sense that legal services will be provided to more clients in a short period, in a more effective, efficient and productive manner.

Transport, accommodation and other indirect costs of litigation:

110. **Recommendation 2.22**: The Commission concurs with the respondents' view that transport, accommodation, and other indirect costs of litigation have a negative impact on access to justice. The following measures are recommended:

(a) Presiding officers must ensure that when a court date is set, matters enrolled in the court roll do proceed;
(b) Legal practitioners should embrace technology to limit the need for a client to travel to the bare minimum;
(c) Consideration should be given for parties who want to present argument only and not evidence, to do so via video conferencing;
(d) The system of rotational sitting of the court as currently utilised by the Land Claims Court, Labour Court and certain Regional and High Courts should be promoted.

Lack of support for vulnerable groups with regard to legal costs:

111. **Recommendation 2.23**: The Commission concurs with the respondents' view that there appears to be a lack of support for vulnerable groups (youth, people with disabilities, and women) with regard to legal costs. South Africa is grappling with a pandemic of violence against women, children and people with disabilities. There is also a stark increase in hate crimes against members of the LGBTQI+ community. The following measures are recommended:

(a) Since the community advice office sector actively pursues programmes and projects that are specifically looking at ensuring access to justice for vulnerable groups, consideration should be given by the DOJ&CD and other

relevant stakeholders towards enhancing their financial and other operational resources to do so;

(b) That consideration be given to extending the coverage of Legal Aid South Africa in the Regulations to the Legal Aid South Africa Act, 39 of 2014 to increase the provision of legal aid to vulnerable groups like the youth, people with disabilities and women in the middle-income band who are currently excluded by the qualification criteria as prescribed in the Regulations. This would, however, require a corresponding increase in the budget allocation to Legal Aid South Africa.

Lack of general education:

112. **Recommendation 2.24**: The Commission concurs with the respondents' views that lack of general education negatively impact on access to justice. Unnecessary litigation can be avoided if people are properly aware of their legal rights. The following interventions are recommended:

(a) A basic legal understanding should be a mandatory part of the school curriculum, for example, as part of the Life Orientation programme;
(b) A greater effort at public awareness should be made by relevant government departments or by the Government Communication and Information System.

Lack of knowledge about laws and legal rights and available avenues:

113. **Recommendation 2.25**: The Commission concurs with the respondents' views that there is a lack of knowledge about laws and legal rights amongst the general public. The following interventions are recommended:

(a) Legal Aid SA; community advice centres (CAOSA) and paralegal services should be empowered to focus on educating the communities that they serve;
(b) Awareness campaigns regarding legal services, which are accessible to indigent persons, should be conducted; posters or other easily accessible materials should be freely available; and the available avenues for exercising rights through institutions or processes, which facilitate access to justice, should be broadcast widely.
(c) DOJ&CD should publish a guide on how and where access to free legal advice can be obtained. The guide should include not only Legal-Aid SA but

also all NGOs and NPOs. Information booklets, pamphlets and flyers detailing the existence and services rendered by these institutions should be made available at all courts.

(d) The Legal Services Ombud must also play an informative role in educating and making members of the public aware of the law and their legal rights.

Corruption:

114. **Recommendation 2.26**: On the subject of corruption perpetrated by members of the legal profession, the National Prosecuting Authority (NPA) and the LPC have a duty to act against allegations of corruption and to ensure that negative findings against law practices and legal practitioners are met with fitting sanctions.

Chapter 3: Access to legal services by users in the lower and middle-income bands:

(a) Legal Aid SA:

115. **Recommendation 3.1**: It is recommended that more resources should be deployed in promoting public awareness of the existence and services provided by institutions such as the Legal Aid SA as this will educate the public and enhance overall access to justice.

(b) Community service and pro bono legal service:

Recommendation 3.2: The SALRC concurs with the respondents' view that:

(a) the minimum hours of *pro bono* services expected from legal practitioners should be made a compulsory condition for the renewal of a legal practitioner's trading licence.

(b) the LPC must develop rules of professional conduct regulating how *pro bono* services should be rendered.

(c) the LPC must establish an enforcement mechanism to deal with unprofessional conduct where *pro bono* rules are not complied with.

(c) Community advice offices and community-based paralegals

116. **Recommendation: 3.4** The Commission recommends that:

(a) when developing law reform proposals regarding paralegals, consideration should be given by the LPC and the DOJ&CD to permitting trained paralegals to represent clients in limited matters to broaden access to justice by members of the public.

(b) CAOs should be properly resourced and capacitated to ensure that communities, who are burdened with shared challenges such as lack of basic municipal services, high rate of gender-based violence, and pollution from mining and similar activities, would benefit from *pro bono* legal information and legal services.[44]

(d) Law clinics

117. **Recommendation 3.5:** It is recommended that the LPC should consider the viability of introducing community service to be rendered by post-study law graduates as a means to broaden access to justice to the majority of the people of South Africa including an appearance in court subject to continuous supervision.[45] Section 29(1) of LPA provides that the "The Minister must, after consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister."

(e) Chapter Nine Institutions

118. **Recommendation 3.6**: The Commission concurs with the respondents' view that there is generally a lack of awareness of alternative *fora* for ADR mechanisms such as judicial/quasi-judicial tribunals, administrative appeal tribunals, the various public and private Ombuds, and Chapter Nine institutions such as the Commission for Gender Equality, the South African Human Rights Commission, and the Public Protector, among others, that could be utilised to a greater extent and strengthened to broaden access to justice for the majority of the people of South Africa. More resources should be deployed in promoting public awareness of the existence of institutions such as the Legal Services Ombud, the National Consumer Regulator (NCR) and Chapter Nine institutions as this will educate the public and enhance overall access to justice.

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44 CALS, *op cit*, 9.

45 Legal Aid SA is not in support of community service that is rendered as part of PVT due to the requirement for continuous supervision which is not possible if such candidate legal practitioner is placed in the service of an institution, *op cit*, 20.

(f) Alternative fora for ADR mechanisms:

119. **Recommendation 3.7**: It is recommended that the use of ADR mechanisms, including the use by organs of state of pre-litigation administrative processes to encourage early settlement of disputes without the need to go to court be promoted.

(e) Small Claims Courts:

120. **Recommendation 3.8**: It is recommended that the monetary jurisdiction of the Small Claims Courts should be reviewed and increased to R40 000.00. Thereafter, it should be reviewed once every two years to keep up with inflation.

(f) Legal expenses insurance:

121. **Recommendation 3.9**: It is recommended that the LPC should collaborate with the Legal Expenses Insurance (LEI) industry to address the key regulatory weaknesses that impact on the provision of premium products geared towards providing access to justice and legal services for the legal services market as a whole. This will ensure that the protection provided to consumers of legal services under the LPA is extended to LEI policyholders.

Chapter 4: Mandatory fee arrangements

122. **Recommendation 4.1**: The Commission recommends that it should be obligatory for all legal practitioners to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services.

123. **Recommendation 4.2**: The Commission recommends that should parties fail to conclude a mandatory fee arrangement, the attorney or an advocate referred to in section 34(2)(b) of the LPA would have failed to comply with the statutory requirements stipulated under subsections 35(7)-(11) of the LPA and that this should constitute misconduct to be adjudicated by the LPC and appropriate sanction determined.

Chapter 5: Contingency fees agreements

124. **Recommendation 5.2:** It is recommended that courts should be encouraged to impose appropriate monetary limits and set a lower amount on contingency fees agreements, and differ from the agreement reached by the parties in the exercise of their discretion and in the interest of justice, regard being had to what may be a reasonable fee taking into account the risk factor.

125. **Recommendation 5.3:** It is recommended that consideration be given to implementing the recommendations of the Parliamentary process initiated by the Department of Transport to bring about new legislation to address the shortcomings encountered with the Road Accident Fund as rapidly as possible.

126. **Recommendation 5.5**: On the question of whether a mechanism should be created specifically to deal with allegations of excessive fees being charged in contingency fees litigation to ensure that those fees remain reasonable in the light of the circumstances of a case, in other words, whether there should be a body focusing specifically on preventing the abuse of contingency fee arrangements, the Commission recommends that the LPC, as the regulator for the legal profession, is the appropriate mechanism to deal with allegations of excessive fees in terms of section 5(b) of the LPA. In its submission to the Commission, the LPC points out that:

> "The Act already has a mechanism to adjudicate disputes not only about the terms in a contingency fees agreement but also any fees chargeable in terms thereof. The Legal Practice Council adopted the Contingency Fee Tribunals established in terms of section 5 of the Act by the former Law Societies and these functions. Furthermore, additional tribunals will be established for each of the nine provinces."

Chapter 6: Mechanism for party-and-party costs

(a) Taxation of legal fees

127. **Recommendation 6.2**: It is recommended that courts should consider applying the proportionality test in addition to that of reasonableness when awarding costs on a party- and-party scale and attorney-and-client scale. The proportionality test aims to maintain a sensible correlation between costs, on the one hand, and the value of the case, its complexity and significance on the other hand.

(b) Role of taxing masters

128. **Recommendation 6.3**: It is recommended that taxation should remain the responsibility of the taxing master (in the High Court, and registrars and clerks in the Magistrates' Courts). More taxing masters need to be appointed and trained to avoid long waiting periods for dates to tax.

(c) Pre-litigation costs:

129. **Recommendation 6.4**: Regarding prelitigation costs that do not further the litigation process, the Commission recommends that the LPC should consider developing Fee Guidelines for an initial consultation between a legal practitioner and a client whose total income/turnover per annum does not exceed the amount determined by the Minister by notice in the Gazette. This could take the form of a fixed or flat fee. The purpose will be to ensure that advice is obtained at the earliest possible stage, which could prevent possible disputes.

(d) Factual and expert evidence:

130. **Recommendation 6.5**: Expert evidence should be avoided when it is not necessary because it leads to excessive legal fees. The Commission concurs with the recommendations made by the respondents that:

(a) That the rules relating to expert evidence require revamping to improve the advice rendered to court and to ensure that the costs are curtailed.
(b) Fees charged by experts should be regulated by the relevant professional bodies. The fees should be reasonable and relate to work done by the expert and not a repetition of what had been done by others.
(c) Expert reports must be truthful, impartial and only relate to the area of expertise for which the expert is qualified.
(d) The LPC should inform all relevant professional bodies of the need for guidelines to be determined concerning the fees that may be charged. The guidelines should be published for purposes of transparency and that disciplinary action will be taken where experts charge unreasonable and disproportionate fees.

(e) Legal costs consultants

131. **Recommendation 6.6**: It is recommended that an investigation be conducted by the DOJ&CD into the feasibility of establishing an administrative body that will be responsible for prescribing minimum norms and standards and code of conduct for legal costs consultants without a right of appearance in court. Legal costs consultants are not expressly included in the code of conduct that must be developed by the LPC in terms of section 36(1) of the LPA. The code of conduct applies to all legal practitioners, candidate legal practitioners and juristic entities. 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. It also provides users of legal services with more product choices and competitive prices, which is an important tenet of a free market system.

(f) Tariffs for advocates' fees:

132. **Recommendation 6.7**: It is recommended that the recoverable tariffs that apply in respect of attorneys' fees and counsels' fees, that is, Rules 33 read with Tables A and B of Annexure 2 to the Magistrates' Courts Rules; Rules 69 (Tariff for Advocates and Attorneys with Right of Appearance) and 70 (Tariff for Attorneys) of the Uniform Rules; and Rule 18 of the Supreme Court of Appeal (SCA) Rules (Tariff for Attorneys' Fees), must be reviewed in relation to each other and in respect of the various hierarchies of court to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Court level right up to the SCA and the Constitutional Court. The review must be informed by the legal practitioner service-based Fee Guidelines principles discussed in Chapter 7 of this Discussion Paper.

(g) Tariffs in criminal matters

133. **Recommendation 6.8**: Although there is no provision in the Rules Board for the Courts of Law Act barring the Rules Board from making rules regulating the practice and procedure in connection with litigation in criminal matters in the Magistrates' Courts, High Court and SCA, however, cost orders are generally not granted against either the State or the accused party in litigious criminal matters. It is recommended that service-based attorney-and-client Fee Guidelines be developed by the LPC in all branches of the law including criminal matters.

(h) State obligation to inform complainants and injured parties of the existence of the various sentencing options

134. **Recommendation 6.9**: It is recommended that the DOJ&CD should consider amending section 297 of the Criminal Procedure Act, 1977 (Act 51 of 1977) to compel the State to inform complainants and injured parties of the existence of the sentencing options where it is relevant, or where applicable, to compel presiding officers to enquire whether the provisions have been explained and whether any compensatory order is sought. Although the provisions of the Criminal Procedure Act, 1977 do not assist the accused in reducing her/his legal costs, this may reduce the legal fees of the injured party when instituting civil action to recover his/her damages from the accused.

(i) Allowances payable to witnesses attending criminal proceedings

135. **Recommendation 6.10**: It is recommended that the DOJ&CD should consider amending section 191(3) and (4) of the Criminal Procedure Act, 1977 to include a provision that will provide for a bi-annual review or an automatic annual adjustment of allowances payable to witnesses attending criminal proceedings in line with inflation as per the consumer price index.

Chapter 7: Mechanism for attorney-and-client fees

(a) Universal and compulsory tariffs:

136. **Recommendation 7.1**: The Commission concurs with the views of many respondents who submitted that the imposition of a universal and compulsory tariff is undesirable not only for the legal profession but for the economy of South Africa too.

(b) Tariff with limited targeting:

137. Recommendation: See paragraphs 24-42 and Table 1 above.

(c) Attorney-and client fee guidelines

138. **Recommendation 7.3**: The Commission is of the view that the LPC, as the regulatory body for the legal profession in the Republic, should develop service-based attorney-and-client fee guidelines for determining legal fees in respect of all branches of the law. Although this matter will be decided by the LPC, however, the service-based attorney-and-client fee guidelines may be developed based on the factors enumerated under section 35(2) of the LPA. Attorney-and-fee guidelines will serve as a yardstick to determine a reasonable fee. Parties will be able to deviate from the fee guidelines in justifiable circumstances. This includes the development of fee guidelines in non-litigious matters that are reserved for legal practitioners.

(d) legal fees and tariffs in non-litigious matters

139. See paragraph 138 above.

Chapter 8: Legal services for the upper-income band natural persons and juristic entities

140. **Recommendation 8.1**: The Commission concurs with the respondents' views that corporate clients in the upper-income band as well as high net worth individuals should

be excluded from the protection of the mechanism for determining legal fees and tariffs as contemplated under section 35(4) of the LPA. Much as this matter does not require any regulatory intervention, however, it is imperative that all users of legal services must ensure that they are not challenged by excessive fees and that the LPC is available to everyone for assistance. Paying exorbitant fees does not enhance a culture of consciousness with regard to legal fees. The purpose of the Act is to curtail excessive legal costs, irrespective of whether a user can afford them or not.

Justice Laws General Amendment Bill

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type and square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend certain laws of the Republic administered by the Department of Justice and Constitutional Development so as to make provision for a mechanism to determine legal fees and tariffs chargeable by legal practitioners for legal services rendered.

PREAMBLE

WHEREAS the purpose of the Legal Practice Act, 2014 is, among others, 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;

AND WHEREAS section 22 of the Bill of Rights of the Constitution establishes the right to freedom of trade, occupation and profession, and provides that the practice of a trade, occupation or profession may be regulated by law;

AND BEARING IN MIND THAT access to legal services is not a reality for most South African people.

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa as follows: -

Amendment of section 29 of Act 28 of 2014

1. Section 29 subsection (2) of the Legal Practice Act, 2014, is hereby amended by-

(a) by the substitution for paragraph (b) of the following paragraph (b):

"(b) Service at **[the South African Human Rights Commission]** any of the institutions supporting constitutional democracy referred to in Chapter 9 of the Constitution;"

(b) by the insertion after paragraph (c) of the following paragraph (cA):

"(cA) service at a community advice office;"

(c) by the deletion of the word [or] at the end of paragraph (d);

(d) by the insertion after paragraph (d) of the following paragraph:

"(dA) service on a *pro bono* basis in compliance with the rules made by the Council; or"

(e) by the substitution for paragraph (e) of the following paragraph (e):

"(e) any other service that broadens access to justice which the candidate legal practitioner or the legal practitioner may want to perform, with the prior approval of the Minister."

Amendment of section 35 of Act 28 of 2014

2. Section 35 of the Legal Practice Act, 2014, is hereby amended by the substitution for subsection (1) of the following subsection (1):

"(1) **[Until the investigation contemplated in subsection (4) has been completed and the recommendations contained therein have been implemented by the Minister, [f]**Fees in respect of litigious **[and non-litigious]** legal services rendered by legal practitioners**[,]** and juristic entities**[,] [law clinics or Legal Aid South Africa referred to in section 34]** must be in accordance with the tariffs made by the Rules Board for the Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No.107 of 1985)."

3. Section 35 of the Legal Practice Act, 2014, is hereby amended by the substitution for subsection (3) of the following subsection (3):

"**[Despite any other law to the contrary]**, Save for the users of legal services in Magistrates' Court matters whose total income/turnover per

annum does not exceed the maximum threshold to be determined by the Minister by Notice in the Gazette, nothing in this **[section]** Act precludes any user of litigious or non-litigious legal services, on his**,** **[or]** her or its own initiative, from voluntarily agreeing with a legal practitioner in writing, to pay fees for the service in question in excess of or below any tariffs determined as contemplated in this **[section]** Act."

Amendment of section 95 of Act 28 of 2014

4. Section 95 of the Legal Practice Act, 2014, is hereby amended by-

(a) the deletion in subsection (1) of the article [**or**] at the end of paragraph (Zn); and

(b) the insertion in subsection (1) of the following paragraph preceding paragraph (zO):

"(zNA) fees and tariffs payable to legal practitioners and juristic entities in respect of litigious and non-litigious legal services; or"

Amendment of section 6 of Act 107 of 1985

5. Section 6 of the Rules Board for the Courts of Law Act, 1985, is hereby amended by-

(a) the substitution for subsection (6) of the following subsection (6):

"(6) The Board may advise the Minister on the monetary jurisdiction limits of lower courts, the limitation of the costs of litigation, the tariff of legal fees applicable to users of legal services in the lower and middle-income bands, and any other matter referred to the Board by the Minister."

(b) and by the substitution for subsection (7) of the following subsection (7):

"(7) The power to make, amend or repeal rules under subsection (1) shall include the power to make, amend or repeal rules in order to give effect to the provisions of sections 2 and 3 of the Foreign Courts Evidence Act, 1962 (Act No.80 of 1962)[**.**] and section 3(b) of the Legal Practice Act, 2014 (Act No.28 of 2014)."

Amendment of section 1 of Act 66 of 1997

6. Section 1 of the Contingency Fees Act, 1997, is hereby amended by the deletion of the definition of “professional controlling body”.

7. Section 1 of the Contingency Fees Act, 1997, is hereby amended by the addition of the following definition of “success fee” after paragraph (v):

“Success fee” means a fee contemplated in section 2(1)(b) read together with section 2(2) of this Act, comprising of all legal fees collectively, that is, attorneys’ fees; advocates’ fees and correspondent attorneys’ fees, which is in addition to the normal fee.”

Amendment of section 2 of Act 66 of 1997

8. Section 2 of the Contingency Fees Act is hereby amended by the substitution for subsection (1) of the following subsection (1):

“2(1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there <u>is some foreseeable risk in the matter and</u> there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed-

(a) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;

(b) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.”

Amendment of section 4 of Act 66 of 1997

9. Section 4 of the Contingency Fees Act, 1997, is hereby amended by the substitution for subsection (1) of the following subsection (1):

"(1) Any offer of settlement made to any party who has entered into a contingency fees agreement may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the **[professional controlling body]** Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), if the matter is not before court, stating …"

Amendment of section 5 of Act 66 of 1997

10. Section 5 of the Contingency Fees Act, 1997, is hereby amended by the substitution for subsection (1) of the following subsection (1):

"(1) A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), **[professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the Gazette for the purposes of this section]**."

Amendment of section 6 of Act 66 of 1997

11. The Contingency Fees Act, 1997, is hereby amended by the substitution for section 6 of the following section 6:

"6. The Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), [**Any professional controlling body]** or **[, in the absence of such body,]** the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No.107 of 1985**)**,] may make rules as **[such professional controlling body or the Rules Board]** it may deem necessary in order to give effect to this Act."

Short title

12. This Act is called the Justice Laws General Amendment Act, 2021.

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Legalbrief@legalbrief.co.za

Chapter 1: Introduction

A Introduction

1.1 This Report contains the SALRC's final recommendations for law reform, including a proposed draft Bill, with regard to Project 142: Investigation into legal fees, including access to justice and other interventions.[1] The Report follows on Issue Paper 36 and Discussion Paper 150 which were published for general information and comment on 7 May 2019 and 18 September 2020 respectively. The Report takes into account all the input and comments received from the stakeholders, the community workshops held in all the nine provinces of the Republic of South Africa, as well as the international conference held in November 2018 in Durban.

1.2 The main objective of the South African Law Reform Commission (Commission or SALRC) in terms of section 4 of its establishing legislation, the South African Law Reform Commission Act, 1973 (Act No. 19 of 1973) (SALRC Act), 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 to make recommendations for the development, improvement, modernisation or reform thereof.

1.3 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;*

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[1] The title of Project 142 was amended by the Commission at its meeting held on 10 September 2020 to read "Investigation into legal fees, including access to justice and other interventions."

(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.

1.4 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:

(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).

1.5 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 Discussion Paper.

1.6 The preamble to the Legal Practice Act, 2014 (Act No.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.

1.7 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.[2] Many South Africans live in rural areas, making travelling to a lawyer's office a financial battle.[3]

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2 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.

3 *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

1.8 A more recent study conducted by HiiL found that legal needs occur in times of crisis when people are faced with life events and loss of income.[4] The study found that "[w]hen a person is indebted, jailed, evicted, loses a job, is in hospital after an accident, has mental health issues or starts to live separated from his spouse, his or her financial situation becomes risky. Understandably, courts and providers of legal services do not want to run the risk of not being paid, so they ask people to pay upfront. Unfortunately, this increases the financial pressure on individuals who are already struggling."[5]

1.9 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.[6] A 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.[7] 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.

1.10 The Department of Justice and Constitutional Development (DOJ&CD) 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 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*.[8]

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profession in ensuring the realisation of this right? How must the state ensure the progressive realisation of this right?

4 Hague Institute for Innovation of Law (HiiL) "Charging for Justice: SDG 16.3 Trend Report 2020" 109 available at https://www.hiil.org/wp-content/uploads/2020/04/HiiL-report-Charging-for-Justice-1.pdf (accessed on 26 May 2020).

5 *Idem*.

6 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).

7 *Idem*.

8 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.

1.11 The right to access to courts is a fundamental human right and is embodied in section 34 of the Constitution.[9] 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 in legal advocacy services.[10] The introduction of the LPA signals the view of the Legislature and the Executive that appropriate actions have to be taken to address the problem of lack of access to justice for the majority of the people of South Africa.

1.12 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.[11]

1.13 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.

1.14 Legal Aid South Africa also determines its own tariff of fees and disbursements in criminal and civil matters.[12] The same goes for other institutions providing legal services, such as the Office of the State Attorney and juristic entities. The SALRC's investigation analyses the current mechanisms for determining legal fees and tariffs to see if any of the existing mechanisms could be used for benchmarking purposes. CALS submits that

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9 Constitution of the Republic of South Africa, 1996.

10 Turner, S, "Regulatory impact statement" 2 https://www.justice.govt.nz/assets/Documents/Publications/Regulatory-Impact-Statement (accessed on 17 April 2018).

11 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).

12 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).

"tariffs and fees are structural mechanisms that require attention to ensure that the system is more accessible and equitable for lower-income citizens. Although particular institutions, such as Legal Aid SA, have been established to fill this void, it is clear that the desired extent of the reach of these institutions does not service all needs efficiently."[13]

1.15 The SALRC's investigation covers 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 until the SALRC's investigation has been completed.

1.16 Section 34 of the LPA draws a distinction between an attorney and an advocate. This came as a result of arduous lobbying by the legal profession that the whole Bill be premised on the continuation of the two categories of legal practitioners, despite challenges inherent in the divided bar that the Bill is trying to address.[14] Although the Act retains to a large extent the structure of the divided bar with its origins in both the Roman-Dutch and English law, however, section 34(2)(b) of the LPA has introduced a third category of a legal practitioner, that is, an advocate that can accept a brief directly from a member of the public or from a Legal Aid SA Local Office for that service, provided that she/he is in possession of a Fidelity Fund Certificate and has notified the South African Legal Practice Council (LPC) of her/his intention of doing so.

1.17 The continued existence of the divided bar and the distinct recommendations that must be made in respect thereof is not without challenges. It must be borne in mind, however, that one of the important objectives of the legislature is that of transformation of the legal profession. Section 3(c) of the LPA provides that the purpose of this Act is to

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13 CALS "Discussion Paper 150 of Project 142" 4.

14 PMG "Legal Practice Bill [B20-2012]: deliberations on amendments proposed by negotiating mandates" minutes of meeting held on 26 February 2014 available at http://www.pmg.org.za/report/20140226-permanent-delegates-presentation (accessed on 4 September 2014).

"create a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession."

1.18 The disparity in legal fees chargeable between attorneys and advocates (some attorneys charge much more than advocates) on the one hand, and the effect of the divided bar in the development of party-and-party tariffs and attorney-and-client fees, on the other hand, has always been a contentious matter. The referral rule that an attorney instructs an advocate at times undoubtedly has the effect of increasing costs.

1.19 Ellis, *et al*, point out that "whilst it is acknowledged that legal services are diverse, many such services are rendered in teams: One only needs to be reminded about the different roles played by advocates, attorneys and candidate attorneys in High Court litigation. If the fostering of a team spirit between practitioners is what the legislature had in mind, it is commendable."[15] In *Rösemann v General Council of the Bar of SA*,[16] Heher had this to say on the subject of the divided bar:

> *People choose to become attorneys or advocates not because they are forced to select one profession or the other but because of the different challenges which they offer, one, the attorney, mainly office-based, people-orientated, usually in partnership with other persons of like inclinations and ambitions, where administrative skills are often important, the other, the advocate, court-based, requiring forensic skills, at arm's length from the public, individualistic, concentrating on referred problems and usually little concerned with administration*.

1.20 If legal practitioners are to be encouraged to strive to work together, and if fostering of a team spirit is consistent with the purpose of the LPA, the development of service-based tariffs and attorney-and-client fee guidelines, instead of practitioner-based tariffs and fee guidelines, providing a narrative of the services to be rendered and the cost thereof, regardless of which practitioner will provide the service in question, will go a long way towards achieving this objective.

1.21 Presently, there is some degree of inconsistency in the structure of the recoverable tariffs. There is also a concern that recoverable tariffs are not market-related because

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15 Ellis P, at al, *The South African Legal Practitioner-A Commentary on the Legal Practice Act*, (2018) 2-7.

16 2004 (1) SA 568 (SCA), par 26.

they are not updated on a regular basis. Accordingly, there is a need for the review of the tariffs that apply in the different courts. The review must be done in respect of attorneys' fees and counsels' fees. The recoverable tariffs for attorneys and advocates in relation to each other and in respect of the various hierarchies of court need to be calibrated to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Courts level right up to the SCA and the Constitutional Court.

1.22 There is currently also a *lacuna* at the level of the LPC in determining legal fees chargeable by legal practitioners. There is a need for service-based attorney-and-client fee guidelines to be developed by the LPC in respect of all branches of the law. Such service-based attorney-and-client fee guideline must show some connection to the recoverable tariffs developed by the Rules Board. Costs that are disproportionate to the sums in the proceedings or to the value of any non-monetary relief in issue in the proceedings, or to the complexity of the litigation were discouraged by Justice Jackson in the UK.[17]

1.23 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.

1.24 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.[18]

1.25 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 people are excluded from the system of dispute resolution.[19] Hussain *et al*, identify the

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17 Justice Jackson "Review of Civil Litigation Costs: Final Report (2009) 37.

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

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

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 the 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.*[20]

1.26 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.[21]

1.27 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 seems like placing a small sticking plaster over a gaping wound*.[22]

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20 *Ibid,* 28.

21 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.

22 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%.

1.28 In *Camps Bay Ratepayers and residents Association and Another v Harrison and Another*,[23] the Constitutional Court expressed its discontent with the exorbitant fees that counsel charges. The court noted in paragraphs 10 and 11 as follows:

> *[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 counsels 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.*

1.29 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?[24]

B. Terms of reference

1.30 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,[25] 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.

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23 (CCT 76/12) [2012] ZACC, 17.

24 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.

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

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;

(c) The desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners;[26]

(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.

1.31 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).

1.32 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 to broaden access to justice by members of the public. The overall aim of the Commission's investigation is to find ways to broaden access to justice and to make legal

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[26] The DOJ&CD Discussion Document refers to "mechanisms relating to the fees structure for obtaining legal and community legal services which are fundamental to access to justice" 5. The Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery* (2005(5) SA 3 (CC) pars 39; 41) also refers to "the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them.

services more affordable to the people while taking into account the interests of the public and of the legal profession. 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 (DOJ&CD).

1.33 The Legal Practice Council (LPC) points out that the Commission's investigation "encompasses not only a consideration of legal fees generally but also a proper consideration of the effectiveness and desirability of retaining, with or without amendment, the current scheme of permissible contingency fees in terms of the Contingency Fees Act."[27]

1.34 The Law Society of South Africa (LSSA) submits that the mandate of the Commission, in addition to considering access to justice, includes a review of the impact of the costs of expert witnesses in litigation.[28]

C. Socio-economic context

1.35 One of the defining characteristics of South African society is inequality. Rooted in a long history of racial discrimination and dispossession, South Africa has long been one of the most unequal countries in the world. Amongst the 142 countries for which there are estimates of the Gini coefficient[29] since 2010, South Africa is recognised as being the most unequal with a value of 0.630, compared to 0.591 for second-placed Namibia, 0.533 in Brazil (7th), 0.415 in the United States (41st), and 0.317 in Germany (116th) (World Bank, 2020).

1.36 Linked to inequality, a large proportion of the population lives in deep poverty. In 2018, Statistics South Africa (Stats SA) estimated that 55.5 percent of the population fell

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27 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs: Memorandum" (12 September 2019) 14. According to the LPC, "the work of the Commission pertinently addresses two key issues that arise in the context of contingency fees-firstly, whether there is indeed any risk and if so whether that risk warrants a contingency fee in terms whereof a client is invited to agree to a higher than normal fee and secondly the method whereby disbursements are to be accounted for or paid and the extent to which a legal practitioner whose client is entering into an agreement for higher than normal fees is obliged to explain to the client the alternatives available."

28 LSSA "Submissions by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees 42.

29 The Gini coefficient is a measure of inequality that takes a value between zero (perfect equality) and one (perfect inequality).

below the upper-bound poverty line of R992 per capita per month in 2015, while 40.0 percent were poor according to the lower-bound line of R647. Subjective poverty measures yield poverty rates of between 35 percent and 51 percent in 2015, depending on the measure used.

1.37 While persistent deep inequalities are the result of long-term historical forces, they continue to be reinforced by current economic trends. Several authors, for example, have confirmed that income from work is the income source responsible for the largest share of the Gini coefficient.[30] Income from work is estimated to contribute roughly 80-90 percent of the value of the Gini coefficient, with Leibbrandt, *et al*, noting that "at least one-third (of this share) is attributable to the large percentage of households with zero wage income", pointing to the country's significant labour market challenges.[31] Asset income is even more unequally distributed. For example, Gini coefficients for investment income for 2008 and 2014 have been estimated at 0.97 and 0.98.[32] Stats SA finds a relatively smaller contribution of labour income (74.2 percent) in 2015, but does not separate out capital income.[33]

1.38 The richest 20 percent of the population account for 68.2 percent of total income in South Africa. This is twice the proportion of the bottom 80 percent of the population, and more than 28 times the share of the poorest 20 percent of the population. Indeed, the top 10 percent account for 50.5 percent of total income, while the bottom 10 percent account for just 0.9 percent. These latter proportions are very similar to those calculated by Stats SA for 2015: 52.6 percent and 0.8 percent respectively.[34]

1.39 To contextualise inequality in Rand terms, **Figure *1*** presents median annual expenditures across different groups within the South African population. In 2015, Stats SA estimated that 50 percent of the population resided in households where annual per capita expenditure was below R 11 149.[35] The figure shows that there is substantial variation across groups defined according to gender, race and educational attainment of

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30 Hundenborn, J., Leibbrandt, M., and Woolard, I., 2016, "Drivers of Inequality in South Africa.' SALDRU Working Paper Number 194. Cape Town: SALDRU" University of Cape Town, (accessed from http://opensaldru.uct.ac.za/handle/11090/853 on 27 January 2020); Leibbrandt, M., Finn, A., and Woolard, I., 2010, 2012, `Describing and decomposing post-apartheid income inequality in South Africa.' *Development Southern Africa*, 29(1): pp.19-34.

31 Leibbrandt M, *et al*, (2010: 19).

32 Hundenborn J, *et al*, (2016: 3)

33 Statistics South Africa, 2014. Quarterly Labour Force Survey Quarter 3 2014. *Statistical Release P0211.* (accessed from: http://www.statssa.gov.za/ on 27 January 2020).

34 *Idem*.

35 *Idem.*

the household head, and location of the household. While half of the population residing within households whose heads have a higher education have annual expenditures of at least R70 686, half of those in households whose heads only have matric certificates have expenditures of less than R23 543.

1.40 While using income or expenditure is a useful way of measuring inequality, it is a relatively narrow approach. One way of looking at inequality more broadly is to focus on ownership or access to assets and services, using this information to calculate an asset index. Stats SA uses 18 assets and services[36] and finds that ownership of assets has increased over time in South Africa, but that asset inequality is also very high with a Gini coefficient of 0.59 in 2015.

1.41 The labour market is key to understanding inequality in South Africa. This is because historical inequalities have strongly influenced, and continue to influence, patterns of educational attainment and outcomes across groups. At the same time, these patterns are closely linked to both the likelihood of finding employment and the remuneration of such employment, contributing to current inequalities but also laying the foundations of future inequality. Finn, *et al*, for example, find that there is a strong intergenerational link in terms of economic wellbeing and that a large proportion of this is explained by parental educational attainment being 'inherited' by children.[37] Relatedly, it has been found that a parent's education (38 percent), race (34 percent) and father's occupation (11 percent)—all factors over which an individual has no control—are the dominant determinants of an individual's opportunities in South Africa.[38]

1.42 In the third quarter of 2019, the latest period for which we have data, there were 16.4 million employed South Africans, while 6.7 million were unemployed.[39] This means that the unemployment rate was 29.1 percent and that only 42.4 percent of the population aged 15 to 24 years were in employment, a lower figure by international standards. Trends over the past five years indicate that, although the economy has been adding jobs at a rate of 1.6 percent per year, this has been insufficient to absorb the growing

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36 Examples of assets used by Statistics South Africa (2019a: 51) include ownership of a motor vehicle, a radio, a fridge, a camera, or a formal dwelling; access to services includes access to a flush toilet, an electric connection, or piped water.

37 Finn, A.; Leibbrandt, M., and Ranchhod, V., 2016. Patterns of persistence: Intergenerational mobility and education in South Africa. "SALDRU Working Paper Series No. 175 v.3; NIDS Discussion Paper 2016/" (access from: http://www.nids.uct.ac.za/ on 27 January 2020).

38 World Bank, 2018. *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities.* World Bank: Washington DC.

39 StatsSA (2019b).

number of work seekers as the labour force grows by 2.7 percent per year.[40] The result is an increase in the unemployment rate from 25.4 percent to 29.1 percent over the period.

1.43 These aggregate figures, however, obscure substantial differences between population sub-groups. The unemployment rate in 2019 was 30.9 percent for women (3.2 percentage points higher than for men) and was 32.8 percent for Africans compared to just 7.4 percent for Whites. Unemployment rates were also higher for the youth (58.2 percent for 15–24-year-olds, 36.1 percent for 25–34-year-olds) than for older cohorts, and for those with less education (34.4 percent for those with less than matric compared to 8.2 percent for graduates).[41] Even amongst the employed, there are important differences in the distribution of these groups across skill level, occupation, industry and sector (formal vs. informal). While high levels of unemployment contribute to inequality through the large number of zero incomes, inequality amongst the employed in South Africa is itself high and rising over time. Stats SA (2019a) shows that inequality in real monthly labour market earnings rose between 2011 and 2015, with the Gini coefficient estimated at around 0.67.

1.44 The evidence also suggests substantial volatility in employment in South Africa: using data from the National Income Dynamics Survey, Zizzamia and Ranchhod find that only 29.7 percent were employed in each of the five waves of the survey between 2008 and 2017, while 27.2 percent were employed in one or none of the waves.[42] Non-Africans, those with tertiary education, those aged 25-50 years, males, urban residents and the non-poor were substantially more likely to be employed in all five waves than their counterparts in other groups. Labour market outcomes strongly influence poverty dynamics. Zizzamia and Ranchhod find that heads of households that are resilient to poverty, comprising 24.4 percent of the population in 2017, are more likely to be formally employed, to have permanent employment contracts, and to be union members; in

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40 Own calculations, StatsSA 2014, (2019b).

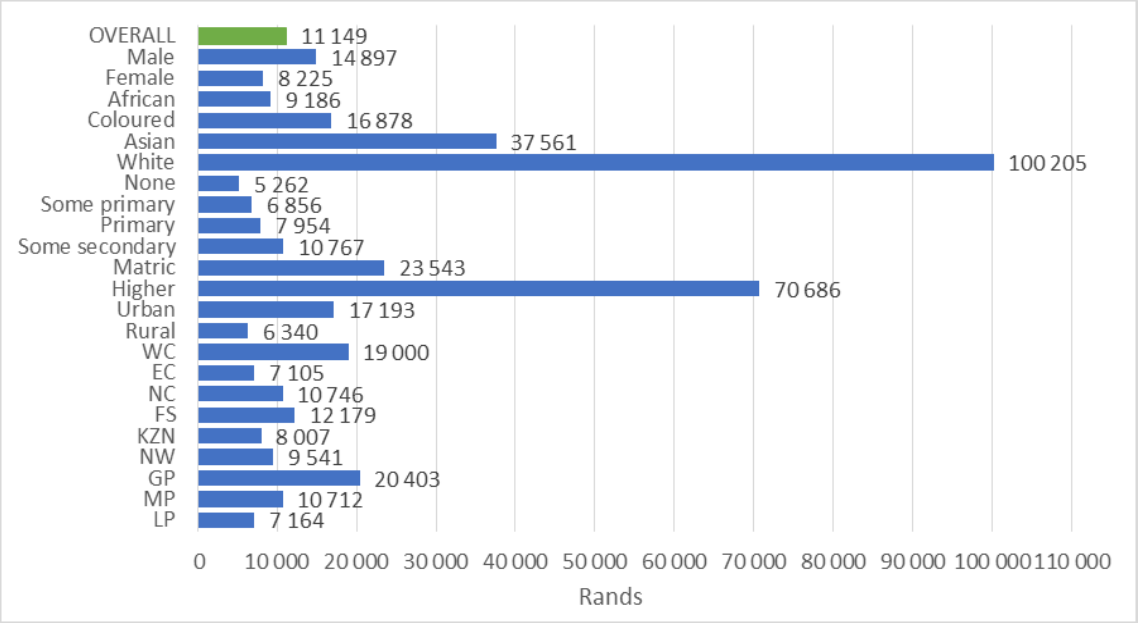
41 StatsSA (2019b).

42 Zizzamia, R., and Ranchhod, V., 2019. Measuring employment volatility in South Africa using NIDS: 2008-2017. *SALDRU Working Paper Series* No. 246; *NIDS Discussion Paper* 2019/13. Retrieved from: http://www.statssa.gov.za/; Zizzamia, R., Schotte, S., and Leibbrandt, M., 2019. Snakes and Ladders and Loaded Dice: Poverty dynamics and inequality in South Africa between 2008-2017. *SALDRU Working Paper Series* No. 235; *NIDS Discussion Paper* 2019/2 (access from http://www.statssa.gov.za/ on 27 January 2020).

contrast, households vulnerable to poverty are more likely to be exposed to unstable or informal employment relationships, unemployment or economic inactivity.

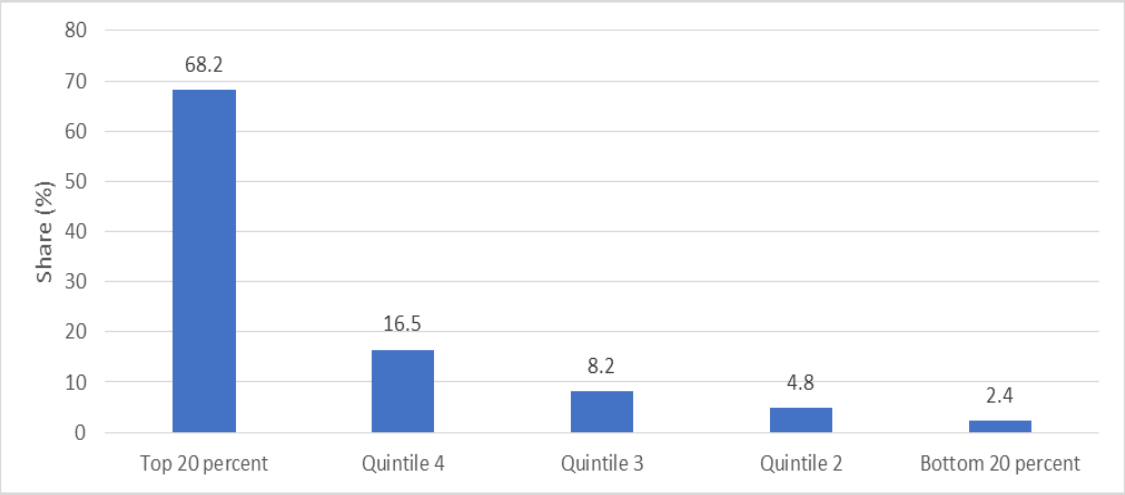
1.45 In summary, the data highlights South Africa's triple challenge of unemployment, poverty and inequality, each of which has deep roots and complex, reinforcing inter-relationships. The evidence presented also illustrates how these problems are able to replicate themselves over time and across generations. From the perspective of the affordability of legal fees, this poses various challenges. Not least of these is the fact that incomes for the vast majority of the population are very low, leaving very little if any disposable income available for expenses such as legal fees.

Figure 1. Median real annual expenditure, 2015



Source: Statistics South Africa (2019).
Notes: Groups defined by gender, race and educational attainment are based on the characteristics of the household head (i.e., "Male" refers to the population within male-headed households). Locational characteristics are based on the location of the household.

Figure 2. Income shares, by income group (2014)



Source: World Bank (2020).
Notes: Estimates based on unit-record consumption data; quintiles calculated as 20 percent of the population, ranked from richest to poorest.

1.46 COVID-19 had a devastating impact on the socio-economic position of the most vulnerable people of South Africa. This global pandemic exposed and re-enforced the structural and systematic barriers inherent in accessing the legal system and related services in South Africa.[43] A social relief of distress (coronavirus) grant was introduced by the President of the Republic of South Africa, Mr Cyril Ramaphosa, in his R500 billion economic stimulus package he announced in April 2020. In his address to the nation, the President said that:

> "While we have put in place measures to protect the wages of workers in the formal economy and have extended support to small, medium and micro-sized businesses, millions of South Africans in the informal economy and those without employment are struggling to survive. To reach the most vulnerable families in the country, we have decided on a temporary 6 months coronavirus grant."[44]

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43 CALS "Discussion Paper 150 of Project 142" 4.

44 TimesLive "President Cyril Ramaphosa's speech on R500bn rescue package" available at https://www.dispatchlive.co.za/news/2020-04-21-in-full-president-cyril-ramaphosas-speech-on-r500bn-rescue-package-and-covid-19-lockdown-ending-in-phases (accessed on 21 April 2020).

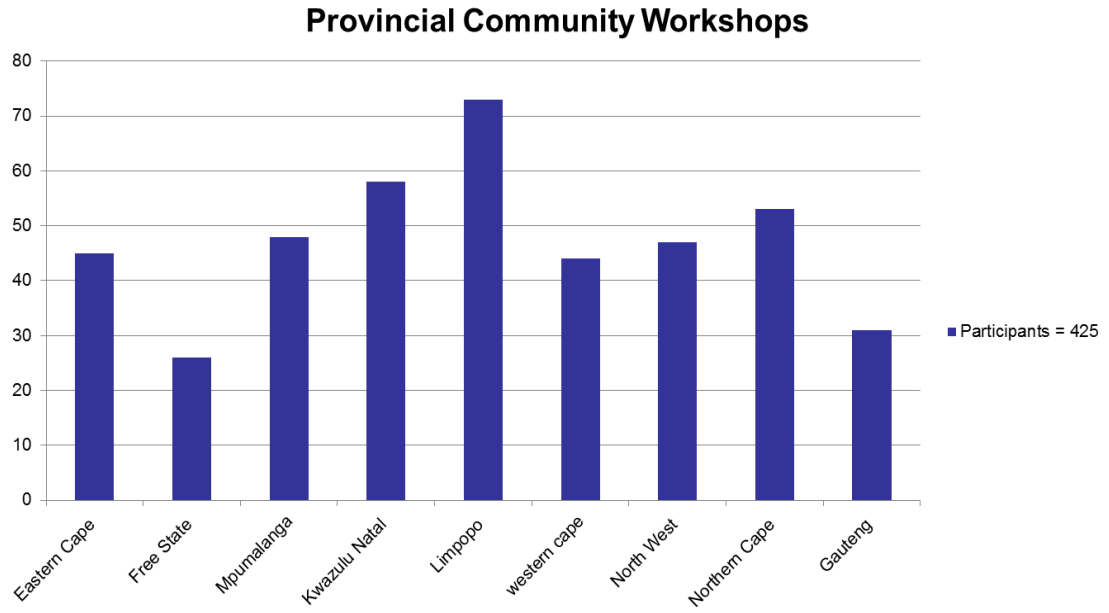
D. Working Methodology

1.47 Section 4 of the SALRC Act provides that the objects of the Commission shall be to do research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law to make recommendations for the development, improvement, modernisation or reform thereof. Section 5(3) of the SALRC Act provides that the Commission shall investigate the matters appearing on any programme approved or amended by the Minister and may for that purpose consult any person or body, whether by the submission of study documents prepared by the Commission or in any other manner.

1.48 Although sections 35(4) and (5) of the LPA mandate the Commission to conduct an investigation into legal fees and tariffs payable to legal practitioners, however, Project 142: Investigation into legal fees was approved by the Minister of Justice and Correctional Services for inclusion in the Commission's research programme on 9 February 2015.

1.49 The Policy Guide approved by the Commission in June 2018 deals with, among others, the law reform process followed by the Commission. For projects that already appear on the Commission's research programme, the first research document that is used in the consultation process with a view to announce the particular investigation and to highlight the problems that have given rise to the investigation is Issue Paper 36: Investigation into legal fees. The Issue Paper was published for general information and comment on 7 May 2019. The closing date for comment and input was 30 August 2019. However, due to the dearth of statistical information or data received in respect of legal fees charged by legal practitioners in the various geographical areas of the Republic of South Africa in litigious and non-litigious matters as of 30 August 2019, the Commission extended the deadline for submission of all outstanding input and comment to 15 November 2019.

1.50 Following the release of Issue Paper 36 for general information and comment on 7 May 2019, provincial community workshops were held in each of the nine provinces of the Republic of South Africa as follows:



1.51 The workshops were attended mainly by the poor and indigent members of the communities that were consulted. The workshops were arranged through the assistance of Community Advice Offices (CAOs). A self-administered questionnaire was used to collect data.[45] The participants completed the questionnaire after the discussions had taken place. The responses received from the participants are dealt with in Chapter 9 of this Report as well as in the relevant sections of this Report.

1.52 On 7-8 July, and 1 August 2019, the Commission held consultative meetings (public hearings) with representatives of various stakeholders representing the interests of the public, the legal profession, the judiciary, the government, and civil society organisations.[46] The public hearings were held at the Commission offices in Centurion. The responses received from the delegations are dealt with in the relevant sections of

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45 The following questions featured in the questionnaire:
1. What can be done to make legal services more affordable?
2. Do vulnerable groups (youth, people with disabilities and women) receive enough support with respect to legal services and access to justice?
3. Is there a lack of knowledge about laws and rights in general? If so, how can this be rectified?
4. What is the impact of a lack of general education on access to justice?
5. Does Legal Aid South Africa adequately address the needs of South Africans with regard to broadening access to justice?
6. How does the public view the role of community advice offices and community-based paralegals in communities?

46 The stakeholders who participated in the public hearings are the LPC; GCB; PABASA; LSSA; Registrar (Pretoria High Court); NBCSA; Judge President of the Gauteng High Court; Competition Commission; Legal Aid South Africa; Rules Board for the Courts of Law; CALS (Wits); and LexisNexis.

this Report.

1.53 Other stakeholders and experts that were consulted by the Commission include the director of the University of KwaZulu-Natal law clinic;[47] director of the University of the Western Cape law clinic, Road Accident Fund, and the State Attorney (Pretoria). The responses received from the participants are dealt with in the relevant sections of this Report. A synopsis of the deliberations is also provided in Chapter 9 of this Report.

1.54 On 15 November 2019, the Commission held a workshop with middle-income consumers of legal services. This workshop took place at Commission offices in Centurion. The responses received from the participants are dealt with in Annexure E as well as in the relevant sections of this Report.

1.55 The second research document that is published by the Commission, which forms the basis of proposals for law reform, is the Discussion Paper. The Policy Guide stipulates that the Discussion Paper must clearly set out the methodology followed in the investigation.[48]

1.56 On 23 March 2020, following the outbreak of the COVID-19 pandemic, the President of the RSA declared a nationwide lockdown with effect from 26 March 2020. The Commission meeting scheduled for 28 March 2020, at which meeting the draft Discussion Paper had to be tabled for consideration, had to be postponed until 30 June 2020. On 1 May 2020, the RSA entered into Level four (4) of the nationwide lockdown pending further notice by the President. The outbreak of the coronavirus and its limitations on the movement of people had implications on the due date for completion of this investigation as provided for in section 35(4) of the Legal Practice Act, 2014 (Act No.28 of 2014).

1.57 The virtual meeting of the Commission held on 30 June 2020 could not approve the Discussion Paper due to several contentious matters that required further consideration. At its meeting held on 10 September 2020, the Discussion Paper was again considered by the Commission. It was approved for general information and public comment. The Discussion Paper took into account the public response to Issue Paper 36, as well as input received from stakeholder consultative meetings and community workshops held in all the nine provinces of the Republic.

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47 Dr D Holness. Also in attendance was Professor David McQuoid-Mason.
48 SALRC “Policy Guide” (30 June 2018) 18.

1.58 On 18 September 2021, Discussion Paper 150 was published for public comment. The closing date for submission of comments was 30 November 2020. At its meeting held on 10 September 2020, the Commission resolved that requests for extension of the deadline for submission of comments to the Commission be considered on a case-by-case basis instead of granting of a general extension to all the stakeholders and members of the public. On 30 October 2020, the LSSA submitted a request for an extension of the deadline for submission of comments to the SALRC on the following grounds:

> "1. The issue of legal fees and access to justice is of a complex nature and the recommendations contained in the Discussion Paper 150 will have far-reaching implications that will affect the legal profession and the public and will significantly change the practice of law in South Africa.
> 2. Special diligence is required to analyse the impact of the recommendations and come up with constructive solutions.
> 3. The LSSA needs to consult extensively with members of the legal profession. This requires the LSSA to dedicate considerable resources to review the implications of some of the recommendations and to prepare a comprehensive submission."

1.59 The request for an extension was granted. Provincial community workshops were again held in all the provinces of the Republic of South Africa, save for the Northern Cape. The purpose of the workshops was to test public opinion against the provisional recommendations identified by the Commission and to ascertain whether the problems identified by community members during the Issue Paper phase are sufficiently captured in the Discussion Paper.

1.60 Building state capacity for the delivery of efficient and effective services to the people of South Africa in all spheres of government is one of the important priorities of the National Development Plan (NDP).[49] Goal 16.3 of the Sustainable Development Goals (SDG) is to promote the rule of law at the national and international levels and

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[49] National Planning Commission "National Development Plan Vision for 2030" (November 2011). The NDP states that "In this chapter (13), we identify critical interventions to build a professional public service and a state capable of playing a transformative and developmental role in realising the vision for 2030" 363.

ensure equal access to justice for all.[50] This SDG goal is in line with the objectives expounded in chapter 13 of the NDP.

1.61 One of the major challenges experienced by the Commission in conducting the investigation into legal fees has been the dearth of published data on the cost of legal services by attorneys and advocates in South Africa.[51] This factor is confirmed by Klaaren who states that:

> "[t]here is little data or evidence publicly available concerning the supply and demand for legal services in South Africa. One direct method of assessing the state of access to justice in South Africa might well be to conduct a national household survey of the use of formal dispute resolution structures. While expensive, such a comprehensive study would assess the consumption, perceived need for, use and costs of such services."[52]

1.62 Stats SA states that:

> "For almost a decade now Statistics South Africa recognised the gap between our surveys and emerging demands for data. The challenge was how to bridge the information gap at a time of constrained resources. Since no funding was expected for a new survey, it was decided to re-engineer the Victims of Crime Survey (VOCS) to include themes on governance, social cohesion and access to justice."[53]

1.63 Although baseline data on access to justice is now being collected by Stats SA, however, there is still much more empirical research to be done in South Africa on access to justice. The exact extent of the access to justice gap in South Africa is unknown.[54] In

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50 United Nations "The 2030 Agenda for Sustainable Development" available at https://sustainabledevelopment.un.org/content/documents/ (accessed on 22 November 2019).

51 In its submission to the Commission, the Rules Board states that "the effectiveness of the tariffs made by the mechanism (the Rules Board) requires empirical evidence as to the recoverability rates and the benchmarking of the tariffs. The Board has attempted to measure the benchmark in the tariffs for fees for attorneys by requesting empirical data from the Law Society of South Africa, unfortunately the information has not been forthcoming."

52 Klaaren J "What does justice cost in South Africa? A research method towards affordable legal services" SAJHR Vol.35 No3, 274-287 278. The investigation into the civil justice system conducted by the Victoria Law Reform Commission in 2008 also found that "there is a need for more data and research on costs. One means by which this might be achieved is by empowering the court to require parties to disclose costs data at the conclusion of the matter or at any other stage of the proceeding" 694.

53 Statistics South Africa "Governance, Public Safety and Justice Survey" (August 2019) iii.

54 Klaaren J "What does justice cost in South Africa? A research method towards affordable legal services" SAJHR Vol.35 No3, 274-287 278. The World Justice Project states that "[t]his justice gap undermines human development, reinforces the poverty trap, and imposes high societal costs. Closing the justice gap is therefore vital to realizing the broader

June 2013, the Productivity Commission was tasked to conduct an inquiry into Australia's system of civil dispute resolution with a focus on constraining legal costs and promoting access to justice and equality for all.[55] The criminal justice system was, however, excluded in the review. The inquiry noted, among others, that disadvantaged Australians face several barriers in accessing the civil justice system. These include communication barriers and a lack of awareness and resources.[56]

1.64 The United Nations also emphasizes the importance of data collection when it states that "tracking progress on the SDGs requires collection, processing, analysis and dissemination of an unprecedented amount of data and statistics at subnational, national, regional and global levels to ensure an accurate review of the implementation of the 2030 Agenda."[57] Likewise, the annual CLIO Legal Trends Report states that "access to consistent, reliable data is rare in the legal industry, which has made it difficult for firms to make smart decisions about the future of their practice."[58]

1.65 As part of this investigation, the SALRC took note of several other studies and research surveys conducted locally and at the international level on the subject of access to justice broadly, and legal services in particular. These studies and research surveys are referred to in the relevant sections of this Discussion Paper.[59] Furthermore, in addition to written comments received from the public on Issue Paper 36, the Commission also designed self-administered questionnaires, which were handed out for completion at provincial community workshops, and the workshop held with middle-income consumers of legal services. Last, but not least, an online survey of the middle-income users was also conducted through the SALRC website with the assistance of the DOJ&CD. The outcome of this online survey as well as the responses to the self-

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developmental agenda and its vision of a just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met" "Measuring the Justice Gap" 4 available at https://worldjusticeproject.org/our-work/research-and-data/access-justice/ measuring-justice-gap (accessed on 22 November 2019).

55 Productivity Commission "Access to Justice Arrangements" (September 204) iv. It is important to note the inclusion of the aspect of 'equity' in the terms of reference for the Productivity Commission which means that every Australian citizen should have 'equal' access to legal representation regardless of one's socio-economic status.

56 *Ibid*, 6.

57 United Nations Environment "The Sustainable Development Goals Report, 2019" (September 2019) available at https://unstats.un.org/sdgs/report/2019/note-to-reader/ (accessed on 22 November 2019).

58 CLIO Legal Trends Report (2017) available at https://www.clio.com/resources/legal-trends/2018-report/#section5 (accesses on 19 February 2020). CLIO is a Canadian company that provides cloud-based legal technological solutions to over 90 countries of the world.

59 The studies include the research conducted by the Socio-Economic Rights Institute of South Africa on "Public Interest Legal Services in South Africa" conducted in 2015.

administered questionnaires is also provided in this Discussion Paper. Unfortunately, no feedback was received by the Commission to the questionnaire that was handed out at the Commonwealth Association of Law Reform Agencies (CALRAs) held in Livingstone, Zambia, on 4-6 April 2019.[60]

E. Policy Questions

1.66 Respondents who forwarded input and comments to the Commission in response to Issue Paper 36 submitted that the proposed Mechanism for determining fees and tariffs payable to legal practitioners must comply with the following policy considerations in order for it to pass the desirability test:

1. Independence of the legal profession

1.67 The Mechanism must promote the rule of law and uphold the independence of the judiciary and the legal profession.

1.68 Addressing the Cape Law Society on the subject of rule of law and the importance of the independent courts and legal professions, the former Chief Justice of the Republic of South Africa, Arthur Chaskalson, said that "I want to lay the foundation for the proposition that the independence of the judiciary and the legal profession are central pillars of our constitutional democracy and that we should be astute to ensure that there is no erosion of these fundamental principles."[61]

1.68 The Chief Justice went on to say that, the Constitution entrenches democracy, rule of law and internationally recognised human rights. It sets out the values on which our democratic order has been founded.[62] Section 165(1) of the Constitution lays down the foundation for an independent Judiciary. This section provides that "the judicial authority of the Republic is vested in the courts." The Chief Justice of the Republic of South Africa, Mogoeng Mogoeng, reiterates the importance of section 165 of the Constitution by saying that "[a]ll persons and organs of State are barred from interfering

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60 The Chairperson of the SALRC, Judge Kollapen, Mr L Mngoma and Ms T Makola attended the conference and made presentation on the investigation into legal fees and requested for input and comment.

61 Arthur Chaskalson "The Rule of Law: The importance of independent courts and legal professions" Address to the Cape Law Society (9 November 2012) 2, available at https://www.sabar.co.za/law-journals/2012/december/2012-december- (accessed on 8 November 2019).

62 Ibid, 3, 4. These values are, among others, human dignity, the achievement of equality, the advancement of human rights and freedoms, supremacy of the Constitution and the rule of law.

with the functioning of the Courts and organs of State, through legislative and other measures, are instructed to assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."[63]

1.70 According to Chaskalson:

> "The independence of the legal profession, like that of the judiciary, is required in the public interest. But there is a corresponding obligation that flows from this, and that is, that the profession must conduct its affairs in a manner consistent with the public interest. The duties owed to clients to act without fear or favour, to the court to act honourably, and generally to observe high professional standards, are important parts of the profession's responsibility to the public. However, that is not all. The public must have access to the profession, which would have no right to assert that it serves the public interest if it were to serve only the elite in our society. What is important is that legal services should be available to all who need them, and in particular, to those who look to the profession as an institution that will uphold and protect the rights of everyone, and not only the rich."[64]

2. Regulation versus deregulation of the legal profession

1.71 The respondents submitted that legal fees could be regulated to a certain extent. This must be done such that it does not have the consequence of closing down law firms because this will have an adverse effect on access to justice.

1.72 Transformation and restructuring of the judicial system and the legal profession has long been in the making. Item 16(6)(a) of Schedule 6 to the Constitution makes provision for the rationalisation of all courts with the aim of establishing a judicial system suited to the requirements of the Constitution.[65]

1.73 In February 2012, then Minister of Justice and Constitutional Development, Mr Jeff Radebe, released a Discussion Document on the transformation of the judicial system and the role of the Judiciary in the developmental South African state for public comment. The Discussion Document provides an overview of the milestones that have been achieved in the transformation of the Judiciary and the court system since the dawn of

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63 Judiciary of the Republic of South Africa "Annual Report 2017/18" 12.

64 Arthur Chaskalson "The Rule of Law: The importance of independent courts and legal professions" Address to the Cape Law Society (9 November 2012) 13.

65 This section provides that "As soon as is practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution."

democracy. The Discussion Document explains that the concept of transformation of the Judiciary-

> *"[i]s rooted in the constitutional provisions, particularly the Bill of Rights and the chapter relating to courts and the administration of justice (chapter 8 of the Constitution). In its scope, the transformation of the judicial system entails a broader concept of reform, which includes the reorganisation and the rationalisation of the courts to align them with the Constitution, the transformation of the legal profession, the reform of state legal services and initiatives to improve the criminal and the civil justice system*."[66]

1.74 The Discussion Document goes further to point out that the transformation of the judicial system is championed through a multi-facetted programme that impacts the different sectors of the judicial system. Among others, the programme encapsulates the transformative initiatives, which are at different stages of development and/or implementation. One of these initiatives is "mechanisms relating to the fees structure for obtaining legal and community legal services which are fundamental to access to justice".[67]

1.75 The Constitution provides for the regulation of all professions. Section 22 of the Constitution provides that "[e]vey citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law." Section 9(1) of the Constitution provides that "[e]very one is equal before the law and has the right to equal protection and benefit of the law."

1.76 After realising that the South African legal profession is regulated by different laws, which apply in different parts of the Republic and, as a result thereof, is fragmented and divided, the Parliament of the Republic of South Africa enacted the LPA to regulate the legal profession in the public interest by means of a single statute. In terms of the Preamble to the LPA, the objectives of the Act are to strengthen the independence of the legal profession; to ensure its accountability to the public, and to ensure that legal services are accessible and within the reach of the citizenry.[68]

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66 DOJ&CD "Discussion document on the transformation of the judicial system and the role of the judiciary in the developmental South African State: (February 2012) 5.

67 *Ibid,* 1.

68 Preamble to the LPA, section 3 of the LPA. Harpur, GD SC, *et al*, "Transformative Costs" (Advocate, April 2019, 43) say that the word *citizenry* is not defined in the LPA. However, reference to the South African Citizenship Act 88 of 1995 shows that only natural persons are capable of acquiring citizenship. Furthermore, section 8(4) of the Constitution provides

1.77 Like the National Credit Act of 2005,[69] the LPA came into operation in several phases. The Act was promulgated on 22 September 2014. Parts I and II of Chapter 10 of the Act regarding the establishment of the National Forum were brought into operation with effect from 1 February 2015. The President determined that the National Forum ceases to exist on the date of the meeting with the Council as envisaged in section 105(3), which date may not be later than 31 October 2018.[70] Furthermore, on 29 October 2018, the President determined 31 October 2018 as the date on which Chapter 2 of the LPA should come into operation, and 1 November 2018, as the date on which sections 35(4) and (5) of the LPA should come into operation.[71]

1.78 The coming into operation of Chapter 2 of the LPA on 31 October 2018 effectively brought the LPC into existence. Section 4 of the LPA provides that "[t]he South African Legal Practice Council is hereby established as a body corporate with full legal capacity, and exercises jurisdiction over all legal practitioners and candidate legal practitioners as contemplated in this Act."

1.79 One of the respondents notes that there are two approaches to the legal fees' challenges. The one approach is through regulation of litigious work and work reserved for legal practitioners. The other approach relates to the broader access to legal advisory services and legal products that enable the economy to grow.[72] The respondent is of the view that if the aim is to make commercial legal services more accessible to the broader community, then regulation is not the answer. Instead, more de-regulation of the legal profession is what is needed to stimulate competition, which will drive down legal fees.[73]

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that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the right and the nature of that juristic person.

69 Otto and Otto state that the National Credit Act was implemented "in a piecemeal fashion to give creditors an opportunity to get their financial systems" and other forms and documents in place first. The technical provisions relating to the establishment of the National Credit Regulator came into operation first, followed by the provisions relating to the establishment of the National Consumer Tribunal. A year later the substantive provisions relating to the rights and duties of consumers and credit providers were brought into operation, *The National Credit Act Explained* (2016) 8.

70 Section 8 of the Legal Practice Amendment Act, 2017 (Act 16 of 2017) which came into operation on 18 January 2018.

71 Proclamation R31 of 2018 published in *The Government Gazette* No.420003 dated 29 October 2018.

72 Van Tonder K "Comments on Issue Paper" (17 June 2019) 5.

73 *Ibid*, 2.

3. Contractual freedom

1.80 The respondents submit that the mechanism must promote contractual freedom. Harpur SC, *et al*, argue that the imposition of a tariff would cut across a fundamental principle of our common law, that is, freedom of contract, and that this is a fundamental matter of public policy.[74] In *Wells v South African Alumenite Company*,[75] it was held that "[i]f there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice." In *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd*,[76] the SCA held that "the fact that parties enter into an agreement gives effect to their constitutional right to freedom to contract."

1.81 A number of mechanisms designed to regulate unfairness in contracts in respect of consumer transactions have recently been proposed in South Africa.[77] The Consumer Protection Act, 2008 (Act No.68 of2008) is one such mechanism. According to Eeden and Barnard[78]-

> "The Act acknowledges that contracts between consumers and businesses are different from contracts between businesses and businesses, and introduces a comprehensive unfairness matrix for explicit judicial evaluation of consumer to business contracts in respect of contracts when subject to the CP."

1.82 The authors point out that although in the past the courts have consistently relied on the common-law contractual autonomy (*pacta sunt servanda*) approach and have been cautious of the direct application of open-ended standards or principles of the law of contract, like good faith, reasonableness and fairness, however, values underlying the Constitution are increasingly having an impact on the enforcement of contracts.[79]

1.83 Section 36 of the Constitution provides as follows:

> *(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity,*

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74 Harpur GD SC, *et al*, "Transformative Costs" Advocate (April 2019) 45.
75 1927 SA 459 AD, par 73.
76 2018 (2) SA 314 (SCA), par 24
77 Eeden and Barnard *Consumer Protection Law in South Africa* 2017 228.
78 Eeden and Barnard *Consumer Protection Law in South Africa* 2017 228.
79 Eeden and Barnard *Consumer Protection Law in South Africa* 2017 233.

equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

1.84 The relationship between private contracts and public policy was examined by the Supreme Court of Appeal in the *AB and Another v Pridwin Preparatory School and Others,*[80] in which matter the SCA held as follows:

Private contracts and public policy
The relationship between private contracts and their control by the courts through the instrument of public policy, underpinned by the Constitution, is now clearly established. It is unnecessary to rehash all the learning from our courts on this topic. It suffices to set out the most important principles to be gleaned from them:

(i) Public policy demands that contracts freely and consciously entered into must be honoured;
(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;
(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;
(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.[81]

1.85 In *Barkhuizen v Napier*[82] matter, the Constitutional Court held that:

What the Constitution requires of the courts, the Supreme Court of Appeal held is that they employ its values to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit individuals the dignity and autonomy of regulating their own lives.

1.86 On the subject of contractual autonomy (pacta sunt servanda) Ngcobo J held that:

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80 [2019] (1) SA 327 (SCA).
81 *Ibid,* par 27.
82 [2007] (5) SA 323 CC par 12.

> *I do not understand the Supreme Court of Appeal as suggesting that the principle of contract pacta sunt servanda is a sacred cow that should trump all other considerations. That it did not, is apparent from the judgement. The Supreme Court of Appeal accepted that the constitutional values of equality and dignity may, however, prove to be decisive when the issue of parties' relative bargaining positions is an issue. All law, including common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle pacta sunt servanda is, therefore, subject to constitutional control*.[83]

4. The competition perspective

1.87 The respondents submit that the mechanism must comply with competition law. The Competition Act, 1998 (Act 89 of 1998) makes provision for the establishment of the Competition Commission responsible for, among others, the investigation, control and evaluation of restrictive practices and abuse of dominant position and mergers. The Competition Commission is also responsible to review legislation and publish regulations and report to the Minister concerning any provision that permits uncompetitive behaviour.[84] The purpose of the Act is to promote and maintain competition in the Republic in order to, among others, provide consumers with competitive prices and product choices.[85]

1.88 Section 1(2) of the Competition Act provides that "[t]his Act must be interpreted-

(a) in a manner that is consistent with the Constitution and gives effect to the purpose set out in section 2;
(b) in compliance with the international law obligations of the Republic."

1.89 Section 39(2) of the Constitution provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

1.90 The Bill of Rights guarantees the following rights:

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83 *Ibid,* par 15.
84 Section 21(1)(k) of the Competition Act 89 of 1998.
85 Section 2(b) of the Competition Act 89 of 1998.

- Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.[86]
- Every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."[87]
- Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.[88]

1.91 In *President of the Republic of South Africa v Modderklip Boerdery*,[89] the Constitutional Court highlighted the importance of section 34 of the Constitution as follows:

> "The first aspect that flows from the rule of law is the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums provided by the State for the settlement of disputes. These mechanisms for the resolution of disputes include the legislative framework, as well as mechanisms and institutions such as the courts and an infrastructure created to facilitate the execution of court orders."

1.92 It is important to note that the Competition Commission has previously considered whether or not the setting of fee guidelines for professional fees by Law Societies and the Bar Council constitute price-fixing or substantially prevents or lessens competition in a market. According to some of the respondents, the fee guidelines only served as benchmarks to counsel as to the rate at which they may charge a fee and were not mandatory.[90] They were a higher limit but certainly not the target. Counsel could deviate from the fee guidelines.

1.93 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.[91] Section 4(1)(a) and (b) of the Competition Act 89 of 1998 prohibits agreement or practice by parties in a horizontal relationship if such agreement or practice has the

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86 Section 22 of the Constitution.
87 Section 28(1)(h) of the Constitution.
88 Section 34 of the Constitution
89 2005(5) SA 3 (CC) pars 39, 41.
90 Capebar "Investigation into Legal Fees: Project 142, Issue Paper 36" (16 August 2019) 4.
91 Notice 113 of 2011 in *The Government Gazette* No. 34051 (4 March 2011), 30.

effect of preventing or lessening competition in a market or it involves restrictive horizontal practices. However, section 10(3)(b)(iv) of the Competition Act provides that an exemption may be granted in respect of agreements or practices which contribute to, among others, the objective of "the economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry." 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.[92] The Competition Commission further held that advertising should be allowed, "but subject to the general advertising laws of South Africa."[93]

5. Reasonable remuneration vs combating overreaching

1.94 The objective of the proposed mechanism is to ensure that legal fees chargeable by legal practitioners for legal services rendered are reasonable and within the reach of the citizenry.

1.95 The LSSA states that "the public must be protected from over-charging. Checks and balances need to be put in place to ensure that a client is not charged a fee, which is in excess of what is reasonable. The profession regards overreaching by legal practitioners as serious misconduct, as is evident in a number of court judgements. The relevant disciplinary action is taken, even to the level of application to the High Court for striking,"[94]

1.96 In *Camps Bay Ratepayers and residents Association and Another v Harrison and Another*, [95] the court issued a stern warning against the legal profession for charging fees beyond what the market can bear.

1.97 Counsel is required by clause 29.1 of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities to charge only reasonable fees.[96] The Code states that counsel should "be mindful that the profession of advocacy is primarily vocational and exists to serve the public interest." In calculating

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92 *Idem*.
93 *Ibid,* 29.
94 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees-Project 142" 20.
95 [2012] ZACC 17 par 11.
96 Notice 198 of 2019 published in *The Government Gazette* No.42364 dated 29 March 2019.

the fees, counsel shall "guard against both overvaluing and undervaluing the services to be rendered."[97]

1.98 The test for attorney-and-client costs is reasonableness. In *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union*[98] the court held that 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.

6. Transformation of the legal profession

1.99 Section 3 of the LPA provides that:

> *The purpose of this Act is to-*
> *(a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld*;

1.100 Since the Constitution of the Republic of South Africa (RSA) places emphasis on the achievement of social justice for everyone, it has been argued that it is transformative in nature,[99] or that it is "transformation-oriented."[100] Section 1 of the Constitution pronounces human dignity; the achievement of equality and the advancement of human rights and freedoms as the values upon which the sovereign, democratic state is founded. According to Pieterse, the notion of "transformative constitutionalism" mandates the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a culture of justification for every exercise of public power.[101] The author points out that:

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97 *Ibid*, clause 29.3. Rule 7 of the Uniform Rules of Professional Conduct of the GCB (Rule 7.1.2, introduced vide 1989 AGM resolution) provided 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 above the value of the service, though his lack of means may require a lower charge, or even none at all"

98 [2002] (2) SA 64 CC par 51.

99 Roux T, "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without Difference?" 1998 285.

100 Pieterse M, "What do we mean when we talk about transformative constitutionalism?" (2005) 155.

101 *Ibid*, 156.

> *The extension of the constitutional transformation project to the so-called private sphere is affirmed by section 8(2) and (3) of the Constitution, which acknowledges that rights may in appropriate circumstances apply also to private parties, hence allowing for constitutional standards to infiltrate private relationships. Additionally, section 39(2) mandates and facilitates the gradual transformation of South African common law which regulates the bulk of private interactions by determining that courts must promote the spirit, purport, and objects of the Bill of Rights when developing common law*.[102]

1.101 The Constitution is thus not simply a document that preserves and protects entrenched privileges and freezes the status quo but requires the State to act positively to ensure the progressive realisation of the rights contained in the Bill of Rights.[103]

F. Outline of the Report

1.102 The Report is structured as follows:

1.103 **Chapter 1** discusses terms of reference for the investigation; socio-economic context obtaining in the Republic of South Africa as well as policy questions, namely: (a) independence of the legal profession; (b) regulation versus deregulation; (c) freedom of contract; (d) the competition perspective; and (e) reasonable remuneration versus combating overreaching.

1.104 **Chapter 2** discusses the factors and circumstances giving rise to unattainable legal fees. Recommendations for legislative and non-legislative interventions are made, where relevant.

1.105 **Chapter 3** discusses the topic of access to legal services by users in the lower and middle-income bands; whereas **Chapter 8** discusses access to legal services for the top end natural persons and juristic entities.

1.106 **Chapter 4** discusses the topic of mandatory fee arrangements. Contingency fees agreements are discussed in **Chapter 5**.

1.107 **Chapter 6** looks at the Mechanism for party-and-party costs, whilst **Chapter 7**, the Mechanism for attorney-and-client fees.

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102 *Ibid*, 162.
103 *Idem*.

1.108 Public responses to Issue Paper 36 and Discussion Paper 150 are summarised in **Chapter 9**.

1.109 **Annexure A** provides a list of respondents to Issue Paper 36; **Annexure B**, the schedule of provincial community workshops; **Annexure C** list of respondents to Discussion Paper 150; **Annexure D**, list of respondents to the questionnaires; **Annexure E** responses to the middle-income users of legal services questionnaire, **Annexure F** is fee parameters for counsel acting on the instruction of the State, and last but not least, **Annexure G** is an excerpt from a comparative study of civil costs litigation and funding across 36 international jurisdictions conducted by Hodges C, Vogenauer S and Tulibacka M.[104]

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104 Hodges C, Vogenauer S and Tulibacka M: *The Costs and Funding of Civil Litigation: A Comparative Perspective* 2010 Hart Publishing 114.

Chapter 2: Factors and circumstances giving rise to unattainable legal fees

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] Draft recommendations for legislative (law reform) and non-legislative interventions are made. Other factors and circumstances are discussed in the relevant sections of the other Chapters of this Report.

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) court processes and procedures;
(c) the legal profession; and

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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.

(d) socio-economic factors.

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 Respondents believe that the complexity of the law, that is, substantive law and rules of court, does contribute to increased legal fees.[5] Although complex areas of the law, such as tax law and intellectual property law, contribute to increased legal fees, they are not prevalent and do not hamper access to justice. Both substantive law and the rules of court are very technical and complex, with the effect that most lay people cannot understand them, and they need a skilled person to assist them. An effort must be made to simplify some Acts and regulations, especially those most commonly used, for example, the Pension Fund Act and Extension of Security of Tenure Act, 1997 (Act No.62 of 1997) (ESTA), to ensure that any person can use the legislation to protect his/her rights.[6]

2.7 The complexity of the existing system of third-party compensation under the Road Accident Fund Act, 1996 (Act No.56 of 1996) (RAF Act) hampers and delay access to justice. Specifically, the complexity of, and delays associated with, both (i) the determination and apportioning of fault; and (ii) the assessment of quantum, lead to delays, disputes, litigation, and ultimately costs. In addition, plaintiffs' attorneys do not endeavour to settle claims prior to litigation. Some explain that it has been the practice to delay the investigation of the quantum of the claim until a trial date has been allocated.[7] A move away from the current common-law based scheme, to a new scheme based on social security principles – where defined benefits are provided on a no-fault basis – will

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5 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 9.
6 *Idem*.
7 *Idem*.

reduce complexity, broaden access, and expedite access to justice, at a much-reduced cost.[8]

2.8 The Centre for the Advancement of Advice Offices in South Africa (CAOSA) submits that the climate, in which communities experience the justice system, is largely informed and influenced by several factors.[9] The issues of illiteracy and the complexity of the legal system become a direct hindrance to the vulnerable and indigent.[10] The community advice office sector is working tirelessly, with minimal resources, to ensure that legal empowerment initiatives are the first layer of access to justice.[11] According to CAOSA, literacy and empowerment initiatives are determining factors in how communities experience justice, and how the law can be accessed and utilised as an instrument of change, in instances when it is not aligned to the needs of the broader society.[12]

2.9 The General Council of the Bar of South Africa (GCB) notes that legal disputes might involve simple and easily determinable legal principles, or might involve extremely intricate and difficult issues of law.[13] Similarly, the facts of a dispute might be easily determinable or might be extremely complex. The attainment of a position where lay persons would generally be able to represent themselves in litigation is a laudable goal, but in an imperfect world, it is unattainable.[14] An example will suffice: when regard is had to the National Credit Act, 2005 (Act No.34 of 2005) (NCA), it will be seen that that Act was the cause of many a dispute about the interpretation and application thereof.[15] All those cases involved intricate questions of interpretation of legislation. To expect a lay person to properly assist a judge/magistrate to determine what was intended by the Legislator with this legislation is an unattainable goal. It speaks for itself that the Legislature must be requested to ensure that the legislation it produces is clear and easily understandable.[16]

2.10 ENSafrica submits that the complexity of the law plays an important part in the

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8 *Idem*.
9 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Chapter 2 para 1.
10 *Idem*.
11 *Idem*.
12 *Idem*.
13 Louw A SC, "GCB Comments on investigation into legal fees" (30 August 2019) 2-3.
14 *Ibid,* 3.
15 *Idem*.
16 *Idem*.

expense incurred by any party in respect of legal fees.[17] However, it is not the only factor. In addition, it is not clear that the complexity of the law in matters such as tax and intellectual property is an issue affecting access to justice, which should not be confused with access to the broadest range of legal services.[18] Highly specialised areas of law, such as tax, intellectual property, corporate finance, competition and construction law, do not regularly intersect with the areas of law that are most often relevant to indigent persons.[19] Therefore, the fact that specialisation and experience command a premium in relation to legal fees does not directly impact on access to justice for indigent persons.[20]

2.11 The Banking Association South Africa (BASA) is of the view that the legal system is over-regulated, which has led to conflicting or ambiguous interpretations of legislation and other legal processes.[21] The Rules of Court do not appear to cater for current societal and other constraints or needs and are open to abuse to the extent that technical issues prevent the finalisation of a matter, resulting in inordinate delays and exorbitant costs.[22] The law in general is a complex mechanism and this is not something unique to South Africa.[23] It is a stretch too far to attribute high legal fees to the complexity of the law alone. Although to some extent high legal fees do hamper access to justice, one cannot attribute that solely to the complexity of the law.[24]

2.12 According to the Road Accident Fund (RAF), the complexity of the existing system of third party compensation under the RAF Act hampers and delays access to justice.[25] The RAF makes reference to the road accident that occurred on 4 January 2018 between a train and a truck at a level crossing close to the Geneva train station in the Western Cape and says that more than a year after the occurrence of the accident, the issue of fault is yet to be determined, noting that the Apportionment of Damages Act, 1956 (Act No. 34 of 1956) provides for the apportionment of fault among the joint wrongdoers.[26] In

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17 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 5.
18 *Idem*.
19 *Idem*.
20 *Idem*.
21 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 1.
22 *Idem*.
23 ABSA "ABSA Bank's Commentary-Issue Paper 36" par 2.1
24 *Idem*.
25 Road Accident Fund "Comments on the investigation into legal fees Project 142 Issue Paper 36" ((27 August 2019) 5.
26 Section 2(1) of the Apportionment of Damages Act, No.34 of 1956 provides that "Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action."

this case, the joint wrongdoers could include the RAF, Passenger Rail Agency of South Africa (PRASA), Metrorail and others.[27]

2.13 The issue of illiteracy coupled with the complexity of the legal system serves as the major obstacle to access to justice for the majority of the vulnerable and indigent members of society. The other contributing factor is that laws are generally not written in plain and simple language that is easily understood by the majority of the people. The community advice office sector strives to ensure that legal empowerment initiatives are the first layer of access to justice. These initiatives are provided in the language and context of each particular community. [28]

2.14 **Recommendation 2.1**: [29] The SALRC concurs with the following recommendations, which have been put forward by the respondents: The law should be written in a less complex and technical manner in order for the citizens to understand their rights and responsibilities, and to find solutions to their legal disputes with much ease.[30] This could be done by drafting laws in plain and straightforward language to ensure that any person can use the law to protect and advance their rights and interests as citizens.

2. Rules of procedure

2.15 Rules of procedure can be overly complex for the lay person, and these rules have been identified as a barrier to access to justice.[31] There are different rules for the different courts. The rules comprise primary and secondary legislation, court rules, practice rules per division and in the regional courts, norms set by the Chief Justice and unofficial practices employed by all courts.[32] This makes it difficult for an attorney from one

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27 *Idem*.

28 CAOSA "Submission to Issue Paper 36-Investigation into legal fees Project 142" (30 August 2019) 4. See also the DOJ&CD "Discussion Paper: Recognition and Regulation of the CAO Sector" (March 2019) chapter 6.

29 The recommendation is supported by Legal Aid SA "Response by Legal Aid SA to the Questions and Recommendations made by the SALRC in Discussion Paper 150," 3; and LSSA "Submission by the LSSA on Discussion Paper 150," 28.

30 Legal Aid SA "Response by Legal Aid South Africa Part A" 9.

31 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. Although it is intended that the court rules should provide for a simple process, however, there are instances where complex procedures cannot be avoided. Examples of these is evidence by experts and audio-visual evidence, Rules Board "Comments/ Submission from the Rules Board for Courts of Law: SALRC Investigation into Legal Fees: Project 142: Issue Paper 36" (9 September 2019) 5.

32 Legal Aid SA "Response by Legal Aid South Africa Part A" 9. Andrews mentions that secondary legislation and civil procedure rules are by far the largest source of procedural

jurisdiction to litigate in the jurisdiction of another division without paying another attorney for their specific skill and knowledge of how that other division works. According to respondents, these circumstances create more technicalities and space for rules to be abused."[33]

2.16 Naturally, rules of procedure are necessary for the effective conduct of cases.[34] The importance of the decisions made by the High Courts, the SCA, and the Constitutional Court in developing rules and principles of customary and statutory law cannot be overemphasised.

2.17 Hodges and Vogenauer remark that the challenge of maintaining fair and equal access to justice remains a problem for many jurisdictions throughout the world.[35] The authors explain that the stakeholders responsible for running the courts – that is, judges, lawyers, and the 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.[36]

2.18 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 doing away with all the archaic Rules, as well as progress- and efficiency-retarding Rules.[37] 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.[38]

2.19 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

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

33 Legal Aid SA "Response by Legal Aid South Africa Part A" 9.

34 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), 180.

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

36 *Idem*.

37 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.

38 *Ibid,* 8.

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".[39]

2.20 The following factors have been identified by the respondents as giving rise to unaffordable legal fees:[40]

(a) Additional compliance and costs are often occasioned by the requirements of practice directives, which vary between the various divisions of the High Court.
(b) Matters may be removed and/or postponed as a result of non-compliance with a practice directive, which hampers access to justice and increases costs.
(c) Legal practitioners spend time waiting for their matters to be called. Fees are charged on time spent waiting at court including travel time and appearance.
(d) Fees are charged for physical service and delivery of the application as well as time spent ensuring the court file is in order.
(e) Judicial interpretation may contribute to the complexity of the rule/s and therefore higher legal costs.[41]
(f) Legislation or rules may be introduced or amended with the resultant increase in costs.[42]

2.21 Legal Aid SA contends that elaborate and complex rules were designed to create fairness.[43] However, what makes the rules of procedure even more complex is the fact that there are different rules for different courts. The fact that every court has its own practice directives makes it impossible for an attorney from one jurisdiction to litigate in another jurisdiction without paying an attorney in that other jurisdiction for his/her specific knowledge of how that court works.[44] The circumstances create more technicalities and

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39 *Ibid,* 9.
40 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 5.
41 In E v E (c/n 12583/2017, judgement delivered on 12 June 2019) the Gauteng High Court gave directions for the disclosure by a schedule, of income and expenses in interim applications for maintenance in divorce proceedings (Rule 43). The Court included an additional process, the filling of a financial disclosure form and was of the view that Rule 43 applications may be filed without restrictions (length of affidavit). Whilst Rule 43 process is simple, the additional compliance as may add to the legal costs, Rules Board 5.
42 Following the amendment of section 65J of the Magistrates' Courts Act 32 of 1944, an application to court to provide for judicial oversight is now necessary. However, the process in section 65J results in an increase of costs that the debtor will have to pay, *idem* 6.
43 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 9.
44 *Idem*.

space for rules to be abused. The aim should be to make courts accessible to lay people, and therefore the processes and rules for specific types of matters, for example, divorce, maintenance and domestic violence must be simplified and uniform.[45] The rules of court are in some instances so complex that they can be used to litigate someone "out of court". If rules are abused in this way, it also escalates the costs of litigation, which again impedes access to the courts.[46]

2.22 The Medical Protection Society (MPS) believes that the rules of procedure themselves are not overly complex, although they could be simplified and streamlined.[47] What does render the rules of court procedure more complex, are the differing practice directives of the different divisions of the High Court. This means that, in different courts, practitioners must ensure that they are familiar with, and able to comply with, differing directives. It would be preferable to have a uniform set of directives and case management requirements across the various divisions of the High Court.[48]

2.23 Furthermore, simplified rules of procedure would, by definition, simplify dispute resolution, and a natural consequence of this would be a reduction in legal costs and the time required to ventilate disputes.[49] Rules of procedure aimed at discouraging the institution of proceedings that lack merit and defences that are unsustainable should be implemented. These could include:[50]

(a) A rule that requires legal practitioners to certify, before launching proceedings, that they have investigated the merits of, and evidence supporting, an intimated claim, together with a sanction for liability for costs if the trial court ultimately finds that the action discernibly lacked merit;
(b) A rule that requires the compulsory appointment of a curator for all minors in whose names' claims are brought, to prevent exploitation;
(c) Summary proceedings in all claims for damages to determine the viability of such claims at an early stage;
(d) A codification of practice directives across all the divisions of the High Court;

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45 *Idem*.
46 *Idem*.
47 Medical Protection Society "Response to the SALRC Issue Paper 36" 2.
48 *Idem*.
49 *Idem*.
50 *Idem*.

(e) Summary costs hearings to determine the amount of costs payable by unsuccessful litigants immediately after judgment is rendered, coupled with a prohibition on appeals until costs awards have been paid;
(f) A rule that holds practitioners jointly liable for adverse costs awards, if they conduct litigious matters on a contingency fee basis and they have decision-making power in the litigation process by virtue of having funded the litigation, or they otherwise exercise control over decisions to litigate or to continue to litigate;
(g) Hearing of prescription as a preliminary/summary issue early on in the case;
(h) Less reliance on split trials/separation of merits and quantum; and
(i) An earlier court-imposed timetable for the conduct of litigation, with clear procedural steps to be completed before a trial date can be allocated.

2.24 The RAF takes the view that the rules of procedure, whilst complex, are necessary to ensure a fair and equal adversarial process. By the same token, however, adherence to the rules by implication translates into higher fees, as lawyers charge fees for work done to comply with the relevant rules. Thus, simplifying the rules and combining some of the processes would go some way to lower the fees required to be written to comply with the rules.[51]

2.25 The Cape Bar notes generally that it is apparent that there are inefficiencies in the court system. Notwithstanding numerous initiatives by the Chief Justice and others to address these inefficiencies, litigation in the High Court and in the Magistrates' Courts remains notoriously slow, cumbersome, and certain of the procedures probably contribute to the increase in costs.[52]

2.26 In the United Kingdom, the report on legal fees by Lord Justice Jackson in 2010 was followed by a review of the civil courts' structure by Lord Justice Briggs in July 2016. The Cape Bar refers specifically to the 16 causes of inefficiency identified by Briggs LJ, namely:[53]

(a) The rules of court require extensive procedures involving professional skill;
(b) The complexity of the law;
(c) Costs rules themselves create "satellite litigation" in respect of costs disputes;

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51 RAF “Comments on the investigation into legal fees” (27 August 2019) para 8.
52 Capebar “Investigation into legal fees-Issue Paper 36” (16 August 2019) 11.
53 *Ibid,* 12-13.

(d) Too few solicitors, barristers and judges have sufficient understanding of the law of costs;

(e) Lawyers are paid by reference to time rather than quality;

(f) The recovery of hourly rates is not satisfactorily controlled;

(g) The preparation of witness statements and expert reports can generate excessive costs;

(h) The cost-shifting rule creates perverse incentives;

(i) Contingency fee agreements, unfortunately, have had unintended consequences – notably that litigants have little interest in controlling costs;

(j) The advent of the electronic era has had the result that, in substantial cases, the process of discovery can be prohibitively expensive (because of the sheer volume of the communications and documents that are generated);

(k) There is no effective control over pre-litigation costs;

(l) In some cases, there is ineffective case management, both by the parties and by the court;

(m) The procedures for detailed assessment are too cumbersome;

(n) The current level of court fees is too high; and

(o) Civil courts remain under-resourced both in terms of staff and IT.

2.27 With regard to the Jackson report's recommended reforms in all 16 of these areas, the Cape Bar makes the following observations:[54]

(a) If certain of the Jackson recommendations were to be adopted, they would require extensive amendments to the Rules of Court in South Africa – for example, (i) how one controls the discovery process in the electronic era, and how one controls the use of extensive electronic documents; and (ii) if witness statements are used to curtail the duration of trials, how one control the length of witness statements and the impact on costs;

(b) In South Africa, courts, which order that the loser pay the expert witness's fees of the winner, very rarely limit those fees. Jackson LJ recommended that courts should consider limiting the recovery of excessive fees, to curb the perverse incentive for a likely winner to inundate the likely loser with unnecessary expert evidence and consequent costs;

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54 *Ibid,* 13-14.

(c) Substantial proposals are made with regard to controlling evidence in court. For example, expert evidence might be dealt with by way of "hot-tubbing,"[55] a practice sometimes used in building arbitrations, and more recently in the Competition Tribunal. However, failure by the judicial officer to control the hot-tub process actively leads to the process simply extending the issues without resolution; and

(d) In South Africa, there have been extensive steps towards better case management, including the recent amendments to rule 37 of the Uniform Rules of the High Court. Nonetheless, the experience of members of the Cape Bar is that cases still take inordinately long, because much of the delay is outside of the control of case management judges.

2.28 The Rules Board for the Courts of Law (Rules Board) notes that in making rules of court procedure, it submits draft rules for comment to role players, including the legal profession (attorneys and advocates), sheriffs, the judiciary, magistracy, and NGOs.[56] The Rules Board constantly endeavours to simplify existing rules and to make new rules and procedures that would enhance access to justice. Whilst it is intended that the rules provide for a simple process, in some instances the nature of the proceedings is such that complex procedures cannot be avoided. Examples are evidence by experts and audio-visual evidence. However, in many instances, additional compliance and costs are often occasioned by the requirements of practice directives that vary between the various High Courts. In some cases, for example, because of abuse, legislation or rules may be introduced or amended with a resultant increase in costs, for example, emoluments attachment orders proceedings in terms of section 65J of the Magistrates' Courts Act 32 of 1944.[57]

2.29 The introduction of the e-development infrastructure will assist in creating a court-annexed electronic platform that enables litigants (including their legal representatives) to file documents at court without the need for physical attendance at court.[58] The electronic platform may further be used to submit applications (unopposed, non-contentious interlocutory applications, such as Uniform Rule 38 applications to compel discovery) for consideration by a judge/magistrate without the necessity of an

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55 Hot-tubbing is the practice of expert witnesses from the same discipline being in the witness box and available to give evidence at the same time.

56 Rules Board “Comments/ Submissions from the Rules Board for Courts of Law” (9 September 2019) 5.

57 *Ibid,* 6.

58 *Idem*.

appearance at court. The court order, once granted, would be sent back to the parties electronically. To do away with appearances at court for non-contentious interlocutory applications would be a substantial saving for litigants, considering that:[59]

(a) Attorneys and advocates spend time waiting for their matters to be called, and fees are charged for the time spent waiting at court, including travel time and appearance; and
(b) Fees are charged for physical service and delivery of the applications, as well as time spent ensuring the court file, is in order.

2.30 The LSSA states that the rules governing procedures in the High Court are generally complex, hence skilled legal practitioners are ordinarily appointed to represent parties.[60] In the Magistrates' Courts, there is room for improvement.[61] Judicial case management can assist in expediting matters and reducing costs pursuant to compliance with the relevant procedural requirements.[62] The Magistrates' Courts are creatures of statute and accordingly have no discretion to act beyond legislation. The LSSA believes that the complexity of the rules of procedure contributes to unaffordable legal fees or hampers access to justice.[63] Legal practitioners are skilled and are remunerated for their skilled services. The simplification and harmonisation of rules pertaining to different courts will contribute towards access to justice.[64]

2.31 On the question that court rolls are clogged by largely tactical trivial applications regardless of their overall value, the respondent submits that the trial process as currently prescribed in the Uniform Rules makes it very “cheap” for a plaintiff to issue legal proceedings, as the cost of particulars of claim will be a tiny fraction of the total costs of the trial. [65] The plaintiff, in doing this, anticipates that the defendant will be intimidated by the enormous costs of a trial hanging over his/her head, and so be more inclined to settle. After the particulars of claim, the plaintiff can move the process forward considerably with very little cost, for instance, by simply not serving a replication and by serving a discovery notice. In this way, vast numbers of matters accumulate at court in

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59 *Idem*.
60 LSSA “Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees” (30 September 2019) 36 Regarding the Investigation into Legal Fees” (30 September 2019) 34.
61 *Idem*.
62 *Idem*.
63 *Idem*.
64 *Idem*.
65 ENSafrica “Comments and input: SALRC Issue Paper 36” (30 August 2019) 8.

which plaintiffs themselves do not believe, but which the plaintiff uses this to 'try his luck'.[66]

2.32 The respondent submits that this situation can be aided by a change in the Rules.[67] For instance, requiring plaintiffs to produce witness statements shortly after the plea is delivered will eliminate the incentive for a plaintiff to "try his luck". As the plaintiff would have produced these later in the process anyway, no additional costs would be incurred in such a Rule change. It must be said, however, that clogging of the court roll causes "dead time" in which nothing happens and no fees are charged. For instance, High Court litigants are required to have a matter trial-ready before they can apply for a trial date, yet the trial date allocated is in most jurisdictions more than a year from the date on which the date is allocated.[68]

2.33 On the question that procedures are highly but unnecessarily technical and incomprehensible to all but the lawyers, ENSafrica submits that indeed there are civil procedures that could be simplified or standardised.[69] For instance, each High Court's practice directives are unique, yet each court is catering for the same processes. Again, this requires legislative intervention into procedural rules, rather than it being a problem of excessive fees.[70]

2.34 Responding to the statement in Issue Paper 36 that the possibility of settlement is largely ignored by procedural rules and left entirely to the lawyers' discretion, the respondent submits that this issue is generally only relevant in the context of civil litigation, which does not self- evidently impact on access to justice.[71] Moreover, it is precisely because of the subjective nature of merit that courts are tasked with deciding on the merits. It is unlikely that this characteristic of the law can be legislated away.[72]

2.35 On the subject that litigation seems endless due to unfettered rights to appeal on law and even on fact, the respondent submits that there are strict rules on when a party may take a matter on appeal.[73] If leave to appeal is granted too often, it is because the discretion to grant leave was exercised incorrectly or the substance of law requires

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66 *Idem.*
67 *Idem.*
68 *Idem*.
69 *Idem*.
70 *Idem*.
71 *Idem*.
72 *Idem*.
73 *Ibid,* 11.

development.[74] It is no accident that appeals are frequent, as our Constitution mandates the development of the common law. Our law has moved in the direction of granting more appeals rather than less.[75] That said, there are respects in which the legal process can be shortened. Currently, the Uniform Rules provide for plaintiffs with particular kinds of claims to apply for summary judgment, which, if successful, may dispose of an action within a few months of it being launched as opposed to a few years if the application for summary judgment fails. However, in practice the defendant can put up almost *any* defence in an affidavit resisting judgment, causing the summary judgment application to be defeated. This is a failure on the part of those who administer justice that causes delay and clogs up the court roll with matters that could have been disposed with a summary judgment.[76]

2.36 **Recommendation 2.2**:[77] The SALRC concurs with the following recommendations, which have been put forward by the respondents:

(a) The court rules and practice directives should be made uniform across all courts.[78]
(b) They should be more straightforward in wording.
(c) They should use plain language and eliminate Latin words. [79]

3. Strengthening lower courts to which the poor can have access more easily

2.37 The Statistics South Africa's Victims of Crime report include questions on access to justice such as perceptions about courts. [80] The report reveals that in general, people in the rural areas took longer to walk to the nearest courts than those in the urban and

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74 *Idem*.
75 *Idem*.
76 *Idem*.
77 The recommendation is supported by Legal Aid SA, *op cit*, 3.
78 Legal Aid SA "Response by Legal Aid South Africa Part A" 9.
79 *Ibid*, 9-10.
80 Statistics SA "Governance, Public Safety and Justice Survey" (2018/19). Victims of crime statistics (VOCS) are population estimates of the level of crime in South Africa based on a sample of 27 071 households nationwide. The Governance and Access to Justice Report is compiled from the VOCS. However, the access to justice questions that are fielded in the questionnaire are very limited and do not include perceptions on access to legal practitioners and legal fees.

metropolitan areas. This means that households in metros had easier access to courts than those in urban and rural areas.[81]

2.38 Responding to the question of whether poor and middle-income people are denied access to the lower courts, the respondents submit that no income group is denied access to any court. However, affordability is the major factor limiting people's access to justice and legal services.[82] Although maintenance, divorce, and domestic violence matters have been simplified for parties to litigate without the assistance of a legal practitioner, however, systematic failures have made it cumbersome for litigants to access maintenance, divorce, and protection orders.[83]

2.39 The fact that litigation is too adversarial as cases are run by the lawyers and not the courts is a question of how the South African legal system works. It is a matter that falls outside of the control of legal practitioners in private practice.[84] ENSafrica submits that a shift from an adversarial to an inquisitorial system would certainly shift costs away from litigants, although it would shift such costs to the state.[85] A shift in costs towards the state is fairer than shifting the burden to practicing lawyers, as the burden would then be borne across the board by all taxpayers. However, it is a burden that the state may have difficulty coping with.[86]

2.40 Responding to the view that the court system is delayed by the postponement of interlocutory and trial hearings, particularly when parties consent and cost order is agreed, respondents state that as long as costs are tendered, postponements are almost always granted by judges and magistrates.[87] This practice has developed over time on the basis of the argument that if costs for the postponement are granted, there is little prejudice. Whilst it may be that legal practitioners are the ones who exploit this practice, stopping the practice requires regulatory or judicial intervention. It is a question of efficiency in the civil procedure rather than of legal fees.[88]

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81 *Ibid,* 55. 42.08% of the participants are satisfied that courts generally deal with perpetrators of crime, whereas 37.38 are not satisfied. 21, 61% feel that courts are too lenient on criminals, 65.

82 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" 6.

83 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.

84 ENSafrica "Comment and input: SALRC Issue Paper 36, Project 142 (Investigation into Legal Fees" 7.

85 *Idem.*

86 *Idem.*

87 *Ibid,* 8.

88 *Idem*.

2.41 On the question that the court system is delayed by the postponement of interlocutory and trial hearings, particularly when parties consent and cost order is agreed, the respondent's view is that as long as costs are tendered, postponements are usually granted by judges/magistrates.[89] This is a practice that has developed over time based on the argument that, if one is compensated for the costs of the postponement, there is little prejudice. However, this often does prejudice a person, as the costs of one day may be far less than the loss suffered from a delayed hearing on the merits.[90] Whilst it may be that legal practitioners are the ones who exploit this practice, stopping the practice requires regulatory or judicial intervention.[91] That said, this is a question of efficiency in civil procedure, rather than a question of legal fees.[92]

2.42 Making oral representation before the Commission, Judge President (JP) Mlambo stated that he has accepted the invitation to attend the hearings to highlight several issues. One of the issues is the refusal by the High Court to accept matters that belong in the magistrate's court. He says that banks are the ones who are driving magistrate's court litigation in the High Court. He says that the main reason for bringing that litigation is that it is alleged that the High Court is more efficient in dealing with these matters than the magistrate's courts. He is not certain if this is correct because he is involved in the leadership of the magistrate's courts. One example is divorce courts. The High Court used to set down divorce matters in Johannesburg before acting judges on Fridays at 14H00. Each acting judge will be allocated 30 cases without exception. However, all these divorce matters should have easily been dealt with in the magistrate's court. Even though most of those divorces are unopposed, however, there is a lot of money that people have to pay to come to court. This is one area that the Commission needs to look at. The Judiciary will be happy if its hands could be strengthened in enforcing the jurisdictional criteria of a magistrate's court. Other than divorce matters, there is a host of other matters that are brought before the High Court where they do not belong in the first place. This will have a huge impact on costs because the costs structure in the magistrate's court is much lower compared to that of the High Court.

2.43 To deter matters from clogging the court roll, JP Mlambo says that he has issued a directive, which will be effective as of 8 July 2019. In terms of this directive, it is going to be difficult, if not impossible, to get a trial date when a party is not trial-ready. Currently,

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89 *Ibid,* 7.
90 *Idem*.
91 *Ibid,* 7, 8.
92 *Idem*.

when pleadings close, parties can ask for a trial date because this is allowed by the Rules. The JP says that the Judiciary is closing this door. Case management will be the basis through which Judiciary sifts the matters. Road Accident Fund (RAF), health and Passenger Rail Agency of South Africa (PRASA) matters are the biggest chunk of matters that are on the court rolls yet they do not belong there in the first place. The delegation from the General Council of the Bar of South Africa (GCB) stated that if the RAF were to improve its case management procedures, it will weed out 50% of the 200 cases in the roll at the Pretoria Division of the High Court on any given day. Of the 200 cases in the roll, 180 of them are RAF cases. This will relieve many of the judges and make them available on a two-week basis instead of one week only.

2.44 Legal Aid SA submits that access to the lower courts for the poor is limited, because Legal Aid SA is only able to assist to a limited extent.[93] As a result of the limited resources of Legal Aid SA, access to an attorney to assist with certain types of matters, such as maintenance claims, Commission for Conciliation, Mediation and Arbitration (CCMA) matters, etc., is restricted.[94] The means test also limits the availability of legal aid to persons who fall below the income threshold. However, the reality is that a person failing the means test may still fall in the category of "poor."[95] Even some people who may consider themselves "middle class," do not necessarily have the resources to afford the fees of a legal practitioner for the duration of a matter.[96]

2.45 While there is an opportunity for all people to institute court action *in person*, the reality is that the complexity prevents access and causes matters to remain unresolved.[97] A possible solution to this problem is to streamline the litigation process to make the courts more user-friendly.[98] All matters could, for example, start as applications, which would make it easier for all to approach the court.[99] Should real disputes of fact arise in matters at a later stage, these matters could be converted into trials.[100]

2.46 The RAF opines that access to the lower courts amongst the poor and middle-income population is generally reserved for criminal matters in which the person qualifies for legal aid, or *pro bono* work in the case of civil matters.[101] Access to the lower courts

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93 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 10.
94 *Idem*.
95 *Idem*.
96 *Idem.*
97 *Idem*.
98 *Idem*.
99 *Idem*.
100 *Idem*.
101 RAF "Comments on the investigation into legal fees" (27 August 2019) para 10.

for these groups will not be affected by streamlining of the lower courts. The RAF argues that the fees that legal practitioners charge in the lower courts are what determine affordability. Restricting attorneys' fees in the lower courts will have a corresponding effect on the affordability of justice in the lower courts.[102]

2.47 CAOSA submits that the DOJ&CD has been largely responsive in ensuring that lower courts are located within communities.[103] The progressive nature in which courts, such as the domestic violence court, maintenance court and small claims court, ensure access to justice by having *pro forma* documents that litigants can easily fill in and use to commence or oppose matters, must be commended.[104]

2.48 However, once again, on account of literacy many community members do not approach courts to have their justice needs met.[105] It then becomes the prerogative of the community advice offices to ensure that the individuals are accompanied and receive the necessary guidance and support to have these matters presented before courts for resolution.[106]

2.49 The recognition of community advice offices is crucial in ensuring that these offices receive the necessary support from the state to continue their services that, in the broader scheme of things, advance equitable justice and ensure communities are deriving benefit from the rule of law.[107]

2.50 Consideration should be given to whether the jurisdiction of the lower courts should be increased, as well as re-evaluating the matters that may be heard in Magistrates' Court.[108] Not every matter high in value is complex, for example, curatorship and interpretation of wills.[109]

2.51 The introduction of e-development to provide for access to courts *via* electronic platforms will facilitate access to courts by the public, who, for example, might be able to submit a summons for divorce or maintenance application online.[110]

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102 *Idem*.
103 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Chapter 2 para 2.
104 *Idem*.
105 *Idem*.
106 *Idem*.
107 *Idem*.
108 *Idem.*
109 *Idem*.
110 *Ibid,* 7.

2.52 Magistrates' Courts should more effectively manage cases so that matters deserving of more than one day, are allocated more days.[111] Conducting litigation piecemeal over an extended period of time is not cost-effective.[112] Students can assist parties to draft and formulate their claims and counter-claims in the Small Claims Courts.[113]

2.53 The Banking Association of South Africa (BASA) notes that strengthening the lower courts by appointing competent and commercially-minded judicial officers is one example of strengthening access and making lower courts attractive to refer disputes to.[114] Inefficient functioning of lower courts and lack of skills in commercial matters makes them undesirable to refer a dispute to.[115]

2.54 ABSA does not believe it to be the case that poor and middle-income people are denied access to the lower courts.[116] The up-skilling of magistrates and more streamlined procedural rules could significantly strengthen the powers of the lower courts, and thereby reduce the time it takes to finalise cases, in turn reducing legal costs.[117]

2.55 **Recommendation 2.3**: [118] The SALRC concurs with the respondents' views that it may be more advantageous to strengthen the lower courts to which the poor and middle-income group can and already do have easier access to justice. Accordingly, the following is recommended:

(a) Magistrates' Courts should manage cases more effectively so that cases that deserve more than one day are allocated more days. Conducting litigation on a piecemeal basis over an extended period of time is not cost-effective.

(b) Lower courts must continue to be strengthened by the appointment of competent judicial officers with appropriate experience and expertise, particularly in commercial matters.

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111 *Ibid,* 36.
112 *Idem*.
113 *Idem*.
114 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 1.
115 *Idem*.
116 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.4.
117 *Idem*.
118 The recommendation is supported by the LSSA and Legal Aid SA, *op cit*, 30 and 5 respectively.

(c) More judicial officers should be appointed and steps be taken to optimise their efficiency. Vacancies that exist must be filled since matters can often not proceed on the date set down because of the unavailability of presiding officers.[119]

4. Direct access to the Constitutional Court [120]

2.56 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".[121] Developing countries such as Brazil, India, and Colombia have simplified direct access to the highest courts of the land.[122] It must be noted that this should remain an exceptional measure to avoid "opening the floodgates".[123]

2.57 Responding to the question of whether restricted access to the Constitutional Court has an adverse effect on access to justice, most respondents are of the view that it does not appear that restricted access to the highest court in the land has an adverse effect on access to justice for the following reasons:

(a) The Constitutional Court is typically the court of last resort and deals exclusively with those cases that raise questions about the application, interpretation or amendment of the Constitution or the constitutionality of legislation.[124]

(b) If the lower courts function effectively and efficiently, people will have limited need to approach the Constitutional Court.[125]

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119 LSSA, *op cit*, 30.

120 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"

121 *Ibid,* 124.

122 *Idem*.

123 *Ibid,* 128.

124 The Banking Association of South Africa "Comments on the Investigation into Legal Fees, Project 142, Issue Paper 36 (30 August 2019) 1. See also ABSA at

125 Legal Aid SA "Response by Legal Aid South Africa Part A" 10.

2.58 However, there is a view that the Constitutional Court must somehow be compelled to deal with pressing, socio-economic rights litigation as a court of first instance and urgently. It must "drive" section 7(2) fulfilment of these rights. The whole idea of a Constitutional Court is that it is given a ticket to be more "political" than other courts and must tackle this issue instead of trying to focus on all areas of law. In SA public interest litigation through Non-government Organisations (NGOs) and Non-profit Organisations (NPOs) is what transforms the law for the poor, not access to justice by individual litigants. This may require some legislative and even constitutional amendments.

2.59 The RAF does not consider the restricted access to the Constitutional Court to have a negative impact on access to justice. Recourse can always be had to the lower courts to address these issues at first instance.[126] Legal Aid SA likewise believes that the restriction of access to the highest court does not hamper access to justice.[127] Human rights issues can be addressed in the lower courts. If the lower courts function efficiently and effectively, people will have limited need to approach the Constitutional Court.[128]

2.60 The Law Society of South Africa (LSSA) answers this question in the negative, noting that recent developments in legislation have expanded the Constitutional Court's mandate beyond simply constitutional matters.[129] The Medical Protection Society (MPS) argues that, to the contrary, allowing unrestricted direct access to the Constitutional Court will hamper the functioning of that court, as it will find itself mired in the task of considering and dismissing matters that do not merit direct access.[130]

2.61 ENSafrica argues that this question is difficult to answer in the abstract, as it depends on the nature of the problem to be solved.[131] If what the poor requires is to change the law, particularly in constitutional respect, then certainly direct access to the Constitutional Court is preferable. However, it seems more likely that what the poor need is assistance in enforcing and implementing existing law, in which case they would be

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126 RAF "Comments on the investigation into legal fees" (27 August 2019) para 9.
127 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 10.
128 *Idem*.
129 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 35.
130 Medical Protection Society "Response to the SALRC Issue Paper 36" 3.
131 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 11.

assisted by greater access to the lower courts, perhaps conducted in a more inquisitorial way to lessen the requirement for legal professional intervention[132]

2.62 BASA states that it does not appear that restricted access to the Constitutional Court adversely impacts access to justice.[133] Access to justice is hampered at a grassroots level, and not because of restricted access to the Constitutional Court with regard to constitutional matters. Generally, the Constitutional Court allows direct access to socio-economically disempowered applicants.[134]

5. Cost-shifting rule

2.63 In *Ferreira v Levin NO and Others,*[135] 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".[136] This general rule – that the costs follow the event – does not apply in the Constitutional Court.[137]

2.64. 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, 1998 (Act No.107 of 1998) (NEMA) and section 21(2)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act Noo.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.[138] In *Manong and Associates (Pty) Ltd v City of Cape Town and Another*,[139] the equality court held that the "general rule is therefore that each party pays its own costs unless there are exceptional circumstances entitling the presiding officer to direct otherwise. This differs from the general rule in the

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132 *Idem.*
133 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 1.
134 *Idem*.
135 1996 (1) SA 984 (CC).
136 *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC).
137 Woolman, et al. *Constitutional Law of South Africa* (1999), 6-2.
138 Erasmus, H.J., *The interaction of substantive and procedural law: The Southern African experience in historical and comparative perspective* (1990) 6.
139 2009 (1) SA 644 (EqC) par 60.

Magistrate's Court, High Court and Supreme Court of Appeal that costs follow the result unless the court directs otherwise."

2.65 In *Biowatch*,[140] 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.

2.66 The precedent laid down in *Biowatch* was followed in *Tebeila Institute of Leadership, Education, Governance and Training v Limpopo College of Nursing and Another*,[141] 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, the 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*,[142] 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.

2.67 Responding to the question as to how does the cost-shifting rule operates in practice, respondents submit that the cost-shifting rule is rendered ineffective when practitioners litigate on behalf of indigent litigants with no prospects of success, and the practitioners then abandon their clients when adverse costs award is made against the clients.[143] In this instance, a costs award is rendered meaningless to a successful litigant who incurred considerable costs in defending litigation.[144]

2.68 The LSSA notes that this rule operates in civil and not criminal litigation.[145] The difference between the costs awarded by the court and the costs that the attorney is entitled to is payable by the client. This is an important factor. If there is too large a disparity between the party-and-party tariff and the attorney-and-own-client costs, this in

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

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

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

143 Medical Protection Society "Response to the SALRC Issue Paper 36" 9.

144 *Idem*.

145 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 39.

itself can be an inhibitor to access to justice.[146] The current trend in decisions made at taxation by taxing masters is to emphasise the injustice in this for the successful party. Uniform Rule 70 refers to an "indemnity" from costs to the successful party.[147] Nothing like this is achieved with the recovery of party-and-party costs in relation to actual attorney-and-own-client costs. This needs to be addressed by regular adjustments to the tariff.[148]

2.69 BASA submits that the basis of the cost-shifting rule is to promote access to courts by the socio-economically disempowered group without the fear of being burdened with a cost order if they lose the case.[149] For example, in Equality Court cases, no order as to costs is awarded and this promotes access to the court.[150]

6. Fear of having to pay opponent's costs [151]

2.70 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 justice.[152] Courts should be mindful of the effects of these cost orders when ordering the unsuccessful party to pay his/her opponent's costs.

2.71 Responding to the question of whether the court in granting costs in favour of the winning party impedes or cause litigants not to litigate for fear of having to pay the opponent's costs, respondents consider adverse costs awards against unsuccessful litigants as necessary to ensure that litigants litigate responsibly, and so that successful litigants are reimbursed for their costs.[153] If such awards are not granted, frivolous litigation will be encouraged, as litigants will not be compelled to exercise restraint.[154]

2.72 Similarly, the RAF believes that the cost-shifting rule is necessary to ensure that no frivolous litigation occurs and that we do not descend into a litigious society in which lawsuits become the order of the day.[155] The bottom line is that if a litigant believes in

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146 *Idem*.
147 *Idem*.
148 *Idem*.
149 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 2.
150 *Idem*.
151 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.
152 *Idem*.
153 Medical Protection Society "Response to the SALRC Issue Paper 36" 10.
154 *Idem*.
155 RAF "Comments on the investigation into legal fees" (27 August 2019) para 14.

his/her case, the fear of having to pay the opponent's fees will not be a factor in his/her decision to sue or not.[156]

2.73 Legal Aid SA points out that, since the litigant should assume that any cost order that may result from the litigation would be on a party-and-party scale, the litigant could only expect to recoup some of his/her legal costs, and would still be out-of-pocket for a substantial sum.[157] Even for impoverished *successful* litigants, the prospect of a cost order would therefore be cold comfort. According to the respondent, costs orders should nevertheless be a consideration. They discourage frivolous lawsuits and provide some relief in instances where a party has difficulty financing legal costs. In most instances, however, cost orders do provide opportunities for parties to litigate in instances where these parties otherwise would not have had the opportunity to do so. If anything, cost orders actually broaden access to justice for some people.[158] The converse is, however, also true. For a person with limited means, an adverse costs order could have disastrous consequences. This would be the case where such a person is involved in litigation with a party who has a vast budget available for litigation. Such a party could extend the scope of litigation beyond what is strictly required, and thus increase costs.[159]

2.74 CAOSA submits that the cost-shifting rule largely influences public interest litigation and *pro bono* work.[160] It becomes the main consideration for practitioners who gauges the risk that is involved in assessing their involvement in a particular matter.[161]

2.75 According to the LSSA, the answer to this question may potentially be in the affirmative.[162] The evaluation of the financial risks involved in litigation is an important disincentive for spurious and/or frivolous litigation. It also underscores the importance of alternative dispute resolution mechanisms and settlement offers. It is an incentive not to reject a reasonable settlement offer.[163]

2.76 ENSafrica submits that it would be a grave injustice if defendants could simply defend every claim, regardless of merit, knowing that there is no consequence over and

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156 *Idem*.
157 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 14.
158 *Idem*.
159 *Idem*.
160 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 4.
161 *Idem*.
162 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 40.
163 *Idem*.

above what they would have had to concede anyway.[164] The converse would be true of vexatious claimants who launch claims regardless of merit. In this way, without imposing costs on the unsuccessful party, nefarious litigants can abuse the legal process to extort unjustified but commercial settlements from one another.[165]

2.77 ABSA is of the opinion that courts granting cost orders in favour of a winning party is a very necessary mechanism to ensure that litigants do not institute claims with little or no merit, or as a defendant, litigate with the main intent of delaying the finalisation of the matter.[166] The respondent does not believe that it impedes a litigant from pursuing their matter. It fully supports the notion of granting cost orders in favour of the winning party.[167]

C. Court processes and procedures

7. Number of parties and number of experts involved

2.78 The number of parties involved in a case generally drives up legal costs since it results in duplication or extra copies of documents to be made and examined, and the amount of time spent in court testifying. 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. This factor also has an impact on expenses incurred by parties as a result of sheriff costs and extra copies of disclosure, to mention but a few.

2.79 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.

2.80 Responding to the question as to how does the number of parties involved in a case, impact access to justice, Legal Aid SA submit that a proper joinder of parties is imperative in litigation and this cannot be avoided.[168] That being said, the number of parties involved in the case generally drives up legal costs. This can be because of the

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164 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 12.
165 *Idem*.
166 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.10.
167 *Idem*.
168 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 18.

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. It further has an impact on expenses incurred by parties as it relates to sheriff's costs, extra copies of disclosure, etc.[169] In admin law, the issue of who should be joined as respondents in competitive processes (fishing allocations; tenders) is not clear. There have been horrendous situations in fishing, where thousands of respondents were joined and millions were charged by attorneys for "perusing" these applications. There is a need for clarity to be provided in the Promotion of Administrative Justice Act, 2000 (Act No.3 of 2000) (PAJA) Rules in this regard.

2.81 Respondents submit that more parties drive up costs because it results in duplication.[170] When more lawyers are involved, the case will progress more slowly. Every party would insist on the opportunity to participate in cross-examination, making submissions to the court, and calling witnesses – all of which would be time-consuming.[171]

2.82 The MPS argues that the more litigants there are in a particular matter, the higher the costs to each of them, since each litigant has to deal (to a greater or lesser extent) with every other litigant's case.[172] It means that one party in the litigation can be caught in the crossfire between other parties to the claim.[173]

2.83 Class action procedures facilitate actions arising from the same cause affecting multiple plaintiffs.[174] The process has developed in recent cases. Where a plaintiff has to sue several defendants to preserve rights where there is no certainty as to whom is liable, this does give rise to significant additional costs that can render the litigation commercially unviable. Rules need to be developed to encourage defendants to make admissions early on (and prior to the institution of action) so that irrelevant parties can

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169 *Idem*.

170 *Idem*. See also RAF who in a similar vein, the RAF maintains that as the number of parties increase, costs also increase as a result of extra copies of documents etc., as well as an increase in court time, at 18, and LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees"42, BASA at 3.

171 *Idem*.

172 Medical Protection Society "Response to the SALRC Issue Paper 36" 15.

173 *Idem*.

174 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 42.

be illuminated.[175] The court should be applying the case management rules in working out the local practice directives in this regard.[176]

ABSA states that, naturally, the more parties to a litigation matter, the higher the legal costs will be, as these multi-party matters can become very complex.[177]

8. Novelty of the matter

2.84 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 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. According to respondents, novel issues often lead to appeals and reviews to the higher court which drives up costs.[178]

2.85 Responding to the question of whether the novelty of a legal point taken in a matter impacts the costs of litigation, and, if so, how, respondents submit that the novelty of a matter has an impact on the costs associated with the matter.[179] This may be as a result of extensive research required to construct an argument, increased litigation as a result of a lack of precedent on the matter, or the need for specialist knowledge.[180] More preparation is required, and parties might want to use senior counsel who are more experienced/knowledgeable or use bigger legal teams.[181]

2.86 The MPS notes that a novel legal point can either reduce or increase the costs of a case.[182] A novel point can curtail the litigation costs by bringing the litigation to a short end. By the same token, however, it can increase the costs, by opening a new avenue of exploration, or by necessitating an appeal(s) to test the validity of the lower court's ruling on the novel point.[183]

2.87 The LSSA also answers this question in the affirmative but notes that more extensive research may be required.[184] Novel legal points may also potentially save costs

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175 *Idem*.
176 *Idem*.
177 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.14.
178 RAF "Comments on the investigation into legal fees" (27 August 2019)13.
179 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 18.
180 *Idem*.
181 *Idem*.
182 Medical Protection Society "Response to the SALRC Issue Paper 36" 16.
183 *Idem*.
184 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 42.

by shortening proceedings. In appropriate cases, a specific legal point can be separated and dealt with as a preliminary issue in terms of the Rules.[185] This will materially curtail costs, especially if the point disposes of the case.[186] If the point taken is bad in law, it can have the opposite effect of delaying the matter and increasing costs.[187]

2.88 Rule 6(5)(d)(iii) of the Uniform Rules of Court is under-utilised in applications. Its use should be encouraged. This rule provides as follows:

> ***6. Applications***
>
> *(5)(d) Any person opposing the grant of an order sought in the notice of motion must-*
>
> *(ii) within fifteen days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant document, and*
>
> *(iii) if he or she intends to raise any question of law only, he or she must deliver notice of his or her intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.*

9. Number of court events

2.89 Legal practitioners charge for each court appearance, regardless of the time actually spent in the courtroom.[188] As a consequence, the higher the number of court appearances, the higher the costs of litigation because legal practitioners charge per day in court (that is, advocates), or hours spent in court (in the case of attorneys).

2.90 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.

2.91 On the question of whether the length of all affidavits in High Court litigation (possibly also Magistrates' Court litigation) should be limited to a specific number of

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185 *Idem*.
186 *Ibid,* 43.
187 *Idem*.
188 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.

pages, and if so, how can this be achieved, one respondent submitted that affidavits are a method of placing evidence before the court. It would be problematic to limit the length of evidence uniformly.[189]

2.92 A distinction must be drawn between affidavits and heads of argument. The limitation of pages in affidavits should not be cast in stone. It is recommended that, unless exceptional circumstances dictate otherwise, the length of affidavits in the High Court and Magistrates' Court litigation be limited to a reasonable number of pages to be determined by the heads of court. On the question of whether heads of argument in all High Court and Magistrates' Court matters should be limited to a specific number of pages, and, if so, how can this be achieved, respondents are of the view that heads of argument are matter specific. The view is that if the SCA and CC can limit the page numbers of heads, why not the High Court? The Commission invites comment and input on whether heads of argument in all High Court and Magistrates' Court matters should be limited to a specific number of pages.

2.93 **Recommendation 2.4**:[190] A distinction must be drawn between affidavits and heads of argument. It is recommended that-

(a) unless exceptional circumstances dictate otherwise, affidavits and heads of argument in all High Court and Magistrates' Court matters be limited to a reasonable number of pages to be determined by the heads of court; and

(b) training be provided to legal practitioners on the preparation of heads of argument to eliminate the inclusion of unnecessary information which may lead to an increase in legal fees. [191]

2.94 Issue Paper 36 posed the question of whether 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

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189 Rules Board for the Courts of Law "Comments/ Submissions from the Rules Board for Courts of Law" 9 September 2019, 25.

190 Legal Aid SA supports the recommendation, *op cit,* 5. However, the LSSA does not support Recommendation 2.4 (a) on the grounds that annexures to an affidavit may run into many pages. There are cases that warrant voluminous heads of argument and each legal practitioner has his/ her own drafting style. The question of the number of pages should not be determined by the heads of court but should be dealt with in the case management procedure instead, *op cit*, 31.

191 *Idem*.

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?

2.95 Respondents point out that the "shotgun approach" to litigation does not protect the legal rights of the individual. It merely drags out the litigation, adds to the cost of an already costly undertaking, and impedes the timely dispensing of justice.[192]

2.96 Legal practitioners have an ethical duty of professionalism. The reasonable evaluation of a client's circumstances and careful analysis of the law, are inherent components of that duty and need to be in forced. Practice directives and case law already provide guidance on this issue. However, the enforcement of these guidelines is not always apparent, and courts do not always issue punitive cost orders in instances of voluminous, irrelevant and uncontrolled court documents.[193]

2.97 The "shotgun approach" to litigation should be punished in the strictest manner, not only through court orders but also by the LPC as misconduct tantamount to unethical behaviour.[194] Because the complexity of matters differs, it would be difficult to limit the number of pages. However, fixing the amount charged for heads of argument by tariff could assist in this regard.[195]

2.98 The respondent also notes that effective implementation of pre-trial processes and case management throughout the process will go a long way to immediately address any attempt at loading the proceedings with irrelevant issues and documents.[196] The presiding officer should at all times consider this comprehensively, taking into account the extent of the matter, as well as which party caused unnecessary delays.[197]

2.99 The Rules Board states that the so-called "shotgun approach" will be difficult to discourage or do away with, as the perception of relevance might be skewed between the parties and the judge/magistrate.[198] Information deemed not relevant and omitted but subsequently required in proceedings can have a major impact on costs. Documents may require amendments and therefore postponement of the proceedings, thus incurring

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192 Legal Aid SA “Response by Legal Aid South Africa Part A” (September 2019) 20.
193 *Idem*.
194 *Idem*.
195 *Idem*.
196 *Idem.*
197 *Idem*.
198 Rules Board “Comments/ Submissions from the Rules Board for Courts of Law” (9 September 2019) 11.

major costs. However, the charging of fees may also be an incentive for being overly prolix.[199]

2.100 The LSSA believes that legislative intervention is undesirable.[200] The litigation process is primarily up to the parties. Judges should, however, assess the question of costs more comprehensively. The new case management rules encourage judges to take a more proactive approach in case management.[201] This includes the use of punitive cost orders.[202]

2.101 The MPS argues that it is often the case, particularly in matters relating to damages arising from medical treatment received by plaintiffs, that the plaintiff is advised to institute legal proceedings against all practitioners involved in his/her treatment. This often results in defendants who are "innocent" in relation to the harm suffered, being compelled to incur costs in defending the proceedings, only to be found not liable.[203]

2.102 In addition, plaintiffs often withdraw their claims against some defendants at a late stage and then want to do so on the basis that they will not be held liable for those defendants' costs.[204] This practice could be discouraged by specific, punitive costs awards against plaintiffs who are found to have unnecessarily included defendants in the proceedings.[205] A provision could be made for such punitive cost awards through an amendment of the Uniform Rules of Court.[206]

2.103 According to the MPS, the default position should remain that the costs ordinarily follow the result.[207] However, the rules should be amended to require the court, as part of its assessment of a costs award, to consider whether it is appropriate to award costs to the successful litigant on a scale other than a party-and-party basis in each instance.[208] This would be an improvement on the present situation, where a successful litigant has

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199 *Idem*.
200 LSSA “Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees” (30 September 2019) 36 Regarding the Investigation into Legal Fees” (30 September 2019) 44.
201 *Idem*.
202 *Idem*.
203 *Idem*.
204 *Idem*.
205 *Idem*.
206 *Idem*.
207 Medical Protection Society “Response to the SALRC Issue Paper 36” 19.
208 *Idem*.

to specifically apply to the court for a punitive costs order, which is only awarded as an exception rather than the rule.[209]

2.104 ENSafrica states that the problem is that, currently, costs are generally awarded to the successful party without regard to considerations as to how the litigation was run.[210] A suggestion might be that a judge/magistrate is assisted by an assessor who, subsequent to the close of the hearing, is tasked with assessing the number of documents put up by a party, but not relied on in argument.[211] The assessor could also take cues from the judge/ magistrate as to which documents were expressly irrelevant.[212] A party who took a "shotgun approach" may then be mulcted with legal costs, even if he/she was the successful party.[213]

2.105 BASA believes that appropriate costs orders might have a positive effect and eliminate the "shotgun approach," especially if cost-consciousness by parties is "rewarded."[214]

2.106 ABSA believes that the award of a cost order in favour of a successful litigant is a very necessary mechanism to ensure that litigants do not become vexatious, or litigate with the main intent of delaying the finalisation of a matter.[215] ABSA does not believe that it impedes a litigant from pursuing his/her matter.[216] ABSA fully supports the notion of granting costs orders in favour of the winning party.[217] It is the function of the taxing master to ensure that litigation was conducted in a cost-conscious manner, and adjust the award of fees should this not be the case.[218]

10. Late settlement

2.107 Many cases that should be settled early in the litigation process are in fact settled late or "on the courthouse steps".[219] Late settlement is attributable to various reasons, such as the failure of the parties to understand issues timeously, lack of communication

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209 *Idem*.
210 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 16.
211 *Idem*.
212 *Idem*.
213 *Idem*.
214 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 3.
215 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.18.
216 *Idem*.
217 *Idem*.
218 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.18.
219 Jackson, R, "Review of civil litigation costs: Final report" (December 2009), 49.

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.[220] There is a tendency to delay settlement in RAF matters in order to drive up costs.[221] Thus, the effect of late settlement is an increase in all costs.

2.108 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.[222] 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 to reach a settlement and save legal costs.

2.109 Responding to the question as to what steps can the courts and the LPC take to encourage the timely settlement of litigated matters, and what is the effect of late settlement, respondents point out that settlement, however late in the process it happens, should always be encouraged.[223] Nevertheless, the unnecessary late settlement of cases definitely contributes to high legal costs. The conduct of the legal practitioners in arriving at a late settlement should be scrutinised, as their laxness or unethical strategy in having the matter settle only at the last moment, should not go unpunished by the court.[224]

2.110 Pre-trial conferences should play a much more important role in the litigation and process, and very particular information should be requested from parties relating to their attempts to settle the matter prior to trial.[225] Settlements reached on the day of trial should be compared to the responses at the pre-trial conference, and scrutinised by courts in considering the question of costs.[226]

2.111 Legal Aid South Africa also suggests that courts should stop postponing matters *sine die*.[227] Presiding officers should take control of the matters before them, be

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220 *Idem*.
221 RAF "Comments on the investigation into legal fees" (27 August 2019)14.
222 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.
223 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 20.
224 *Idem*.
225 *Idem*.
226 *Idem*.
227 *Idem*.

proactive, and all matters should be litigated within a framework timetable depending on the nature of the cause of action and the complexity of the issues.[228]

2.112 The RAF states that, unfortunately, in motor vehicle accident matters there is a tendency to delay settlement in order to run up costs. The effect of late settlement is an increase in costs all around.[229] The Rules Board has issued rules regulating judicial case management, that is, Uniform Rules 30A; 36; 37 and 37A.[230] The object of judicial case management rules is to expedite the flow of civil cases in the High Court to attain the speedy finalisation of such cases to enhance access to justice. [231]

2.113 According to the Rules Board, judicial case management is currently being considered for extension to the Magistrates' Courts.[232] The Rules Board has introduced court-annexed mediation in the Magistrates' Court (Rule 71). The Rules Board is in the process of introducing mediation in the High Court.[233] All of these processes seek to encourage early and therefore timely settlement (where possible) of matters (especially mediation) and further provide opportunities, once litigation has commenced, to consider settlement at later stages (judicial case management).[234]

2.114 ABSA proposes that there should be some sort of punitive measure implemented by the courts/Legal Practice Council on litigants who maliciously and intentionally delay settlement of matters.[235] The effect of late settlement is definitely the unnecessary accumulation of legal costs, and it makes the court process become more ineffective because trial dates are not being utilised for their intended purpose.[236]

2.115 The MPS concurs that, invariably, the effect of late settlement is to increase the costs to both plaintiffs and defendants.[237] In certain instances, it is only possible to achieve a settlement of a matter "late in the day," because of the investigations that have to be conducted and the evidence that has to be gathered.[238] However, in other matters, it is apparent at an early stage that a settlement ought to be concluded, and consideration

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228 *Idem*.
229 RAF "Comments on the investigation into legal fees" (27 August 2019) para 23.
230 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 11.
231 *Ibid,* 12.
232 *Idem*.
233 *Idem*.
234 *Ibid* 13.
235 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.19.
236 *Idem*.
237 Medical Protection Society "Response to the SALRC Issue Paper 36" 20.
238 *Idem*.

should be given to amending the rules to provide for the court to disallow the costs charged by an attorney to his/her client in circumstances in which the legal practitioner cannot demonstrate to the satisfaction of the court that he/she advised the client to accept a tender by the opposing party, and his client subsequently failed to prove damages higher than the tendered amount.[239]

2.116 **Recommendation 2.5**:[240] The Commission concurs with the respondent's recommendation that the following actions/steps be taken:

(a) Ensuring that parties are obligated to provide complete discovery at the earliest opportunity; and
(b) Ensuring that a robust court timetable is imposed, with parties having to complete all steps before a trial date can be allocated. [241]

2.117 In September 2006, the Attorney-General directed the Victorian Law Reform Commission (VLRC) to conduct an investigation into the rules of civil procedure 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.[242]

2.118 The VLRC recommended several 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 to reduce the costs and delays involved in litigation.[243]

2.119 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.[244]

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239 *Idem*. In the present setting, the only sanction applicable to a litigant is that he/she is disallowed recovery of costs from the date on which the tender was made. However, there is no inducement to that litigant's attorney to recommend acceptance of the tender vigorously enough. The potential disallowing of the fees charged by the attorney would encourage more responsible behaviour on the part of legal practitioners.

240 The LSSA and Legal Aid SA support the Commission's recommendation regarding complete discovery and a robust court timetable, *op cit,* at 32 and 6 respectively.

241 Medical Protection Society "Response to the SALRC Issue Paper 36" 20.

242 Victorian Law Reform Commission, "Civil Justice Review Report 14" (March 2008), 7.

243 *Ibid,* 9.

244 *Idem*.

11. General conduct of the parties

2.120 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 should be introduced (in the Rules) to deter legal practitioners who institute matters in the High Court that actually belong in the Magistrates' Court.

2.121 Responding to the question of whether sanctions should 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, the RAF's response to this question is "definitely," because attorneys institute matters in the High Court purely for the opportunity to claim costs on the High Court scale, despite the matter falling within the jurisdiction of a lower court.[245] Maybe this should be a compulsory consideration in each case. At the moment, some judges raise it, others not.

2.122 The MPS refers to the judgment handed down on 26 September 2018 in the matter of *Nedbank Ltd v Thobejane & Related Matters*,[246] in which the court expressed its displeasure at the frequent institution of proceedings in the High Court in respect of matters over which the Magistrates' Courts have jurisdiction.[247] The MPS recommends that the principles discussed in that judgment be incorporated into the rules.[248]

2.123 Legal Aid South Africa also cites the *Thobejane* decision, as well as similar decisions emanating from the Eastern Cape High Court, to reiterate the point that the courts have ruled that matters falling within the jurisdiction of the Magistrates' Court should not be litigated in the High Court.[249]

2.124 The Rules Board notes that Uniform Rule 31(5)(e) provides for costs in default judgments to be on the Magistrates' Court scale where the matter falls within the

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245 RAF "Comments on the investigation into legal fees" (27 August 2019) para 25.
246 [2018] ZAGPPHC 692
247 Medical Protection Society "Response to the SALRC Issue Paper 36" 22.
248 *Idem*.
249 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 21-22.

jurisdiction of the Magistrates' Courts.[250] Despite this punitive provision, it must be borne in mind that:

(a) In some cases, a matter is instituted in the High Court despite falling within the jurisdiction of the Magistrates' Court, as matters in the High Court are less likely to get derailed by technical issues. Optimal results are obtained in the High Court in a short space of time, whilst the matter may take longer in the Magistrates' Court.[251]

(b) Regard must be had to a litigant's right of access to courts as enshrined in the Bill of Rights. Court rules cannot limit this right.[252]

(c) The Courts have recently expressed their displeasure with matters that fall within the jurisdiction of the Magistrates' Court being instituted in the High Court.[253]

2.125 The LSSA points out that sanctions already exist in the form of adverse costs orders in deserving matters.[254] The respondent also notes that some matters involve human rights issues, which deserve the attention of a High Court despite the quantum of the claim. In particular, wrongful arrest and detention cases currently attract very low awards.[255] This is a carryover of historically low awards. The courts have upheld the right of a plaintiff in matters such as these to proceed in the High Court.[256]

2.126 ENSafrica believes that sanctions would certainly dis-incentivise this kind of conduct.[257] But the issue is whether it is the practitioners who are the cause of this, or the litigants themselves.[258] Also, there are negative perceptions in the business sector about the quality of justice available in some lower courts, which should be addressed. Running cases in the lower courts is avoided for the reason that people do not trust those courts to deliver justice – so there should not be sanctions for using the High Court until the problems in the lower courts are fixed.[259] Solutions that look at how to improve the

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250 Comments by the Rules Board for Courts of Law (9 September 2019) 13.
251 *Ibid,* 14.
252 *Idem*.
253 The Rules Board then discusses the *Thobejane* decision. *Ibid*.
254 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 45.
255 *Idem*.
256 *Idem*.
257 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 16.
258 *Idem*.
259 *Idem*.

running of the court system as a whole are a big part of solving problems of access to justice, especially for the middle class and indigent people.[260]

12. Insufficient use of case management

2.127 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 excessive adversarial stances taken by legal practitioners, and by tactical interlocutory applications that may not have substantial value.[261]

2.128 The object of case management is to change lawyers' attitude, to "moving attorneys away from technical points taking and becoming less adversarial".[262] 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.[263] The question is: Is judicial discretion as to costs being properly used?

2.129 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".[264]

2.130 Section 8(3) of the Superior Courts Act, 2013 (Act No.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.[265] The norms and standards seek to achieve access to quality justice for everyone by ensuring the effective, efficient, and

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260 *Ibid,* 16-17.
261 SALRC, "Project 142: Preliminary investigation on legal fees: Amended proposal paper: Options for approaching the legal fees investigation" (May 2017), 28-29.
262 Hussain, SC *et al*., *Case management in our courts* (2016), 30-31.
263 *Idem*.
264 *Ibid,* iii.
265 Notice No.147, published in *The Government Gazette* No.37390 dated 28 February 2014.

expeditious adjudication and resolution of all disputes through the courts.[266]

2.131 The following norms and standards, among others, were enacted by the Chief Justice under Notice No.147 of 28 February 2014:[267]

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*.

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 coordinate case flow management at a 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 a 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.

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266 Judiciary Annual Report 2017/18, 20.
267 Notice No.147, published in *The Government Gazette* No.37390 dated 28 February 2014 4-7.

(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 the 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 a 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.

2.132 In May 2019, the Rules Board published new judicial case flow management rules which became effective as of 1 July 2019.[268] In terms of the new Rule 37A of the Uniform Rules, a judicial case management system shall apply at any stage after a notice of intention to defend is filed, to such categories of defended actions as the Judge President of any Division may determine in a Practice Note or Directive, as well as to any other proceedings determined by the Judge President, of own accord, or upon request of a party.[269]

2.133 In cases where Rule 37A Judicial Case Management does not apply, a pre-trial conference contemplated in Rule 37 of the Uniform Rules will be applicable.[270] Furthermore, Rule 30A now provides that in the event of non-compliance with the rules or any order or direction made in the judicial case management process referred to in rule 37A, any other party may notify the defaulting party to comply within 10 days of delivery of such notice to comply, failing which the other party may apply for an order that the claim or defence be struck out.

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268 Notice No.R.842 published in *The Government Gazette* No.42497 dated 31 May 2019.
269 Rule 37A(1)(a)-(b) of the Uniform Rules.
270 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 12.

2.134 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.[271] 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."

2.135 In its submission to the Commission, the Rules Board states that *judicial case management is currently being considered for extension to the Magistrates' Courts. Draft rule amendments are under consideration by the Magistrates' Court Committee of the Board*.[272] The respondent submits that the Rules Board has introduced court-annexed mediation in the Magistrates' Court. The rules are contained in Rule 71 of the Magistrates' Courts Rules.

2.136 Responding to the question, first, whether there is insufficient use of case management and, if so, to what extent? And second, in what ways can the courts improve case management to render the litigation process more efficient, faster, and more effective, respondents criticise the insufficient and inconsistent application of case management.[273] Firstly, pre-trial procedures are mostly left to the devices of legal practitioners. According to the respondent, formal pre-trial procedures should be implemented in all matters.[274] A certificate that confirms that ADR mechanisms were implemented but failed, as well as the reasons for the failure, must form part of case management.[275]

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271 Parkinson, P and Knox, B, "Can there ever be affordable family law?" (2018) 92 ALJ, 467.
272 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 12.
273 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 22.
274 *Idem*.
275 *Ibid* 22-23.

2.137 The allocation of dates for pre-trial procedures should be prioritised, depending on the type and nature of the cause of action.[276] This determination should also be done by identifying specific courts for specific matters. The forum in which the matter would be heard should therefore be predetermined and categorised on the basis of the specific nature of the civil matter. The only way to enforce proper time and case management is through punitive costs orders. Presiding officers must be much more vigilant in getting parties to finalise matters within the timeframes specified in the Chief Justice's Notice.[277]

2.138 The RAF notes that case management is increasingly becoming more effective and more widely used.[278] However, there needs to be uniformity across the various divisions of the High Court in the way in which cases are managed.[279]

2.139 This sentiment is echoed by the MPS. It points out that part of the difficulty with case management is that almost every division of the High Court applies its own practice directives.[280] The unification of the case management process would go a long way towards promoting efficiency and clarity. The respondent further points out that each division of the High Court makes use of case management, but not all to the same extent.[281] The case management process applied in the Western Cape – which requires the attorneys for litigants to provide the pre-trial judge with proof of compliance with all pre-trial steps before a trial date will be allocated – ensures that:[282]

(a) More matters are settled before being allocated trial dates; and
(b) More matters, which are referred for hearing on specified trial dates run than are postponed or otherwise remove from the role.

2.140 This results in more efficient use of the time of judges dedicated to hearing trials, and it also reduces the number of matters that are declared trial-ready and allocated trial dates. More resources are required to allow the court a greater hand in a more robust case management framework, and to ensure that key procedural steps, for example, disclosure of expert summaries and joint meetings of experts, have been taken before a trial date is allocated.[283]

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276 *Idem*.
277 *Idem*.
278 RAF "Comments on the investigation into legal fees" (27 August 2019) para 26.
279 *Idem*.
280 Medical Protection Society "Response to the SALRC Issue Paper 36" 24.
281 *Idem*.
282 *Idem*.
283 *Idem*.

2.141 The Rules Board states that judicial case management has only recently been introduced in the Uniform Rules.[284] The LSSA stresses that case management is being introduced and perfected as an ongoing mechanism.[285] Not all courts have implemented practice directives pursuant to the case management systems introduced during July 2019.[286]

2.142 ENSafrica holds the view that increased case management will benefit litigants, however, it will require substantial state resources in the form of more judges/ magistrates, and more resources being made available to these judicial officers.[287]

2.143 As the taxation scales for costs is low in relation to what clients pay their legal practitioners, clients are out-of-pocket even where they receive a costs order in their favour.[288] Dilatory litigants use this to their advantage. They may, for instance, refuse to comply with the notice to eventually force the counterparty to issue an application to compel compliance. After receipt of such an application, the dilatory litigant will then comply with the notice shortly before the hearing, and propose that the application to compel be withdrawn on the basis that costs are reserved and then never dealt with again.[289]

2.144 Experience with case management by the Commercial Court in the South Gauteng High Court has been very positive in this respect.[290] The judges lay down strict requirements for document requests, including having to justify that the requested document is relevant, and keep a watchful eye on interlocutory points.[291] The judges also set down days in which they require all interlocutory points to be disposed of simultaneously. Having been assigned a specific judge, litigants are deterred from taking technical points that they know would be questionable or which they intend to tactically withdraw later. In this way, judges manage unnecessarily technical and combative litigants very effectively.[292]

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284 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 15.

285 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 46.

286 *Idem*.

287 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 17.

288 *Idem.*

289 *Idem*.

290 *Idem*.

291 *Idem*.

292 *Idem*.

2.145 BASA believes that if matters are settled timeously, this too might curtail legal costs and encourage access to courts.[293] It may be prudent for courts to limit costs in cases of numerous postponements.[294] There may also be lengthy delays awaiting the delivery of judgment.[295]

2.146 ABSA believe that the courts' case management processes have historically been ineffective, and for this reason, there is such a disinterest in their use.[296] However, recent amendments to the Gauteng High Court case management system are promising, and the initial experience in their function has been both speedy and efficient.[297] It is hoped that the system is expanded.[298] Business Day reports that "the digital case management pilot project was successfully completed and operationalised at the Johannesburg High Court and Pretoria High Court."[299]

2.147 **Recommendation 2.6**: The Commission concurs with the respondents' submission that judicial case management should also be extended to the Magistrates' Courts.

2.148 The recommendation is supported by Legal Aid SA and LSSA.[300] According to the LSSA:

> "Although there are judicial case management systems in place at some Magistrates' Courts, they are not managed and used very effectively. The reasons for this might include a lack of training for magistrates and an insufficient number of magistrates to deal with this. The Department (of Justice and Correctional Services) should be encouraged to appoint more magistrates, especially in remote areas where they are overwhelmed."

13. Insufficient use of cost management

2.149 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

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293 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 4.
294 *Idem*.
295 *Idem*.
296 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.23.
297 *Idem*.
298 *Idem*.
299 Ensor, L. Business Day available at https://www.businesslive.co.za/bd/national/2020-07-23-ronald-lamola-commits-to-modernisation-of-justice-system/ (accessed on 23 July 2020).
300 Legal Aid SA, *op cit,* 33.

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 the high costs of litigation in 2000. A similar approach was followed in England following the review of the Civil Procedure Rules of 1998 by Lord Justice Jackson in 2009.

2.150 The likely effect of the introduction of a Written Cost Estimate in the South African legal costs' regime is discussed in Chapter 4 of this Report: Mandatory Fee Arrangements.

2.151 Responding to the question, first, whether courts do make effective use of their discretionary power to make cost awards? And second, in what ways could court be more effective in exercising their discretionary power to make cost awards to manage the cost of litigation more effectively, respondents state that the courts should exercise their discretion in a much wider fashion and should evaluate the conduct of the parties in the process leading up to judgment, and the time period it took to get there.[301] Costs should then be awarded considering these findings. A successful but tardy litigant should not necessarily be rewarded, whereas an efficient but unsuccessful litigant should not necessarily be punished. A guide for punitive costs orders should be considered.[302]

2.152 It is the RAF's position that courts should use their discretionary powers to punish litigants who do not comply with the rules or timelines, as these acts drive up the costs of litigation.[303]

2.153 The Rules Board notes that the Rules provide for the exercise of this discretionary power.[304] Empirical evidence will need to be considered to determine whether the courts effectively exercise their discretion of the power.[305] However, the Rules of Court might need to be reformulated to compel courts to consider issues such as those referred to in Magistrates' Courts Rule 33(11) and (12), and Uniform Rule 39(24) before making a costs order.[306]

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301 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 22.
302 *Idem.*
303 RAF "Comments on the investigation into legal fees" (27 August 2019) para 27.
304 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 15.
305 *Idem*.
306 *Idem*.

2.154 The LSSA notes that it is generally the case that the courts make effective use of their discretionary power to make cost awards.[307] However, the court could be more discerning in matters where two counsel have been appointed.[308]

2.155 The MPS advocates that the court should be granted wider powers to make orders for costs on appropriate scales, in keeping with the interests of justice, and which approximate the actual legal costs incurred by the parties.[309] The requirement that justice should be done as between litigants, will be far more likely to promote the awarding of costs orders that fairly and justly compensate litigants for their role in the litigation – particularly where such a role has been a negative one for the administration of justice.[310]

14. Urgent/priority matters [311]

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

2.157 Responding to the question of whether the fees charged for urgent matters are justified, given that legal practitioners prioritise them over other matters, respondents point out that urgency usually means someone desperately requires access to justice.[312] A legal practitioner briefed in an urgent matter will usually have to work additional hours, often after hours, to bring the application, and should therefore be able to be remunerated accordingly.[313] However, the current practice of charging up to five times the normal fee is hampering access to justice and should be regulated.[314] ABSA believes that these fees are justified.[315] There is a view that there is no reason why more should be charged for urgent applications.

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307 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 46.

308 *Idem*.

309 Medical Protection Society "Response to the SALRC Issue Paper 36" 23.

310 *Idem*.

311 Department of Justice and Constitutional Development, "Briefing and Tariff Policy V2" (January 2017) 13.

312 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 25.

313 *Idem*.

314 *Idem*.

315 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.31.

2.158 From the Rule Board's perspective, tariff provisions might need to be introduced to ensure a uniform approach at taxation for fees permitted to be recovered in these kinds of matters.[316]

2.159 The LSSA answers this question in the affirmative, given that urgent matters are prioritised over other matters. According to the respondent, a legal practitioner who takes on an urgent matter must leave all else and focus fully on that matter.[317] This has implications for the other legal matters and the personal life of that practitioner. The sacrifice is compensated through a reward.[318]

2.160 ENSafrica also maintains that urgent applications not only require other work to be set aside but also require intensive periods of work: at night, over weekends and on public holidays.[319] Such intensive bursts of the work often require working through the night, perhaps as much as 24 hours or more in one go. In the process, family responsibilities are neglected, holidays get cancelled, etc.[320] In such circumstances, even if a premium fee is not charged, a large number of hours are accumulated very quickly, multiplied by the rate per hour, resulting in a rapidly mounting fee. However, this fee is often warranted when considering the harm that would be suffered if urgent relief is not obtained (usually an interdict).[321] In addition, urgent applications take place over an extremely short space of time and require everything to be done right the first time around. The client requires experience, and such experience commands a premium fee, which commercial clients are willing to fund, provided that the benefits exceed the costs.[322]

2.161 **Recommendation 2.7**:[323] The Commission agrees with the recommendation that the relevant rules (tariff provisions) must be introduced to ensure that there is a uniform approach permitted at the taxation of fees to be recovered in respect of urgent/priority matters.

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316 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 16.

317 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 49.

318 *Idem*.

319 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 19.

320 *Idem*.

321 *Idem*.

322 *Idem*.

323 The recommendation is supported by Legal Aid SA, *op cit* 6; and LSSA, *op cit,* 34.

15. Functioning of the courts

2.162 Issue Paper 36 asked what role should courts play to reduce legal costs for parties or to protect litigants from high legal costs, and to ensure equality of arms in the litigation process?

2.163 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.[324] 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.[325] The High Court ruled that those cases belonged in the lower court, where legal costs are much lower.[326]

2.164 Respondents have identified several factors and challenges relating to the daily operation of the courts in particular, and the government departments in general, which affect access to justice and have an impact on legal fees.[327] These factors are the following:

(a) Inefficient, failing and/or faltering court structures, court services and administration;
(b) Unavailability of court officials during office hours;
(c) Shortage of staff;
(d) Lack of training;
(e) Non-existent telephone and elevator services;
(f) Shortage of filing space at courts;
(g) Problems with the court filing system which results in files being lost and matters being postponed as a result of court files not being available;
(h) Limited amount of taxing masters allocated to a specific court; and

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324 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 & another,* Case No 1114/16; *Nedbank Limited v Sonko,* Case No 1429/16; *First National Bank v Langbehn and Another,* Case No 359/16.

325 *Idem*.

326 *Idem*.

327 Werkmans Attorneys "Submission to the South African Law Reform Commission on Legal Fees" (29 August 2019) 7.

(i) Unavailability and, in some instances, inexperience, of the taxing masters at the various courts.[328]

2.165 The Commission notes that the leadership of the Judiciary has taken steps to address some of the operational challenges affecting the day-to-day operation of the courts. In his 2017/18 annual report, the Chief Justice of the Republic of South Africa, Mogoeng Mogoeng, says that a number of committees have been set up to identify and address challenges relating to, among others, court infrastructure, security, and court order integrity.[329] The leadership of the Judiciary will continue to innovatively explore other measures for the enhancement of efficiency and effectiveness. The Judiciary is deeply concerned that over 615 prosecutorial positions remain unfilled in the NPA owing to budgetary constraints and that the courts' budget is inadequate compared to what is required to have a Judiciary that is comprehensively efficient and effective in its operations.[330]

16. Lack of effective and efficient use of court resources and information technology

2.166 One respondent submits that legal practitioners and support staff are compelled to follow a physical paper-based process. Presently, the legal process is all paper-based. Counsel and courts demand a paper-based file.[331] There is also a concern to reduce carbon footprint. With the advent of the carbon tax, legal practitioners may be exposing themselves to this kind of tax.[332]

2.167 The respondent recommends that the current paper-based legal process should be transformed into a digital process to reduce legal fees. Court clerks and sheriffs should be able to receive and process digital legal documents by utilising an electronic court filing system separate from the digital court system. Furthermore, court rules need to be amended to make provision for the digital court legal process.[333]

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328 *Idem*. This factor leads to multiple postponements of taxation proceedings and some bills of costs taking longer than a year to be taxed.

329 Judiciary Republic of South Africa "Annual Report 2017/18" 010.

330 *Ibid*, 011.

331 Legal Serve "Legal Costs" (16 August 2019) 5.

332 Molefe T (LexisNexis South Africa), submission made to the Commission at stakeholder consultative meeting (public hearings) held in 1 August 2019

333 Legal Serve "Legal Costs" (16 August 2019) 5

2.168 Responding to the question as to why is there a lack of effective and efficient use of court resources and information technology, it is clear that respondents believe that courts have do not have the necessary infrastructure in place to ensure seamless litigation, nor are the courts adequately resourced.[334] They believe that the courts are inundated with spurious litigation and there is an over-abuse of the courts' resources.[335]

2.169 Legal Aid South Africa explains that the position of court manager was created to ensure that courts are resourced and operate efficiently. Furthermore, the DOJ&CD has regional offices that are overseeing the smooth functioning of the courts. However, it seems that there is a disconnection between these functionaries.[336] The operational budgets for the courts also seem to be insufficient.[337] Furthermore, the long and involved process of appointing any service provider, such as transcription services, photocopiers, stationery supplies, etc., continuously hampers efficiency.[338] All officials at the local court level and provincial level need training and assistance in supply chain management.

2.170 The respondent submits that there appears to be very little consistency in the supply of records/ transcripts/ court documents, creating an environment that can easily lead to corruption.[339] At this stage, essentials, such as the ability to make a photocopy, should be provided for at all courts. The DOJ&CD and/or LPC should also consider partnering with technology companies to provide free and/or sponsored Wi-Fi services at courts.[340]

2.171 According to the LSSA, this is a work in progress.[341] The question assumes that there is sufficient infrastructure within the judicial system, which is not necessarily so. E-litigation is not fully operational in South Africa.[342]

2.172 The MPS notes that practitioners know very little about the information technology systems used by the courts, including whether each division of the High Court uses the same information technology resources.[343] Practitioners for the most part are

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334 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.24.
335 *Idem*.
336 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 23.
337 *Idem*.
338 *Idem*.
339 *Idem*.
340 *Idem*.
341 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 46.
342 *Idem*.
343 Medical Protection Society "Response to the SALRC Issue Paper 36" 25.

unable to comment meaningfully on whether or not the courts utilise their IT resources efficiently.[344] What is clear, however, is that there is an immediate need for the implementation of an e-filing system.

2.173 According to BASA, a factor that might be impeding the use of information technology at court is a certain law of evidence rules that require original documentation and parties frivolously disputing the authenticity of evidence presented in electronic format.[345]

2.174 Presenting the Office of the Chief Justice Department Budget Vote 2019/20, the Minister of Justice and Correctional Services, Mr Ronald Lamola MP, said that:

> "One of the ways of ensuring access to justice and an efficient court system is through the use of technology. I have already alluded to the (OCJ E-Filing) modernisation project when I presented the policy budget statement of the Department of Justice and Constitutional Development. In respect of the Superior Courts in particular the OCJ continued with the development of the e-Filing solution, which will be rolled out during the 2019/20 financial year. The system will enable all records linked to a case to be easily managed, secured and shared, contributing to the effective and efficient delivery of court services."[346]

2.175 The Minister also reported that a centralised court e-filing system help desk has been established to provide support to judges, court officials and legal practitioners. The system would be expanded across the country in the 2020/2021 financial year.[347]

2.176 **Recommendation 2.8**: The SALRC takes note of the OCJ E-Filing Court Modernisation Project, which is presently in the process of being rolled out to superior courts and, over time, to the lower courts. Furthermore, it is recommended that:

(a) the current paper-based legal process should be transformed into a digital process to reduce legal fees. Court clerks and sheriffs should receive proper training to be able to receive and process digital legal documents by utilising an electronic court filing system separate from the digital court system; and

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344 *Idem*.

345 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 4.

346 Minister Ronald Lamola: Office of the Chief Justice Department Budget Vote 2019/20 available at https://www.gov.za/speeches/budget-debate-office-chief-justice-# (accessed on 26 November 2019).

347 Ensor, L. Business Day available at https://www.businesslive.co.za/bd/national/2020-07-23-ronald-lamola-commits-to-modernisation-of-justice-system/ (accessed on 23 July 2020).

(b) Court rules need to be amended to make provision for the digital court legal process.

(c) An electronic platform should be introduced to enable litigants and their legal representatives to file documents at court without the need for physical attendance at court. E-filing may also be utilised to submit applications such as unopposed, non-contentious interlocutory applications and applications to compel discovery, for consideration by a Magistrate or Judge without the necessity of an appearance at court.[348] According to the Chief Justice, Mogoeng Mogoeng, the main challenges faced by the courts are that they handle hard copies throughout the court processes. These include dockets, case files and judgements.[349] On 23 November 2018, the Chief Justice announced plans to pilot an e-Filing system, which, if successful, will be rolled out to all the courts. The e-Filing system will enable law firms and litigants to file documents to the court electronically over the internet. The objective is to improve efficiency and the quality of service rendered to the public.[350]

(d) A helpdesk should be installed at all courts to assist litigants, including self-represented litigants, who make use of the e-Filing system.[351]

2.177 The recommendation is supported by Legal Aid SA, provided that "indigent people and people who do not know how to use digital processes should not be excluded from the court system due to their lack of means and knowledge."[352] The LSSA is, however, of the view that the proposal for adoption of an electronic platform to enable litigants and their legal representatives to file documents without the need for their physical presence at the court is premised on a utopian society instead of the realities obtaining in the country.[353] At the present moment, complete digitisation of the court system may not be attainable. It will be counter-productive for the government to develop such a policy in the absence of available resources to implement it.[354]

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348 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 6.
349 Office of the Chief Justice "We the People" (July 2019 Issue) 20.
350 *Idem*.
351 Legal Aid SA, *op cit,* 4.
352 Legal Aid SA, *op cit*, 7.
353 LSSA, *op cit*, 29.
354 *Idem*.

17. Insufficient use of e-discovery [355]

2.178 Electronic discovery (e-discovery) refers to the "collection, processing and review of electronic documents, which are stored in electronic format",[356] also known as electronically stored information (ESI).[357] According to Cassim, ESI includes "e-mail, web pages, word-processing files, computer databases and any information that is stored on a computer or other electronic device."[358] 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.[359]

2.179 Rule 35 of the Uniform Rules comprises fifteen (15) subparagraphs. Subparagraph (1) provides as follows:

> *(1) Any party to any action may require any other party thereto, by notice in writing, to make the discovery on oath within 20 days of all documents and tape recordings relating to any matter in question in such action (whether such matter is one arising between the party requiring the discovery and the party required to make a discovery or not) which are or have at any time been in the possession or control of such other party. Such notice shall not, save with the leave of a judge, be given before the close of pleadings.*

2.180 Discovery can have significant implications for the costs of a case, especially where there is a high degree of complexity.[360] Several 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, 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,[361] and the improper management of the

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

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

357 Cassim F "The use of electronic discovery and cloud-computing technology by lawyers in practice: lessons from abroad" *Journal for Juridical Science* (2017) 20.

358 *Idem*.

359 *Idem*.

360 *Idem*.

361 "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).

disclosure of documents (including electronically stored information).[362] Incomplete discovery may require a second round of discovery with attendant delays and added costs.[363]

2.181 Cassim says that Uniform Rule 35 does not specifically address the discovery of ESI, although Rule 23(1) of the Magistrates' Courts Rules facilitates the discovery of electronic and digital forms of recording and is, therefore, a step in the right direction.[364]

2.182 Responding to the question, first, as in what ways can the cost of discovery be decreased to render legal fees more affordable? and second, how does the cost of discovery impact on access to justice, respondents argue that the cost of discovery can be decreased if the parties can be compelled to hold a "pre-trial conference" prior to the discovery stage so that they can decide on the documents to be discovered based on their dispute.[365] Furthermore, discovery and every other aspect of litigation, including the serving and filing of pleadings, should be done electronically.[366] According to Legal Aid SA, the parties must at their own convenience have access to the documents and court processes that are recorded on the system. As such, e-discovery can be very effective and cost-efficient.[367] Supplementary discovery or advanced discovery can be considered at a later stage, once the matter has passed all the case management stages, and the presiding officer or case management officer has issued the certificate that the matter is ready to be placed on the roll for trial. This will address issues of unnecessary delay of the matter, unnecessary discovery costs, and access to justice. Moreover, copies, messengers and many other expenses, which add to the overhead of legal practitioners, will be avoided, which, in turn, should lessen the costs of litigation for clients.[368]

2.183 Furthermore, Legal Aid SA also suggests that the rules pertaining to the use of correspondent attorneys must be done away with insofar as the exchange and filing of pleadings are concerned, as this adds to the costs of litigation.[369] Courts must transform

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362 *Idem*.
363 *Ibid,* 4.
364 Cassim F "The use of electronic discovery and cloud-computing technology by lawyers in practice: lessons from abroad" *Journal for Juridical Science* (2017) 26.
365 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 19.
366 *Idem*.
367 *Idem*.
368 *Idem*.
369 *Idem*.

and adapt to electronic filing and, eventually, do away with the physical documentation and court files.[370]

2.184 According to the Rules Board there are two relevant aspects:[371]

(a) *The actual cost of copies of documents* – These costs can be decreased if existing paper documents are scanned and exchanged electronically (*via* e-mail, memory stick or compact disc, for example), as well as the exchange of electronically generated documents that are not printed but exchanged electronically between the attorneys. If the infrastructure at the courts is upgraded to allow the judge/ magistrate, witnesses and legal representative to have access to the pleadings and discovered documents in their electronic format, a further saving may be realised. Hard copy trial bundles and the costs associated therewith are then done away completely.

(b) *Discovery* – The costs associated with discovery may possibly be reduced by defined discovery, *i.e.*, the discovery of documents that pertain to the issue in dispute thereby doing away with wholesale discovery. The curtailing of what is discovered will reduce the quantum of costs charged by legal practitioners in the discovery process.

2.185 The LSSA states that the cost of discovery can be decreased by the use of e-discovery.[372] Discovery is one of the most important steps in the litigation.[373] The main object of discovery is to identify information that is relevant to the issues in dispute and to exclude privileged information.[374] The MPS suggests that electronic discovery could be made compulsory, as well as ensuring that discovery is full and complete early on in the case so that parties have full disclosure from the outset.[375]

2.186 ENSafrica notes that certain components of the discovery process are outdated.[376] For instance, practice Rule 35(12) is used as a fishing expedition to frustrate one's opponent, potentially calling for vast amounts of irrelevant material.[377] This

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370 *Idem*.
371 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 8-9.
372 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 43.
373 *Idem*.
374 *Idem*.
375 Medical Protection Society "Response to the SALRC Issue Paper 36" 17.
376 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 13.
377 *Idem*.

strategy is employed where a litigant wants to force the opposing party to incur legal costs, and where it is desirable to force the opposing party to get a "special allocation" because of the volume of paper (further delaying the matter). In addition, a party wishing to delay the matter will continuously issue such processes, enabling him/her to claim that the matter is not yet ripe for hearing. A refusal to comply with the Rule 35(12) request will merely result in an interlocutory application, increasing both time and costs.[378] Ultimately, the parties who suffer are the clients who pay the legal fees and the judge who oversees the matter and the mountains of irrelevant paper only after all interlocutory issues have been disposed of.[379] It is unclear why the party serving the Rule 35(12) notice is not required to justify the relevance of the request.[380]

2.187 Another issue with the discovery process in trials is that a party in receipt of a discovery notice can effectively delay the matter quite easily.[381] Should he/she simply ignore the notice, the party that served the notice will have to bring an application to compel and obtain a court date.[382] Once the court hears the matter, it will order the defaulting party to deliver the discovery affidavit within a set number of days, at which point the hitherto-recalcitrant party can simply file the discovery.[383] It is unclear why the application to compel is required when the discovery is required in any event. This merely adds delay and costs to litigation. Costs orders against the recalcitrant party may act as a disincentive to this type of conduct.[384]

2.188 Insufficient discovery being made can be ascribed to many causes. It could be that a party has not been made to appreciate that the records are relevant, or the party appreciates this fact but wishes to avoid it.[385] It could also simply be a delaying tactic or a tactic to force the opponent to incur legal costs.[386] It should be considered whether the Rules could be supplemented with guidelines on relevant documents for particular types of causes of action.[387]

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378 *Ibid,*13-14.
379 *Idem* 14.
380 *Idem*.
381 *Idem*.
382 *Idem*.
383 *Idem*.
384 *Idem*.
385 *Idem*.
386 *Idem*.
387 *Idem*.

2.189 In ABSA's view, perhaps consideration should be given to making the discovery process a digital one.[388] This will eliminate the cost of printing and the need for attorneys to spend hours trying to compile all the documentation.[389]

2.190 Legal Aid SA notes that electronic document management and e-discovery are generally underutilised, resulting in avoidable costs and delays.[390] E-discovery can assist by:[391]

(a) Eliminating unnecessary expenditure on stationery, photocopying, messenger services, etc.
(b) Streamlining civil procedure, resulting in a speedy process and shorter finalisation period of the matter.

2.191 This would of course require that the DOJ&CD set up a framework in which all practitioners can participate. There is a lack of IT awareness and reluctance to change.[392] The LPC should consider encouraging all members to become technologically aware and offer appropriate training. The civil courts need to be overhauled to implement electronic systems.[393]

2.192 The RAF notes that Rule 35 of the Uniform Rules of Court does not provide for e-discovery.[394] Uniformity, lack of authentication methods, and metadata are the primary reasons for the reluctance to use e-discovery.[395]

2.193 The LSSA does not believe that sufficient use is made of e-discovery.[396] Paper-based discovery is one of the major culprits in driving up litigation expenses. All too often, one party produces a lengthy discovery schedule that is met with the standard request from the other party for access to the discovered documents.[397] The current discovery rules then only permit the receiving party to inspect the documents and to make copies or transcripts thereof.[398] In almost every such matter, the receiving party is

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388 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.16.
389 *Idem*.
390 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 19.
391 *Idem*.
392 *Idem*.
393 *Idem*.
394 RAF "Comments on the investigation into legal fees" (27 August 2019) para 21.
395 *Idem*.
396 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 43.
397 *Idem*.
398 *Ibid,* 43-44.

forced to tender to pay the photocopying or printing costs of obtaining such copies from the producing party, which the producing party often charges for at rates that exceed several Rands per individual page.[399]

2.194 There is a cost factor in facilitating access to technology, which in turn impacts the cost of litigation.[400] As access to networks in rural areas may pose challenges, e-discovery should be phased in progressively.[401] This might mean that an old and new system should run concurrently for a period of time. [402]

2.195 The MPS points out that e-discovery will only be rendered effectual when it is made compulsory.[403] It would reduce costs. The courts, however, need to participate in the e-discovery process, lest the point of elimination of paper discovery is lost.[404] This view is supported by Harrison who states that "[g]lobal statistics tell us that the major cost of any case is the review of documents and this accounts for at least 70% of the total cost. The reason is simply that without eDiscovery technology, lawyers look at every document whether it is of any interest or not and they charge by the hour for their time. Again, statistics tell us using eDiscovery technology will reduce costs by at least 30% overall and in many cases much higher than that."[405]

2.196 ENSafrica states emphatically that sufficient use of e-discovery is not made.[406] First and foremost, the parties operate their matters with the court in mind. When the court operates on a purely paper-based system, parties are disinclined to operate on an electronic system. The courts' requirement to physically file documents force all parties to keep physical copies of all processes.[407] According to the respondent, the physical filing of the original papers becomes academic over the course of a matter, because of the epidemic of loss of court files at court, requiring files to be constantly reconstructed with new hard copies.[408]

2.197 Unfortunately, the Rules also make the electronic exchange of documents optional. However, large commercial firms always agree to the electronic exchange of

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399 *Idem*.
400 *Idem*.
401 *Idem*.
402 *Idem*.
403 Medical Protection Society "Response to the SALRC Issue Paper 36" 18.
404 *Idem*.
405 Harrison T "Notes for Discussion Paper" email dated 23 November 2020.
406 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 14.
407 *Idem*.
408 *Ibid,* 15.

documents. It is far less common for others to do so.[409] This should not be the case. In South Africa, arbitrations are run every day without files being lost. Moreover, documents are served and filed electronically. Using electronic means, parties are also able to electronically "link" and "tag" document to avoid duplication.[410] Having an electronic database of documents also enables the parties to have software automatically index, paginate and de-duplicate documents.[411]

2.198 The tariffs currently do not incentivise e-discovery.[412] The tariffs for taxation should be amended to disallow printing for purposes of the exchange of documents pursuant to discovery.[413]

2.199 According to BASA, e-discovery could reduce costs and shorten time periods and could therefore increase access to justice.[414] Because of the fees that traditional discovery attract, legal practitioners may be making sub-optimal use of e-discovery.[415] The court could encourage e-discovery by not allowing additional fees for traditional discovery in cases where e-discovery would have been suitable.[416] Perhaps practitioners fear that sensitive data might be easily intercepted (this could result in a breach of legal confidentiality) or manipulated.[417]

2.200 **Recommendation 2.9**: The Commission concurs with the respondents' recommendation that the Rules of Court should be amended to enhance e-discovery.[418] Rule 35 of the Uniform Rules should be amended to make e-discovery compulsory. Rule 35(12) should also be amended to explicitly require "material relevance". This will lower the costs of litigation and help improve the administration of justice. [419] Furthermore, the Commission takes note of the Task Team established by the Rules Board with the

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409 *Idem*.
410 *Idem*.
411 *Idem*.
412 *Idem*.
413 *Idem*.
414 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 3.
415 *Idem*.
416 *Idem*.
417 *Idem*.
418 *Ibid,* 44.
419 *Idem*. The Cassi LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) is developing a Best Practices Guide, which is intended to assist legal practitioners in dealing with the volumes of electronic information produced during the discovery stage. This will be made available to legal practitioners to encourage them to make use of e-discovery, LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees"44.

mandate of investigating the e-development of the rules for court and include the topic of e-discovery.[420] According to the respondent, the Task Team will have the benefit of evaluating rules in foreign jurisdictions and the commentaries and criticisms of those rules, as well as the impact of those rules on the costs and complexity of the process.[421]

2.201 The recommendation is supported by Legal Aid SA, provided that assistance is provided to self-representing litigants who lack the knowledge of the use of digital processes.[422] The LSSA notes that the recent amendment to Rule 35 of the Uniform Rules by the Rules Board "has again overlooked the benefit of enabling litigants to request electronic copies of electronic documents discovered by the other party and still prescribes the archaic procedure of making discovered documents available for inspection at a time and date at a particular office of the discovering party."[423]

D. The legal profession

18. Method of remuneration – billable hours [424]

2.202 The costs of legal fees in South Africa are discussed in detail in Chapter 7 of this Report.

2.203 Most of the respondents state that legal services are not commoditised or homogenous goods and services. They are very complex depending on the nature of the problem encountered.[425] There is a wide variety of specialities in the legal market (intellectual property, tax law, environmental law, labour law, etc.); practice firms (small, medium, large commercial, etc.); and geographical locations (rural, urban and metropolitan areas).[426] Legal services differ from the usual categories of search goods. They are dubbed 'credence goods' by economists because their characteristics (particularly quality) cannot be judged by the consumer even after consumption.[427] The

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420 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 10.

421 *Ibid,* 10-11.

422 Legal Aid SA, *op cit*, 7.

423 LSSA, *op cit*, 35. The latest amendment is contained in Government Notice 1157, published in *Government Gazette* No43856 dated 30 October 2020.

424 Toothman, JW and Ross WG, Legal fees law and management (2003) 27, 337.

425 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019)18; LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees"27 of 72.

426 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 27 of 72.

427 Klaaren J "What does justice cost in South Africa? A research method towards affordable legal services" SAJHR Vol 35, NO.3 274-287 277.

consumer has to rely on the legal practitioner not only to supply the service but to diagnose what services are required to meet the consumers' needs.[428]

2.204 It would appear that most legal practitioners charge on the basis of billable hours.[429] They are generally expected to bill a certain number of hours per year 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.[430]

2.205 Responding to the question of whether the various methods of remuneration used by legal practitioners in facilitating access to justice are appropriate, Legal Aid SA points out that in those instances in which fees are charged based on hours and pages, it can make it difficult for the man on the street to access the courts, because it would be almost impossible for the client to determine how much the litigation will cost for the duration of the matter, and therefore whether it would be affordable.[431] According to the respondent, in contingency fee agreements, the 25% double costs principle is exorbitant in many instances. It can still lead to abuses, given the high percentage of fees practitioners become entitled to, and the active and many times unnecessary incurrence of fees by practitioners to increase their entitlement at the end of the matter.[432] Contingency fee agreements are discussed in Chapter 5 of this Report.

2.206 The RAF submits that the abuse of contingency fees in the RAF context continues unabated.[433] Access to justice for a claimant unable to pay the upfront litigation costs is available under a contingency fee agreement contemplated in subsection 2(a) of the Contingency Fees Act, where the attorney is entitled to recover

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428 *Idem*.

429 The 2016 LexisNexis report on "Attorneys' Profession in South Africa" found that 61% of salaried partners bill between R1000-R3000 per hour and a majority of candidate attorneys bill less than R1000 per hour, at 31. Harpur GD SC, et al, "Transformative Costs" states that under the National Forum Code, a fee offered by an attorney and accepted by counsel is marked on a brief to counsel stipulating to the instructing attorney the fee that will be charged for the service or the daily or hourly rate that shall be applied to computing a fee, at 39. Most of the schedules of professional fees advertised by law firms on their websites provide fee structures based on the rank of the legal practitioner (director, associate or candidate attorney), on hourly and daily rates, save for disbursements which are largely based on flat or fixed fees.

430 *Ibid,* 39. The Legal Trends Report found that law firms in the U.S.A. collect on average 86% of what they bill their clients, and 14% of the billable time goes unearned, CLIO "Legal Trends Report (2017).

431 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 11.

432 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 11*Ibid*.

433 RAF "Comments on the investigation into legal fees" (27 August 2019) para 3.4

his *normal* fee if the claim is successful, but no additional "uplift fee."[434] Contingency fee agreements as contemplated in subsection 2(b), which allows for an "uplift fee" if the claim is successful, is, for the most part, inappropriate in the RAF context, because the "speculative" aspect that gives rise to the "risk", which justifies the "uplift fee", is absent.[435]

2.207 According to the LSSA, the remuneration methods used by legal practitioners do facilitate access to justice, for example, contingency fee agreement and agreements to cater for payment in the form of instalments.[436] Remedies are available in the event of legal practitioners over-reaching.[437]

2.208 According to the respondent, the LPC should have a mechanism in place to assess legal fees. In addition, South African courts have exercised inherent jurisdiction to fix fees in circumstances of overreach.[438]

2.209 BASA states that it may well be that people are prohibited from access to legal services because of the various fee structures and a certain amount of ambiguity around the same.[439] Socio-economic factors may also influence the reasons why people are denied access to legal assistance because of unaffordability.[440] ABSA notes that there is always room for improvement. The respondent welcomes suggestions of alternative, more numerous methods of remuneration.[441]

2.210 **Recommendation 2.10**: The Commission concurs with the respondents' recommendation that the remuneration method mainly used by legal practitioners, that is billable hours and contingency fee agreements, do facilitate access to justice. However, other alternative methods of remuneration like fixed and/or flat fees and "milestone" billing should be considered. Flat fees will discipline lawyers to leave irrelevant stuff out and avoid interlocutory skirmishes.

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434 *Idem*.
435 *Ibid,* 11-12.
436 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36.
437 *Idem*.
438 *Idem*.
439 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 1.
440 *Idem*.
441 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.5.

2.211 The recommendation is supported by Legal Aid SA.[442] The Respondent further recommends that consideration be given to the development of flat fees, the authority to be responsible for setting the rate for flat fees and the implementation thereof.[443]

19. Improper and unethical billing practices [444]

2.212 Improper billing practices may include billing for hours not worked, billing more hours than actually work (bill "padding"),[445] double billing (billing for work already done for another client, or billing two clients for the same hour),[446] cryptic time entries, non-itemised bills, mixed, lumped, or blocked time entries (more than one task is included in the same entry),[447] overstaffing, and duplicating effort (where the time of two or more practitioners is billed when one would have sufficed).[448] 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. Unethical billing is common and needs to be addressed. It will stop if estimates have to be given upfront.

2.213 Legal Serve Document Exchange submits that business management applications exist that enable a legal practitioner to automatically record all the time taken to perform a task, like drafting a summons or contract. The IT software applications make it difficult, if not impossible, for the legal practitioner to overreach his/ her client, provided that the client has visibility to the itemized timesheets.[449]

2.214 Responding to the question, first, whether unethical billing practices exist in our law and, if so, to what extent? and second, in what ways could the practice of hourly billing be modified to discourage unethical billing practices, Legal Aid SA contends that unethical billing is a reality in our society.[450] Some practitioners use the ignorance of clients to make them not only agree to pay a percentage of the capital recovered but also for work billed by the practitioner.[451] According to the respondent, any method of billing

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442 Legal Aid SA, op cit, 8.
443 *Idem*.
444 Toothman, JW and Ross, WG *Legal Fees Law and Management* (2003) 39.
445 *Ibid*, 52
446 *Ibid*, 60
447 *Ibid*, 55
448 *Ibid*, 63.
449 Legal Serve "Legal Costs" (16 August 2019) 4. These types of application also record other related charges like telephone call duration, perusing of letters, email and others.
450 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 12.
451 *Idem*.

can be regulated and legislated. However, if the enforcement of these rules is not effective, the newer and better practices will still not protect clients.[452] The respondent suggests that the following measures can be considered:[453]

(a) Capped hourly fees; and
(b) Regulated fee agreements.

2.215 The RAF states unequivocally that unethical billing practices are pervasive in our law.[454] However, proving that a practitioner has overreached is difficult, and simply beyond the means of the average litigant. One method of discouraging this practice is to regulate all legal services by way of a pre-determined tariff(s) for certain legal services.[455]

2.216 CAOSA submits that it has encountered many matters in which clients did not fully comprehend the scope and duty of legal practitioners, and, as such, the expectation of the services in relation to the fees billed, is skewed.[456] This is most apparent in after-hours bail applications, in which the manner of business has opened the organised profession to many unethical practices, and has contributed, to a large extent, to the demise of the overall social reputation of lawyers.[457]

2.217 The LSSA argues that unethical practices do exist in any sphere.[458] The LPC is responsible for the regulation of legal practitioners under the LPA, and this includes dealing with such unethical practices.[459]

2.218 ENSafrica notes that these practices do exist, and most of them constitute malpractice for which the legal practitioner could be struck from the roll.[460] However, setting a price mechanism or limiting prices cannot logically reduce the malpractice

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452 *Idem*.
453 *Idem*.
454 RAF "Comments on the investigation into legal fees" (27 August 2019) para 11.
455 *Idem.*
456 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 3.
457 *Idem*.
458 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36.
459 *Idem*.
460 Some of them amount to criminal offences. The sanction for this is clear. ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 12.

complained of in this paragraph. Rather, the focus should be on a dedicated and well-resourced professional body to police such malpractice.[461]

2.219 BASA acknowledges that unethical billing practices may exist, however, there is no quantitative evidence to substantiate this.[462] An option is to introduce "milestone" billing, whereby agreed fees are charged at pre-determined stages, and upon completion of that phase.[463]

2.220 According to ABSA, it is a common cause that unethical billing practices exist in South Africa.[464] Perhaps consideration should be given to capping legal fees for lower court matters based on the case's quantum and level of difficulty.[465] However, ABSA does not believe that unethical billing practices *per se* are the only, or most significant, contributor to high legal costs.[466] Unethical building practices are only a small contributing factor.[467]

2.221 **Recommendation 2.11**:[468] Many respondents are of the view that, like in any other profession, improper and unethical billing practices exist within the legal profession. It is accordingly recommended that the LPC as the regulator of the legal profession should address such unethical practices.

20. Payment of referral fees [469]

2.222 Payment of referral fees occurs when an attorney pays a fee to a third party for the referral of work by the 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.[470]

2.223 Most of the respondents agree that a system for payment of referral fees does exist in South Africa.[471] This practice, which is harmful to clients because it reduces their

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461 *Idem*.
462 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 2.
463 *Idem*.
464 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.6.
465 *Idem*.
466 *Idem*.
467 *Idem*.
468 The recommendation is supported by the LSSA, *op cit*, 35, and Legal Aid SA, *op cit*, 8.
469 Jackson, R, "Review of civil litigation costs: Final report" (December 2009), 194.
470 *Ibid*, xvii.
471 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019)12; LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees"

ability to negotiate a fee that is affordable, is prevalent in RAF matters, criminal matters, property and estate matters referred by estate agents and banks.

2.224 Clauses 14 and 27 of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities which deal with payment of commission and acceptance of briefs and the referral rule respectively, are silent on the question of whether or not referral fees may be recovered by a legal practitioner or juristic entity from clients or third parties.[472] In its submission to the SALRC, the LSSA states that:

> "[p]aragraph 18.10 of the Code of Conduct applicable to attorneys prohibits referral at a fee by non-attorney third parties. Transgression of this has been dealt with in the past and will be dealt with in the future by the regulator. A similar regulation should apply to referral and non-referral advocates. To curtail costs, referral fees should never be recoverable from the client."[473]

2.225 Responding to the question of whether a system for payment of referral fees exists in South Africa and, if so, to what extent, the RAF asserts that, despite a prohibition on touting, there is an extensive, yet rarely acknowledged, system of touts in operation in our legal system, particularly in the field of third-party law.[474] It is the reason why a client in one province engages the services of an attorney in another province to institute litigation in yet a third province.[475]

2.226 Likewise, Legal Aid SA also notes that a system of payments for referrals does exist in the South African legal environment, for instance in RAF claims, criminal matters, and property and estate matters referred by estate agents and banks.[476]

2.227 The LSSA states that paragraph 18.10 of the Code of Conduct applicable to attorneys prohibits referral at a fee by non-attorney third parties.[477] A similar regulation should apply to referral and non-referral advocates.[478]

(30 September 2019) 36 Regarding the Investigation into Legal Fees"38 of 72; RAF "Comments on the investigation into legal fees" (27 August 2019) 13.

472 The Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities was published in *The Government Gazette* No.42337 dated 29 March 2019.

473 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees"38.

474 RAF "Comments on the investigation into legal fees" (27 August 2019) para 13.

475 *Idem*.

476 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 12-13.

477 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 38.

478 *Idem.*

2.228 To curtail costs, referral fees should never be recoverable from the client.[479] Specialist firms will offer a percentage of their own attorney-and-client fees as a referral fee to colleagues.[480] This has no impact on the bottom line for the client and serves to channel specialised to work to specialists.[481]

2.229 **Recommendation 2.12**: To reduce legal fees, it is recommended that referral fees must not be recoverable from the client in all legal matters. The LPC must prohibit all forms of payment and receipt of referral fees by all legal practitioners, that is, candidate attorneys, attorneys, referral and non-referral advocates, and juristic entities alike, by making this an act of misconduct in the Code of Conduct provided for in section 36 of the LPA.[482]

2.230 This recommendation is supported by Legal Aid SA.[483] It is also supported by the LSSA "to the extent that they amount to an increase of normal fees."[484]

21. Court fees

2.231 Responding to the question of whether 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, the RAF submits that, court fees – in the form of cost of summons, stamp duty and sheriff's fees – are negligible and do not impact on access to justice.[485]

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479 *Idem*.

480 *Idem*.

481 *Idem*.

482 Section 36 of the LPA provides that the
"(1) The Council must develop a code of conduct that applies to all legal practitioners and all candidate legal practitioners and may review and amend such code of conduct.
(2) The code of conduct serves as the prevailing standard of conduct, which legal practitioners, candidate legal practitioners and juristic entities must adhere to, and failure to do so constitutes misconduct." Clause 21 of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities provides that
"Misconduct on the part of any attorney will include (without limiting the generality of these rules)-
21.1 a breach of the Act or of the code or of any of the rules, or a failure to comply with the Act or the code or any rule with which it is the attorney's duty to comply;
21.2 any conduct which would reasonably be considered as misconduct on the part of an attorney or which tends to bring the attorney's profession into disrepute."

483 Legal Aid SA, *op cit*, 8.

484 LSSA, *op cit*, 36.

485 RAF "Comments on the investigation into legal fees" (27 August 2019) para 17.

2.232 Legal Aid SA does not believe that the reintroduction of court fees would be appropriate.[486] Although not technically court fees, one also has to consider the impact of sheriffs' fees. [487] Interventions to reduce sheriffs' fees should be explored, as well as alternative means of service and execution.[488]

2.233 ENSafrica points out that it used to be that, to initiate proceedings, a plaintiff had to pay stamp duty (however minimal), but this was repealed many years ago.[489]

2.234 ENSafrica also argues that using upfront court fees as a deterrent to vexatious litigation would have an asymmetric effect, depending on the financial circumstances of the litigant. That is, it would deter the poor more than the wealthy.[490] According to one respondent, suggestions have been made to impose court fees as a percentage of the claim, however, there are problems with this approach as well. [491] For instance, many claims (such as interdicts) have no monetary value against which to apply a percentage.[492] In addition, where a poor litigant is owed a large amount, a wealthy litigant can simply not pay, knowing that the poor litigant will be priced out of court by a court fee calculated as a percentage of the large amount.[493]

2.235 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. Although the court fees were not prohibitively expensive, however, given the dire financial situation of many South Africans, the court fees could still hamper access to justice.[494]

2.236 Rule 67 of the Uniform Rules provides as follows:

"The court fees payable in respect of the various provincial and local divisions are as follows:

			R c
(a)			80,00
	(i)	On every original initial document whereby an action is instituted or application is made	
	(ii)	on every bill of costs to be taxed which is not related to an	

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486 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 17.
487 *Idem*.
488 *Idem*.
489 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 13.
490 *Idem*.
491 *Idem*.
492 *Idem*.
493 *Idem*.
494 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 17.

	Action or application already registered in the court	60,00
(iii)	on every power of attorney (to be filed with the registrar) to appeal against the judgement of an inferior court, excluding appeals in Criminal cases	80,00
(iv)	on every notice of appeal against the judgement of a single judge to the full court	80,00
(b)	For the registrar's certificate on certified copies of documents (each)	2,00
(c)	For each copy of an order of court made by the registrar	
(i)	for every 100 typed words or part thereof	2,00
(ii)	for every photocopy of an A4-size page or part Thereof	2,00

2.237 Although Uniform Rule 67 still makes provision for the payment of court fees to institute or defend legal proceedings, however, the factual position is that no court fees are payable for instituting or defending legal proceedings.[495] In its submission to the Commission, the Rules Board stated that it intends to recommend to the Minister that Rule 67(1)(a) of the Uniform Rules of Court must be repealed.[496] The whole of Rule 67 was suspended with effect from 1 April 2009 in the Law Society of the *Northern Provinces and Another v Rules Board for Courts of Law*[497] following the demonetization of adhesive revenue stamps by Government Notice 360 of 27 March 2009.

2.238 In its submission to the Commission, Legal Aid SA states that although sheriff's fees are not technically speaking court fees, however, their impact in enhancing or hindering access to legal services must be looked at. To initiate proceedings, a party is required to show that the opponent is aware of the legal proceedings. This is done through service by a sheriff. The sheriff's return of service would be accepted as proof that the opponent was given proper notice. Sheriffs are also responsible for executing court orders. The view expressed by respondents is that sheriff's fees are expensive. Challenges encountered in serving legal process would add to costs because the sheriff would charge for every attempt taken to deliver service.[498]

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495 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 8

496 *Idem*.

497 Unreported GNP case no 34475/2009 dated 26 June 2009. The order issued by Rabie J reads as follows:
1. Magistrates' Court Rule 34(4) is suspended.
2. Rule 67 of the Uniform Rules of Court is suspended.
3. The aforesaid suspension of Rule 34(4) of the Magistrates' Court Rules and the suspension of Rule 67 of the Uniform Rules of Court will have retrospective effect from 1 April 2009.

498 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 17.

2.239 **Recommendation 2.13**: The SALRC recommends:

(a) the repeal of Rule 67 of the Uniform Rules, which still makes provision for the payment of court fees to institute or defend legal proceedings in its entirety.

(b) that interventions to reduce sheriffs' fees, as well as alternative means to deliver and execute court orders, should be explored by the Rules Board.

2.240 The Commission's recommendation 2.13(a) has been implemented by the Rules Board. The repeal of Rule 67(a)(i) to (iv) of the Uniform Rules was published in *Government Gazette* No.43856 dated 30 October 2020. The repeal came into operation on 1 December 2020.

2.241 Recommendation 2.13(b) is supported by Legal Aid SA, bearing in mind the Rules Board's authority to effect changes to substantive law.[499] The LSSA supports the recommendation. According to the Respondent, "sheriffs' fees are often a hindrance to access to justice and beyond the means of many litigants. In certain areas, sheriffs require a cash deposit upfront, particularly when receiving instructions from a newly established law firm."[500]

22. Agreements with practitioners to limit costs [501]

2.242 This refers to a contractual agreement between a 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.

2.243 Responding to the question of whether agreements with practitioners to limit costs do exist, and if so, whether such agreements favour or promote access to justice, the RAF points out that practitioners should be encouraged to implement these types of

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499 Legal Aid SA, *op cit*, 9.
500 LSSA, *op cit*, 36.
501 *Idem*.

agreements because they might serve to lower costs, and thus promote access to justice.[502]

2.244 According to Legal Aid SA, practitioners enter into agreements relating to costs, and these agreements tend to exist to limit costs.[503] They are not very prevalent, and even if an initial agreement is made, it is not always adhered to.[504]

2.245 ENSafrica holds the view that there is no simple answer to this question.[505] Where there is more or less equal bargaining power between a legal practitioner and client, agreements with practitioners can bring clarity and certainty to a mandate, which is beneficial to both parties.[506] Where there is an inequality of bargaining power, the stronger party might use such an agreement to exert power over the other, to the benefit of the stronger party.[507]

2.246 According to BASA, it would depend on the particular agreement. If a client is billed according to stages in the matter, it might promote access to justice.[508] ABSA states that these agreements do exist and they do promote access to justice.[509]

23. The referral system

2.247 The Commission invited the General Council of the Bar of South Africa (GCB) and the LSSA to give input on this topic at the international conference on Access to Justice, Legal Costs and Other Interventions.[510] 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*

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502 RAF "Comments on the investigation into legal fees" (27 August 2019) para 29.
503 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 25.
504 *Idem*.
505 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 20.
506 *Idem*.
507 *Idem*.
508 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 5.
509 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2,32.
510 The international conference was held in Durban on 01-02 November 2018.

> *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 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 an 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*.[511]

2.248 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 for excellent legal services. However, the same can be said of many attorneys.*
>
> *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*. [512]

2.249 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.

2.250 Responding to the question as to why there is still a need for a correspondent attorney when electronic communication is available, the LPC submits that attorneys should be at liberty to make use of a correspondent attorney if they so wish owing to the fact that courts have not as yet adopted uniformly to electronic filing, nor have they done

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

512 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.

away with all physical documentation.[513] Therefore, it may be convenient to engage the services of a correspondent attorney to, at the very least, attend to the filing of documents in the registrar's or clerk's office.[514] LSSA submits that it will be imprudent to dismiss the issue of correspondent attorneys.[515] Until there is a sophisticated electronic court digital system available, there will still be a need for a correspondent attorney.[516]

2.251 **Recommendation 2.14**: The Commission concurs with the respondents' view that until such time that there is a sophisticated electronic court digital system in place, it will be imprudent to dismiss the role of correspondent attorneys.

24. Restrictions on advertising and marketing

2.252 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 and marketing and touting from compliance with the provisions of that Act.[517] 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*.

2.253 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.[518] 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.

2.254 Rule 41 of the Rules for the Attorneys' Profession[519] prohibits members from holding themselves out as experts and specialists in a certain branch of the law without

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513 LPC "Project 142: Discussion Paper 150- Legal Costs" 3.
514 *Idem*.
515 LSSA, *op cit*, 44.
516 *Ibid*, 43.
517 Law Society of South Africa, Case No. 2004, July, 1127.
518 Notice 113 of 2011 in *The Government Gazette* No. 34051 (4 March 2011), 30.
519 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.

justification for doing so, from distributing verbal and written publications to clients that are made in such a manner that brings the image of the profession into disrepute, and from comparing and criticising legal services provided by another practicing member on the basis of quality.

2.255 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.[520] 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.[521]

2.256 It is clear from the Competition Commission's decision above that there is no longer a place for any restrictions on advertising and marketing 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.[522] 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.[523] The Competition Commission further held that advertising should be allowed, "but subject to the general advertising laws of South Africa".[524]

2.257 According to Toothman and Ross, the relaxation of advertising restrictions in the USA has enabled law firms to indulge in 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 disseminating information about legal services has been the Internet, with some firms now providing their own websites".[525]

2.258 In the *Law Society of the Cape of Good Hope v Berrange,*[526] the court found the respondent law firm guilty of breaching the applicant's Rules of Professional Conduct in

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https://www.lssa.org.za/upload/RulesForTheAttorneysProfession2016.pdf/ (accessed on 21 April 2019).

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

521 *Idem*.

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

523 *Idem*.

524 *Ibid,* 29.

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

526 [2006] 1 All SA 290 C (9 June 2005).

that "the respondent devised and implemented a scheme in terms of which his firm rewarded estate agencies for the referral of conveyancing work." Desai J held that "this clearly constitutes the soliciting of professional work within the meaning of Rule 14.6.1.1. The scheme implemented by the respondent was a way of touting for business and displays a high level of disloyalty to other members of the profession. The practice of touting by legal practitioners is a serious contravention which should be eradicated,"[527]

2.259 Issue Paper 36 posed the following question: 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.

2.260 The Cape Bar takes the view that, although the rules relating to advertising were relaxed, the mischief that they were intended to address remains relevant.[528] The Bar considers that the primary competition between counsel should be on the basis of quality and fees, rather than by marketing. The Cape Bar suggests that the reasons for limiting the extent to which counsel compete for work other than by quality and price are sound and those restrictions on touting should remain in place. Moreover, the lay public may be far less well-informed about the quality and price of counsel than attorneys are, and therefore may more easily be misled by advertising and touting by counsel.[529]

2.261 Legal Aid SA, on the other hand, believes that there is no longer any need to limit advertising.[530] The legal profession is a highly competitive profession, which sees a constant increase in the number of practitioners on a yearly basis. Regrettably, the public is yet to receive the benefits of this competition.[531] Legal practitioners should be allowed to compete with one another in all possible ways, but especially on fees.[532] No minimum fee should be fixed, as many practitioners will, without reservation, work for a nominal fee against the backdrop of an already aggressive and competitive environment within the profession.[533]

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527 *Idem*.
528 Capebar "Investigation into legal fees-Issue Paper 36" (16 August 2019) 9.
529 *Idem*.
530 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 24.
531 *Idem*.
532 *Idem.*
533 *Idem*.

2.262 Legislated fees can also be anti-competitive, as legal practitioners cannot compete on the reduction of fees.[534] Larger clients (such as banks) also play a role in controlling the market, as their conduct in appointing firms on their so-called "panels" may also be considered to be anti-competitive and prejudicial to clients not being able to afford the prescribed and legislated tariffs.[535] Panel firms are not in a position to negotiate with clients on fees. This practice should be reviewed and corrected.[536]

2.263 The LSSA disagrees that advocates do not really compete with each other.[537] Their marketing has historically taken place *via* word-of-mouth within the attorneys' profession. The introduction of the new non-referral advocate should, however, change this dynamic.[538] ENSafrica notes that the competition authorities have excised the LSNP rules on touting, which is viewed as restricting competition between legal practitioners.[539] Given that the anti-competitive restrictions have been removed, ENSafrica is of the view that the existing restrictions do not tamper with the provision of affordable legal services to clients.[540]

2.264 Advocates are in the same line of business and are competitors, notwithstanding the lack of advertising.[541] However, price is but one aspect of competition. Other aspects include *inter alia* service and specialist skill, and in many instances, clients are prepared to pay a premium for the specialist skill possessed by a particular advocate.[542] The same applies insofar as attorneys are concerned, albeit that large corporate clients have substantial bargaining power, and are able to elicit excellent service and skill at highly competitive rates from attorneys.[543] Accordingly, in ENS's view, advertising would not necessarily give rise to the provision of more affordable legal services to the public.[544] Moreover, to render such specialised services cost-effectively, specialisation and expertise is a prerequisite. A legal practitioner learning such a field for the first time will logically be required to spend more time in learning it, increasing time spent and (once

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534 *Idem*.
535 *Idem*.
536 *Idem*.
537 LSSA “Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees” (30 September 2019) 36 Regarding the Investigation into Legal Fees” (30 September 2019) 47.
538 *Idem*.
539 ENSafrica “Comments and input: SALRC Issue Paper 36” (30 August 2019) 18.
540 *Idem*.
541 *Idem*.
542 *Idem*.
543 *Idem*.
544 *Idem*.

multiplied by his/her rate) fees charged.[545] A talent flight because of a price ceiling may therefore not only decrease access to justice but may also indirectly cause an increase in legal costs.[546]

2.265 BASA notes that taking into consideration aspects of competition law, it may be prudent to allow practitioners to advertise, but it should not allow for the slander of other practitioners and should be only to promote the attributes of one's own firm (also only to advertise the area of expertise and not the fee).[547]

2.266 **Recommendation 2.15**:

(a) In line with the Competition Commission's decision above that advertising should be allowed subject to the general advertising law of South Africa, it is clear that there is no longer a place for any restrictions on advertising and marketing 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 of permitting ethical and not misleading advertisements.[548]

(b) The Commission concurs with the LSSA's recommendation that the practice of touting by legal practitioners must be eradicated. The payment of money or an offer of any financial reward to third parties in the form of touting by legal practitioners increases the cost of legal services and thus hampers access to justice.[549]

25. Reservation of work for legal practitioners

2.267 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.[550] Rule 31.1 of the Attorneys' Profession also prohibits sharing legal fees with any person who is not a legal practitioner.[551] There is no doubt that big accounting

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545 *Idem*.
546 *Idem*.
547 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 5.
548 The recommendation is supported by Legal Aid SA, *op cit*, 9.
549 LSSA, *op cit*, 38.
550 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.
551 SALRC, "Project 142: Preliminary investigation on legal fees: Amended proposal paper: Options for approaching the legal fees investigation" (May 2017), 37.

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 the condition that these service providers remain publicly accountable by being registered with a relevant body.[552]

2.268 Issue Paper 36 posed the question as 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?

2.269 Section 34(9) of the LPA provides that:

> "The Council must, within two years after the commencement of Chapter 2 of this Act, investigate and make recommendations to the Minister on-
>
> (a) the creation of other forms of legal practice, including
> (i) limited liability practices;
> (ii) multi-disciplinary practices; and
> (b) the statutory recognition of paralegals"

2.270 One of the respondents submits that the solution is to allow non-lawyers to control law firms as semi-regulated alternative business structures, which will allow for more business efficient management structures and will drive costs down, particularly if the landscape is competitive.[553] The respondent proposes that the impact of the UK alternative business structures on legal fees be further investigated as a solution for South Africa's challenges.[554]

2.271 Section 19(c) of the Road Accident Fund Act No. 56 of 1996 notably reserves work for attorneys and does not provide for the instruction of section 34(2)(ii) advocate directly by members of the public, paralegal or service providers.[555] The section provides that the claim under the RAF Act may only be instituted and prosecuted by the third party (Claimant), or on behalf of the Claimant, by-

> (i) "any person entitled to practice as an attorney within the Republic, or

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552 *Ibid,* 38.
553 Van Tonder K "Comments on Issue Paper" (17 June 2019) 6.
554 *Idem*.
555 Road Accident Fund "Comments on the investigation into legal fees project 142 Issue Paper 36" 27 August 2019 1.

(ii) any person who is in the service, or who is a representative of the state or government or a provincial, territorial or local authority."

2.272 This reservation of work prevents and lessens competition in the market, and serves to reduce access to justice by sustaining unaffordable fees for legal services. Consequently, many claimants are forced into contingency fee arrangements in which they are required to part with substantial sums of the compensation received from the RAF, for example, up to 40% of the compensation.[556]

2.273 The RAF concurs with the view of the Competition Commission that the legal profession should be opened up to other suitably qualified, registered, and regulated service providers, which would afford claimants a wider discretion; would serve to stimulate competition; and, in the end, enhance access to justice.[557]

2.274 Legal Aid SA espouses the basic economic principle holding that any measure that increases service providers or competition within a closed environment will naturally result in a positive change in the demand/supply ratio, with the consumer reaping the benefits.[558] One should, however, guard against compromising quality in specialised areas such as notary work.[559]

2.275 The LSSA states that work reservation protects the consumer public.[560] The abandoning of reservation of certain work for legal practitioners would have serious implications for South Africa's legal system. Legal work is of a professional nature and should be reserved.[561]

2.276 ENSafrica submits that, clearly, lowering the barrier to entry into attorneys' or advocates' practice will increase the supply of practitioners and decrease the cost of legal services.[562] However, dropping barriers to entry will reduce the qualification and experience needed to advise regarding litigation. Access to justice is not achieved if one does not have access to *quality* justice. In fact, legal malpractice, like medical

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556 *Ibid*, 4.
557 *Idem*.
558 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 24.
559 *Idem* 25.
560 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 47.
561 *Idem*.
562 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 18.

malpractice, can very well leave the public worse off than they would have been had they not received "help".[563]

2.277 BASA believes that abandoning the reservation of certain work for legal practitioners is likely to enhance access to justice.[564] However, it is imperative that this is weighed against the skill, training and ability of non-legal practitioners to effectively provide a legal service. The risks involved could far outweigh the benefits.[565]

2.278 ABSA does not believe that abandoning reservation of legal work is the right approach.[566] Reservation of certain legal work for legal practitioners is necessary to ensure that unskilled, unscrupulous charlatans do not take advantage of the public.[567]

2.279 **Recommendation 2.16**:[568] Section 34(9) of the LPA mandates the LPC to conduct an investigation and make recommendations to the Minister on the creation of other forms of legal practice, including limited liability and multi-disciplinary practices. It is recommended that this matter be dealt with by the LPC in terms of its mandate provided for in the LPA.

26. Lack of direct briefing for advocates

2.280 Advocates were previously obliged to take instructions through the medium of an attorney. The LPA now provides for the direct briefing of an advocate by a member of the public or a justice centre. This section provides as follows:

> "34(2)(a) An advocate may render legal services in expectation of a fee, commission, gain or reward as contemplated in this Act or any other applicable law-
>
> (i) upon receipt of a brief from an attorney; or
>
> (ii) upon receipt of a request directly from a member of the public or from a justice centre for that service, subject to paragraph (b)."

2.281 Issue Paper 36 posed two questions in relation to this matter:

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563 *Idem*.
564 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 5.
565 *Idem*.
566 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.28.
567 *Idem*.
568 The recommendation is supported by the LSSA, *op cit*, and Legal Aid SA, *op cit*, 9.

(i) Does the lack of briefing of advocates from the public have an adverse impact on access to justice?

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

2.282 MPS contends that this question appears to be no longer relevant in light of the enactment of the LPA.[569] Legal Aid SA also notes that the LPA makes provision for advocates to take instructions directly from the public.[570] The relaxation of the minimum tariffs allowed to be charged by legal practitioners should allow for these advocates to take part in the competition regarding fees. Competition will invariably lead to reduced costs for the public.[571]

2.283 The LSSA also points out that the LPA has introduced the concept of an advocate who can practice with a Fidelity Fund Certificate, and accordingly can receive instructions directly from members of the public.[572] The LSSA supports the co-existence of this with the referral system, because of the level of support that advocates provide to attorneys, especially those from smaller practices. In this regard, even a small firm is able to take on big and complex matters, knowing full well that it can rely on the readily available skills of advocates.[573]

2.,284 ABSA does not believe that the lack of briefing advocates by the public has an adverse impact on access to justice.[574] The respondent does believe that there may be unnecessary outsourcing by attorneys to advocates when the attorneys are well able to do the work themselves, thereby doubling the legal costs.[575] This should only be permitted in matters of unusual complexity or legal uncertainty.[576]

2.285 Legal Aid SA believes that the GCB and the various societies of advocates should not be allowed to determine where their members might hold chambers.[577]

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569 Medical Protection Society "Response to the SALRC Issue Paper 36" 27.
570 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 24.
571 *Idem*.
572 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 47.
573 *Idem*.
574 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.26.
575 *Idem*.
576 *Idem*.
577 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 25.

However, minimum standards should be set regarding what comprises a law office.[578] The LSSA states that the LPC is best placed to consider this aspect.[579]

2.286 **Recommendation 2.17**: The Commission concurs with the respondents' view that:

(a) the introduction of section 34(2)(b) of the LPA regarding receipt by an advocate of a request (briefing) directly from a member of the public or from a Legal Aid SA Local Office for a legal service will enhance access to justice by members of the public.

(b) on the question of whether the various societies of advocates should be allowed to determine where their members may hold chambers/offices, it is recommended that the LPC is the relevant body to make a determination in this matter.[580]

2.287 The recommendation is supported by Legal Aid SA.[581] The Respondent proposes that the term "Legal Aid SA Local Office" be substituted for the term "**a justice centre**" to align the same with the terminology contained in the proposed amendment to the Legal Aid SA Act submitted to the Minister.

27. The silk system

2.288 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.[582] The draft Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in terms of the LPA[583] 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.[584] 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

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578 *Idem*.
579 The LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 48.
580 The recommendation is supported by the LSSA, *op cit*, 38.
581 Legal Aid SA, *op cit*, 10.
582 Rogers, O, "High fees and questionable practices" (April 2012) *The Advocate,* 41.
583 S97(1)(b) of the LPA.
584 *Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities,* Notice 81 of 2017, 174.

into partnerships with other advocates and attorneys so that they can share in the profits generated by the partnerships.

2.289 Responding to the question, first, as to what extent, if any, does the silk system influence junior counsel in setting their fees, and, second, how does the silk system impact on access to justice, one of the respondents submit that there is no evidence that the institution of silk impedes access to justice.[585] Anecdotal evidence suggests that most senior silks may charge above R60 000 per day. More junior silks may charge not much more than one-third of that rate. There is also no evidence that attorneys are inclined to agree to higher fees merely because a particular counsel is silk. Attorneys are motivated primarily by the quality of counsel, and by the attorneys' own superior negotiating position.[586]

2.290 The respondent argues that whether or not junior counsel charge fees on the basis of 50% of senior counsels' rates or otherwise, that too would be the product of competitive dynamics. From experience, many juniors charge their own rate, and attorneys insist on juniors charging their own rate, rather than a percentage of senior counsels' fee.[587]

2.291 Legal Aid SA submits that the silk system does not necessarily have a negative impact on access to justice.[588] The system encourages legal practitioners to strive for and retain the highest standard and achievement within their chosen profession and serves as recognition and reward for this milestone.[589] Included in this achievement should also be the ability to charge increased fees to clients who can afford it. As much as we endeavour to reduce the overall legal costs to the wider public, specialist and skilled legal practitioners will always be required to form part of the legal profession.[590] They bring quality service to the public, and that should not be compromised. They also assist in transferring skills and thus retain expertise in the field.[591]

2.292 The respondent states that the general rule that the junior advocate will charge two-thirds of the amount charged by the senior advocate definitely impacts negatively on

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585 Capebar “Investigation into legal fees-Issue Paper 36” (16 August 2019) 11.
586 *Ibid,* 10.
587 *Idem*.
588 Legal Aid SA “Response by Legal Aid South Africa Part A” (September 2019) 25.
589 *Idem*.
590 *Idem*.
591 *Idem*.

the cost of litigation.[592] This general rule cannot constitute a blanket rule, especially in cases where the junior is relatively inexperienced.[593]

2.293 The MPS points out that junior counsel will, in terms of the Rules of the GCB, charge a fee, which is levied as a percentage of senior counsel's fee in the same matter.[594] This could lead to the result where the fee rate payable to junior counsel in such matters is higher than the fee rate that the junior would ordinarily charge when not briefed along with senior counsel.[595] There is no clear reason why this practice should continue to exist on a compulsory basis.[596]

2.294 The LSSA is of the opinion that the silk system drastically increases the cost of legal services, and therefore does not enhance access to justice.[597] This system has however been accepted by our courts. To this extent, there should be a proactive process of transformation to eradicate the discrepancy between senior attorneys and senior advocates.[598]

2.295 By the same token, however, it is very unlikely that persons who cannot afford to litigate will engage a silk. There are many junior counsels available, and no litigant is compelled to brief a silk.[599] As with other professions, access to justice is basic in nature.[600] Once the *pro bono* system is properly implemented, even access to very senior practitioners will be enhanced.[601]

2.296 ENSafrica points out that if the advocate's experience and reputation (that being the basis for him/her to have been granted silk status) is determinative of his/her rate, then fees will remain unchanged even if silk status is done away with.[602] Moreover, only a limited number of matters will require the experience of a silk. The average person (particularly the average poor person), will have matters more suited to assistance from attorneys and junior advocates.[603] That said, it is debatable whether a junior advocate

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592 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 25.
593 *Idem*.
594 Medical Protection Society "Response to the SALRC Issue Paper 36" 31.
595 *Idem*.
596 *Idem*.
597 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 48.
598 *Idem*.
599 *Idem*.
600 *Ibid,* 49.
601 *Idem*.
602 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 19.
603 *Idem*.

should be entitled to a fee equal to two-thirds of the silk's fee, simply because he/she is briefed with a silk (as is currently the practice). In fact, nothing about the junior or the matter has changed by virtue of being briefed as a junior to a silk, plus the junior actually benefits from the mentorship.[604] For this reason, it is not clear why the client should be liable for the increased fees. The "two-thirds rule" for juniors is as often negotiated out of as it is adhered to, so its impact is less than may otherwise be expected.[605]

2.297 BASA opines that senior counsels' fees may not be accessible to the general public.[606] Junior counsel might base their fees charged at a slightly lesser rate than that of senior counsel.[607]

2.298 **Recommendation 2.18**: To the extent that a junior counsel's fee is determined as a percentage of a senior counsel or silk's fee (for example, one third, or two thirds or 50% of senior counsel of a silk's fee), the system negatively influences the setting of a junior advocate's fee and gives rise to unattainable legal fees. It is not clear why a junior counsel should be entitled to a higher fee when briefed along with senior counsel or silk than would ordinarily be the case when he/she is not briefed along with senior counsel. This (general) rule cannot constitute a blanket rule, especially in cases where the junior is relatively inexperienced. It is also not clear why the client should be liable for the increased fees. Against this background, it is recommended that when a junior counsel is briefed along with senior counsel, there is no rational justification for pegging the junior counsel's fees against those of senior counsel. The junior counsel's fees must be determined in terms of the tariff applicable to junior counsel.

2.299 The recommendation is supported by the LSSA. The Respondent submits that "[i]t is a highly unsatisfactory state of affairs that junior counsel's fee is determined as a percentage of senior counsel's fee. It is just and equitable that junior counsel should only charge for the work that he/she has actually done and at the normal rate applicable to junior counsel. We, in any event, believe that remuneration should be service-based and not practitioner-based."[608]

2.300 The LPA Code of Conduct provides as follows:

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604 *Idem*.
605 *Idem*.
606 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 5.
607 *Idem*.
608 LSSA, *op cit*, 39.

Specific provisions relating to conduct of attorneys

An attorney shall

18.16 *be in attendance, or immediately accessible, during a consultation with counsel or an attorney acting as counsel, or at court during the hearing of a matter (other than unopposed application) in which he or she is the attorney of record, in person or through a partner or employee, being an attorney or a candidate attorney*.

Independence of counsel

25.5 Counsel may, when appearing in a matter before any court or tribunal of any kind, appear unaccompanied by their instructing attorney or the instructing attorney's candidate attorney or another representative, provided that the instructing attorney or a partner or employee of the instructing attorney is immediately accessible at all times.[609]

2.301 Responding to the question as to why must an attorney be present in court when a matter is argued, the LPC submits that clause 25.5 of the LPA mentioned above already provides a solution to the identified problem.[610] According to the Respondent, "if the advocate requires an instruction specifically from the attorney, then the matter could be stood down and the advocate could communicate telephonically, or by WhatsApp, or by email with the attorney."[611]

2.302 The LSSA states that "although the LPA Code provides some leeway, the fact remains that it is the attorney who briefs the advocate and not the client."[612] It is submitted that clause 18.16 of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic entities does not require the presence of attorneys at all times. It suffices if they can be immediately accessible when required by a referral advocate. This could be done telephonically, by email or any other means of electronic communication.

2.303 **Recommendation 2:19**: It is recommended that the requirement that an attorney must be present when a matter is argued must be gradually phased out. The Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic entities

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609 Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in *The Government Gazette* No. 42337 dated 29 March 2019.

610 LPC "Project 142: Discussion Paper 150-Legal Costs" 5.

611 *Idem*.

612 LSSA "Submission" at 39. The Johannesburg Society of Advocates (JSA) is of the view that it is not matter a matter of compliance but that it is critical for attorneys to be present in court because attorneys are the vital link to the client, the discovered documents and the history of the matter, "Response to the SALRC's Discussion Paper 150: Investigation into Legal Fees" par 35.7.

does not require the presence of attorneys at all times. It suffices if an attorney can be immediately accessible when required by a referral advocate. This could be done telephonically, by email or any other means of electronic communication.

27. Role of technology in the legal profession

2.304 One of the respondents submits that it is accepted globally that the only way to overcome financial and practical barriers to access to justice is to drive transformation and the adoption of digital legal technology.[613] According to independent research conducted by the respondent, approximately 47% of legal costs incurred are directly attributed to costs outside the control of a legal practitioner. One way to address this problem is to champion transformation and the general acceptance and consumption of digital legal services.[614]

2.305 Another respondent submits that the challenge facing the legal profession today is whether or not to embrace technology.[615] The legal profession is, according to the respondent, very conservative and slow to mechanise. However, the society that they service is not waiting for the legal profession to transition. Society is moving at a much quicker pace. The users of legal services want to have a definite sense of what the legal fees are going to cost them and how long it is going to take to have their dispute resolved. This happens not only in litigation but in pure legal advice and in a whole range of other legal services. The respondent states that this state of affairs gave his company an opportunity to start digitising content and information.

2.306 The respondent submits that there is pressure on the law firms to operate more efficiently and effectively, smarter and productively. Automation has the effect of reducing costs for the consumer of legal services. For the legal practitioner, this means that she will have to provide her service more efficiently and effectively and can serve more clients in a short period of time. Most of the operational costs, according to the respondent, go to servicing the relatively huge office space and huge libraries. Therefore, if the total costs of running a legal firm can be contained in one area, the costs of maintaining the other supporting areas should be reduced. It falls logically that technology and innovation should and must happen in the legal profession as well. The respondent states that banking has been exposed for charging high fees. However,

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613 Legal Serve “Legal Costs” (16 August 2019) 1.
614 *Ibid*, 2.
615 Molefe T (LexisNexis South Africa), submission made to the Commission at stakeholder consultative meeting (public hearings) held in 1 August 2019.

through the implementation of technology, the banks that embrace technology are able to reduce their service fees. The banks that do not innovate are taken over by those who do and reduce their operational costs.

2.307 The respondent submits that virtualisation has enabled legal practitioners to provide legal services that are not confined geographically. Legal advice can be provided by making use of a cellular phone. Video conferencing is also possible through a cellular phone or iPad. The use of technology avoids the necessity of having to travel to other parts of the country and the world for business when meetings can take place virtually anywhere. A person who is assaulted by his neighbour can simply phone for legal advice. The client does not have to travel all the way to the legal practitioner's office for advice.

2.308 Instead of having to pay huge amounts for standard, less complex legal services, several "self-service" or "do-it-yourself" solutions like smart contracts are now available. Users of legal services can simply download a standard template for a contract to buy a house or motor vehicle, or a lease agreement to rent out her property. According to the Legal Trends Report, as the millennial generation grows older and comes to rely more on legal services, they provide insight into the trajectory of future consumer expectations which points towards the direction of text and email communications; document sharing; online payments and credit cards.[616]

2.309 Part II of Table C (Sheriffs who are not officers of the public service) of Annexure 2 to the Magistrates' Courts Rules provides for various amounts that are payable for service of the court process and other documents (that is, service or attempted service of summons, subpoenas, notice, order or other documents; for the execution or attempted execution of a warrant, interdict, garnishee order or emoluments attachment order; and for the execution of any writ against the immovable property.[617] The relevant provisions are couched as follows:

> *1B (a) For the service of a summons, subpoena, notice, order or other documents not being a document mentioned in item 2, the journey to and from the place of service of any of the above-mentioned documents-*
>
> *(i) within a distance of 6 kilometres from the court-house of the district for which the sheriff is appointed: R40,00;*

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616 CLIO "Legal Trends Report" (2017).

617 Government Notice No. R32 of 23 January 2015 as amended by Government Notice No. R1055 of 29 September 2017.

(ii) within a distance of 12 kilometres, but further than 6 kilometres from the court-house of the district for which the sheriff is appointed: R47,00;
(iii) within a distance of 20 kilometres, but further than 12 kilometres from the court-house of the district for which the sheriff is appointed: R63,00;

2 (a) For the execution of a warrant (other than immovable property), interdict, garnishee order or emoluments attachment order, the journey to and from the place of service of any of the above-mentioned documents-

(i) within a distance of 6 kilometres from the court-house of the district for which the sheriff is appointed: R56,00;
(ii) within a distance of 12 kilometres, but further than 6 kilometres from the court-house of the district for which the sheriff is appointed: R63,00;
(iii) within a distance of 20 kilometres, but further than 12 kilometres from the court-house of the district for which the sheriff is appointed: R78,00;

(d) for the execution of any writ against immovable property-
(i) for the execution, including service of notice of attachment upon the owner of the immovable property and upon the registrar of deeds or other officer charged with the registration of such property, and if the property is in occupation of some other person other than the owner, also upon such occupier: R186,00;
(ii) …

2.310 Responding to the question as to why there is still a need for the 15-kilometre requirement in the Rules of Court, the LPC submits that "we agree that there is no longer any need for this stipulation."[618] The Court Rules will, however, have to be amended to make provision, as of right, for notices and service by email. Presently, notices and service by email take place by agreement between the parties.[619]

2.311 **Recommendation 2.20:** The Commission concurs with the respondents' recommendation that the relevant provisions in the Magistrates' Courts Rules and Uniform Rules requiring the appointment of an office within specified kilometres of the address of court as an address for notice and service of documents should be amended to make provision for digital court legal process.

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618 LPC "Project 142: Discussion Paper 150-Legal Costs" 2. The LPC submits that dispensing with the 15-kilometre rule presents an obstacle to a lay person who does not appoint an attorney, *idem*.

619 *Idem*.

2.312 The Commission invites comment and input on the question of whether the kilometres rule for service of the court process and other documents by sheriffs should be abolished and that delivery of all court process and documents be done electronically?

2.313 **Recommendation 2.21**: The Commission concurs with the respondent's recommendation that the general acceptance and use of Information Technology (digital legal services) in the provision of legal services will result in the reduction of legal fees. The providers and consumers of legal services will all benefit from automation in the sense that legal services will be provided to more clients in a short period of time, in a more effective, efficient and productive manner.

2.314 The Commission's recommendation is supported by Legal Aid SA and the LSSA subject to cognisance being taken of the digital divide and the high cost of data in South Africa.[620]

E. Socio-economic factors

27. Lack of funds to pay legal expenses

2.315 Lack of funds to pay legal expenses is one of the major reasons for the hampering of access to justice in South Africa.[621] The view of the respondents generally is that the majority of the South African people are not in a position to pay for legal services. This is largely due to the high unemployment rate, the high number of low paying jobs as well the high cost of legal services in South Africa.[622] 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.[623]

2.316 It is reported that clients with a monthly income of R600.00 are frequently charged fees in the region of R1500.00 for an initial consultation, R177.50 for a 15-minute consultation, and R50.00 a page for photocopying.[624]

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620 Legal Aid SA, *op cit*, 11; LSSA, *op cit*, 40.

621 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.

622 RAF "Comments on the investigation into legal fees" (27 August 2019)12.

623 *Ibid,* 25.

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

2.317 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.[625] 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.[626] 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.[627] 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 better[628].

2.318 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.[629] 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.[630] The legal system imposes time constraints for the commencement of proceedings, service of documents and returns, 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.

2.319 Responding to the question as to what extent is the average South African able to pay legal fees, CAOSA submits that the grave concern is largely around that part of society that is considered to not qualify for legal aid but cannot afford private legal fees.[631] This group is often referred to as the "missing middle," and is termed as such on the basis that they are considered middle-class, although they may be straddling the poverty

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625 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.

626 *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.

627 *Ibid,* 1.

628 *Ibid,* 3.

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

630 *Ibid,* 162.

631 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 6.

line. Innovative and scaled billing, which considers the income of the legal service user, will be an important consideration towards access to justice.[632]

2.320 Legal expenses become a secondary need in instances of poverty, and as such, these individuals and households have to resolve the justice needs in another manner. This is usually done through community advice offices, law clinics and public interest organisations that often litigate in matters that affect a group of people.[633]

2.321 Legal Aid SA submits that the average South African is not able to pay for extended legal actions.[634] The average South African obtains legal services where necessary, such as the drafting of an antenuptial contract or the registration of a bond. Members of the public usually find themselves defending actions, rather than instituting them. Legal Aid SA fills some of the gaps, but it is not able to assist everyone.[635]

2.322 The RAF makes the point that the majority of South Africans are not able to pay legal fees.[636] If not for contingency fee agreements, most South Africans would not have access to the justice system.[637]

2.323 The LSSA affirms that much needs to be done to enhance access to justice for the average South African.[638] It also points out that the concern about the "missing middle" is not unique to South Africa.[639] Contingency fee agreements are often the only way in which those people are able to access the courts.[640]

2.324 BASA submits that legal fees in the Magistrates' Court that are based on tariff might be more accessible to the average South African.[641] However, many legal practitioners do not agree to charge the clients as per the tariff.[642] As High Court litigation

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632 *Idem*.
633 *Idem.*
634 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 26.
635 *Idem*.
636 RAF "Comments on the investigation into legal fees" (27 August 2019) para 30.
637 *Ibid*.
638 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 49.
639 The Australian Productivity Commission estimates that only 8% of households would qualify for legal aid in terms of the means test, and that the majority of people are caught in the gap between the rich and the poor. *Ibid*.
640 *Idem*.
641 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 5.
642 *Idem*.

almost always requires the services of an advocate, it is unlikely to be affordable to the average South African.[643]

2.325 **NB:** The Commission concurs with the respondents' view generally that the majority of the South African people are not in a position to pay for legal services. This is largely due to the high unemployment rate, the high number of low paying jobs as well high cost of legal services in South Africa.

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

2.326 The regulations prescribing the tariff of subsistence and travelling allowances payable to witnesses in criminal proceedings provides as follows:[644]

> *2.* ***Subsistence allowance****-*
>
> *(1) A witness who is for the purpose of the attendance of criminal proceedings absent from his or her residence or place of sojourn and-*
>
> *(a) is obliged to be absent for longer than 24 hours from his or her residence or place of sojourn, shall be entitled to the allowances as prescribed from time to time for the Public Service; or*
>
> *(b) is obliged to be absent from his or her residence or place of sojourn for less than 24 hours, shall be entitled to the reasonable actual expenses incurred if the necessary corroborative documents accompany the claim to the satisfaction of the court manager or the registrar.*
>
> *3.* ***Transport and travelling expenses****-*
>
> *(1) A witness may, subject to the provisions of sub-regulation (2) make use of-*
>
> *(a) public transport, in which case he or she is entitled to an amount equal to the fare for the least expensive transport along the shortest route; or*
>
> *(b) private transport, in which case he or she is entitled to a transport allowance as prescribed from time to time for the Public Service.*
>
> *(2) A witness may only use air transport at State expense if the court manager or registrar-*
>
> *(a) is satisfied that the use thereof is warranted; and*

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643 *Idem*.

644 Notice R 391 of 11 April 2008 as amended by Notice R967 published in *The Government Gazette* No.41096 dated 6 September 2017.

(b) has approved that the witness may make use of air transport.

(3) On satisfactory proof having been produced, a witness is entitled to be reimbursed for his or her reasonable actual expenses incurred in respect of parking and toll fees.

2.327 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 make pursuing litigation a daunting task.[645] 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.[646]

2.328 The costs of participating in the justice system can be prohibitive for persons living in rural areas.[647] 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.[648] 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.[649] Community courts might play an important role in enhancing access to justice, reducing legal costs, and reducing the burden on the Magistrates' Courts.

2.329 Responding to the question as to what is the impact of transport, accommodation, and other indirect costs of litigation on access to justice, the RAF notes that, in respect of motor vehicle accident matters, the RAF usually covers these costs.[650] Alternatively, these costs are covered by contingency fee agreements.[651]

2.330 CAOSA points out that, community advice offices, which are located within communities, provide an invaluable service of ensuring that primary legal assistance is rendered to individuals before approaching the organised profession.[652] Outside of the main factor of being located within communities, another important factor is that

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645 Dugard, J and Drage, K, "To whom do the people take their issues?" (2013), 2.
646 *Ibid,* 162.
647 *Ibid,* 183.
648 *Ibid,* 183.
649 *Ibid,* 25.
650 RAF "Comments on the investigation into legal fees" (27 August 2019) para 31.
651 *Idem*.
652 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 7.

community-based paralegals are relatable and understand the specific contexts of the community members' justice needs.[653]

2.331 Legal Aid SA argues that indirect costs add to the total cost of any legal remedy.[654] Clients often have to travel to legal practitioners, courts, scenes etc. when they do not have the funds to do so. Forum shopping, such as banks issuing summons in the High Court when they should have done so in the Magistrates' Court must be stopped to make access easier.[655]

2.332 Practitioners should also embrace technology and limit the requirement for a client to travel to the bare minimum.[656] Courts must also ensure that a court date is a certainty and that matters in fact proceed. It happens far too often that an indigent person is at court and ready to proceed, whilst the opposing party find reasons for the matter to be postponed. All of this impact indigent clients and access to justice.[657]

2.333 The LSSA believes that indirect costs of litigation negatively impact on access to justice.[658] The SCA can serve as an example. When parties have been granted leave to appeal to the SCA, it often involves travelling from different parts of the country to Bloemfontein, including accommodation, etc.[659]

2.334 These costs can be creatively addressed by a change in the system in one of two ways:

(i) either the parties who need to present argument only and not evidence, could be allowed to do so *via* video conferencing; or

(ii) there could be a rotational sitting of the court. An example is a practice within the Land Claims Court, the Labour Court, and certain High Courts and Regional Courts.[660]

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653 *Idem*.
654 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 26.
655 *Idem*.
656 *Idem*.
657 *Idem*.
658 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 49.
659 *Idem*.
660 *Idem*.

2.335 **Recommendation 2.22**: The Commission concurs with the respondents' view that transport, accommodation, and other indirect costs of litigation have a negative impact on access to justice. The following measures are recommended:

(a) Presiding officers must ensure that when a court date is set, matters enrolled in the court roll do in fact proceed;
(b) Legal practitioners should embrace technology to limit the need for a client to travel to the bare minimum;
(c) Consideration should be given for parties who want to present argument only and not evidence, to do so via video conferencing;
(d) The system of rotational sitting of the court as currently utilised by the Land Claims Court, Labour Court and certain Regional and High Courts should be promoted.

2.336 The recommendation is supported by Legal Aid SA and LSSA.[661]

29. Lack of support for vulnerable groups with regard to legal costs

2.337 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.)[662] There may therefore be a specific need to support young people who need access to the courts.[663] The added difficulties and costs encountered by disabled individuals in accessing justice must be addressed.[664] These added costs might include increased transportation costs and the costs of caretakers.

2.338 Responding to the question of whether there is a lack of support for vulnerable groups (minors, people with disabilities, and women) with regard to legal costs, CAOSA asserts that this point is crucial in addressing the legal needs of the most disenfranchised members of society.[665] The community advice office sector actively pursues programmes and projects that are specifically looking at ensuring access to justice for this group.[666]

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661 Legal Aid SA, *op cit*, 12; LSSA, *op cit*, 41.
662 *Ibid,* 160.
663 *Ibid,* 160.
664 Nyenti, M, "Access to justice in the South African social security system: Towards a conceptual approach" (2013) *De Jure* 914, 44.
665 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 8.
666 *Idem*.

2.339 South Africa is grappling with a pandemic of violence against women and children and those with disabilities. There is also a stark increase in hate crimes against members of the LGBTQI+ community. The barrier to accessing justice for these groups moves far beyond economics, with factors such as prejudice of the legal professionals who are not sanitised in handling these matters, often resulting in secondary trauma.[667]

2.340 Because the organisation has limited resources, Legal Aid SA maintains that there is a lack of support for vulnerable groups with regard to legal costs.[668] People from vulnerable groups encounter further lack of support, such as transport to court and/or consulting with a legal practitioner.[669] According to the LSSA, the problem is much wider.[670] The respondent proposes that the budget for Legal Aid South Africa be increased significantly with regard to vulnerable groups.[671] Regulation 9(1) of the Regulations to the Legal Aid South Africa Act provides that legal aid may be provided to a litigant in a civil matter if-

(a) The matter has merit/ prospects of success;
(b) The matter has good prospects of enforcement of a court order; and
(c) There are sufficient resources available.

2.341 There appears to be no coverage in the Regulations to the Legal Aid South Africa Act for the provision of legal aid to youth, people with disabilities and women in the middle-income band.

2.342 However, legal aid for children is provided specifically in section 28(1)(h) of the Constitution. This section provides that "Every child has the right to-

(h) have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result".

2.343 Children may also be provided with legal aid in terms of the undermentioned legislation where it is required to protect the best interests of a child:

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667 *Idem*.
668 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 26.
669 *Idem*.
670 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 50.
671 *Idem*.

(a) Section 18(3) of the Administration of Estates Act No.66 of 1965, for the administration of an estate;
(b) To institute a personal injury claim against the Road Accident Fund;
(c) In a domestic violence matter;
(d) To an unaccompanied foreign child in terms of the Refugees Act, 1998;
(e) In a matter brought in terms of the Protection from Harassment Act, 2011
(f) For a money claim that exceeds the Small Claims Court monetary jurisdiction by more than 50%; and
(g) If it is required for the appointment of a curator *ad litem* or a curator *bonis*.[672]

2.344 CALS submits that "in order for Legal Aid to be accessible to middle-income users, the income threshold to qualify for legal assistance has to be increased and reviewed annually. We submit that the threshold of R7400 for singles and R8000 for households excludes an enormous amount of the population and further marginalises the missing middle."[673]

2.345 **Recommendation 2.23**: The Commission concurs with the respondents' view that there appears to be a lack of support for vulnerable groups (youth, people with disabilities, and women) with regard to legal costs. South Africa is grappling with a pandemic of violence against women, children and people with disabilities. There is also a stark increase in hate crimes against members of the LGBTQI+ community. The following measures are recommended:

(a) Since the community advice office sector actively pursues programmes and projects that are specifically looking at ensuring access to justice for vulnerable groups, consideration should be given by the DOJ&CD and other relevant stakeholders towards enhancing their financial and other operational resources to do so;
(b) That consideration be given to extending the coverage of Legal Aid South Africa in the Regulations to the Legal Aid South Africa Act, 39 of 2014 to increase the provision of legal aid to vulnerable groups like the youth, people with disabilities and women in the middle-income band who are currently excluded by the qualification criteria as prescribed in the Regulations. This

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672 Legal Aid SA "Response by Legal Aid South Africa Part B" (September 2019) 10.
673 CALS "Discussion Paper 150 of Project 142" 8.

would, however, require a corresponding increase in the budget allocation to Legal Aid South Africa.

2.346 Legal Aid SA responds by stating that legal aid is currently available to vulnerable groups like youth, people with disabilities and women, subject to the mandate and qualification criteria set out in the Regulations to the Legal Aid South Africa Act, 2014.[674] The Respondent supports the recommendation. However, "any consideration to extend the mandate should be accompanied by the necessary consultation with Legal Aid SA to consider and determine the financial impact on the organisation and the practicality of the extension of the mandate. If the mandate of Legal Aid SA is extended the organisation's budget should also be extended."[675]

2.347 The LSSA submits that "Legal Aid SA should be properly resourced, and its areas of operation should be extended beyond what is recommended by the SALRC (that is, youth, people with disabilities and women). Given the state's Constitutional obligation to afford citizens access to justice, it is imperative that the fiscus should prioritise Legal Aid's financial resources. The means test should be substantially increased. It is noted that the means test currently employed by the Legal Aid Board only offers the most indigent citizens access to justice."[676]

30. Lack of tax funding for necessary legal services [677]

2.348 SASAS 2014 found that 76% of surveyed persons were in favour of the use of tax funding for legal services.[678] This is a policy decision that has already been implemented through Legal Aid.[679] However, Legal Aid requires the passing of a "means test", which means that tax funding for legal services is not available to all.[680]

2.349 Responding to the question as to whether there is a lack of funding from the national fiscus for legal services, the Office of the Chief State Law Adviser expounds upon existing statutory mechanisms to achieve access to justice.[681] It then notes that

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674 Legal Aid SA, *op cit*, 12.
675 *Ibid*, 13.
676 LSSA, op cit, 42.
677 *Ibid,* 25.
678 *Ibid,* 25.
679 Legal Aid South Africa, "Who qualifies for legal aid?". Available at https://legal-aid.co.za/how-it-works (accessed on 23 October 2018).
680 *Idem*.
681 Office of the Chief State Law Adviser "Request for comment and input into SALRC Issue Paper 36" para 5-11.

the establishment of Legal Aid South Africa and the use of contingency fee agreements seek to enhance and promote access to justice, but that existing laws do not afford access to justice for everyone.[682] The respondent acknowledges that the right to a legal practitioner by a detained or an accused person is an important constitutional right. The Constitution also affords everyone the right to equal protection and benefit of the law within available resources, but it does not afford everyone a right to a legal practitioner at the expense of the State.[683]

2.350 The Cape Bar believes that, in essence, one of the greatest limitations to the effective functioning of legal aid is funding, a difficulty facing many public institutions in South Africa.[684] As a general observation, it is obvious that the various courts in South Africa suffer from limited resources that, to some extent, contribute to the delays experienced in cases and to inefficiencies in the system.[685]

2.351 Legal Aid SA submits that the fiscus is under strain because of the tough economic climate. It is against this background that the country and the legal fraternity must find creative ways to ensure increased access to justice.[686]

2.352 ENSafrica states that the funding is not sufficient to serve the need.[687] Additionally, it appears that the funding is not efficiently and effectively utilised.[688] The fact that the vast majority of Legal Aid South Africa's budget is spent on criminal law matters is a clear indication that there is insufficient funding for legal services pertaining to administrative law matters for indigent persons by the state.[689]

2.353 According to BASA, it would appear that entities such as Legal Aid South Africa are under-funded.[690] It may be prudent to extend the qualifying criteria for entities such as Legal Aid South Africa or law clinics, as many people do not qualify for legal aid but at the same time cannot afford legal costs outside of these structures.[691]

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682 *Ibid,* 11.
683 *Idem*.
684 Capebar "Investigation into legal fees-Issue Paper 36" (16 August 2019) 14.
685 *Ibid,* 15.
686 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 26.
687 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 20.
688 *Idem*.
689 *Idem*.
690 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 6.
691 *Idem*.

2.354 **NB**: The Commission notes the respondents' view that the fiscus is currently under severe strain due to the unfavourable economic climate. A huge budget of Legal Aid SA is spent on criminal matters compared to civil matters.[692] Furthermore, the various courts in the Republic also suffer from limited resources that, to some extent, contribute to the delays experienced in finalising cases and to inefficiencies in the court system.

31. Power imbalance in opposing litigants who are wealthier [693]

2.355 Power imbalances are more often than not the reality in litigation. For poorer litigants, this may translate into a lack of bargaining power in a negotiation, increased financial sensitivity to delaying tactics, and potential disadvantages in the level of professional assistance available to them.[694]

2.356 In *Nedbank Ltd v Thobejane* and Similar Matters,[695] the court held that:

> "The internationally accepted principles and policies that should be followed to ensure that access to justice for all is guaranteed to resound with the spirit and objectives of our Constitution. The question the court has to rightfully ask is, what purpose would the rule of law and the Constitution serve if only the affluent could afford to bring their cases to court? Put differently, would the rule of law and the Constitution serve its purpose if indigent persons could not bring their cases to court due to the prohibitive costs or high costs of legal representation?"

2.357 Responding to the question of whether wealthier litigants have an unfair advantage when litigating, thus creating a power imbalance, the RAF submits that it is definitely the case that wealthy litigants have access to the most senior legal practitioners and can out-litigate less wealthy opponents.[696] Similarly, Legal Aid SA points out that wealthier litigants have an unfair advantage in that they can afford to:[697]

(a) Pay legal fees and institute legal action against anybody they wish to;

(b) Pay the incidental costs of legal actions;

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692 In 2018/19 financial year, Legal Aid SA took on over 362 213 new criminal matters compared to 53 990 civil matters in the same financial year, Part B at 3.

693 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.

694 *Ibid,* 240.

695 2019 (1) SA 594 (GP) par 63.

696 RAF "Comments on the investigation into legal fees" (27 August 2019) para 32.

697 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 26-27.

(c) Delay the finalisation of matters, for example, not wanting to enter into a settlement agreement until the last moment or trial date;
(d) Engage as many expensive expert witnesses as they wish; and
(e) Spend as much time as they need in court.

2.358 CAOSA submits that the rules governing conflicts of interest have sometimes been used inappropriately by legal practitioners who are not willing to accept *pro bono* instructions.[698] This contributes to the narrative that the organised profession only services the wealthy.[699]

2.359 The LSSA believes that wealthier litigants can afford larger legal teams and more protracted litigation.[700] ENSafrica argues that, if it is accepted that legal practitioners are able to build experience, specialisation and reputation for good quality, and if it is accepted that these attributes command a premium, then certainly the party able to pay the highest premium gets the better service.[701] The party who wins this bidding war will then secure the services of the practitioner with the greatest experience, specialisation and reputation for good quality, affording a power imbalance to him/her.[702]

2.360 It is not clear what can be done about this.[703] Banning or placing a ceiling on the premium chargeable for the services will simply cause the relevant practitioners to take those skills to a place where they are not banned, for example abroad.[704]

2.361 On the other hand, a commercial client, say, a mine, faced with a situation such as a land invasion, may find itself opposed by a non-profit organisation representing the community members for free.[705] While the commercial client must worry about fees, the power imbalance is actually in favour of the community members who do not bear legal costs.[706]

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698 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 9.
699 *Idem*.
700 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 50.
701 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 20.
702 *Idem*.
703 *Idem*.
704 *Idem*.
705 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 20.
706 *Idem*.

2.362 One must be cautious, of course, to distinguish between an unfair advantage and a fair advantage.[707] The facts of the case – its inherent merits – remain unchanged, irrespective of the costs of attorneys and advocates.[708]

2.363 BASA answers this question in the affirmative.[709] In the current legal system, wealthier litigants are able to litigate vigorously and for lengthy periods. Wealthier litigants might tend to "out-litigate" opponents.[710]

2.364 **NB:** The Commission notes the respondents' view that wealthier litigants have an advantage (fair and unfair, depending upon the circumstances of a particular matter) over impecunious parties when litigating, thus creating a power imbalance.

32. Cost of translators and interpreters [711]

2.365 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.[712] The costs of a translator or interpreter may also be prohibitive for indigent litigants.[713] These costs are not limited to court proceedings, but may also include costs associated with the translation of documents in preparation for court proceedings.[714]

2.366 Responding to the question as to what is the impact of the cost of translators and interpreters on access to justice, the RAF believes that these costs play a minor role in the overall scheme of legal fees.[715] Legal Aid SA, on the other hand, submits that the cost of translators and interpreters does impact access to justice.[716] It is common knowledge that the shortage of budget for these services brought the courts to a standstill

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707 *Ibid,* 21.
708 *Idem*.
709 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 6.
710 *Idem*.
711 *Ibid,* 57.
712 *Ibid,* 56.
713 *Ibid,* 57.
714 *Ibid,* 57.
715 RAF "Comments on the investigation into legal fees" (27 August 2019) para 33.
716 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 27.

approximately two to three years ago.[717] A different solution is desperately needed, and e-solutions, such as translation applications, should be investigated for suitability.[718]

2.367 The Rules Board observes that it appears that the state is currently providing interpreters in civil court proceedings.[719] In the past in the civil justice system, litigants have had to bear the costs of interpreters, whereas, in the criminal justice system, these costs were borne by the state.[720] The cost of interpreters may have an impact on access to justice where the service of an interpreter is required for the purposes of obtaining legal advice or consulting with an attorney outside of the court precinct.[721]

2.368 The LSSA notes that in some courts there is no provision for translators and interpreters in civil matters. Parties have to bear the costs of such translators and interpreters.[722] There is also the risk of important legal points getting lost in translation.[723] The English language policy introduced by the Chief Justice will have an impact on this, but it is doubtful whether there can be any better policy in the South African context.[724] This increases the cost of legal services. Translators and interpreters are funded by the government.[725] Small claims courts, which sit after hours, pose problems for interpreters who may have to travel long distances after hours.[726]

2.369 BASA argues that the costs and time delays that are associated with translators and interpreters might impede access to justice for the indigent, who might often be the very people that require these services.[727]

2.370 **NB**: The Commission takes note of the respondents' views that the cost of translators and interpreters in criminal matters is borne by the State. These services have been extended by the State to some civil matters, although not in all civil court proceedings.

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717 *Idem*.
718 *Idem*.
719 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 16.
720 *Idem*.
721 *Idem*.
722 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 50.
723 *Idem*.
724 *Idem*.
725 *Idem*.
726 *Ibid* 51.
727 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 6.

33. Lack of general education

2.371 Lack of general education is another factor that has an adverse effect on access to justice.[728] SASAS 2014 found that this accounted for 19% of the reasons people gave for their difficulty in accessing justice.[729] 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.

2.372 Responding to the question as to what is the impact of the lack of general education on access to justice, the RAF notes succinctly that better-educated litigants can make decisions that are more informed.[730] Legal Aid SA points out that people are generally acutely unaware of their legal rights until it is too late.[731] Unnecessary litigation can be avoided if people are properly aware of their legal rights.[732] Legal Aid SA, NGOs, Chapter 9 institutions, the state, and the legal profession as a whole have a role to play in the legal education of the public.[733] Legal Aid SA regularly sees its clients incurring severe legal consequences for failing to comply with elementary, but essential, legal requirements when they transact.[734] Of course, expensive legal costs play a role in this regard, as these mistakes are made because of the clients' inability to obtain legal advice prior to transacting.[735]

2.373 The LSSA states that lack of general education negatively affects access to justice.[736] Education about the legal system must start at an early stage in schools.[737] BASA notes that this would best be answered by a survey completed by laypersons.[738]

2.374 ENSafrica describes this as a fundamental issue.[739] In many cases, there are avenues for complaint, such as Ombudsmen, the Broad-Based Black Economic Empowerment Commission, and other regulators, but the nature of their respective

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728 *Ibid,* 25.
729 *Ibid,* 25.
730 RAF "Comments on the investigation into legal fees" (27 August 2019) para 34.
731 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 27.
732 *Idem*.
733 *Idem*.
734 *Idem*.
735 *Idem*.
736 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 51.
737 *Idem*.
738 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 6.
739 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 21.

mandates may not be widely known, nor the requirements for access to such bodies.[740] A basic legal understanding should be a mandatory part of the school curriculum, for example, as part of the Life Orientation programme.[741] Relevant government departments or the Government Communication and Information System (GCIS) could also make a greater effort at public awareness.[742] There are many mechanisms whereby public awareness campaigns could be implemented by the state.[743]

2.375 ABSA believes there is a significant impact, but the issue cannot be resolved by simply addressing the legal costs issue. This is a far deeper issue.[744]

2.376 **Recommendation 2.24:**[745] The Commission concurs with the respondents' views that lack of general education negatively impact on access to justice. Unnecessary litigation can be avoided if people are properly aware of their legal rights. The following interventions are recommended:

(a) A basic legal understanding should be a mandatory part of the school curriculum, for example, as part of the Life Orientation programme;
(b) Greater effort at public awareness should be made by relevant government departments or by the Government Communication and Information System.

34. Lack of knowledge about laws, legal rights and available avenues

2.377 Knowledge of the law and of one's rights is the basis for a person's ability to seek legal advice or redress.[746] According to SASAS 2014, this factor was cited by 26.5% of the surveyed persons as hampering their access to justice.[747] Lack of knowledge of the law and of legal rights is closely related to a general lack of education.

2.378 Participants to the community workshops held by the Commission recommended that the DOJ&CD should embark on extensive community outreach initiatives in terms of which they will educate communities about the law. This should be done using various platforms including traditional and social media outlets and workshops. The Department of Home Affairs (DHA) should likewise do some outreach work by frequently travelling to

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740 *Idem*.
741 *Idem*.
742 *Idem*.
743 *Idem*.
744 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.39.
745 The recommendation is supported by the LSSA, *op cit*, 42, and Legal Aid SA, *op cit*, 13.
746 *Ibid,* 145.
747 *Ibid,* 145.

rural and township communities to assist with innumerable issues relating to the acquisition of identity documents, passports, death and marriages certificates, among others. Responding to the question of whether there is a lack of knowledge about laws and legal rights, and if so, how can this be rectified, CAOSA submits that accessible legal practitioners must back up legal empowerment initiatives.[748] The organisation's experience, especially in deceased estates and housing matters, is that many community empowerment initiatives also require backup legal services wherein communities – upon being educated on the laws and their rights – then have access to legal practitioners to enforce these rights.[749]

2.379 Legal Aid SA believes that there is indeed a lack of knowledge about laws and legal rights amongst the general public.[750] To improve the level of knowledge, more education is needed, especially at the school level. It should form part of Life Orientation.[751] Community advice centres and paralegal services should focus on educating the communities that they serve.[752] Although Legal Aid SA is not able to fill all the gaps, it has a strategy for education around constitutional rights. This should be broadened and increased.[753]

2.380 The LSSA submits that there is a lack of knowledge about laws and legal rights. This can be rectified through increased awareness and education at an early stage in schools.[754]

2.381 ENSafrica is of the view that there is a general lack of knowledge of legal rights and avenues for protection and exercise of legal rights.[755] Awareness campaigns regarding legal services, which are accessible to indigent persons, should be conducted; posters or other easily accessible materials should be freely available, and the available avenues for exercising rights through institutions or processes which facilitate access to justice should be broadcast widely.[756] However, public awareness campaigns will be fruitless in the absence of resources and support is applied to ensure that those legal

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748 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 11.
749 *Idem*.
750 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 27.
751 *Idem*.
752 *Idem*.
753 *Idem*.
754 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 51.
755 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 21.
756 *Idem*.

services that are available to indigent persons can adequately and competently cope with the demands made of them.[757]

2.382 BASA states that there would appear to be a lack of knowledge of the law and legal rights.[758] In addition to mandatory *pro bono* hours, attorneys could be required to give their time at community-based help desks.[759]

2.383 **Recommendation 2.25**: The Commission concurs with the respondents' views that there is a lack of knowledge about laws and legal rights amongst the general public. The following interventions are recommended:

(a) Legal Aid SA; community advice centres (CAOSA) and paralegal services should be empowered to focus on educating the communities that they serve;
(b) Awareness campaigns regarding legal services, which are accessible to indigent persons, should be conducted; posters or other easily accessible materials should be freely available, and the available avenues for exercising rights through institutions or processes which facilitate access to justice should be broadcast widely.
(c) DOJ&CD should publish a guide on how and where access to free legal advice can be obtained. The guide should include not only Legal-Aid SA but all NGOs and NPOs. Information booklets, pamphlets and flyers detailing the existence and services rendered by these institutions should be made available at all courts.
(d) The Legal Services Ombud must also play an informative role in educating and making members of the public aware of the law and their legal rights.

35. Language and culture [760]

2.384 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.[761] Language may also have direct cost consequences because interpreters are required

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757 *Idem*.
758 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 6.
759 *Idem*.
760 *Ibid,* 26.
761 *Ibid,* 95.

for court proceedings. Differences in culture between the presiding officer and the legal representatives and litigants may be a further barrier to communication.

2.385 Responding to the question of whether language and culture act as a barrier to access to justice, CAOSA submits that language plays a critical role in advancing access to justice.[762] In most instances, legal practitioners and law firms use language that is not relatable to the communities, and as such miss the opportunity to meaningfully engage.[763]

2.386 Legal Aid SA believes that language can act as a barrier to access to justice.[764] Being unable to express oneself in one's mother tongue inevitably leads to misunderstandings, which results in injustice. The law is also complex, and if a complex concept is explained in a foreign language, there will be gaps in understanding.[765]

2.387 The Rules Board maintains that, at court, there is no barrier provided an interpreter is available for the matter, the costs thereof are borne by the state or the interpreter is provided by the state, and the interpreter's skills are of a reasonable standard.[766] Outside of court, language may act as a barrier to access to justice, as interpreters may be needed to obtain legal advice and there is a cost associated with such a service.[767]

2.388 The LSSA believes that language does act as a barrier to access to justice, but it should not act as a barrier if there are adequate government-funded interpreters and translators available.[768]

2.389 BASA also believes that language acts as a barrier to access to justice.[769] The absence of an interpreter may result in unnecessary delays to arrange for an interpreter

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762 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 13.

763 *Idem*.

764 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 28.

765 *Idem*.

766 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 16.

767 *Idem*.

768 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 51.

769 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 7.

to be present. During that period, there may be much that is "lost in translation" which might adversely impact a matter.[770]

2.390 ABSA states that language acts as a barrier to access to justice.[771] ABSA does not believe that the court-appointed translators are in all instances effective, and on occasion resulting in the loss of information through translation.[772]

2.391 **NB:** The Commission takes note of the respondents' views that language acts as a barrier to access to justice. The absence of an interpreter may result in unnecessary delays to arrange for one to be present. Outside of court, language may also act as a barrier, as interpreters may be needed to obtain legal advice and there is a cost associated with such a service. The Commission further takes note that the cost of interpreters in criminal court proceedings and, to some extent, civil court proceedings are borne by the State.

36. Corruption

2.392 Most of the participants to the provincial community workshops held by the Commission between June and August 2019 highlighted corruption by the government officials as a major problem affecting access to justice. The Statistics SA's Governance, Public Safety and Justice Survey (GPSJS) report released in August 2019 confirm this.[773] The latter report lists corruption as the second biggest problem experienced by the people of South Africa after disruptions of the supply of utilities like water and electricity. Daily Maverick reports that South Africa is a classic example of how corruption and other corrupt activities impede the achievement of human development and the promotion of human rights in general.[774] Referring to revelations made at the Judicial Commission of Inquiry into Allegations of State Capture, the online newspaper argues that legal practice may wittingly or unwittingly have contributed to State capture through abuse of client-lawyer privilege used as a cloak to perpetrate corruption and the use of trust accounts by legal practitioners to launder corruptly received money.[775] Both the National Prosecuting Authority and the LPC have a duty to act against allegations of corruption

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770 *Idem*.
771 ABSA "ABSA Bank's Commentary-Issue Paper 36" par 2.42.
772 *Idem*.
773 Statistics SA "Governance, Public Safety and Justice Survey 2018/19" 31, 32.
774 Sibanda O's article appeared in Daily Maverick dated 8 January 2019 available at https://www.dailymaverick.co.za/opinionista/2020-01-08-corruption-could-undermine-the-integrity-of-sas-legal-profession/ (accessed on 9 January 2019).
775 *Idem*.

and to ensure that negative findings against law practices and legal practitioners are met with fitting sanctions.

2.393 New24.com reports that a group of "fed-up subcontractors" complained to the Chief Justice of the RSA about corruption at the high court. According to Fengu, the subcontractors are tired of constant postponements and alleged missing court files at the Pretoria High Court. [776]"The Pretoria High Court filing system is hopelessly inefficient and not trustworthy. Their matter was once moved from opposed matters to unopposed cases without their knowledge and consent."[777]

2.394 In *Mfengwana v Road Accident Fund*,[778] the court held that "[a]necdotal evidence within the legal profession points towards wide-spread abuses (of contingency fee agreements). In Grahamstown, a local costs consultant has been so alarmed by the abuses that he has come across in the course of his work that he wrote a detailed memorandum to the judges of the Eastern Cape Division. The judges, in turn, have established a committee to consider the problem and appropriate responses to it."

2.395 **Recommendation 2.26**: On the subject of corruption perpetrated by members of the legal profession, both the National Prosecuting Authority and the LPC have a duty to act against allegations of corruption and to ensure that negative findings against law practices and legal practitioners are met with fitting sanctions.

37. Breakdown in service delivery

2.396 As stated in paragraph 2.265 above, Statistics SA's GPSJS report of 2019 lists disruptions of the supply of utilities like water and electricity as the biggest dispute or problem faced by the people of South Africa. The following are among the problems highlighted by participants to the provincial community workshops held by the Commission which impact community members' access to justice:

- Violence against women and children;
- Drug-related problems and substance abuse;
- Punishment not adequate or proportionate to crime;
- Police response time too long;

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776 Fengu M's article appeared on News24.com on 05 February 2020 available at https://www.news24.com/citypress/news/fed-up-subcontractors-complain-to-mogoeng-about-corruption-at-high-court-20200206 (accessed on 6 February 2020).

777 *Idem*.

778 (1753/2015) [2016] ZAECGHC 159 par 28.

- Family disputes (child support, maintenance, separation or divorce);
- Difficulties in getting identity documents, passports, birth and death certificates;
- Delays in providing human settlements and advice or assistance regarding the transfer of property;
- Delays in infrastructure development;
- Challenges in accessing Legal Aid;
- Inadequate capacity of CAO and Law Clinics to assist community members to resolve their disputes; and
- Clogging up of court rolls.

2.397 Legalbrief reports that "it has become a feature of the weekly urgent motion roll that urgent applications were made accusing the police of refusing to intervene even when faced by clear criminal activity unless they were given a court order directing them to act."[779] Responding to the above-mentioned reported comments by police that "management should first obtain a court order before they act", JP Legodi said that "it is not the responsibility of the courts to prevent, combat and investigate crimes. Nor was it the function of the courts to maintain public order, secure the inhabitants and their property. The Constitution gave this power to the police."[780]

2.398 The concept of a mechanism to determine legal fees charged by legal practitioners for legal services with the purpose of broadening access to justice, is, rightly as highlighted by the LSSA, not defined in the LPA"[781] Access to justice is a multidimensional concept that is broadly concerned with the ability of the people to obtain just resolutions to justiciable problems through impartial formal and informal institutions and with appropriate legal support.[782] Legal services are but one of the mechanisms for the resolution of justiciable problems and disputes. As correctly pointed out by the LSSA, the responsibility to ensure access to justice for all is primarily that of the State, and not necessarily the legal profession.[783]

2.399 **NB:** It is the responsibility of the government at all spheres and levels to ensure that Organs of State operate effectively and efficiently at all times and that services are

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779 Legalbrief Issue No.180 dated 12 November 2019.
780 *Idem*.
781 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 6.
782 Idem. The LSSA "SUBMISSION BY THE LSSA ON ISSUE PAPER 36 REGARDING THE INVESTIGATION INTO LEGAL FEES" (30 SEPTEMBER 2019) states that "access to justice should not be conflated with access to legal services" at 8.
783 *Ibid*, 8.

delivered to the people of South Africa as per the mandate of the Organs of State concerned.

F. Summary of the recommendations

In this Chapter 2, the following recommendations are made:

The complexity of the law:

1. **Recommendation 2.1**: The SALRC concurs with the following recommendations, which have been put forward by the respondents: The law should be written in a less complex and technical manner in order for the citizens to understand their rights and responsibilities, and to find solutions to their legal disputes with much ease. This could be done by drafting laws in plain and straightforward language to ensure that any person can use the law to protect and advance their rights and interests as citizens.

Rules of procedure:

2. **Recommendation 2.2**: The SALRC concurs with the following recommendations which have been put forward by the respondents:

(a) The court rules and practice directives should be made uniform across all courts.
(b) They should be more straightforward in wording;
(c) They should use plain language and eliminate *Latin* words;
(d) An electronic platform should be introduced to enable litigants and their legal representatives to file documents at court without the need for physical attendance at court. E-filing may also be utilised to submit applications such as unopposed, non-contentious interlocutory applications and applications to compel discovery, for consideration by a Magistrate or Judge without the necessity of an appearance at court. According to the Chief Justice, Mogoeng Mogoeng, the main challenges faced by the courts are that they handle hard copies throughout the court processes. These include dockets, case files and judgements. On 23 November 2018, the Chief Justice announced plans to pilot an e-Filing system, which, if successful, will be rolled out to all the courts. The e-Filing system will enable law firms and litigants to file documents to the court

electronically over the internet. The objective is to improve efficiency and the quality of service rendered to the public.

Strengthening lower courts to which the poor can have access more easily:

3. **Recommendation 2.3**: [784] The SALRC concurs with the respondents' views that it may be more advantageous to strengthen the lower courts to which the poor and middle-income group can and already do have easier access to justice. Accordingly, the following is recommended:

(a) Magistrates' Courts should manage cases more effectively so that cases that deserve more than one day are allocated more days. Conducting litigation on a piecemeal basis over an extended period of time is not cost-effective.

(b) Lower courts must continue to be strengthened by the appointment of competent judicial officers with appropriate experience and expertise, particularly in commercial matters.

(c) More judicial officers should be appointed and steps taken to optimise their efficiency. Vacancies that exist must be filled since matters can often not proceed on the date set down because of the unavailability of presiding officers.

The number of court events:

4. **Recommendation 2.4**: A distinction must be drawn between affidavits and heads of argument. It is recommended that-

(a) unless exceptional circumstances dictate otherwise, affidavits and heads of argument in all High Court and Magistrates' Court matters be limited to a reasonable number of pages to be determined by the heads of court; and

(b) training be provided to legal practitioners on the preparation of heads of argument to eliminate the inclusion of unnecessary information which may lead to an increase in legal fees.

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[784] The recommendation is supported by the LSSA and Legal Aid SA, *op cit*, 30 and 5 respectively.

Late settlement

5. **Recommendation 2.5**: The Commission concurs with the respondent's recommendation that the following actions/steps be taken:

(a) Ensuring that parties are obligated to provide complete discovery at the earliest opportunity;
(b) Ensuring that a robust court timetable is imposed, with parties having to complete all steps before a trial date can be allocated; and
(c) Making a referral to ADR mandatory, except where a good cause can be shown. The LSSA notes that, although this is primarily up to the parties, it does present challenges to getting the various institutions, for example, the Road Accident Fund, the Department of Health, and others, to settle matters timely. Late settlement leads to congestion of the court rolls and an increase in litigation costs.

Insufficient use of case management:

6. **Recommendation 2.6**: The Commission concurs with the respondents' submission that judicial case management should also be extended to the Magistrates' Courts.

Urgent/priority matters:

7. **Recommendation 2.7**: The Commission agrees with the recommendation that the relevant rules (tariff provisions) must be introduced to ensure that there is a uniform approach permitted at the taxation of fees to be recovered in respect of urgent/priority matters.

Lack of effective and efficient use of court resources and information technology

8. **Recommendation 2.8**: The SALRC takes note of the OCJ E-Filing Court Modernisation Project which is presently in the process of being rolled out to superior courts and, over time, to the lower courts. Furthermore, it is recommended that:

(a) the current paper-based legal process should be transformed into a digital process to reduce legal fees. Court clerks and sheriffs should receive proper training to be able to receive and process digital legal documents by utilising an electronic court filing system separate from the digital court system; and

(b) Court rules need to be amended to make provision for the digital court legal process.

(c) An electronic platform should be introduced to enable litigants and their legal representatives to file documents at court without the need for physical attendance at court. E-filing may also be utilised to submit applications such as unopposed, non-contentious interlocutory applications and applications to compel discovery, for consideration by a Magistrate or Judge without the necessity of an appearance at court.[785] According to the Chief Justice, Mogoeng Mogoeng, the main challenges faced by the courts are that they handle hard copies throughout the court processes. These include dockets, case files and judgements.[786] On 23 November 2018, the Chief Justice announced plans to pilot an e-Filing system, which, if successful, will be rolled out to all the courts. The e-Filing system will enable law firms and litigants to file documents to the court electronically over the internet. The objective is to improve efficiency and the quality of service rendered to the public.[787]

(d) A helpdesk should be installed at all courts to assist litigants, including self-represented litigants, who make use of the e-Filing system.

Insufficient use of e-discovery:

9. **Recommendation 2.9**: The Commission concurs with the respondents' recommendation that the Rules of Court should be amended to enhance e-discovery. Rule 53 should be amended to make e-discovery compulsory. Rule 35(12) should also be amended to explicitly require 'material relevance'. This will lower the costs of litigation and help improve the administration of justice. Furthermore, the Commission takes note of the Task Team established by the Rules Board with the mandate of investigating the e-development of the rules for court and include the topic of e-discovery. According to the respondent, the Task Team will have the benefit of evaluating rules in foreign jurisdictions and the commentaries and criticisms of those rules, as well as the impact of those rules on the costs and complexity of the process.

Method of remuneration-billable hours:

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785 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 6.

786 Office of the Chief Justice "We the People" (July 2019 Issue) 20.

787 *Idem*.

10. **Recommendation 2.10**: The Commission concurs with the respondents' recommendation that the remuneration method mainly used by legal practitioners, that is billable hours and contingency fee agreements, do facilitate access to justice. However, other alternative methods of remuneration like fixed and/or flat fees and "milestone" billing should be considered. Flat fees will discipline lawyers to leave irrelevant stuff out and avoid interlocutory skirmishes.

Improper and unethical billing practices:

11. **Recommendation 2.11**: Many respondents are of the view that, like in any other profession, improper and unethical billing practices exist within the legal profession. It is accordingly recommended that the LPC, as the regulator of the legal profession, should address such improper and unethical practices.

Payment of referral fees:

12. **Recommendation 2.12**: To reduce legal fees, it is recommended that referral fees must not be recoverable from the client in all legal matters. The LPC must prohibit all forms of payment and receipt of referral fees by all legal practitioners, that is, candidate attorneys, attorneys, referral and non-referral advocates, and juristic entities alike, by making this an act of misconduct in the Code of Conduct provided for in section 36 of the LPA.

Court fees:

13. **Recommendation 2.13**: The Commission recommends that interventions to reduce sheriffs' fees, as well as alternative means to deliver and execute court orders, should be explored by the Rules Board.

The referral system:

14. Recommendation 2.14: The Commission concurs with the respondents' view that until such time that there is a sophisticated electronic court digital system in place, it will be imprudent to dismiss the role of correspondent attorneys.

Restrictions on advertising and marketing:

15. **Recommendation 2.15**:

(a) In line with the Competition Commission's decision above that advertising should be allowed subject to the general advertising law of South Africa, it is clear that there is no longer a place for any restrictions on advertising and marketing 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 of permitting ethical and not misleading advertisements.

(b) The Commission concurs with the LSSA's recommendation that the practice of touting by legal practitioners must be eradicated. The payment of money or an offer of any financial reward to third parties in the form of touting by legal practitioners increases the cost of legal services and thus hampers access to justice.

Reservation of work for legal practitioners:

16. **Recommendation 2.16**: Section 34(9) of the LPA mandates the LPC to conduct an investigation and make recommendations to the Minister on the creation of other forms of legal practice, including limited liability and multi-disciplinary practices. It is recommended that this matter be dealt with by the LPC in terms of its mandate provided for in the LPA.

Lack of direct briefing for advocates:

17. **Recommendation 2.17**: The Commission concurs with the respondents' view that:

(a) the introduction of section 34(2)(b) of the LPA regarding receipt by an advocate of a request (briefing) directly from a member of the public or from a Legal Aid SA Local Office for a legal service will enhance access to justice by members of the public.

(b) on the question of whether the various societies of advocates should be allowed to determine where their members may hold chambers/offices, it is recommended that the LPC is the relevant body to make a determination in this matter.

The silk system:

18. **Recommendation 2.18**: To the extent that a junior counsel's fee is determined as a percentage of a senior counsel or silk's fee (for example, one third, or two thirds or 50% of senior counsel of a silk's fee), the system negatively influences the setting of a junior advocate's fee and gives rise to unattainable legal fees. It is not clear why a junior counsel should be entitled to a higher fee when briefed along with senior counsel or silk than would ordinarily be the case when he/she is not briefed along with senior counsel. This (general) rule cannot constitute a blanket rule, especially in cases where the junior is relatively inexperienced. It is also not clear why the client should be liable for the increased fees. Against this background, it is recommended that when a junior counsel is briefed along with senior counsel, there is no rational justification for pegging the junior counsel's fees against those of senior counsel. The junior counsel's fees must be determined in terms of the tariff applicable to junior counsel.

19. **Recommendation 2:19**: It is recommended that the requirement that an attorney must be present when a matter is argued must be gradually phased out. The Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic entities does not require the presence of attorneys at all times. It suffices if an attorney can be immediately accessible when required by a referral advocate. This could be done telephonically, by email or any other means of electronic communication.

Role of technology in the legal profession:

20. **Recommendation 2.20:** The Commission concurs with the respondent's recommendation that the relevant provisions in the Magistrates' Courts Rules and Uniform Rules requiring the appointment of an office within specified kilometres of the address of court as an address for notice and service of documents should be amended to make provision for digital court legal process.

21. **Recommendation 2.21**: The Commission concurs with the respondent's recommendation that the general acceptance and use of Information Technology (digital legal services) in the provision of legal services will result in the reduction of legal fees. The providers and consumers of legal services will all benefit from automation in the sense that legal services will be provided to more clients in a short period of time, in a more effective, efficient and productive manner.

Transport, accommodation and other indirect costs of litigation:

22. **Recommendation 2.22**: The Commission concurs with the respondents' view that transport, accommodation, and other indirect costs of litigation have a negative impact on access to justice. The following measures are recommended:

(a) Presiding officers must ensure that when a court date is set, matters enrolled in the court roll do in fact proceed;
(b) Legal practitioners should embrace technology to limit the need for a client to travel to the bare minimum;
(c) Consideration should be given for parties who want to present argument only and not evidence, to do so via video conferencing;
(d) The system of rotational sitting of the court as currently utilised by the Land Claims Court, Labour Court and certain Regional and High Courts should be promoted.

Lack of support for vulnerable groups with regard to legal costs:

23. **Recommendation 2.23**: The Commission concurs with the respondents' view that there appears to be a lack of support for vulnerable groups (youth, people with disabilities, and women) with regard to legal costs. South Africa is grappling with a pandemic of violence against women, children and people with disabilities. There is also a stark increase in hate crimes against members of the LGBTQI+ community. The following measures are recommended:

(a) Since the community advice office sector actively pursues programmes and projects that are specifically looking at ensuring access to justice for vulnerable groups, consideration should be given by the DOJ&CD and other relevant stakeholders towards enhancing their financial and other operational resources to do so;

(b) That consideration be given to extending the coverage of Legal Aid South Africa in the Regulations to the Legal Aid South Africa Act, 39 of 2014 to increase the provision of legal aid to vulnerable groups like the youth, people with disabilities and women in the middle-income band who are currently excluded by the qualification criteria as prescribed in the Regulations. This would, however, require a corresponding increase in the budget allocation to Legal Aid South Africa.

Lack of general education:

24. **Recommendation 2.24**: The Commission concurs with the respondents' views that lack of general education negatively impact on access to justice. Unnecessary litigation can be avoided if people are properly aware of their legal rights. The following interventions are recommended:

(a) A basic legal understanding should be a mandatory part of the school curriculum, for example, as part of the Life Orientation programme;
(b) A greater effort at public awareness should be made by relevant government departments or by the Government Communication and Information System.

Lack of knowledge about laws and legal rights and available avenues:

25. **Recommendation 2.25**: The Commission concurs with the respondents' views that there is a lack of knowledge about laws and legal rights amongst the general public. The following interventions are recommended:

(a) Legal Aid SA; community advice centres (CAOSA) and paralegal services should be empowered to focus on educating the communities that they serve;

(b) Awareness campaigns regarding legal services, which are accessible to indigent persons, should be conducted; posters or other easily accessible materials should be freely available; and the available avenues for exercising rights through institutions or processes, which facilitate access to justice, should be broadcast widely.

(c) DOJ&CD should publish a guide on how and where access to free legal advice can be obtained. The guide should include not only Legal-Aid SA but also all NGOs and NPOs. Information booklets, pamphlets and flyers detailing the existence and services rendered by these institutions should be made available at all courts.

(d) The Legal Services Ombud must also play an informative role in educating and making members of the public aware of the law and their legal rights.

Corruption:

26. **Recommendation 2.26**: On the subject of corruption perpetrated by members of the legal profession, both the National Prosecuting Authority and the LPC have a

duty to act against allegations of corruption and to ensure that negative findings against law practices and legal practitioners are met with fitting sanctions.

Chapter 3: Access to Legal Services by Users in the Lower- and Middle-income Bands

A. Introduction

3.1 In conducting the investigation contemplated in sections 35(4) and (5) of the LPA, the Commission deemed it proper to categorise the population of interest into three bands, namely: the lower-income band; middle-income band; and upper-income band, for the reasons suggested by Klaaren as follows:

> *(a) First, such a research method works within an understanding of this market as a market;*
> *(b) Second, continuing on the theme of legal aid, such a three-banded analysis fits well with the provision of at least state-funded legal services for the poor.*
> *(c) Third, a three-tier analysis works well in a country like South Africa for reasons of politics.*
> *(d) The fourth and final justification is a pragmatic one. While the best data in this area will most likely come from national surveys or extensive qualitative studies, a rough three-tiered approach can work with rougher forms of evidence available either anecdotally or in many cases through independent regulatory institutions such as competition authorities.*[1]

3.2 This three-tier distinction is also based largely upon the submissions received and public consultations and workshops held in response to Issue Paper 36, which point out clearly that users of legal services who fall within the lower to middle-income bands have problems with access to justice and the cost of legal services is a prohibitory factor to them. Accordingly, this Chapter looks at access to legal services by users in the lower and middle-income bands; and Chapter 8 looks at access to justice for the top end natural persons and juristic entities.

3.3 To start off the discussion of access to legal services and access to justice for the lower-income band, the Commission conducted provincial community workshops in each of the nine provinces of the Republic of South Africa with the assistance of CAOSA. There are over 303 community advice offices (CAOs) in South Africa.[2] They are mainly situated in rural areas. Although the discussions at the workshops focused on matters

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1 Klaaren J "Towards affordable legal services: Legal costs in South Africa and a Comparison with other professional sectors" (October 2018) 5. Klaaren's paper was presented at the SALRC conference held in November 2018.

2 CAOSA "Legal Practice Act, 2014, Section 29 Community Service Provisions-Key Considerations from the Community Advice Office Sector" (October 2019) 3.

pertaining to access to legal services specifically, like sections 28; 34 and 35 of the Constitution,[3] as well as the factors giving rise to unattainable legal fees for most people, however, more attention was given to other matters pertaining to access to justice more broadly, like the lack of protection of other rights in the Bill of Rights.

3.4 Carmona and Donald state that:

> *The exclusion of people living in poverty from the protection provided by the law denies them the opportunity to improve their enjoyment of rights. Without equal access to justice, persons living in poverty are unable to claim their rights, or challenge crimes, abuses or violations committed against them, trapping them in a vicious cycle of impunity, deprivation and exclusion*.[4]

3.5 However, there remains easy, user-friendly and practical access to domestic violence, harassment, maintenance and children's courts, which do not require the services of a legal practitioner.

3.6 There is no definition provided of the concept "missing middle" in any of the literature consulted by the researchers of the Commission. This concept is not to be confused with that of "middle class"[5] In its submission to the Commission, the LSSA states that "more accessible subsidised competent legal services should be available for those unable to afford private services. The problem lies with the "middle" income bracket whose means will exceed the level for subsidised services. That income bracket faces the same problems in respect of all professional or technical services."[6]

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3 Section 28(1)(h) of the Constitution provides that "Every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."
Section 34 of the Constitution provides that "Everyone has 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."
Section 35(3) of the Constitution provides that "Every accused person has a right to a fair trial, which includes the right:
(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly.
(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

4 Carmona MS and Donald K "Access to justice for persons living in poverty: a human rights approach" (March 2014) 7 available at https://papers.ssrn.com/sol3/papers.cfm? (accessed on 22 November 2019).

5 See Klaaren J ""Towards affordable legal services: Legal costs in South Africa and a Comparison with other professional sectors" (October 2018) 6, 7.

6 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 13.

3.7 ENSafrica also submits that "there may be some benefit in having regulated fees for certain types of legal services for middle [class] income individual clients who, we understand from the Issue Paper and materials cited therein, struggle to pay legal fees and do not qualify for free or nominal charge legal service through Legal Aid SA or university law clinics."[7]

3.8 Based upon the LSSA's submission above and for academic purposes, the following working definition of the concept "missing middle" could be adopted for purposes of the investigation: "missing middle" are the users of legal services whose financial means exceed the level of subsidised legal services, but cannot afford to pay legal fees levied by private legal practitioners.

3.9 On 15 November 2019, the Commission hosted a workshop for the middle-income users of legal services. The workshop was held in Centurion. A self-administered questionnaire was distributed at the workshop for the participants to complete. A total of 27 participants attended the workshop. An analysis of the responses received is provided in Annexure D of this Report.[8]

3.10 The respondents had to answer the following questions:

(a) What ADR forum or process do you use when faced with a legal problem?
(b) Did you find the ADR cheaper/ more expensive as compared to the formal court process?
(c) In your opinion, should everyday South Africans be provided with a greater chance to represent themselves in our courts, by increasing the power of certain smaller courts for this purpose, or are legal practitioners necessary in most legal matters?
(d) Have you ever been involved in court proceedings, and if so, what type of legal matter were you faced with?

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7 ENSafrica "Comment and input: SALRC Issue Paper 36, Project 142 (Investigation into Legal Fees" 24.

8 It must be noted that the responses provided in Annexure C of this Discussion Paper do not necessarily reflect the views of the middle-income users of legal services generally, as the sample that participated in the workshop did not represent the population of interest nationally. Although the aim was to hold several similar workshops in other provinces, however, this was not possible due to time constraints. Furthermore, the date of the workshop coincided with the deadline for submission of all comments and data in respect of Issue Paper 36 to the Commission.

(e) How much money did you spend in dealing with the matter?
(f) Did you get the outcome that you had hoped for?
(g) How long did the matter take to get finalised?
(h) When faced with a legal matter how do you fund the legal representation?
(i) In your opinion, are legal fees affordable?
(j) If legal fees are not affordable then what can be done to promote access to legal services for middle-income users? and
(k) In your opinion, does Legal Aid SA adequately address the needs of South Africans in terms of broadening access to justice?

3.11 51.8% of the respondents used mediation to resolve their legal problems. 70.3% of the respondents found it cheaper to use the ADR mechanism compared to a formal court process. 14.8% of the respondents felt that arbitration is expensive. 55.5% of the respondents were involved in court proceedings involving a variety of matters including attachment of property; dispute with an employer; urgent application; assault; protection order; administration of the estate; bail application and adoption. Various amounts of money are indicated as being spent by the respondents in resolving their legal disputes. 11% of the respondents stated that they received the outcome that they hoped for, whereas another 11% did not. One respondent stated that four years after failing to have the legal dispute resolved, the matter was struck off the roll. Various methods were used to fund litigation. These include, among others, self-paid instalments, law clinic, legal insurance, and arranging a loan. 66.6% of the respondents are of the view that legal fees are not affordable. 18.5% of the respondents felt that Legal Aid SA does not assist people who earn above the means test threshold.

3.12 Responding to the question of what should be done to make legal fees attainable for most people, especially for the middle-income users of legal services; participants had this to say (Annexure C of this Report):[9]

(a) mandatory mediation should be promoted;
(b) legal fees (tariffs and guidelines) should be regulated in line with the public's affordability;
(c) appropriate means should be found to subsidise middle-income users;
(d) middle-income users should be allowed to qualify for legal aid and *pro bono*/ community legal services and pay reduced legal fees;

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9 The middle-income users of legal services workshop were held at Centurion on 15 November 2019.

(e) more legal aid offices should be established;
(f) technological advancement should be introduced to assist self-represented litigants; and
(g) access to information and education awareness should be expanded.

3.13 The following mechanisms for providing access to justice by users of legal services in the lower and middle-income bands are discussed next:

(a) Legal Aid South Africa;
(b) Community service and pro bono legal services
(c) Community advice offices and community-based paralegals
(d) Public interest/ non-profit/ non-government organisations
(e) Law clinics
(f) Legal Services Ombud
(g) Chapter Nine institutions
(h) Community courts
(i) Traditional courts
(j) Use of ADR mechanisms;
(k) Small claims courts;
(l) Unbundling legal services:
(m) Legal expenses insurance:
(n) Independent and impartial tribunals:
    (i) Advisory Council to monitor the implementation of PAJA;
    (ii) National Credit Regulator and National Consumer Tribunal; and
    (iii) Companies Tribunal.

B. Legal Aid South Africa

3.14 State-funded legal aid is provided by Legal Aid SA, an autonomous body regulated by the Legal Aid South Africa Act, 2014 (Act No.39 of 2014). Legal Aid SA'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.

3.15 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 into account the personal circumstances of the person concerned and the nature and

gravity of the charge.[10] 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.[11] 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.[12] In other instances, it refers indigent persons to practitioners in private practice who are prepared to act at a reduced tariff of fees.[13] Regulation 29 provides that "no legal aid applicant has the right to choose the legal practitioner who will be instructed to represent him/her."[14]

3.16 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;[15]
(b) children in conflict with the law;[16]
(c) every detained person (including sentenced prisoners);
(d) every person accused of a crime;[17]
(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.[18]

3.17 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

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10 Section 22 of the Legal Aid South Africa Act 39 of 2014.
11 Sections 3(a) and 4(1) of the Legal Aid South Africa Act 39 of 2014.
12 See Legal Aid South Africa Integrated Annual Report 2015/2016, 22.
13 In terms of section 24 (1)(c) of the Act.
14 Regulation 29 of the Regulations to the Legal Aid South Africa Act 39 of 2014 in Notice No. R745 published in *The Government Gazette* No.41005 dated 26 July 2017.
15 *Ibid*, Regulation 22.
16 *Idem*. See also paragraph 4.1.1 of the Legal Aid Guide, 2014.
17 Regulation 2 of the Regulations to the Legal Aid South Africa Act 39 of 2014.
18 Regulation 18 of the Regulations to the Legal Aid South Africa Act 39 of 2014.

would regulate legal costs once a decision has been made whether or not it is desirable to have such a mechanism.

3.18 Legal Aid SA Tariff of Fees and Disbursements in Criminal Matters covers matters in the district, regional, and high courts, and in the Supreme Court of Appeal (SCA).[19] 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.

3.19 Legal Aid SA applies a means test to determine who qualifies for legal aid at State expense.[20] 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.

3.20 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.[21]

3.21 An applicant for legal aid may appeal to the Provincial Executive in the event that legal aid is refused by the Head of Office. An applicant may, in criminal matters, appeal to the National Operations Executive, and in civil matters, to the Chief Legal Executive against refusal to grant legal aid by the Provincial Executive.[22] A dissatisfied applicant

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19 Legal Aid South Africa, "Legal Aid manual", Annexure B (undated).

20 *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).

21 See also page 47 of the Legal Aid manual.

22 Legal Aid SA "Legal Aid Manual" 30.

may approach the court for judicial review of the decisions of the National Operations Executive and Chief Legal Executive after internal remedies have been exhausted.[23]

3.22 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 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.

3.23 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)).[24] 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 advisory 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.

3.24 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 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.

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23 *Ibid*, 31.

24 See also section 4(1)(f) of the Legal Aid South Africa Act 39 of 2014.

3.25 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.[25] The right of an accused person to be represented at State expense is provided for in section 35(3)(g) of the Constitution.[26] 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.[27]

3.26 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.

3.27 The current legal costs regime in South Africa pertaining to criminal proceedings has been criticised because resources are wasted on unacceptable delays and postponements.[28] 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.[29] In

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25 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.

26 "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."

27 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.

28 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.

29 *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.[30]

3.28 Legal Aid SA primarily focuses on criminal matters due to a lack of resources.[31] In 2014, criminal matters accounted for 90% of Legal Aid SA's work.[32] The HSRC has asked whether Legal Aid SA's area of operation needs to be extended.[33]

3.29 One of the questions to which the respondents had to provide their views and opinions was whether Legal Aid South Africa adequately addresses the needs of South Africans in terms of broadening access to justice. There were mixed reactions received from the participants. Some said that Legal Aid helps some but not others.[34] Some of the respondents were happy, but some were not. Those who were not happy provided, among others, the following reasons: a number of matters are not taken on by Legal Aid SA without proper explanation; there were complaints about the quality of service provided by legal representatives instructed by Legal Aid SA; they are understaffed yet overburdened in some offices; some people are not aware of Legal Aid SA' existence; people who live in urban areas get adequate information compared to those who live in rural areas.

3.30 The LSSA submits that, to a certain extent, further changes to the means test for Legal Aid South Africa and the monetary limit to the jurisdiction of the small claims court will facilitate access to justice.[35] Poor persons should be able to access reliable, effective and competent legal aid in relation to lower court matters.

3.31 Legal Aid SA submits that the fiscus is under strain because of the tough economic climate. It is against this background that the country and the legal fraternity must find creative ways to ensure increased access to justice.[36]

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30 *Idem*.

31 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.

32 *Idem*.

33 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.

34 Ralijeje LMS in Eastern Cape.

35 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 35.

36 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 26.

3.32 **Recommendation 3.1**:[37] It is recommended that more resources should be deployed in promoting public awareness of the existence and services provided by institutions such as the Legal Aid SA as this will educate the public and enhance overall access to justice.

3.33 In Canada, legal aid is limited by areas of practice and by financial criteria.[38] According to Glenn, legal aid is generally available in criminal law matters, immigration and refugee law, family law, and housing matters.[39] 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.[40] He states that eligibility may be maintained at slightly higher figures if the applicant contributes to the legal costs. There are also maximum rates for capital assets.[41] 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.[42]

3.34 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*
> *Tier 3 10 or more years' call.*[43]

3.35 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.[44]

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37 The recommendation is supported by Legal Aid SA, op cit, 8. The Respondent currently has programmes aimed at promoting public awareness.
38 Glenn, HP, "Costs and fees in common law Canada and Quebec". Faculty of Law and Institute of Comparative Law, McGill University, 9.
39 *Idem*.
40 *Idem*.
41 *Idem*.
42 Section 9 of the Legal Services Act, 2002.
43 Legal Services Society Tariffs, "General Terms and Conditions". https://lss.bc.ca/lawyers/tariffGuide.php (accessed on 11 August 2018).
44 *Idem*. Also, the Legal Aid Ontario "Disbursement Handbook" (April 2016).

C. Community service and *pro bono* legal services

3.36 Section 3 of the LPA provides that the purpose of the Act is to-

> (b) broaden access to justice by putting in place-
>
> > (ii) measures to provide for the rendering of community service by candidate legal practitioners and practicing legal practitioners.

3.37 The LPA aims to create a greater responsibility on the part of legal practitioners 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 practicing legal practitioners upon which continued enrolment as a legal practitioner is dependent.[45]

3.38 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.[46] 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.[47]

3.39 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.[48]

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45 See section 29 of the Legal Practice Act.
46 Holness, D, "Recent developments in the provision of *pro bono* legal services by attorneys in South Africa" (2013), 137.
47 *Ibid,* 142.
48 LSSA "Access to justice and *pro bono* legal services" (10 August 2018), 2.

3.40 In 2016, the LSSA together with its constituent members,[49] undertook a national dialogue project to investigate a national framework for the delivery of *pro bono* and community service by the legal profession. A key finding that emerged from the national dialogue is that the LPA is ambiguous and unclear with regard to the long-standing tradition of volunteerism in the legal profession.[50] Section 29 of the LPA reads 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 practitioners; or

(b) a minimum period of recurring community service by practicing legal practitioners upon which continued enrolment as a legal practitioner is dependent.

(2) Community service for the purposes of this section may include, but is not limited, to the following:

(a) Service in the State, approved by the Minister, in consultation with the Council;

(b) service at the South African Human Rights Commission;

(c) service, without remuneration, as a judicial officer in the case of legal practitioners, including as a commissioner in the small claims courts

(d) the provision of legal education and training on behalf of the Council, or on behalf of an academic institution or non-government organisation; or

(e) any other service, which the candidate legal practitioner or the legal practitioner may want to perform, with the approval of the Minister.

(3) The Council may, on application and on good cause shown, exempt any candidate legal practitioner or legal practitioner from performing community service, as set out in the rules.

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49 The constituent members are Black Lawyers Association, National Association of Democratic Lawyers and the four statutory provincial law societies, that is, Law Society of the Northern Province, Cape Law Society, the Free State Law Society and the KwaZulu Natal Law Society.

50 NADEL "*Pro bono* and Community Service: Report on Section 29 of the Legal Practice Act 28 of 2014" 8.

3.41 Section 94 of the LPA provides as follows:

Regulations

94(1) The Minister may, and where required in the circumstances, must, subject to subsection (2), make regulations relating to-

(j) the rendering of community service as contemplated in section 29(1).

(2) The regulations contemplated in subsection (1) must-

(a) in the case of subsection 1(a) to (l) and (o) and (p) be made after consultation with the Council, unless otherwise indicated

Section 95 of the LPA provides as follows:

Rules

95. (1) The Council may, and where required in the circumstances, must by publication in the Gazette, make rules relating to-

(zO) any other matter in respect of which rules may or must be made in terms of this Act.

3.42 The *pro bono* rule 25 of the attorneys' profession, which came into operation on 1 March 2016,[51] creates one set of rules for the entire attorneys' profession and consolidates the rules of the four law societies.[52] Although the *pro bono* rule 25 of the

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51 Notice 2 of 2016 published in *The Government Gazette* No.39740 dated 26 February 2016.

52 NADEL "*Pro bono* and Community Service: Report on Section 29 of the Legal Practice Act 28 of 2014" 29. Rule 25 of the attorneys' profession provides as follows:

25.1 Definitions

Pro bono services shall include, but not limited to, service approved in terms of rule 25.3 or recognised in terms of rule 25.4, relating to, the delivery, through recognised structures, of advice, opinion or assistance in matters falling within the professional competence of a member, to facilitate access to justice for those who cannot afford to pay for such services.

Recognised structures shall include, but not limited to, the office of the Registrars of the High Court when issuing in forma pauperis instructions, small claims courts, community (non-commercial) advice offices, university law clinics, non-the government organisations, the office of the Inspectorate of Prisons and circle and specialist committees of the society, approved in terms of rule 25.6 or recognised in terms of rule 25.8.

Those who cannot afford to pay shall be those who ordinarily qualify for assistance through recognised structures.

25.2 Practicing members who have practised for less than 40 years and/or who are less than 60 years of age shall, subject to being asked to do so, perform *pro bono* services of not less than 24 hours per calendar year.

attorneys' profession was promulgated prior to the date of coming into operation of section 29 and Chapter 9 of the LPA,[53] however, section 119(2) of the LPA provides that-

> (2) Any-
>
> (b) rule, code, notice, order, instruction, prohibition, authorisation, permission, consent, exemption, certificate or document promulgated, issued, given or granted and any other steps taken in terms of any such law immediately before the date referred to in section 120(4) and having the force of law, remain in force, except in so far as it is inconsistent with any of the provisions of this Act until amended or revoked by the competent authority under the provisions of this Act.

3.43 Some of the respondents submit that prior to the advent of the LPA, it was mandatory for all attorneys to provide at least 24 hours per annum of *pro bono* work and many members of the attorneys' profession performed above the expected minimum hours.[54] The advocates' profession had similar arrangements, although it was not compulsory for them to provide *pro bono* legal services.[55]

25.3 Members may refer to the society, for approval by Council as *pro bono* services, a written description of areas of professional work proposed for recognition as *pro bono* services.
25.4 The Council shall, within 30 days of publication of this rule and thereafter from time to time, publish a list of services which, when performed by attorneys at no charge for those who cannot afford to pay, shall be recognised as *pro bono* services capable of being delivered in compliance with the provision of this rule.
25. 6 Members may refer to the society, for approval by Council as a recognised structure, a written description of a structure for recognition.
25.14 Disbursements incurred, save for travel expenses referred to in rule 25.13, in respect of *pro bono* services shall be borne by the client.
25.15 It shall be unprofessional conduct for a practicing member who has still to perform *pro bono* service hours in ay any year to refuse, without good cause, to deliver *pro bono* services.

53 Chapter 9 of the LPA deals with Regulations (to be made after and with consultation with the LPCI) and Rules to be made by the LPC.

54 In its submission to the DOJ&CD on the Legal Practice Act, 2014 Section 29 Community Service Provisions-Key Considerations from the Community Advice Sector (14 October 2019), CAOSA proposes that community service by candidate legal practitioners and legal practitioners should be compulsory in order for it to be entrenched and to make an impactful contribution, at 4.

55 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" 10. A delegate from PABASA who attended stakeholder public hearings on 8 July 2019 asked whether senior counsel/ attorney could be asked to do community work by the LPC and what the implications of this could be on section 22 (freedom of trade, occupation and profession) of the Constitution. The delegate was of the view that unless this is done as a condition for renewal of a practitioner's trading license, however, more intrusion on the rights of members of the legal profession may open the Minister to legal challenges.

3.44 The respondents are of the view that the minimum hours expected from legal practitioners should be made a compulsory condition for the renewal of a legal practitioner's trading licence.[56] According to one delegate, counsel can refuse to change how he/ she charges his/her fees but cannot refuse to provide assistance to members of the public as a condition for renewal of a trading license on a compulsory basis.[57] From the information submitted to the Commission, it would appear that many juristic entities exceeded the minimum number of hours expected of them.[58] As required by rule 25 of the rules for the attorneys' profession, which provides that members may elect to deliver *pro bono* legal services either personally or through one or more of the recognised structures, Bowmans entered into partnership and joint venture arrangements with recognised structures to deliver *pro bono* legal services in matters including applications for protection orders in family law matters, assistance with housing-related matters, providing assistance to asylum seekers, and public interest litigation matters.[59]

3.45 However, other respondents are of the view that since the dawn of democracy, the act of providing *pro bono* legal services has declined and the poor and most vulnerable members of society have to rely upon the state for the provision of free legal services.[60] There is also the view that *pro bono* legal services should be rendered on a case by case basis instead of the minimum 24 hours per annum required by rule 25 of the attorneys' profession, due to the fact that the 24 hours can be spent in a matter of a week without the legal practitioner having to appear in court.[61]

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56 This view is supported by CALS. In its submission to the Commission, CALS states that "the provision of *pro bono* legal services should be made mandatory for every legal practitioner. This should also be made a precondition for the continued enrolment of legal practitioners with the LPC," *op cit*, 10.

57 Delegation from PABASA attended stakeholder public hearings held on 8 July 2019.

58 Webber Wentzel spent over 21 000 hours in total on *pro bono* related matters in previous (assumingly 2018/19) financial year (Webber Wentzel, at 2); Bowmans spent 9537 *pro bono* hours in 2018/19, 9732 in 2017/18, 11002 in 2016/17, 8011 in 2015/16 and 8609 in 2014/15 financial year (Bowmans at 9).

59 The recognised structures include law clinics, Gauteng Local Division of the High Court (helpdesk); Cape Town and Randburg Magistrates' Courts Domestic Violence Helpdesks; Housing Legal Clinic; and Refugee Legal Clinic (Johannesburg). *Pro bono* hours were spent in the following public interest litigation matters: SAHRC and Jonathan Qwelane: 2225 hours; *September and Others v CMI Business* (three applicants in an unfair constructive dismissal case): 464 hours; Nkhensani Christina Motomokgolo v Hlayseka Rikhotso and 20 Others (customary law dispute regarding reburial following exhumation of body by community); Lack of recognition and regulation of marriages concluded in accordance with the tenets of Shari' ah law (Muslim marriages): 383 hours and Infringement of Dineo Kgatle's constitutional rights to freedom and security of his person: 426 hours.

60 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 51.

61 In its submission to the DOJ&CD on the Legal Practice Act, 2014 Section 29 Community Service Provisions-Key Considerations from the Community Advice Sector (14 October

3.46 Most commentators state that it is not possible for the state alone to provide unlimited legal aid due to budgetary and resource constraints.

3.47 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.[62] 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 that the quality of the legal service provided is of a sufficient standard to enhance access to justice to needy and poor people.[63]

3.48 Legalbrief reports that the LPC plans to increase the number of *pro bono* hours lawyers must work annually in order to be in good standing with the LPC.[64] The draft code proposes that the 24 mandatory hours of *pro bono* service per annum be increased to 200 hours for each attorney in law practice that generates an annual turnover of between R3m and R15m. Practices that earn above R15m annually must do a collective 500 *pro bono* hours per annum. Advocates in practice with an annual turnover of above R5m must do 150 mandatory *pro bono* hours.[65]

3.49 Responding to the question of whether *pro bono* legal services should be regulated in South Africa, and if so, how, respondents replied in the affirmative by stating that:

(a) the LPC must develop rules of professional conduct regulating how *pro bono* services should be rendered;
(b) the LPC must establish an enforcement mechanism to deal with unprofessional conduct where *pro bono* rules are not complied with;[66]

2019), CAOSA states that "the previous 24 hours (Northern Provinces, KZN and Free State) was not measured against its impact and as such without having a clear mechanism of measuring impact, it is not probable to submit that this allocation may have been too little or too much", at 2.

62 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. See also CAOSA at 14.

63 Idem. See also CAOSA at 14, who state that without legal professionals being required to render direct legal services, the entire piece of legislation will be devoid of its very essence.

64 Legalbrief Issue No.5125 dated 8 March 2021.

65 *Idem*.

66 CAOSA proposes that sanctions should be introduce for legal practitioners who fail to honour their *pro bono* legal commitment "Legal Practice Act, 2014 Section 29 Community Service Provisions-Key Considerations from the Community Advice Sector (14 October 2019)" at 5.

(c) *pro bono* or innovation/incubation fund be established by the LPC,[67] including professional indemnity legal insurance covering *pro bono* activities undertaken by legal professionals;[68] and

(d) the mechanisms through which *pro bono* services can be rendered be expanded by implementing a system through which legal practitioners source *pro bono* work from NGOs, NPOs and Legal Aid SA.[69]

3.50 **Recommendation 3.2:** The SALRC concurs with the respondents' view that:

(a) the minimum hours of *pro bono* services expected from legal practitioners should be made a compulsory condition for the renewal of a legal practitioner's trading licence.

(b) the LPC must develop rules of professional conduct regulating how *pro bono* services should be rendered.

(c) the LPC must establish an enforcement mechanism to deal with unprofessional conduct where *pro bono* rules are not complied with.

3.51 It is not clear why section 29(2) of the LPA only mentions one Chapter Nine institution, that is, the South African Human Rights Commission, and not the others.[70] The wording of section 29(2) of the LPA presupposes that the list of institutions at which community service may be rendered is not exhaustive.[71] The Commission is of the view that all the institutions supporting Constitutional democracy referred to in Chapter 9 of the Constitution should be added to the list of examples of institutions where community service may be rendered. These institutions are the following:

(a) The Public Protector;

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67 Slingo J reports that in the UK, a service provider directory to fund *pro bono* work is due to go live in March 2020. The service provider directory is an initiative that is backed by more than 100 commercial litigation firms, the general counsel of major companies and commercial bar all working together to promote access to justice through the National *Pro bono* Centre, The Law Society Gazette available at https://www.lawgazette.co.uk/news/litigators-create-directory-to-improve-access-to-justice/5103014.article (accessed on 13 February 2020).

68 In its submission to the DOJ&CD on the Legal Practice Act, 2014 Section 29 Community Service Provisions-Key Considerations from the Community Advice Sector (14 October 2019), CAOSA states that "it is our submission that support for legal practitioners with travel would be a necessary investment. This would ensure that the most disadvantaged communities who are often situated in far flung areas have access to legal practitioners", at 4.

69 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 52.

70 NADEL "*PRO BONO* and Community Service. Report on Section 29 of the Legal Practice Act 28 of 2014" 34.

71 Section 29(2) of the LPA provides that "Community service for the purpose of this section may include, but is not limited, to the following…"

(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.

3.52 **Recommendation: 3.3**: The SALRC recommends that section 29(2) of the LPA be amended by the substitution for subparagraphs (b) and (e) of the following subparagraphs (b) and (e); and the addition of the following subparagraphs:

Community service

(2) Community service for the purposes of this section may include, but is not limited, to the following:

(a) Service in the State, approved by the Minister, in consultation with the Council;[72]

(b) service at **[the South African Human Rights Commission]** <u>any of the institutions supporting constitutional democracy referred to in Chapter 9 of the Constitution</u>;

(c) service, without remuneration, as a judicial officer in the case of legal practitioners, including as a commissioner in the small claims courts;

(cA) <u>service at a community advice office</u>;

(d) the provision of legal education and training on behalf of the Council, or on behalf of an academic institution or non-government organisation; **[or]**

(dA) <u>service on a *pro bono* basis in compliance with the rules made by the Council; or</u>

(e) any other service <u>that broadens access to justice</u> which the candidate legal practitioner or the legal practitioner may want to perform, with the <u>prior</u> approval of the Minister.

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[72] The LSSA raises a concern with the view that service in the state should be regarded as community service. According to the Respondent, "it is not the legal profession's obligation to provide free legal services to the state. Community service should primarily be for the benefit of indigent members of society," *op cit*, 47.

3.53 It is necessary that paragraph (e) of section 29(2) be amended as proposed above to align community service with the purpose of the LPA as provided for in section 3(b) of the LPA, that is, "to broaden access to justice" and not to confine the concept to the provision of legal services only. It is submitted that the above-mentioned proposed amendment of the LPA will enable the Minister to make regulations, and the LPC to make rules, regulating community service and *pro bono* legal services on the same model as provided for under rule 25 of the attorneys' profession.

D. Community-advice offices and community-based paralegals

3.54 There are two main types of paralegals that may be distinguished, that is, those who work in commercial law environments, and those who are community-based and work with and serve poor rural communities, also known as community-based paralegals (CBPs).[73] Civil society organisations (CSOs), including community advice offices (CAO), 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.[74] CBPs provide a crucial link to justice services and legal redress in South Africa, particularly for poor and vulnerable people.[75]

3.55 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;

(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;

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73 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, 6.

74 Foundation for Human Rights, "A policy framework for engagement between CSOs and the government" (undated), 3. Paralegals operate in several sectors. These include community advice offices, trade unions, law firms, service organisations, the government departments, and commercial and business entities; *idem*.

75 Dugard, J and Drage, K, "To whom do the people take their issues?" *Justice and Development* (2013), 1.

(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*.[76]

3.56 Section 94 of the LPA provides that:

(1) The Minister may, and where required in the circumstances, must, subject to subsection (2) make regulations relating to-

(l) the rendering of community service as contemplated in section 29(1).

3.57 Chapter 9 of the LPA, with the inclusion of section 94(1)(l), came into operation on 1 November 2018.[77]

3.58 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.[78] 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.

3.59 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;

(f) Train local people as to their legal rights and remedies available;

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76 Foundation for Human Rights, "A policy framework for engagement between CSOs and the government" (undated), 15.

77 Proclamation R.31 of 2018, published in *The Government Gazette* No.42003 dated 29 October 2018.

78 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.

(g) Publicise local legal events and problems; and

(h) *Lobby for improvements in the justice system*.[79]

3.60 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.[80] Most of the CSOs are affiliated with the National Alliance for the Development of Community Advice Officers (NADCAO), now the Centre for the Advancement of Advice Offices in South Africa (CAOSA).[81]

3.61 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).[82]

3.62 Legal aid law in Sierra Leone, adopted in May 2012, makes provision for CBPs to complement the provision of legal aid.[83] The Malawi Law Commission created a formal recognition of CBPs in their legal aid legislation.[84]

3.63 In South Africa, CAOs assist their clients in providing legal advice, resolving community conflict, dealing with labour disputes, job-seeking, counselling, filling out

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79 *Ibid,* 7.
80 Dugard J, and Drage, K, "To whom do the people take their issues?" (2013), 25.
81 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).
82 *Ibid,* 26-31.
83 *Ibid,* 16.
84 *Idem*.

forms, and helping in the process of documentation and providing assistance with transport to access government services.[85]

3.64 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.[86] 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.[87]

3.65 In its submission to the Commission, CALS recommends that community advice offices must be rolled out nationwide to reach out to communities that are remote and marginalised. This includes informal settlements, villages, inner cities and other marginalised areas.[88]

3.66 There is at present a lack of formal recognition of CBPs.[89] Nor is a legal qualification required for a person to act as a paralegal, let alone a CBP.[90] 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.[91]

3.67 However, it is imperative that adequate training be provided to CBPs to enable them to provide sound legal advice to clients.[92] Since 1990, the CAO sector has been attempting to obtain recognition for its role in the access to justice eco-system. [93] There is a draft Bill developed by the DOJ&CD currently in the pipeline dealing with the proposed legislative framework for the recognition and regulation of CAOs and CBPs in particular. The draft Bill deals with several issues affecting the day-to-day operation of

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85 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.

86 *Ibid,* 8.

87 *Idem*.

88 CALS, *op cit*, 8.

89 *Ibid,* 12.

90 *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.

91 *Idem*.

92 *Idem*.

93 "Legal Practice Act, 2014 Section 29 Community Service Provisions-Key Considerations from the Community Advice Sector (14 October 2019)" at 5.

CAOs and CBPs 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.

3.68 In the previous section dealing with community service, the SALRC made a recommendation that section 29(2) of the LPA be amended by the inclusion of, among others, a subparagraph to make COA one of the recognised structures through which community service could be delivered by candidate legal practitioners and legal practitioners.

3.69 **NB**: With regard to paralegals who work in commercial law environments, section 34(9)(b) of the LPA provides that the "Council must, within two years after commencement of Chapter 2 of this Act, investigate and make recommendations to the Minister on the statutory recognition of paralegals." Chapter 2 of the LPA came into operation on 31 October 2018.[94] Regarding CBPs, the Commission has taken note of the draft Bills intended to regulate CAOs and CBPs currently in the pipeline.

3.70 **Recommendation: 3.4** The Commission recommends that:

(c) when developing law reform proposals regarding paralegals, consideration should be given by the LPC and the DOJ&CD to permitting trained paralegals to represent clients in limited matters to broaden access to justice by members of the public.

(d) CAOs should be properly resourced and capacitated to ensure that communities, who are burdened with shared challenges such as lack of basic municipal services, high rate of gender-based violence, and pollution from mining and similar activities, would benefit from *pro bono* legal information and legal services.[95]

E. Public interest/ non-profit/ non-government organisations

3.71 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

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94 Proclamation No. R31 of 2018 published in Notice No10883 dated 29 October 2018.
95 CALS, *op cit*, 9.

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.

3.72 Responding to the question of whether legal fees charged by non-profit organisations are justifiable and within the reach of the constituency they are meant to serve and, if so, why, CAOSA submits that these organisations, with limited resources, deliver high impact legal services through their litigation and support services to the community advice office sector.[96] CAOSA has developed collaborative relationships wherein much-needed backup legal services are accessed.[97] However, the demand and need far exceed the capacity of these organisations, and the added support from the organised profession is most needed.[98]

3.73 Legal Aid SA holds that legal fees charged by non-profit organisations are justifiable in certain circumstances, for instance, where a child centre charges 60% less than a mainstream psychologist.[99] The fee is substantially less than it would normally be, and the money will be used to ensure the continuation of the child centre.[100] As far as the LSSA is aware, NGOs do not charge their constituents anything.[101] All services are free. If they recover costs, these costs go towards their operating and other expenses.[102]

3.74 **NB:** The Commission notes the respondents' views that public interest, non-profit and non-government organisations charge (nominal) affordable rates for their services if any. Their fees are lower than what lawyers charge in practice. However, people do not

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96 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 14.
97 *Idem*.
98 *Idem*.
99 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 28.
100 *Idem*.
101 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 52.
102 *Idem*.

know what the various ones specialise in or even about their existence. This is why there should be some form of publication dealing with this matter.

F. Law clinics

3.75 Law clinics provide legal services to the public and assist the poor and indigent by providing free legal services. However, the clinic may recover from the recipient of its services any amount that is actually disbursed by the clinic on behalf of the recipient. A nominal administrative fee is payable to open a file.[103] Law clinics are attached to the various universities. The clinics act for 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 including the payment of sheriff's fees. The University of Western Cape Law Clinic has attorneys who supervise candidate attorneys and students. Students take instruction from the client and the attorney proposes the way forward. Students learn by doing.

3.76 According to the LSSA, law clinics should and do offer free legal services to the indigent.[104] It might possibly be a solution to enhance access to legal services for the "missing middle," if such persons who do not comply with the means test but are within a specific income bracket, can pay a fixed fee for services by these institutions.[105] University law clinics should have increased participation.[106] This view is shared by CALS who submit that "university law clinics should actively aim to expand their services to middle-income persons by increasing the means test amount that allows a person to qualify for their services. This amount should be intentionally made higher than that of Legal Aid SA and should be reviewed annually."[107]

3.77 One of the respondents proposes that more law clinics be established all around South Africa where third-year law students who are registered for a law degree can assist members of the public. As a requirement for a law degree, students may be required to do 200 hours of community service to a law clinic to prepare them for law practice. By

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103 Consultation held with director: University of Western Cape Law Clinic, Mr S Jassiem, on 14 August 2018. The amount is R30.
104 *Idem*.
105 *Idem*.
106 *Idem*.
107 CALS, *op cit*, 11.

the time a law student does her/ his articles, she/ he will be more equipped to draft pleadings, advise clients and have better reading and drafting skills.[108]

3.78 Holness argues that a law graduate community service (LGCS) is provided for under section 29 of the LPA (community service) as a means for free legal services, but it has not taken off the ground yet.[109] According to the commentator, it follows that any 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.[110] There are various well-established providers of free legal services that a community service graduate (CSG) could logically work at in promoting access to justice particularly in civil matters, such as the Lawyers for Human Rights, Legal Resources Centre and law clinics.[111] However, these are not specifically included in community service under section 29(2) of the LPA. The LPA does not specifically state what an LGCS is, how it will be implemented, funded, and regulated.[112]

3.79 **Recommendation 3.5:** It is recommended that the LPC should consider the viability of introducing community service to be rendered by post-study law graduates as a means to broaden access to justice to the majority of the people of South Africa including an appearance in court subject to continuous supervision. [113] Section 29(1) of LPA provides that the "The Minister must, after consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister."

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108 Pretorius P "Legal Costs" email dated 11 June 2019.

109 Holness D, "Improving access to justice in South Africa in civil matters through existing community-based paralegals and some considerations as to possible law graduate post-study community service" 24 Paper presented at the SALRC international Conference on Access to Justice, Legal Costs and Other Interventions held in Durban on 1-2 November 2018. The author states that LGCS is specifically provided under section 29(1)(a) "community service as a component of practical vocational training by candidate legal practitioners." at 26.

110 Holness, D, "Recent developments in the provision of *pro bono* legal services by attorneys in South Africa" (2013) 24.

111 Holness D, "Improving access to justice in South Africa in civil matters through existing community-based paralegals and some considerations as to possible law graduate post-study community service" 27 Paper presented at the SALRC international Conference on Access to Justice, Legal Costs and Other Interventions held in Durban on 1-2 November 2018

112 *Idem*.

113 Legal Aid SA is not in support of community service that is rendered as part of PVT due to the requirement for continuous supervision which is not possible if such candidate legal practitioner is placed in the service of an institution, *op cit*, 20.

G. Legal Services Ombud

3.80 Chapter 5 of the LPA, which makes provision for the establishment of the Office of Legal Services Ombud, is not operational yet.[114] In terms of section 47 of the LPA, a judge discharged from active service in terms of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No.47 of 2001) will be appointed by the President as the Legal Services Ombud (LSO). The LSO will act independently and subject to the Constitution and the law, which he or she must apply impartially without any fear, favour or prejudice. In terms of section 46 of the LPA, the objectives of the Ombud are to:

(a) protect and promote the public interest in relation to the rendering of legal services as contemplated in this Act;

(b) ensure the fair, efficient and effective investigation of complaints of alleged misconduct against legal practitioners;

(c) promote high standards of integrity in the legal profession; and

(d) *promote the independence of the legal profession*.

3.81 Section 48 of the LPA provides as follows:

(1)(a) In addition to the other powers and functions conferred on or assigned to him or her in this Act, and for the purposes of achieving the objects referred to in section 46, the Ombud is competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged-

(i) maladministration in the application of this Act;

(ii) abuse or unjustifiable exercise of power or unfair or other improper conduct or undue delay in performing a function in terms of this Act;

(iii) act or omission which results in unlawful or improper prejudice to any person, which the Ombud considers may affect the integrity and independence of the legal profession and public perceptions in respect thereof.

3.82 In the UK, the Legal Ombudsman handles all public complaints (expression of dissatisfaction with a legal service) across the entire legal sector.[115] Complaints are

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114 Section 45 of the LPA makes provision for the establishment of the Office of Legal Services Ombud.

115 The Law Society (UK) https://www.lawsociety.org.uk/support-services/risk-compliance/regulation/legal-ombudsman/#ou25 (accessed on 08 May 2020).

received from individuals, small businesses, charities, associations and trusts.[116] First, an attempt is made to resolve the dispute informally. If this is not possible, the Ombudsman will investigate the matter and allow both parties a chance to make representation. The Ombudsman will make a provisional finding and parties afforded an opportunity to respond within a fixed deadline. If parties are agreed, the complaint is regarded as resolved. Should parties not agree, the Ombudsman will make a final decision based on what is fair and reasonable under the circumstances, taking into account a decision that is likely to be made by a civil court, the Code of Conduct rules and good practice.[117]

3.83 CAOSA submits that a majority of vulnerable community members have had negative experiences with legal services in relation to Road Accident Fund matters.[118] This demonstrates a gap in the profession's ability to measure the quality of service and the ability to self-correct in instances in which there is malpractice.[119] Complaints are dependent on the client making a submission, which in itself is not entirely subjective – the complaint process is designed to further alienate vulnerable members of society in that they are directly pitted against the legal professional.[120] CAOSA wholeheartedly supports the establishment of a Legal Services Ombud office.[121]

3.84 **NB:** The Commission takes note of the respondents' proposals for the establishment of the Office of Legal Services Ombud to handle complaints of alleged abuse of power, improper conduct and maladministration in the application of the LPA. Judge Siraj Desai, who is a retired judge, was appointed by the President of the Republic of South Africa, Mr Cyril Ramaphosa, as the Legal Services Ombud with effect from 16 December 2020 for a term of seven years.[122]

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116 *Idem*.
117 *Idem*.
118 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 16.
119 *Idem*.
120 *Idem*.
121 *Idem*.
122 Information available at IOL https://www.iol.co.za/capeargus/news/judge-desai-delighted/ (accessed on 12 February 2021).

H. Chapter Nine institutions

3.85 The latter part of the 20th century has seen a rapid expansion of the ombudsman enterprise across the public and private sectors.[123] 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.

3.86 Ombudsmen, or institutions supporting constitutional democracy, are a significant alternative dispute resolution mechanism, outside of the courts.[124] 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.[125]

3.87 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 that are unable physically to access those services.[126]

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123 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.

124 *Ibid,* 7.

125 *Ibid,* 6.

126 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

3.88 In *Economic Freedom Fighters v Speaker of the National Assembly and Others*; *Democratic Alliance v Speaker of the National Assembly and Others*,[127] 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*.[128] *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*.[129]

3.89 The Public Protector Act, 1994 (Act No.23 of 1994) 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.[130] The services are provided to persons and communities free of charge. The informal nature of the complaints process is structured such that individuals do not necessarily require legal representation and therefore can avoid paying private legal fees.[131]

3.90 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.

3.91 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

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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.

127 (CCT 143/15; CCT 171/15) [2016] ZACC 11.

128 *Ibid,* para 64.

129 *Ibid,* para 67.

130 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.

131 *Ibid*, 14, 15.

approaches.[132] 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
(h) Failure to attend to damage caused by faulty state equipment and infrastructure failure.[133]

3.92 Responding to the question of whether there is a lack of awareness of alternative *fora* for ADR mechanisms such as judicial/quasi-judicial tribunals, administrative appeal tribunals, and Chapter Nine institutions, Legal Aid SA submits that a lack of in-depth knowledge of these programs also results in resistance to make use of these alternatives, as the perception exists that they benefit the offender to the detriment of the victim.[134]

3.93 The MPS does not believe that there is such a lack of awareness. Having said that, no harm could be done by more widely advertising the services of these *fora*.[135] Indeed, more resources could be deployed to promote public awareness of the existence of institutions such as the National Consumer Regulator, as this will educate the public and enhance overall access to justice.[136]

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132 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.
133 *Idem*.
134 *Idem*.
135 Medical Protection Society "Response to the SALRC Issue Paper 36" 42.
136 *Idem*.

3.94 Community advice offices have a restorative approach when it comes to matters of justice.[137] Mediation in most matters is encouraged as an accessible and durable process that allows the parties to take control of the matter and its outcome.[138]

3.95 The court-annexed mediation rules, although progressive, were exclusionary in not encompassing the mediation process in community advice offices.[139] Another problem with court-annexed mediation rules is that mediators are not paid by the state but by the parties. Hence, CAOSA has engaged the DOJ&CD to review this and ensure that an all-encompassing approach to mediation is adopted.[140]

3.96 The LSSA submits that Chapter Nine Institutions should increase their awareness amongst communities in South Africa, including other institutions geared towards protecting the rights of citizens. [141]

3.97 ENSafrica in general believes that user-friendly information regarding ADR mechanisms should be made available more widely and that doing so would progress the objective of access to justice.[142] Mediation very usefully exposes each party to a counter-argument to his/her case early on in the matter. The mediator, not dependent on the client for his/her fees, is able to be frank on his/her assessment of the case.[143] Such a view often does prompt a settlement, but even where it does not, it serves as a useful reality check for litigants. Although the mediator is not a judge/magistrate, commercially minded clients take seriously a neutral third party that expresses concern about the case.[144]

3.98 However, parties may simply go to mediation as a tick-box exercise to progress to court litigation.[145] If this becomes the habit, mediation will merely add extra procedural complication, delay and legal fees.[146]

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137 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 12.
138 *Idem*.
139 *Idem*.
140 *Idem*.
141 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 51.
142 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 21.
143 *Idem*.
144 *Idem*.
145 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 21.
146 *Idem*.

3.99 **Recommendation 3.6**:[147] The Commission concurs with the respondents' view that there is generally a lack of awareness of alternative *fora* for ADR mechanisms such as judicial/quasi-judicial tribunals, administrative appeal tribunals, the various public and private Ombuds, and Chapter Nine institutions such as the Commission for Gender Equality, the South African Human Rights Commission, and the Public Protector, among others, that could be utilised to a greater extent and strengthened to broaden access to justice for the majority of the people of South Africa. More resources should be deployed in promoting public awareness of the existence of institutions such as the Legal Services Ombud, the National Consumer Regulator (NCR) and Chapter Nine institutions as this will educate the public and enhance overall access to justice.

I. Community Courts

3.100 The term "community courts" has become the contemporary term used when referring to popular informal justice structures existing outside the formal legal system.[148] Examples of informal justice structures include street committees, yard, block and area committees operating in rural and urban African townships and informal settlements in almost all the provinces of the RSA.[149]

3.101 Although informal justice structures are viewed by many communities as the most likely mechanism of achieving an outcome that satisfies their sense of justice, however, there are many weaknesses common to most informal justice structures.[150] These include lack of accountability, lack of fairness and human rights abuse. Moloi states that:

> *[t]he Black Administration Act, 1927 (Act 38 of 1927) allowed urban Africans to run courts and in so doing take responsibility for some governance obligations, but conversely also sowing the seeds of greater generational rifts in the urban African population. The predominant pre-occupation of the makgotla courts was the disciplining of the unruly youths of the townships. After the restructuring of the black local government in 1982, a similar law was passed, that is, the Black Local Authorities Act, 1982 (Act No.102 of 1982), which contained similar powers to run courts. Despite the turmoil of the 1980s, these informal justice structures were not terminated. As state repression increased, these informal justice*

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147 The recommendation is supported by Legal Aid SA, *op cit*, 20, and LSSA, *op cit*, 48.

148 SALRC "Commission Paper 12/2019 Preliminary Investigation: Proposal Paper on Community Courts" (16 March 2019) 6.

149 *Idem*.

150 *Ibid*, 12.

> *structures subsequently became more aggressive in nature and as youth involvement increased, a persecutory impulse became prevalent*:[151]

3.102 The community advice office sector, in most settings, focuses its attention on empowering and capacitating community structures to ensure that the practices of these institutions are in line with the Constitution.[152] The Centre for Community Justice and Development has since 2000 ran training and support projects to enable paralegals to interphase the traditional dispute mechanisms with mainstream law, as most communities refer disputes to these forums on account of proximity and relatability to their particular issues.[153]

3.103 Although most of the disputes brought about by community members at the Fezeka Community Court, Guguletu, are resolved through mediation, however, the court itself operates the same way as any Magistrates' Court. It would appear that the name "community court" arose as a result of the fact that most of the complainants and accused persons come from the same community. They know each other as relatives, companions or neighbours. At the consultation meeting held with Ms Johannisen and Ms Moilo, Ms Francis-Subbiah suggested that if the mediation services provided by the court are meant to serve as a precursor before a party goes to court, then maybe they should be called "community mediation forums" or "community mediation centres."[154]

3.104 Issue Paper 36 asked whether informal dispute resolution mechanisms such as community courts enhance access to justice. Legal Aid SA holds the view that these mechanisms work if they are properly managed and regulated.[155] The LSSA is not in a position to comment on the question, but cautions against any processes that would not be allowed in terms of the Constitution.[156]

3.105 BASA believes that these mechanisms are physically more accessible to the general public and allow parties to self-represent.[157]

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151 *Ibid*, 8.

152 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 19.

153 *Ibid*.

154 The consultation meeting took place on 18 November 2020, at the Fezeka Community Court, Guguletu, Western Cape. Ms Johannisen is an attorney at the University of Western Cape Law Clinic. Ms Moilo is an official at the Fezeka Community Court.

155 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 30.

156 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 54.

157 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 8.

3.106 There is a view in the DOJ&CD that the Traditional Courts Bill (TCB) discussed below should be enacted first so as to draw lessons on some of the principles that may resonate with community courts.[158] The TCB will be used as the blueprint for the development of policy on community courts.

J. Traditional Courts

3.107 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 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 representation[159] (similar to the procedure in small claims courts); it focuses on restorative justice measures[160] (similar to court-annexed mediation in Magistrates' Courts), and it affords litigants the right of review to a High Court having jurisdiction when procedural deficiencies are seen to exist.[161]

3.108 Schedule 2 of the Bill contains a list of matters which traditional courts are competent to deal with. These are the following:

(a) Theft, where the amount involved does not exceed R15000.

(b) Malicious damage to property where the amount involved does not exceed R15000.

(c) Assault where grievous bodily harm is not inflicted.

(d) Breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute where the amount involved does not exceed R15000.

(e) Receiving any stolen property knowing it to be stolen where the amount involved does not exceed R15000.

(f) Crimen injuria.

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158 SALRC "Commission Paper 12/2019 Preliminary Investigation: Proposal Paper on Community Courts" (16 March 2019) 34.

159 See clause 7(4)(b) of the Traditional Courts Bill, 2017.

160 See clauses 2 and 3 of the Traditional Courts Bill, 2017.

161 See clause 11 of the Traditional Courts Bill, 2017.

(g) Advice relating to customary law practices in respect of-

(i) ukuThwala;

(ii) initiation;

(iii) customary law marriages;

(iv) custody and guardianship of minor or dependent children;

(v) succession and inheritance; and

(vi) customary law benefits.

(h) Any matter arising out of customary law and custom where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette *and different amounts may be determined in respect of different categories of disputes.*

(i) Altercations between members of the community.

3.109 Clause 7 of the new TCB of 2017 "…allows parties to be represented by any person of his or her choice and prohibits legal representation".[162] Section 7 of the Bill thus precludes legal representation, yet section 35 of the Constitution protects the right to legal representation,[163] and our courts affirm its significance.[164] The exclusion of legal representation is in line with the traditional courts' role as non-adversarial courts, and lawyers may prolong the process. There should not be a blanket preclusion of legal representation; the circumstances of each case differ, and the traditional court should also consider permitting legal representation in exceptional circumstances.[165] 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.

3.110 The new TCB provides for a High Court review of the proceedings for a party who is aggrieved by non-compliance with the provisions in clause 11 of the Bill. Furthermore, clause 12 of the Bill affords an aggrieved party the right of appeal to a

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162 See clause 7 of the Traditional Courts Bill, 2017.

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

164 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.

165 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/1025159/2520-9515/1735 (online); ISSN: 2520-9515.

Magistrates' Court on grounds other than those provided for under clause 11(1). Clause 12(2)(b) of the Bill empowers a magistrate to give any order or decision it deems competent in the matter. Clause 14 of the Bill affirms that, where there is a dispute over the jurisdiction of a traditional court, or a party seeks transfer of the matter, the matter may be transferred to a competent civil court.[166] It also includes a Code of Conduct for officials or parties appearing in the traditional courts, in clause 16.

3.111 In terms of the 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.[167] Apart from procedural considerations, this will also save the litigant costs, as the costs of litigation can be expensive in the formal court system.

3.112 It is submitted that the inclusion of clauses 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, although Magistrates' Courts are preferred on the grounds of legal costs involved, should be welcome changes.[168] It is further submitted that the new Bill identifies with the court-annexed mediation project in the Magistrates' Courts insofar as it focuses in clauses 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".[169] Therefore, it is important to finalise the TCB because of the critical role it will play in South Africa's legal system.

3.113 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 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 in these sections. The 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

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166 The matter may be transferred to a civil court (Magistrate's Court or small claims court) that is competent to hear the matter.

167 See clause 4 of the Traditional Courts Bill of 2017.

168 See sub clauses 4 and 11 respectively of the Traditional Courts Bill of 2017.

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

Commission Report (RP 209/2003) that legal representation is not appropriate, because this is a process towards dispute resolution.

3.114 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.

3.115 Issue Paper 36 asked whether clients should 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?

3.116 Legal Aid SA notes that the whole point of traditional courts is to keep the process informal and costs low.[170] Traditional courts must, however, be more strictly regulated and formalised to avoid abuse of power.[171]

3.117 The LSSA answers this question in the affirmative.[172] The LSSA has previously commented on the Traditional Courts Bill and in particular clause 9(3)(a) that denies a party to the proceedings before a traditional court the right of legal representation.[173] Lawyers are not allowed to participate in proceedings, even in respect of criminal cases, thereby infringing on a person's right to legal representation.[174] It is the duty of a legal representative to ensure that his/her client is not prejudiced. Preventing a party the right to legal representation will deny many persons, particularly the uneducated, the marginalised and the indigent, the constitutional right to a fair trial.[175]

K. Use of ADR mechanisms

3.118 Alternative Dispute Resolution (ADR) is defined as an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them.[176] Some methods, such as mediation,

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170 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 30.
171 *Idem*.
172 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 55.
173 *Idem*.
174 *Idem*.
175 *Idem*.
176 Victorian Law Reform Commission, "Civil justice review report 14" (March 2008), 212.

involve seeking resolution by an agreement reached between the parties. Other methods, such as arbitration, may involve a binding determination by a third party.[177]

3.119 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.[178] Various other methods are used to resolve disputes. Relatively few civil disputes are resolved by judicial decision.[179] The LSSA states that although ADR has its place in dispute resolution, however, its downside is that it negatively affects the jurisprudential development of the South African legal system because, unlike litigation which creates a precedent and settles the law, ADR processes do not follow a precedent-based system.[180]

3.120 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 mechanisms for dispute resolution.[181]

3.121 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.[182] 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 other persons as prescribed in the Act.[183]

3.122 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.[184]

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177 *Idem*.
178 *Idem*.
179 Victorian Law Reform Commission, "Civil justice review report 14" (March 2008), 212.
180 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees-Project 142" 45.
181 South African Law Reform Commission, "Issue Paper 8: Project 94: Alternative dispute resolution" (15 July 1997), 16.
182 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.
183 *Ibid,* 7.
184 *Ibid,* 8.

In *Afcons Infrastructure Ltd v Cherian Varkey Construction*,[185] 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 tortious liability.

3.123 The use of 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.

3.124 Legal Aid SA advocates that if ADR mechanisms are made a compulsory step before a summons is issued, that will go a long way in limiting the number of cases adjudicated in court.[186] The issuance of an ADR certificate, indicating that no settlement could be reached and that the matter may therefore proceed to litigation, should be required before a matter is placed on the roll.[187] LSSA is of the view that ADR can be efficacious in certain matters like family law matters in which it can be made compulsory, although the discretion to utilise ADR should remain with the parties.[188] However, CALS expresses a different view. The Respondent cautions against mandating mediation in domestic violence, harassment and other predominantly gendered offences.[189] According to the Respondent, mandating mediation in these family law matters may have the effect of perpetuating the victimisation and re-traumatisation of the survivor, thus facilitating the return of the survivor to the unsafe environment of the abuser.[190]

3.125 Responding to the question of whether different methods to settle disputes will enhance access to justice, MPS submits that:

> "*We support alternative dispute resolution such as mediation and pre-litigation resolution. It is MPS's experience in other international*

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185 [2010] (8) SCC;
186 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 21.
187 *Idem*.
188 LSSA, *op cit*, 33.
189 CALS, *op cit*, 13.
190 *Idem*.

> *jurisdictions that pre-litigation procedures can encourage early and full exchange of information about a case. This enables plaintiffs and defendants to investigate and resolve claims without the need to issue formal legal proceedings. Pre-litigation procedures are particularly effective where compliance is encouraged by cost penalties against parties who ignore or fail to meaningfully engage with the procedure. Furthermore, in cases where a claim cannot be resolved pre-action, such a framework supports the efficient management of the proceedings by the early exchange of information and by narrowing the issues in dispute*." [191]

3.126 An emerging trend currently is that state organs set up pre-litigation administrative processes with a view to encouraging early settlement of disputes without the need to go to court. The Western Cape Department of Health's Medico-Legal Unit and the Eastern Cape Provincial Government's Litigation Unit are but some of the examples.

3.127 The RAF requests the Commission to consider the following:

(a) *recommending the establishment of a new State-owned entity, alternatively, broadening the mandate of an existing State department, or State-owned entity, to provide for a mandate to employ relevant experts (State experts) to address, for medico-legal purposes, prospective claimants of compensation, damages, grants, etc. where the claim is against the State or an organ of State*.

(b) *In the alternative to (a) above, an upper tariff must be prescribed for medico-legal services rendered by private experts, that is, the tariff must allow the expert to charge less than the prescribed tariff, but not more, to allow for compensation whilst at the same time managing costs and access to justice*.[192]

3.128 **Recommendation 3.7:** [193] It is recommended that the use of ADR mechanisms, including the use by organs of state of pre-litigation administrative processes with a view to encouraging early settlement of disputes without the need to go to court be promoted.

3.129 The insufficient use of ADR mechanisms can be ascribed to a multitude of factors – resistance to change, not only by the legal profession, but also by the public at large;

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191 Medical Protection Society "Response to the SALRC Issue Paper 36" 11.

192 RAF "Comments on the investigation into legal fees" (27 August 2019) 11.

193 The recommendation is supported by LSSA, *op cit*, 48, and Legal Aid SA, *op cit*, 21. Legal Aid SA submits that ADR mechanisms must be court based and should not exclude indigent clients who would like to make use of this mechanism to resolve their disputes.

including a lack of suitably qualified mediators, the cost of mediation, lack of formal mediation structures, and insufficient ombudsmen for the government departments situated at all Magistrates' Courts.[194]

3.130 The LPC should further encourage its members to consider offering mediation services on a *pro bono* basis.[195]

3.131 The RAF believes that litigants should be forced to make use of ADR, failing which they should not be granted access to the courts.[196] ADR is not popular amongst practitioners, because it does not have the fee-generating potential of litigation.[197]

3.132 In a similar vein, the MPS suggests that with respect to certain types of disputes which have shown themselves to be suited to resolution by means of ADR, the rules of the court could be amended to require litigants to prove to the satisfaction of the court that they have attempted and failed at ADR before they will be allowed to issue process in relation to those disputes.[198]

3.133 Although the Cape Bar suggests that the promotion of mediation at an early stage of litigation is a sensible initiative because of the potential to resolve many cases inexpensively, it cautions against enforcing mediation by rote. Experience elsewhere indicates that it can become a dilatory and expensive additional layer to litigation.[199]

3.134 Arbitration has the advantages of the expedition and specific expertise. However, since arbitration is resorted to voluntarily, the Cape Bar suggests that no regulation of its process or fees is necessary.[200]

3.135 CAOSA points out that, in many instances, the courts refer matters to the community advice offices for mediation. These vary from matters related to harassment, domestic violence, maintenance, to property and neighbour disputes.[201] The sector is ready to scale this service nationally, especially in local courts where disputes often stem

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194 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 21.

195 *Idem*.

196 RAF "Comments on the investigation into legal fees" (27 August 2019) para 24.

197 *Idem*.

198 Medical Protection Society "Response to the SALRC Issue Paper 36" 21.

199 Capebar "Investigation into legal fees-Issue Paper 36" (16 August 2019) 11. This view is also shared by the LSSA who points out that "mandatory ADR may result in a delay in the relief sought by the parties when a party frustrates the progression of the matter to court." "Submission by the LSSA on Discussion Paper 150" 32.

200 *Idem*.

201 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 2.

from personal conflicts that have escalated.[202] The respondent has in the past made submissions to the DOJ&CD to review the rules relating to court-annexed mediation.[203] It submits that the rules in their current format will not achieve the intended objective, and will not position mediation as the ideal mechanism for resolving low or high conflict disputes.[204]

3.136 The LSSA submits that ADR mechanisms also have cost implications.[205] Court-annexed mediation is not yet fully in operation and not necessarily cost-saving.[206] In addition, the current fee structure for mediators or court-annexed mediation may affect the availability of experienced mediators.[207] Whilst parties do not pay for the presiding officer in litigation, payment will have to be made for the presiding officer in ADR matters.[208] Whilst the LSSA strongly recommends ADR processes, they should not be mandatory and should run in parallel to the court processes.[209] Issues such as guardianship, relocation, and change in care or residency of children, should not form part of ADR processes.[210] The ideal would be to have dedicated family law courts, or alternatively, a stream dedicated to these matters, with the presiding officers and staff specifically trained.[211]

3.137 Although ADR has its place in dispute resolution, it negatively affects the jurisprudential development of the South African legal system.[212] ADR processes do not follow a precedent-based system, whereas litigation creates a precedent and settles the law.[213] It also provides certainty pertaining to the law.[214]

3.138 ENSafrica suggests that provision could be made for compulsory mediation prior to trial, and an adverse costs order could follow where the parties have not in good faith

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202 *Ibid,* Ch 2 para 5.
203 *Idem.*
204 *Idem*.
205 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 45.
206 *Idem*.
207 *Idem*.
208 *Idem*.
209 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 53.
210 *Idem*.
211 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 53.
212 *Idem*.
213 *Idem*.
214 *Idem*.

participated in mediation proceedings.[215] This mechanism is applied in many jurisdictions with positive results and a reduction in litigation and presumably legal costs.[216]

3.139 In South Africa the benefits of mediation are generally not well understood, and potential litigants who have already reached "deadlock" in a dispute are often reluctant to embark on a mediation process, as it requires consensus to be reached between the parties.[217] Compulsory mediation could have real benefits if properly applied and if qualified and experienced mediators are available to participate within short time frames.[218]

3.140 For BASA, the answer lies in the appointment of competent and properly trained mediators/arbitrators.[219] Enforcement because of non-performance of an agreement reached by mediation may cause litigants to seek formal court mechanisms.[220] Litigants often agree to the decisions in arbitration to be final, barring some egregious unfairness in the process, and therefore these decisions are unlikely to be reversed or reviewed by a court (essentially parties that do not have right of appeal and this additional risk may prevent litigants from using ADR mechanisms).[221]

3.141 ABSA submits that the ADR mechanisms are neither efficient nor are they well-equipped in South Africa.[222] For example, an arbitration will cost significantly more than a trial, so it does not necessarily follow that ADR is the solution to reducing legal costs.[223] The respondent submits that it would be prudent to extend the powers of the Office of the Family Advocate to facilitate mandatory ADR mechanisms.[224]

3.142 The Commission is currently seized with three investigations dealing broadly with family law matters. One of these investigations is ‘Project 100D: Alternative Dispute Resolution in Family Matters. This investigation aims to develop an integrated approach to the resolution of family law disputes, with specific reference to disputes relating to the

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215 ENSafrica “Comments and input: SALRC Issue Paper 36” (30 August 2019) 16.
216 *Idem*.
217 *Idem*.
218 *Idem*.
219 Banking Association of SA “Comments on the investigation into legal fees” (30 August 2019) 4.
220 *Idem.*
221 *Idem*.
222 ABSA “ABSA Bank’s Commentary-Issue Paper 36” para 2.20.
223 *Idem*.
224 Banking Association of SA “Comments on the investigation into legal fees” (30 August 2019) 8.

care of and contact with children after the breakdown of the parent's relationship.[225] It is anticipated that the investigation will make recommendations for the further improvement of the family justice system that will be orientated to the needs of all children and families, foster early resolution of disputes and minimise family conflict.[226] It is submitted that mediation has become the preferred procedure to resolve family law disputes owing to the limitations associated with the adversarial system of resolving disputes. This investigation will further explore the feasibility of introducing mandatory mediation as well as other forms of collaborative dispute mechanisms in which parties can engage voluntarily.[227] In its submission to the Commission, the LSSA states that:

> *Whilst we strongly recommend ADR processes, they should not be mandatory and should run parallel to the Court processes. Issues such as guardianship, relocation, change in the care of residency of children should not form part of ADR processes. The ideal would be to have dedicated Family Law Courts, alternatively, a stream dedicated to these matters, with the presiding officers and staff specifically trained*.[228]

3.143 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.[229] 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 the government is another attempt to broaden access to civil justice and to make legal services affordable to most people.

3.144 Rule 84 of the Magistrates' Courts Rules provides as follows:

Fees of mediators

84. (1) Parties participating in mediation are liable for the fees of the mediator, except where the services of a mediator are provided free of charge.

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225 SALRC, "Discussion Paper: Project 100D: Alternative Dispute Resolution in Family Matters" ((June 2019) vi.

226 SALRC "Project 100D: Alternative Dispute Resolution in Family Matters" (June 2019) vi.

227 *Ibid* viii.

228 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees-Project 142" 53.

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

(2) Liability for the fees of a mediator must be borne equally between opposing parties participating in mediation: Provided that any party may offer or undertake to pay in full the fees of a mediator.

(3) The tariffs of fees chargeable by mediators will be published by the Minister together with the schedule of accredited mediators referred to in rule 86(2).

3.145 The Commission submits that even though parties to mediation have to pay for the fees of the mediator, except where the services of a mediator are provided free of charge, however, it would still be less compared to the high costs of litigation and the uncertainty about the final legal fees.[230] The publication of a tariff of fees payable to the mediator by the Minister means that the costs of court-connected mediation can be controlled, and therefore can be less compared to the costs of litigation through private legal practitioners.[231] The fact that the fees of a mediator may be split between the two opposing parties has the further advantage of lessening legal fees for the parties.

3.146 The Commission further submits that persons who can afford to pay for the services of a mediator should do so.[232] However, poor and vulnerable members of society who cannot afford to pay for private mediation must have public, community-based or NGO mediation services available to them at State expense.[233] It is submitted that:

> *[a] means test should determine whether parties qualify for state-funded mediation in whole or in part, or whether the parties should fund the mediation themselves. The means test, and therefore payment, would be based on a sliding scale according to parties' income, the indigent getting a free pro bono service*.[234]

3.146 Family matters are dealt with differently in the lower courts compared to the 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

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230 SALRC "Project 100D: Alternative Dispute Resolution in Family Matters" (June 2019) 159.

231 *Idem*.

232 *Idem*. The view is that consumers of legal services in the middle-income band who can afford to pay the services of private mediation should have to pay, unless the means test is designed such that it can be able to accommodate those that cannot afford to pay.

233 *Idem*.

234 *Idem*.

mechanism to enhance access to justice for the majority of indigent people and the middle-income category who access these courts on a day-to-day basis.

3.148 Making a presentation at the SALRC workshop,[235] 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.

3.149 Parkinson stressed the need for mediation in family matters.[236] 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 attends 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".[237]

3.150 **NB:** The question of whether it should be mandatory for parties in family law matters to attempt mediation or other ADR mechanisms prior to instituting legal action is accordingly dealt with in Project 100D: Alternative Dispute Resolution Mechanism in Family Matters. A Report in this investigation was published by the Commission in November 2019 for general information and comment.

L. Small claims courts

3.151 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,[238] excluding interest and

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

236 Parkinson, P, "Can there ever be affordable family law?" (2018), 92 464.

237 *Idem*.

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

costs. The increase in monetary jurisdiction follows previous increases of the Small Claims Courts over the years as follows:[239]

20/09/1985	R1 000.00
15/09/1995	R3 000.00
1/04/2004	R7 000.00
1/11/2010	R12 000.00
1/04/2014	R15 000.00
1/04/2019	R20 000.00

3.152 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.[240] Thus a Small Claims Court may adjudicate claims for the delivery or transfer of movable and immovable property; actions for ejectment against the occupier of any premises or land within the area of jurisdiction of the court; actions arising out of a liquid document, mortgage bond, or lease agreement; actions based on or arising out of a credit agreement as defined in section 1 of the National Credit ACT, 2005, and actions for counterclaims in respect of any of the above-mentioned causes of action whose value does not exceed the monetary jurisdiction of the small claims court.[241]

3.153 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.

3.154 A proposal was made at the SALRC conference that the jurisdiction of the Small Claims Court should be increased to encourage self-representation. Among the recommendations made at community workshops that were conducted by the Commission throughout the provinces are that paralegals should be allowed to represent clients in the Small Claims Courts as well as in the Magistrates' Courts in certain matters, and that sheriff's fees be done away with in Small Claims Courts matters as these fees

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239 Guidelines for Commissioners and Clerks of the Small Claims Courts 6 available at www.justice.gov.za/scc/scc.htm (accessed on 19 February 2020).

240 *Ibid*, 14.

241 *Ibid*, 16.

make access to justice more expensive. Responding to the question of whether the jurisdiction of the Small Claims Court should be increased to encourage self-representation, and if so, what should the jurisdiction of the Small Claims Court be, the RAF suggests a monetary jurisdiction of R50 000.00.[242]

3.155 Legal Aid SA advocates for the increase of the jurisdiction of the Small Claims Court to make the adjudication of most disputes less formal.[243] For example, this could include individual cases relating to disputes in terms of the Basic Conditions of Employment Act.[244] The respondent suggests that a total review of the Small Claims Court jurisdiction should be undertaken.[245] The Small Claims Court Act should also be amended to allow for appeals from this court to avoid injustices being committed.[246]

3.156 According to Legal Aid SA, the jurisdiction of the Small Claims Court should be reviewed and increased to R30 000.00.[247] Thereafter, it should be reviewed annually and escalated along with the inflation rate.[248]

3.157 Small Claims Courts can alleviate congestion and provide access to justice, provided that these courts are properly resourced and managed much more professionally.[249] It should further be considered to operate these courts during working hours as well.[250]

3.158 The MPS believes that the current monetary jurisdiction of the Small Claims Court is set at the appropriate level.[251] If it becomes possible to litigate for higher amounts in the Small Claims Court without the benefit of legal representation, then it is probable that manifold more cases lacking merit will be entertained before the Small Claims Court.[252] Alternatively, if it should be considered appropriate to increase the monetary jurisdiction of the Small Claims Courts, then consideration should be given to excluding from its jurisdiction matters of a technical nature, or which would necessitate the leading of expert evidence.[253]

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242 RAF "Comments on the investigation into legal fees" (27 August 2019) para 40.
243 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 10.
244 *Idem*.
245 *Idem*.
246 *Idem*.
247 *Ibid,* 30.
248 *Idem*.
249 *Idem*.
250 *Idem*.
251 Medical Protection Society "Response to the SALRC Issue Paper 36" 55.
252 *Idem*.
253 *Idem*.

3.159 CAOSA submits that the monetary jurisdiction of the Small Claims Court should be reviewed every two years, and voluntary community structures, such as stokvels and burial societies, should be allowed to refer disputes to the small claims court (which they are not presently permitted to do).[254]

3.160 CAOSA also submits that sheriff's fees in small claims matters should be either reduced or be at state expense, as they too present a block to the effectiveness of orders made by the court.[255]

3.161 The LSSA is of the opinion that the jurisdiction of the Small Claims Court should be increased.[256] The LSSA is not in a position to suggest an amount, as it does not have statistics of the percentage of "small" quantum claims which might be clogging up the system in the lower courts (if that is the case).[257] However, the more cases that can be dealt with through Small Claims Courts the better. At the very least, the current jurisdiction limit should be linked to the consumer price index increases.[258]

3.162 In ENSafrica's view, given the informality of the Small Claims Court process, the current jurisdiction is appropriate for its purpose.[259] However, the cost of litigating in the Magistrates' Courts or High Court is so expensive that there is a substantial "gap" for claims that exceed Small Claims Court jurisdiction but are not worth litigating in the Magistrates' Courts, because of their costs.[260] A fast-track process with more checks and balances than the Magistrates' Courts should be considered to address this gap.[261]

3.163 The Rules Board notes that the monetary jurisdiction of the Small Claims Court has recently been increased with effect from 1 April 2019 to R20 000-00.[262]

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254 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Ch 2 para 18.

255 *Idem*.

256 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 54.

257 *Idem*.

258 *Idem*.

259 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 23.

260 *Idem*.

261 *Idem*.

262 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 18.

3.164 BASA states that this question would best be answered by quantitative data from the courts.[263] One may want to consider a monetary jurisdictional limit of between R25 000.00 and R50 000.00.[264]

3.165 **Recommendation 3.8:**[265] It is recommended that the monetary jurisdiction of the Small Claims Courts should be reviewed and increased to R40 000.00. Thereafter, it should be reviewed once every two years to keep up with inflation.

M. Unbundling legal services

3.166 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.[266] No person, other than a practising 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.[267]

3.167 Responding to the question whether legal services should be unbundled in order to enable self-represented litigants (SRLs) to better manage their cases, and if so, how, LSSA expressed the view that unbundling legal services will not necessarily achieve the objective of assisting SRLs to manage their own cases.[268] Instead, it may open the door to unscrupulous and unskilled service providers to render legal services in an unregulated manner. Legal Aid SA responded by stating that whilst the benefits of unbundling seem evident and a positive step towards increasing access to legal services, the question is whether this is a feasible option in South Africa. The reality is that unbundling could possibly be considered for SRLs that have access to certain equipment and information and that are able to help themselves.[269]

3.168 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

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263 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 8.
264 *Idem.*
265 The recommendation is supported by the JSA, *op cit*, par 35.2; LSSA, *op cit*, 48; and Legal Aid SA, *op cit*, 21.
266 Sections 34 and 35(3)(f) respectively of Constitution of the Republic of South Africa, 1996.
267 Sections 33(1)(a) and 33(3)of the Legal Practice Act 28 of 2014.
268 LSSA *op cit*, 71.
269 Legal Aid SA, *op cit*, 55.

courts, are based on the traditional proposition that litigants will conduct litigation, from start to finish, through the medium of a lawyer.[270] 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.[271]

3.169 In Canada, 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 now involving self-representing parties.[272] 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.

3.170 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 halfway 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. [273]

3.171 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.[274] High costs of legal services; lack of legal aid funding; previous poor experience with lawyers and the

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270 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. See also SALRC "Project 100D: Alternative Dispute Resolution Mechanism in Family Matters" 164.

271 *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 unbundled legal services in Australia lags behind other jurisdictions in developing policy and practical guidance.

272 Glenn, HP, "Costs and fees in common law Canada and Quebec". Faculty of Law and Institute of Comparative Law, McGill University 11.

273 Australian Government Productivity Commission "Access to Justice Arrangements Inquiry Report" No. 72 September 2014 20.

274 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.

perception that lawyers will not adequately present their arguments are some of the reasons why litigants choose to represent themselves.[275]

3.172 Research conducted in Australia shows that SRLs are a diverse group of people, a substantial proportion of whom are socially and economically disadvantaged.[276] There tends to be a higher proportion of SRLs in tribunals and lower courts than in superior and appellate courts.[277] Furthermore, SRLs have varying experience of interaction with court and tribunal staff, judges and tribunal members.[278]

3.173 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 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 41.01 of the High Court Rules 2004 (Cth) all contain specific provisions regarding SRLs.

3.174 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.[279] 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.[280]

3.175 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

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275 France E "Litigants in person-no single response" Paper presented at Commonwealth Law Conference held in Zambia on 8-12 April 2019.

276 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.

277 *Idem*.

278 *Idem*.

279 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.

280 *Idem*.

playing ground. They are obliged to explain the proceedings and ensure that an SRL has basic information about the procedure before the court.[281]

3.176 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.[282] The Productivity Commission also recommended that "in addition to out-of-pocket expenses such as disbursements, successful SRLs, including those who have purchased unbundled legal services, should be able to recover legal costs from the opposing party in courts where costs are awarded."[283]

N. Legal expenses insurance

3.177 Legal expenses insurance (LEI) provides funding for legal services for the consumer in exchange for policy payments.[284] The benefits of LEI vary from one policy to another. In Europe, policies cover a limited range of legal matters and are generally sold to individual consumers.[285] In Canada, it has become possible to insure against the costs of litigation, but the practice is not, or at least not yet, widespread.[286] Some unions also offer LEI to their members.[287]

3.178 In South Africa, the LEI industry is a mature industry that has evolved since 1984. It is estimated that the industry has at least 20 companies that offer legal insurance in a wide range of legal matters including civil, criminal, labour and administrative matters for private individuals acting in their own personal capacity.[288] Despite the lack of

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281 *Idem*.

282 Australian Government Productivity Commission "Access to Justice Arrangements Inquiry Report" No. 72 September 2014 56.

283 *Idem*.

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

285 *Ibid,* par 5. 29.

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

287 *Idem*.

288 Scorpion Legal Protection "Comment to the South African Law Reform Commission Investigation into Legal Fees: Project 142/ Issue Paper 36" (29 August 2019) 2. The commonly known LEI providers include LegalWise, Scorpion Legal Protection, Clientele, Legal & Tax, Hollard, Lipco, Lexcorp and FNB Justice 1ST.

accurate data on the precise size of the LEI market in South Africa, it is estimated that there are roughly 1.5 million LEI policyholders. Assuming that half of the policyholders cover at least one additional dependent, there are approximately 3.2 million individuals in South Africa who are covered by LEI.[289]

3.179 Legal advice, assistance and mediation are provided by in-house legally qualified staff through call centres and walk-in servicing centres. Since the market is regulated by the Short-term Insurance Act, 1998 (Act No.53 of 1998) and the Financial Advisory Intermediary Services Act, 2002 (Act 37 of 2002), litigation services have to be outsourced because "legal expenses insurers cannot employ practicing attorneys to conduct litigation in-house as it is in contravention of existing legislation governing the legal profession."[290]

3.180 In 2012, Finmark Trust commissioned a study to look at, among others, the structure of the LEI industry and the impact of existing and proposed insurance legislation on the design and distribution of the product. The Project Team found that the primary reason why policyholders purchased the product was the high cost of legal services and the fear of not being able to access legal assistance should a legal problem arise.[291] However, the review also found that specific features of the product are not well suited under the current legislative framework.[292] It found that the market is characterised by low levels of financial and legal literacy, that clients are seldom aware of exclusions that apply and that there is limited knowledge of rights and avenues for recourse within the financial services realm and within the legal profession.[293] The product is and could be one of the mechanisms that enable access to legal services for those who are not poor enough to qualify for Legal Aid, but not reach enough to be able to afford to hire an attorney at standard market rates.[294]

3.181 The exclusion of the premium products from regulation by the legal profession increases the vulnerability of clients who purchase products whose terms and conditions they do not fully understand. Lack of norms and standards with regard to minimum

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289 Finmark Trust 'Legal Expenses Insurance" (February 2014) 21 available at http://finmark.org.za/legal-expenses-insurance (accessed on 06 November 2019). It is standard for policies to cover the policyholder's spouse and children. Extended family members can be covered at additional cost.

290 *Ibid* 11.

291 *Ibid,* 12.

292 This finding is informed by the fact that legal expenses insurers are not members of the now LPC and the industry operates independently of the legal profession.

293 *Ibid,* 16.

294 *Ibid*,18.

qualifications for legally employed staff, and lack of recourse to the profession by policyholders who receive poor legal services from insurers further exacerbates the situation. In Quebec, LEI is actively promoted by the Quebec Bar.[295]

3.182 **Recommendation 3.9**:[296] It is recommended that the LPC should collaborate with the LEI industry to address the key regulatory weaknesses that impact on the provision of premium products geared towards providing access to justice and legal services for the legal services market as a whole. This is will ensure that the protection provided to consumers of legal services under the LPA is extended to LEI policyholders.

3.183 Legal Aid SA supports the recommendation subject to the proviso that the extent of the cover offered by the LEI industry is reviewed as some cover is very limited, for instance, where only undefended divorces are covered.[297] The LSSA is of the view that the LEI does not fall under the regulatory control of the LPC. As such, "it is imprudent for the LPC to collaborate with organisations that they cannot in any way regulate on the basis recommended by the Commission. Our position is that legal services rendered by the LEI industry should not be in contravention of section 33 of the LPA and that anyone rendering legal services as envisaged should be a legal practitioner, subject to the authority of the LPC." [298]

O. Independent and impartial tribunals

1. Advisory Council to monitor the implementation of PAJA

3.184 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 PAJA.[299] This section provides as follows:

> 10(2) *The Minister may make regulations relating to* –

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295 Glenn, HP, "Costs and fees in common law Canada and Quebec", 9

296 The recommendation is supported by CALS. The Respondent recommends that the LPC should take it upon itself to regulate the LEI industry. The LEI industry must be aligned with the objectives of the LPA which include making access to justice a reality for all people of South Africa" *op cit*, 14.

297 Legal Aid SA, *op cit*, 21.

298 LSSA, *op cit*, 49.

299 Act 3 of 2000.

(a) the establishment, duties and powers of an advisory council to monitor the application of this Act and to advise the Minister on –

(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.

3.185 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 the first instance.[300] A measure of independence and impartiality will hugely increase the effectiveness of these internal appeals.

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300 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.

3.186 Sebei and Tooley confirm that communities are able to take environmental decisions of organs of State to court for judicial review under the PAJA.[301] 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.[302]

3.187 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.

3.188 The RAF supports the idea of mandating independent and impartial tribunals established particularly in respect of social security and social assistance matters for the review and/or appeal against administrative decisions of the State entities concerned like the RAF; Unemployment Insurance Fund (UIF) and the South Africa Social Security Agency (SASSA) among others.[303]

3.189 The draft Public Procurement Bill, 2020 (PPB) proposes to regulate public procurement and to prescribe a single regulatory framework for procurement that will be applicable to national, provincial and local government as well as state-owned entities (SOEs).[304] The PPB proposes the establishment of a Public Procurement Regulator (PPR) to ensure that institutions comply with the Act and engage in prudent spending of funds for procurement.[305] The Bill also proposes the establishment of an independent Public Procurement Tribunal as a dispute resolution mechanism to review administrative decisions taken by provincial treasuries, the PPR and SOEs, and to limit the need to litigate in the civil courts.[306] The PPB proposes to repeal the Preferential Procurement Policy Framework Act, 2000 (Act No.5 of 2000) in its entirety.

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301 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.

302 *Ibid,* 1.

303 RAF "Comments on the investigation into legal fees" (27 August 2019)12.

304 Draft Public Procurement Bill [B-2020], see also https://www.sanews.gov.za/south-africa/public-procurement-bill-open-public-comment

305 Clause 4 of the Draft Public Procurement Bill, 2020.

306 *Ibid*, clause 99.

2. National Credit Regulator and National Consumer Tribunal

3.190 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.[307] 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.[308] The National Credit Act, 2005 was enacted, among other things, to assist over-indebted consumers who are unable to fulfil their monthly repayments on credit agreements to restructure their monthly repayments with credit providers.[309]

3.191 The Act also makes provision for the establishment of a National Credit Regulator (NCR) to regulate the credit market and to ensure compliance with the Act. The NCR is empowered to resolve disputes before they go to court. Section 138(1)(b) of the NCA provides that if the matter has been investigated by the NCR, and the NCR and the respondent agree to the proposed terms of the appropriate order, the Tribunal or a court, without hearing any evidence, may confirm that resolution or agreement as a consent order. The NCR may also refer applications for debt restructuring to a debt counsellor. Section 44 of the NCA makes provision for the registration of debt counsellors. According to Otto,[310] a debt counsellor must consider a consumer's application to be declared over-indebted and to determine whether there have been instances of reckless credit granting in contravention of the NCA.

3.192 In addition, the Act establishes the National Consumer Tribunal (NCT) as an independent tribunal to adjudicate disputes between consumers and credit providers.[311]

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

308 *Idem*.

309 Section 4(1) of the National Credit Act excludes from the scope of operation of the Act, among others:

(a) a credit agreement in terms of which the consumer is-

(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);

(b) a credit agreement in respect of which the credit provider is located outside the Republic, approved by the Minister on application by the consumer in the prescribed manner and form.

310 Otto, JM and Otto R-L, *The National Credit Act Explained* (2016) LexisNexis 44.

311 Section 134 of the National Credit Act creates three more ADR mechanisms for the resolution of complaints in terms of the Act other than by the National Credit Regulator. The first one is the Financial Services Ombud, who may deal with complaints where the credit provider is a financial institution. The second and third, is the consumer court and alternative dispute resolution agent respectively, if the credit provider is not a financial institution. The latter may resolve the dispute through conciliation, mediation or arbitration.

The NCT is empowered to, among others, make an order declaring conduct as prohibited in terms of the NCA, to interdict such conduct, impose administrative fines and suspend or cancel a person's registration in terms of the Act.[312] Its orders may be served or executed as though it is an order of the High Court.[313]

3.193 Consumers are also protected under the Consumer Protection Act, 2008 (Act No. 68 of 2008) (CPA). The CPA 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.

3.194 Recovering legal costs in the debt recovery process depends to a 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.[314] Court rules determine the legal costs recoverable in terms of the specified items and a corresponding fee tariff allowed for each such item.[315]

3.195 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".[316] The commentators point out that "[i]t is the latter type of undertaking that exposes vulnerable consumers to the risk of exploitation.[317] 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".[318]

3.196 Delivering a speech at the Annual General Meeting of the Council for Debt Collectors, the Deputy Minister of Justice and Constitutional Development, the Hon JH Jeffery MP, said that:

> *One of the issues that the Department (DOJ&CD) was requested by the task team to look into was an amendment of the (Debt Collectors) Act to*

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312 Otto, JM and Otto R-L, *The National Credit Act Explained* (2016) LexisNexis 41.
313 *Ibid*, 42.
314 Searle, JG, "Recovering legal costs in debt recovery process". http://www.jgs.co.za/index.php/ (accessed on 6 June 2018).
315 *Ibid*. See Debt Collections Act, 1998; Regulations Relating to Debt Collectors, 2003 Amendment, Notice No. R.623, published in *The Government Gazette* No.35573, dated 10 August 2012.
316 Buchner, G and Hartzenberg, CJ, "Cashing in on collections" (2013) *De Rebus*, 30-33.
317 This point is confirmed by the LSSA, see page 60 of LSSA's Submission to the Commission.
318 *Idem*.

> *require attorneys, who do debt collecting, to register with the Council. Both the National Treasury and the DTI felt strongly that this should happen in the interests of consumers generally and poor debtors more particularly. They were of the view that there are widespread abuses by attorneys in the collection of debts and they were also of the view that the Council seems to be more efficient in addressing abuses and disciplining its errant members than the regulatory bodies in the legal profession. They furthermore alleged that fees prescribed under the Act that debt collectors may recover in their debt collecting duties are less than what attorneys charge*.[319]

3.197 The draft Debt Collectors Amendment Bill, 2016 provides for, among others, the amendment of the Debt Collectors Act, 1998 (Act No.114 of 1998) to make it applicable to attorneys, to require the Rules Board and the Council to make recommendations to the Minister on fees and expenses payable in respect of debt collection; [320] to make it an offence (improper conduct) for an attorney, employee of an attorney or agent of an attorney, to carry on business as a debt collector without registering in terms of the Act, [321] and the appointment of inspectors to investigate complaints against debt collectors.[322]

3.198 In *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services*, [323] the Constitutional Court held that the relevant sections of the Magistrates Court Act 32 of 1944 that authorised the issuing of emoluments attachment orders without any prior intervention of the court (judicial oversight) are constitutionally invalid.

3.199 Furthermore, the Constitutional Court held that:

> *Bearing in mind that the scope of both sections 57 and 58 of the Magistrates' Courts Act is restricted to enforcing payment of debts, it follows that these sections do not apply to debts covered by the National Credit Act in respect of which payment may only be enforced in terms of section 129 and 130 (of the National Credit Act). In light of section 34 of*

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319 Address by the Deputy Minister of Justice and Constitutional Development, the Hon JH Jeffery, MP at the AGM of the Council for Debt Collectors, held at Klooftzicht, Kromdraai Rd, Muldersdrift, 18 November 2019 available at: https://www.justice.gov.za/m_speeches/2019/20191118-DebtCollectors_dm.html (accessed on 05 December 2019).

320 Long title of the Draft Debt Collectors Amendment Bill [2016].

321 *Ibid*, clause 8A.

322 *Ibid*, clause 15B.

323 (CCT127/15) [2016] ZACC 32 paras 203 and 204. These are sections 65J(2)(a) and 65(J)(2)(b)(i) of the Magistrates' Courts Act 32 of 1944.

the Constitution, it is doubtful that sections 57 and 58 are constitutionally compliant.[324]

3.200 Since the judgement in the *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services*, sections 57 and 58 of the Magistrates' Courts Act were amended by the Courts of Law Amendment Act 7 of 2017 to curb the abuse in the issuing of default judgements and emoluments attachment orders by clerks of the court without judicial oversight in the Magistrates' Courts.

3.201 The *University of Stellenbosch Law Clinic and Others v National Credit Regulator and Others* [325]case dealt with the problem of spiralling costs of small and microloans. The third applicant borrowed R5600, paid R13000 and still owed R13300. The fourth respondent borrowed R5600, paid R17500 and still owed R2200. The fifth applicant borrowed R16000, paid R19700 and still owed R3800. The sixth applicant borrowed R6000, paid R14300 and still owed R10000. The seventh applicant borrowed R700, paid R5100 and still owed R600. The eighth applicant borrowed R5000, paid R1300 and still owed R8000.

3.202 Section 1 of the National Credit Act defines collection costs to mean "an amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement, but does not include a default administration charge." Section 101(1) of the Act provides that the cost of credit includes the following costs:

(a) the principal debt;
(b) an initiation fee;
(c) a service fee;
(d) interest;
(e) cost of any credit insurance provided in accordance with section 106;
(f) default administration charges; and
(g) collection costs.

3.203 Section 103(5) of the Act provides as follows:

Despite any provision of the common law or a credit agreement to the contrary, the amounts contemplated in section 101(1)(b) to (g) that accrue during the time a consumer is in default under the credit agreement may

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324 *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services* (CCT127/15) [2016] ZACC 32 paras 31 and 32.
325 (14203/2018) [2019] ZAWCHC 172.

> *not in aggregate exceed the unpaid balance of the principal debt under the credit agreement as at the time that the default occurs*.

3.204 The applicants sought three declaratory orders ordering, first, that the collection costs as defined in the Act must be read to include legal fees incurred to enforce the monetary obligations under the credit agreement; second, that the limitation in terms of section 103(5) that all amounts (bar the capital) cannot exceed the balance of the debt, must apply at all times regardless of whether a judgement has been granted; third, that legal fees may not be claimed until they are agreed upon or taxed.[326]

3.205 The applicants contended that the above interpretation of the National Credit Act "will give true effect to the provisions of the Act whereas at present the exclusion of legal fees is undermining the protection which the Act was intended to afford consumers."[327]

3.206 Opposing the relief sought,[328] the respondents contended, first, that the legislation could not have intended to include legal costs in collection costs. The legislature would have been aware of the issue of legal costs and expressly excluded them. Furthermore, the interpretation sought by the applicants would encroach on the discretion of a court to award costs orders. Second, the respondents contended that the interpretation sought by the applicant would result in consumers stopping making any payments once the cap is reached in fear of triggering further liability. Third, the respondents contended that disallowing a party the opportunity to recover even taxed costs would affect a litigant's constitutional right of access to the court.[329]

3.207 The court granted the applicants the relief sought. In his judgement, Hart AJ ordered that:

> *Collection costs as referred to in Section 101(1)(g), as defined in Section 1, and as contemplated in Section 103(5) of the National Credit Act, Act 34 of 2005 includes all legal fees incurred by the credit provider in order to enforce the monetary obligations of the consumer under a credit agreement charged before, during and after litigation.*
>
> *Legal fees, including fees of attorneys and advocates, in as much as they comprise part of collection costs as contemplated in section 101(1)(g) of the National Credit Act, Act 34 of 2005, may not be claimed from a*

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326 *Ibid*, par 6.
327 *Ibid*, par 7.
328 The National Credit Regulator did not oppose the relief sought.
329 *Ibid*, pars 18; 19; 21 and 22.

consumer or recovered by a credit provider pursuant to a judgement to enforce the consumer's monetary obligations under a credit agreement, unless they are agreed to by the consumer or have been taxed.[330]

3. Companies Tribunal

3.208 The Companies Tribunal is established in terms of section 193 of the Companies Act, 2008 (Act No.71 of 2008). It has jurisdiction throughout the Republic of South Africa. The Companies Tribunal is mandated to adjudicate and resolve any dispute submitted to it by companies through the ADR mechanism[331] and to make any order provided for in the Act.[332] The process is party-driven and voluntary in nature. On 1 August 2019, the Tribunal introduced an online case management system to ensure better management of cases and to allow clients to file their applications online. Services are offered at no cost to the parties.[333]

P. Summary of the recommendations

In this Chapter 3, the following recommendations are made:

1. **Recommendation 3.1**: It is recommended that more resources should be deployed in promoting public awareness of the existence and services provided by institutions such as the Legal Aid SA as this will educate the public and enhance overall access to justice.

2. **Recommendation 3.2:** The SALRC concurs with the respondents' view that:

   (a) the minimum hours of *pro bono* services expected from legal practitioners should be made a compulsory condition for the renewal of a legal practitioner's trading licence.

   (b) the LPC must develop rules of professional conduct regulating how *pro bono* services should be rendered.

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330 *Ibid*, par 42.
331 Companies Tribunal Bulletin Volume 1 (April –June 2019) 2.
332 Section 195(1)(a) of the Companies Act 71 of 2008.
333 Companies Tribunal Bulletin Volume 1 (April –June 2019) 2.

(c) the LPC must establish an enforcement mechanism to deal with unprofessional conduct where pro bono rules are not complied with.

3. **Recommendation: 3.3**: The SALRC recommends that section 29(2) of the LPA be amended by the substitution for subparagraphs (b) and (e) of the following subparagraphs (b) and (e); and the addition of the following subparagraphs:

Community service

(2) Community service for the purposes of this section may include, but is not limited, to the following:

(a) Service in the State, approved by the Minister, in consultation with the Council;

(b) service at **[the South African Human Rights Commission]** <u>any of the institutions supporting constitutional democracy referred to in Chapter 9 of the Constitution</u>;

(c) service, without remuneration, as a judicial officer in the case of legal practitioners, including as a commissioner in the small claims courts;

(cA) <u>service at a community advice office</u>;

(d) the provision of legal education and training on behalf of the Council, or on behalf of an academic institution or non-government organisation; **[or]**

(dA) <u>service on a *pro bono* basis in compliance with the rules made by the Council; or</u>

(e) any other service <u>that broadens access to justice</u> which the candidate legal practitioner or the legal practitioner may want to perform, with the <u>prior</u> approval of the Minister.

It is submitted that the above-mentioned proposed amendment of the LPA will enable the Minister to make regulations, and the LPC to make rules, regulating community service and *pro bono* legal services on the same model as provided for under rule 25 of the attorneys' profession.

4. **Recommendation: 3.4** The Commission recommends that:

(a) when developing law reform proposals regarding paralegals, consideration should be given by the LPC and the DOJ&CD to permitting

trained paralegals to represent clients in limited matters to broaden access to justice by members of the public.

(b) CAOs should be properly resourced and capacitated to ensure that communities who are burdened with shared challenges such as lack of basic municipal services, high rate of gender-based violence, and pollution from mining and similar activities, would benefit from *pro bono* legal information and legal services.

5. **Recommendation 3.5:** It is recommended that the LPC should consider the viability of introducing community service to be rendered by post-study law graduates as a means to broaden access to justice to the majority of the people of South Africa including an appearance in court subject to continuous supervision.[334] Section 29(1) of LPA provides that the "The Minister must, after consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister."

6**.** **Recommendation 3.6**:[335] The Commission concurs with the respondents' view that there is generally a lack of awareness of alternative *fora* for ADR mechanisms such as judicial/quasi-judicial tribunals, administrative appeal tribunals, the various public and private Ombuds, and Chapter Nine institutions such as the Commission for Gender Equality, the South African Human Rights Commission, and the Public Protector, among others, that could be utilised to a greater extent and strengthened to broaden access to justice for the majority of the people of South Africa. More resources should be deployed in promoting public awareness of the existence of institutions such as the Legal Services Ombud, the National Consumer Regulator (NCR) and Chapter Nine institutions as this will educate the public and enhance overall access to justice.

7**.** **Recommendation 3.7:** It is recommended that the use of ADR mechanisms, including the use by organs of state of pre-litigation administrative processes with a view to encouraging early settlement of disputes without the need to go to court be promoted.

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334 Legal Aid SA is not in support of community service that is rendered as part of PVT due to the requirement for continuous supervision which is not possible if such candidate legal practitioner is placed in the service of an institution, *op cit*, 20.

335 The recommendation is supported by Legal Aid SA, *op cit*, 20, and LSSA, *op cit*, 48.

8. **Recommendation 3.8** It is recommended that the monetary jurisdiction of the Small Claims Courts should be reviewed and increased to R40 000.00. Thereafter, it should be reviewed once every two years to keep up with inflation.

9**.** **Recommendation 3.9**: It is recommended that the LPC should collaborate with the LEI industry to address the key regulatory weaknesses that impact on the provision of premium products geared towards providing access to justice and legal services for the legal services market as a whole. This is will ensure that the protection provided to consumers of legal services under the LPA is extended to LEI policyholders.

Chapter 4: Mandatory Fee Arrangements

A. Introduction

4.1 In this Chapter, mandatory fee arrangements are discussed. Under this topic, two principal questions are discussed. The questions 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. Second, the position in other jurisdictions is discussed.

B. Mandatory fee arrangements

4.2 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*.

4.3 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 matters 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?

4.4 In recent years, the government has enacted two pieces of legislation with the purpose of establishing a legal framework for achieving and maintaining a consumer market that is fair, accessible, efficient, sustainable, and responsible for the benefit of

consumers generally.[1] The NCA and the CPA 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,[2] improving consumer awareness and information, and encouraging responsible and informed consumer choice and behaviour.[3]

4.5 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*.[4]

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.

4.6 The compulsory documents to be provided by an attorney or advocate referred to in section 34(2)(b) of the LPA are discussed below:[5]

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1 See section 3(1) of the Consumer Protection Act 68 of 2008 and section 3 of the National Credit Act 34 of 2005.
2 Section 3(d) of the National Credit Act, 2005.
3 Section 3(1)(e) of the Consumer Protection Act, 2008.
4 Hussain, I *et al., Case management in our courts* (2016), 85.
5 *Ibid,* 85.

Written agreement to appoint an attorney and section 34(2)(b) advocate

4.7 The agreement to appoint an attorney or an advocate referred to in section 34(2)(b) of the LPA must be in writing. Section 34(2)(b) advocate is one who renders legal services in expectation of any fee, commission, gains 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.

4.8 Section 50 of the Consumer Protection Act provides that:[6]

> (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 breakdown of the consumer's financial obligations under the agreement.*

4.9 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.*

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6 Act 68 of 2008.

4.10 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 v Road Accident Fund*,[7] 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.

4.11 In the *Dumse v Mpambaniso* matter,[8] 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 him being charged about 84% of the amount that the attorney recovered from the RAF.[9] 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.[10] He stated that the question of fees was not discussed with him. However, when he inquired, he was told that this "would be discussed later".[11]

(b) Written cost estimate notice

4.12 A Written Cost Estimate Notice must comply with the requirements stipulated under section 35(7) of the LPA. The LSSA is of the view that the provisions of subsection 35(7) are unworkable and unfair for the following reasons:[12]

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 overcharges in an unacceptable manner and this should be addressed:

"[O]ur judgement affects only what the winning party may recover, in a party-and-party costs, from the loser. The winner remains liable, as

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7 *Tjatji and others v Road Accident Fund* [2013] (2) SA 632 (GSJ).
8 [2012] SA 974 (ECD).
9 *Ibid,* para 3.
10 *Ibid,* para 6
11 *Ibid,* para 7.
12 LSSA, letter to the Minister of Justice and Correctional Services dated 4 July 2018.

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 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 counsels…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."[13]

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 calling 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.

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[13] Camps Bay Ratepayers and Residents Association v Harrison and Another (CCT 76/12) [2012] ZACC 17 para 10 and 11.

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).
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?"

4.13 Issue Paper 36 posed several questions following the concerns raised by the LSSA on the possible consequences of the implementation of subsection 35(7). The views and comments of the respondents to such questions are discussed below:

(a) Whether the provisions of subsection 35(7) are reasonable and workable in practice?

4.14 Some of the respondents submit that the provisions of subsection 35(7) are reasonable and workable,[14] yet others are of the view that they are not.[15] According to one respondent, the provisions of subsection 35(7) are "overly prescriptive. It also assumes that billing will be based on hourly rates, which as stated elsewhere is becoming less often the case. Subsection 35(7) also assumes that at the commencement of the mandate, the full extent of the legal services required is known or ascertainable. This is unrealistic, especially in litigation matters where the manner in which a dispute will be resolved, and the conduct of other stakeholders in resolving such dispute, is usually not predictable."[16]

4.15 Most of the respondents submit that subsection 35(7) as is currently formulated does not make provision for changes in the mandate between the client and a legal practitioner over time and whether such changes should trigger amendments to the initial written cost estimate notice. It is important to note that subsection 35(10) makes it an offence any non-compliance with the provisions of subsection 35(7) on the part of an

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14 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 44.
15 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 63.
16 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 38.

attorney or an advocate referred to in section 34(2)(b), and that the client is in terms of subsection 35(11) not required to pay any legal costs to that attorney or advocate until the LPC has made a determination regarding amounts to be paid.

(b) Whether 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 whether attorneys, because of their experience, are able to provide such an estimate?

4.16 Some of the respondents are of the view that any attorney or advocate should be able to estimate the likely financial implications including fees, disbursements, charges and other costs of a matter where they have taken proper control of the matter subject to exceptions as the litigation process can take an unexpected course of action.[17] However, other respondents submit that "attorneys should not be charged with the responsibility of predicting advocates fees, nor those of expert witnesses, nor disbursements that may or may not be incurred during a litigation process. Not all attorneys are experienced. Attorneys are entitled to practice immediately after admission; therefore, reliance on experience for effective implementation of the requirements of subsection 35(7) is unrealistic."[18]

(c) 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 and require information that is outside the control or domain of the attorney, or are attorneys and advocates able to ascertain this information relatively easily?

4.17 As stated above, the views of some of the respondents are that attorneys must not be burdened with the responsibility of predicting advocates' fees. There appears to be no obligation on the part of referral advocates to render written costs estimate notices. This appears to be an oversight on the part of the Legislature which, it is submitted, has to be corrected.

(d) Will the enforcement of the written cost estimate notice in respect of all matters be counter-productive or assist in the goal of enhancing access to justice by making legal fees more affordable?

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17 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 44.
18 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 38.

4.18 Some of the respondents submit that the enforcement of an estimate may not be prudent or possible.[19] They submit that "[t]he requirement of a written cost estimate for each matter will be counterproductive and delay the effective rendering of legal services in many cases. Legal services are frequently delivered in circumstances of urgency, with instructions being provided by clients in remote locations or via phone, text message, email or through third parties. To expect a detailed cost estimate in every case is unnecessarily onerous and bureaucratic."[20]

4.19 However, other respondents are of the view that the enforcement of a written cost estimate notice is a positive proposal. "Legal services should not be treated as a private decision of the attorney and to be enforced no matter what, but should be treated as an agreement or arrangement between the attorney-and-client."[21]

4.20 The requirements for subsection 35(7) Written Cost Estimate are discussed below.

(a) It must be provided in litigious and non-litigious matters;

4.21 The requirement that a written cost 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]

4.22 The LSSA submits that "in non-litigious matters, the fee guidelines could be published, which will form a useful basis against which to evaluate the reasonableness or otherwise of a fee charged."[23] This view is in line with the recommendations made by the Commission regarding the mechanism for determining legal fees payable to legal practitioners.

(b) It must be provided at the earliest available opportunity – that is, at the first consultation with the client or as soon as possible immediately thereafter;

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19 Banking Association of SA "Comments on the Investigation into Legal Fees, Project 142, Issue Paper 36" (30 August 2019) 13.

20 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 39.

21 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 44. See also ABSA Bank "ABSA Bank's Commentary" 9.

22 Section 1 of the Consumer Protection Act 68 of 2008.

23 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 62.

4.23 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*.

4.24 The requirement that a written cost estimate notice should be provided at the earliest available opportunity, which is, at the first consultation with the client or as soon as possible immediately thereafter, is recommended and is in line with international best practices.[24]

4.25 In *Masango M Nelson v Road Accident Fund and Others*,[25] the court held that a CFA is an agreement between the attorney-and-client upfront, subject to a two week "cooling off" period, in terms of the Consumer Protection Act.

(c) It must be in writing;

4.26 Toothman and Ross point out that:

> *[t]he 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*.[26]

4.27 The requirement of subsection 35(7) that a cost estimate notice should be "in writing" is consistent with the provisions of section 50(2) of the Consumer Protection Act and is accordingly recommended.

(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.

4.28 Section 68(9) of the Solicitors' (Amendment) Act, 1994 (Ireland) states that, in this section, "charges" includes *fees, outlays, disbursements, and other expenses*. The

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24 See section 68 'Section 68 Letter' of the Solicitors' (Amendment) Act 1994 (Ireland).
25 [2016] (6) SA 508.
26 Toothman, JW and Ross, WG, *Legal fees law and management* (2003), 16.

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;

4.29 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,[27] 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.[28]

4.30 As stated above, there is, however, a view that the provisions of subsection 35(7) burden attorneys and non-referral advocates with the responsibility to predict advocates' fees. It is submitted that advocates should be required to provide their own written cost estimates and that this should not be the obligation of attorneys and non-referral advocates alone to do so. Millard and Joubert have recommended that a distinction should be drawn between two agreements, namely (1) an agreement between attorney-and-client, and (2) an agreement between attorney and counsel.[29]

(iii) an outline of the work to be done in respect of each stage of the litigation process, where applicable;

4.31 Hussain *et al.*[30] 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***

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

28 Australian Law Reform Commission, "Managing justice: A review of the federal civil justice system", Report 89, par 4.28.

29 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 566.

30 Hussain, I *et al.*, *Case management in our courts* (2016), 87-92.

[Drafting of summons, particulars of claim, or declaration; founding papers; counterclaim, 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, counterclaim, the plea to counterclaim, replication, rejoinder, surrejoinder, rebutter, surrebutter; opposing papers in motion proceedings, replying papers in the 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***

(i) ***Stage 9: Recovery of costs and execution; and***

(j) ***Stage 10: Appeals and reviews**.*

4.32 Regarding the requirement that a written cost estimate should provide an outline of the work to be done in respect of each stage of the litigation process, where possible, there is a view that subsection 35(7) as is currently formulated does not make provision for changes in the mandate between the client and a legal practitioner over time, and whether such changes should trigger amendments to the initial written cost estimate

notice and what the relation between the initial cost estimate and the final one should be.

(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;

4.33 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.

4.34 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 proceeded with".[31]

4.35 Section 35(7) is not operational yet. This section is intended to strengthen the control of legal services fee agreements by the LPC and the courts. According to Millard and Joubert,[32] the implications of the new section 35(7) of the LPA are that legal practitioners will, in future, be required to supply cost-estimate notices in addition to written contingency fee agreements and that the fees reflected in both documents must reconcile.

4.36 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*.

4.37 Responding to the question posed in Issue Paper 36 as to whether every legal practitioner who deals directly with a client should be obliged to conclude a fee arrangement with that client prior to the commencement of the provision of legal services,

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31 *Ibid,* 40.

32 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.

the respondents submitted that a written disclosure of fees at the commencement of the litigation process setting out all the fees associated with the intended proceedings and the likely additional fees that may be due should the conduct of the legal proceedings change in due course should be made obligatory to all legal practitioners.[33]

4.38 The respondents point out that a written fee agreement in the form provided for under section 35(7) of the LPA will be most desirable. The mandatory fee arrangement should set out the nature of the work to be done by an attorney or non-referral advocate and the possible timeframes for completion of the work at hand. It should list all the possible stages of the litigation process. It will enable the client to know in advance the legal fees that she or he will be liable to pay to her/his attorney at a particular stage of the litigation process. The mandatory fee agreement should include a cooling-off period that will allow the client to change her/his mind prior to a certain task being undertaken by the attorney. The mandatory fee agreement should also state the fees that are unavoidable to pay on the part of the client, should the client wish to exercise her/his right to withdraw from the litigation process and the recovery costs regime.

4.39 **Recommendation 4.1**: The Commission recommends that it should be obligatory for all legal practitioners to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services.

4.40 The recommendation is supported by CALS and Legal Aid SA. CALS submits that "while it is accepted that the attorney or advocate drawing up the fee agreement would not necessarily know the entire process which the matter (especially litigious matters) may go through, an estimate containing the most likely avenues and/or processes that may follow can be foreseen and included in the fee estimate."[34]

4.41 Werkmans Attorneys is of the view that a written cost estimate must be a non-binding estimate.[35] The LSSA submits that much as it "supports in principle entering into mandatory fee arrangements when the client secures the legal practitioner's services, such agreement should only entail the basis upon which the fees are charged, e.g., itemised rates and other aspects of the fees to be charged. It should not entail an estimate of the envisaged total costs."[36]

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33 See comment from the Banking Association of South Africa at 12; and Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019)43.

34 CALS, *op cit*, 14.

35 Werkmans Attorneys "Second Submission to the SALRC on Legal Fees" 3.

36 LSSA, *op cit*, 50.

2. What should the consequences be in the absence of a mandatory fee arrangement?

4.42 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 an 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.*

4.43 Responding to the question posed in Issue Paper 36 as to what should the consequences be if there is no mandatory fee arrangement, the respondents submit that in the absence of a mandatory fee agreement, the attorney or non-referral advocate would have failed to comply with the statutory requirements stipulated under subsections 35(7)-(11) of the LPA and that this should constitute misconduct to be adjudicated by the LPC and appropriate sanction determined.[37]

4.44 Some of the respondents submit that "it will not be appropriate to deprive a legal practitioner of the right to charge for work done"[38] Subsection 35(11) of the LPA correctly stipulates that in the event of non-compliance with the provisions of subsection 35(7), "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."

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37 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 43. Section 36(1) of the LPA provides that "The Council must develop a code of conduct that applies to all legal practitioners and all candidate attorneys and may review and amend such code of conduct. A Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities was published by the LPC in Notice 198 of 2019 published in *The Government Gazette* No 42364 dated 29 March 2019.

38 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 63

4.45 Sibanda argues that:

> *[i]ndications are that the legal profession has lost some parts of its ethical and moral compass. The thinking is now prominently about financial gain and wealth. Law and justice are no longer a key consideration for some legal practitioners. Put simply, the articulation by legal practitioners of law, justice, due process, social justice, ethics, accountability and integrity of the legal practice is steadily diminishing*.[39]

4.46 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*.[40]

4.47 It is submitted that the requirement of a mandatory fee agreement will assist in improving the assessment process of contingency fees, and help address the abuse of contingency fees agreements. The LPA mechanisms will require legal practitioners to furnish particulars of the risk and costs 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 upfront what their legal costs/fees are, and such an agreement would set the parameters. Lawyers and clients would be bound by this agreement, and safeguards would need to be in this agreement to protect clients from abuse and exploitation by their legal practitioners.

4.48 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.

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39 Daily Maverick dated 8 January 2019 available at https://www.dailymaverick.co.za/opinionista/2020-01-08-corruption-could-undermine-the-integrity-of-sas-legal-profession/ (accessed on 9 January 2019).

40 Haran, P, "Report of the Legal Costs Working Group" (November 2005), 41.

4.47 **Recommendation 4.2**:[41] The Commission recommends that should parties fail to conclude a mandatory fee arrangement, the attorney or an advocate referred to in section 34(2)(b) of the LPA would have failed to comply with the statutory requirements stipulated under subsections 35(7)-(11) of the LPA and that this should constitute misconduct to be adjudicated by the LPC and appropriate sanction determined.

C. Position in other jurisdictions

1. Australia

4.49 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 bringing about a simpler, cheaper, and more accessible legal system. In its report, which was completed in 2000,[42] 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.*[43]
>
> *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 practise rules and legislation.*[44]
>
> *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.*[45]
>
> *In Victoria, a practitioner must give the client details of the method of costing, billing intervals and arrangements, the clients right to negotiate a*

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41 The recommendation is supported by Legal Aid SA, *op cit*, 22.

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

43 *Ibid,* par 4.24.

44 *Ibid,* par 4.25.

45 *Ibid,* par 4.27.

costs agreement, an estimate of total costs or a range of estimates, and the client's avenues of complaint.[46]

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.[47]

2. Ireland

4.50 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.[48]

4.51 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 the costs recovered in the contentious business from any other party or parties (or any insurer of such party or parties).*

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46 *Ibid,* par 4.28.
47 *Ibid,* par 4.29.
48 Haran, P, "Report of the Legal Costs Working Group" (November 2005), 7.

4.52 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 a material increase in expenditure is incurred.[49]

D. Summary of the recommendations

In this Chapter 4, the following recommendations are made:

1**. Recommendation 4.1**: The Commission recommends that it should be obligatory for all legal practitioners to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services.

2**. Recommendation 4.2**: The Commission recommends that should parties fail to conclude a mandatory fee arrangement, the attorney or an advocate referred to in section 34(2)(a)(ii) of the LPA would have failed to comply with the statutory requirements stipulated under subsections 35(7)-(11) of the LPA and that this should constitute misconduct to be adjudicated by the LPC and appropriate sanction determined.

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49 *Ibid,* 40.

Chapter 5: Contingency Fee Agreements

A. Introduction

5.1 In this Chapter, contingency fee arrangements are discussed. A distinction is drawn between contingency fee agreements (CFAs) and the conditional fee agreement. CFAs are discussed under the following rubrics:

(a) Review of case law;
(b) Scope of the problem;
(c) Use of contingency fee agreements in personal injury matters;
(d) Impact of class action claims on contingency fees; and
(e) Position in other jurisdictions.

5.2 Recommendations for legislative and non-legislative interventions are also made. The recovery of costs by legal practitioners rendering free legal services is also discussed in this Chapter.

B. Background

5.3 Following an indication by the former Chief Justice of the Republic of South Africa, Ismail Mahomed, that a system of speculative fees approved by the Association of Law Societies is not acceptable in terms of common law, the Commission was mandated to investigate the desirability of introducing a system of CFAs. In its report approved in November 1996,[1] the Commission recommended, among others, that CFAs should be legalised in the Republic and that common law prohibitions on such fees be removed.[2]

5.4 The position in common law was that legal practitioners could not enter into 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 Fees Act in 1997 introduced legal fee structuring that was dependent on successful litigation as an exception to the common-law prohibition of the CFA.

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1 SALRC "Project 93: Speculative and Contingency Fees" November 1996.
2 SALRC "Annual Report" 1996 29.

5.5 CFAs fees are prohibited in criminal and family matters[3] but are commonly used in civil cases such as personal injury cases, medical negligence matters, and non-litigious matters. The risk is that, without proper monitoring of the cap on these CFAs, overreaching may occur.[4] 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 upfront. 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 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.

5.6 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".[5]

5.7 Although the Contingency Fees 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 arranging for the payment of fees and disbursements.

5.8 CFAs 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

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3 The prohibition is contained in the Schedule to the Regulations (that is, prescribed form of Contingency Fee Agreement) made by the Minister of Justice.

4 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.

5 Law Council of Australia, "Percentage based contingency fee agreements – Final report" (May 2014), 5.

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. Most of the respondents are of the view that CFA requires more stringent regulation.[6]

5.9 It is submitted that there are strict requirements in the Contingency Fees Act, 1997 (Act No.66 of 1997) (Contingency Fees Act) for a valid agreement. In terms of the Act, there must be an explicit agreement between attorney-and-client, which must be in writing and be signed by both parties.[7] 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 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.

5.10 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.[8] The client who feels aggrieved by the agreement may refer it to the LPC for redress.[9] The Act offers two forms of CFA:[10]

(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)).

5.11 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 Fees Act requires such

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6 Louw A SC "GCB Comments on investigation into Legal Fees" (30 August 2019) 4.
7 See section 3 of the Contingency Fees Act 66 of 1997.
8 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.
9 Right of review in terms of section 5 of the Contingency Fees Act. However, it is rarely used in practice.
10 A contingency fee agreement must not be confused with a conditional fee agreement.

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.

C. Conditional fee agreements

5.12 CFAs are not be confused with conditional fee agreements.

5.13 Issue Paper 36 asked whether conditional fee agreements operate effectively in practice and, if so, to what extent?

5.14 According to Legal Aid SA, a conditional fee agreement refers to an agreement between a legal practitioner and client, whereby a fee is payable only in the event of a successful claim.[11] A conditional fee agreement refers to a success fee that is not calculated as a percentage of the amount awarded by the court, [12] whereas a CFA is calculated as a percentage of an awarded amount. "No win, no fee" agreements are the most common type of conditional fee agreement.[13] These fee arrangements are not particularly prevalent, because the practitioner would carry a substantial risk with limited expectation beyond the fees that he/she would, anyhow, have been entitled to in the ordinary course of litigation.[14]

5.15 The negative consequences of conditional fee agreements include litigants showing a lack of interest in controlling the costs incurred by their legal representatives, thus putting the opposing party at risk for being liable for increased costs.[15] Conversely, such a practitioner would avoid unnecessarily prolonging litigation, because he/she may eventually not receive compensation for redundant work.[16]

5.16 In some instances clients negotiate a lower fee, with a conditional increased fee in the event of successful litigation.[17] This may serve to balance the interests of the practitioner and the client and serve as an incentive to come to the aid of an impecunious

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11 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 14.
12 Jackson, R, "Review of civil litigation costs: Final report" (December 2009), viii.
13 *Ibid,* xvi.
14 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 14.
15 *Idem*.
16 *Idem*.
17 *Idem*.

client and provide some measure of compensation for the legal representative to ameliorate the risk.[18]

5.17 In the matter of *Masango v RAF*, the court specifically pointed out that a legal practitioner may not charge a percentage of the capital.[19] In the debt collectors' industry, the above-mentioned approach poses a problem where commercial entities insist on instructing attorneys by offering a percentage of the capital recovered in debt collections.[20] This should be looked at by the SALRC, as it enhances costs certainty and justifies an exception.[21] Such a percentage should, however, not be recoverable from the debtor. The maximum that the debtor would ever have to pay should be in line with party-and-party recovery tariffs, which should be determined.[22] The Contingency Fees Agreement Act should be amended to allow for a percentage in the case of debt collections.[23]

5.18 According to ENSafrica, a negative consequence of conditional fee agreements is that the legal practitioner who acts on a contingency fee basis, when presented with a settlement offer that his/her client would otherwise have accepted, may be inclined to unduly influence the client to refuse the offer.[24] In this way, the legal practitioner, by gaining a personal interest in the outcome, may unduly influence the client's assessment of risk in the hope that a larger pay-out will result.[25] The greater the risk appetite of the legal practitioner, the greater the risk to the client, who might lose a matter in which settlement was on the table.[26] Conversely, a legal practitioner with an especially low-risk appetite might influence a client to accept an offer that is too low, simply because it is on the table.[27]

5.19 Whilst BASA cannot comment on whether these agreements operate effectively, it notes that they may increase access to justice, as parties do not have to pay legal fees

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18 *Idem*.
19 LSSA “Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees” (30 September 2019) 36 Regarding the Investigation into Legal Fees” (30 September 2019) 40.
20 *Idem*.
21 *Idem*.
22 *Idem*.
23 *Idem*.
24 ENSafrica “Comments and input: SALRC Issue Paper 36” (30 August 2019) 12.
25 *Idem*.
26 *Idem*.
27 *Idem*.

upfront.[28]

5.20 Legal Aid SA contends that the LPC has a duty to take a much stricter view of these abusive practices, and should insist in all matters in which CFAs were signed and registered with the Council, that accounts must be taxed and payments vetted by the Council.[29]

D. Review of the case law

5.21 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*, [30] the court examined the origins of contingency fees. 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 CFA 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,*[31] the attorneys charged clients a 30% fee instead of the prescribed 25%. The court confirmed that a CFA 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.

5.22 In *Masango and Another v Road Accident Fund and Others*,[32] Mojapelo DPJ noted that the Contingency Fees Act does not define the meaning of "fees", "normal fees" and "success fees" and went on to assign them their ordinary meaning as follows:

> *A fee may be defined as payment due to a professional person or body for services rendered, or advice given*.[33]
>
> *"Normal fees of an attorney for litigious work are fees or charges that would ordinarily be allowed on taxation. In a sense normal fees that an attorney charges his client are the fees which are included in what is referred to as attorney-and-client costs. Normal fees exclude any fees that*

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28 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 2.
29 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 11.
30 [2004] (9) BCLR 930 (SCA).
31 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.
32 [2016] (6) SA 508 par 13.
33 *Ibid*, par 15.

> *an attorney may be entitled to recover from his client by virtue of any special arrangements made with the client or in terms of some specific statutory provision applicable to a particular case*. [34]
>
> *Success fee are increased fees which a legal practitioner will be entitled to recover in the event of the client being successful in litigation to the extent set out in the agreement concluded in terms of the CFA. A success fee is a normal fee which has been increased by a pre-agreed percentage*.[35]

5.23 Furthermore, the court held that a CFA is an agreement between the attorney-and-client upfront, subject to a two week "cooling off" period, in terms of the Consumer Protection Act.[36] Vat is levied on the legal practitioner and not on the client.[37] 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*,[38] the court looked at the impact of section 2 of the Contingency Fee Act. In *Glodo,*[39] the CFA was scrutinised when the applicant requested that the CFA that he had signed be declared unlawful.

5.24 In *Graham and Others v Law Society of the Northern Provinces,*[40] the applicants were awarded approximately R2 million by the Road Accident Fund. However, the

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34 *Ibid*, pars 16; 17.

35 *Ibid*, par 18.

36 *Masango and Another v Road Accident Fund and Others* [2016] (6) SA 508 par 4. The two weeks "cooling off" period is also provided in section 3(3)(h) of the Contingency Fees Act, 1997.

37 Id, par 52. The court held that "VAT is therefore not recoverable above the 25% cap imposed by section 2(2) of the CFA. As the contingency fees agreement in *casu* seeks to authorise the plaintiff's attorney to recover VAT above the 25% cap imposed by section 2(2) of the CFA, it is for that reason invalid."

38 [2017] (5) SA 445 (ECG). The attorneys' profession was criticised for widespread abuse of CFAs.

39 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.

40 [2014] ZAGPPHC 496.

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 'common-law contingency fee agreements' to reverse illegal splits of Road Accident Fund payments.[41] 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.[42] 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*,[43] 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.[44] In this matter, the court clarified the law on CFAs as follows:

> *(a) Absent compliance with the Act, a Contingency Agreement is void;*
> *(b) The legal practitioner may not charge the maximum permissible under the Act plus taxed cost to be paid by the other side;*
> *(c) A maximum of the legal practitioner's fees is what the Act says, it is a maximum above which no fees may lawfully be recovered; the party-and-party costs recovered by the successful party from the unsuccessful party are what the client recovers and are due to the client;*
> *(d) The 25% limit is calculated on the capital amount only and not on the capital plus costs; 25% of the amount awarded is section 2(2) is a globular sum applicable to all those on contingency involved in the case taken together*.[45]

5.25 The case of *Van der Merwe & Another v The Law Society of the Northern Provinces and Others* [46] 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

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41 *Idem*.
42 *Idem*.
43 [2018] (85) SA (ECGHC).
44 Also see "Court slashes large contingency fees in EC Health and RAF lawsuit", available at https://www.medicalbrief.co.za/archives/ (accessed on 27 November 2018).
45 [2018] (85) SA (ECGHC) par 118.
46 (32616/06) [2008] ZAGPPHC 4 (20 June 2008).

should be regarded as "overreaching", which is always subject to the scrutiny of either the professional controlling body or the courts.[47]

5.26 The *Pretoria Society of Advocates v Geach and Others*[48] 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 mounts the steed of greed and attempts 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 novices. They are experts in their particular field of litigation, which is claims against the Road Accident Fund (RAF).*[49]

5.27 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.[50]

5.28 In the *SAPPIL* case,[51] 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 CFA 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 appears to be problems of CFAs that are concluded contrary to the provisions of the Contingency Fees Act.

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47 Nel, G, "Decoding s 2(1)(a) and (b) of the Contingency Fee Act", *De Rebus* (June 2018), 14-18.

48 [2011] (6) SA 441.

49 *Idem*.

50 [2011] (6) SA 441. Also see sections 1 and 2 of the Prevention of Organised Crime Act 121 of 1998, which deal with racketeering.

51 [2013] (2) SA 583 (GNP).

5.29 The *Dumse v Mpambaniso*[52] 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 were 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.

5.30 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*,[53] 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.

5.31 According to Justice Mlambo, "[v]ery few agreements in terms of the Contingency Fees Act have been registered with the provincial law societies".[54] There are various reasons why some of the agreements are not registered with the LPC. 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.[55]

5.32 The above discussion demonstrates that courts are intervening in cases of abuse of the CFAs by members of the legal profession.

E. Scope of the problem

5.33 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.

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52 [2012] SA 974 (ECD).
53 [2013] (2) SA 632 (GCJ).
54 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.
55 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.

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, excluding costs.[56]

5.34 The basic problems are 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. In *Masango and Another v Road Accident Fund and Others*,[57] Mojapelo DJP held that "[t]here is reason to believe that the practice of attorneys simply charging 25% of their client's capital award is widespread, especially in personal injury claims. This court has seen many such agreements that were handed to it by counsel when seeking to obtain court orders to sanction settlements in such claims. The practice is not legal and needs to be weeded out." The court went on to state that:

> "It would be unconscionable and totally illegal in such a case for the attorney to charge R250 000 (25% of the R1 million) or R25 million (R25% of R100 million) for services worth only R10 000. An agreement which stipulates 25% as the attorney's fee would in such a case lead to a situation where the attorney, for very little professional services actually rendered (without even issuing a summons) charges fees of R250 000 (on a claim of R1 million) or R25 million (on a claim of R100 million). This is totally unreasonable and unlawful. It is an illegal practice which should not be allowed to survive."[58]

5.35 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.[59] 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 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,

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56 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.

57 [2016] (6) SA 508 par 20.

58 *Ibid*, par 23.

59 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.

if I am correct, a manifestation of endemic corruption embedded in the attorney's profession".[60]

5.36 Despite the clarity provided by the court in *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development*[61] (*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 to adequately monitor compliance with the requirements of the Contingency Fees Act. Although CFAs are generally prohibited in criminal and family law matters, 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 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*.[62]

5.37 Section 3(1) of the Contingency Fees Act provides that a CFA must be in writing and sets out the form and content with which the agreement must comply. This section provides for several process issues. These are, among others, that before the agreement is entered into, the client:

(a) is advised of any other ways of financing litigation, and of their respective implications;

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60 *Mfengwana v Road Accident Fund,* para 28-29.
61 [2013] (2) SA 583 (GNP).
62 *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development and Another* [2013] (2) (SA) 583 (GNP).

(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.

5.38 Millard and Joubert point out that there is an overlap between the LPA and the Contingency Fees Act,[63] and contend that the format of the CFA 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.[64] The authors propose that the template of the agreement must be reviewed. Section 35(12) of the LPA 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)". This is confirmed by the LPC's draft Rules which provide that "an attorney who is a party to contingency fee agreement shall annex to that agreement a copy of the cost estimate notice furnished in terms of Section 35(7) as read with Section 35(12) of the Legal Practice Act 28 of 2014."[65]

5.39 Legal practitioners have been calling for a substantial review of the Contingency Fees Agreement Act and Regulations to address many uncertainties and challenges that exist.[66] A total review of the contingency fees system would probably be in the interest of the public as well.[67]

F. Use of contingency fees agreements in personal injury matters

5.40 Contingency fees 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

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63 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 577.

64 *Ibid,* 566.

65 *The Government Gazette* No.42739 dated 4 October 2019 at 81.

66 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 40.

67 *Idem*.

loss of support, and linked medical expenses for emergency treatment to the Health Professions Council of South Africa tariff.[68] Since the coming into operation of the Road Accident Fund Amendment Act 19 of 2005 in August 2008, the use of CFAs in claims against the Department of Health and the Ministry of Police have increased exponentially each year.[69]

5.41 In a memorandum to the DOJ&CD, the State Attorney (Johannesburg) raised concern about the astronomical size of awards for future medical expenses which, in their view, are going to destroy the Republic's health system and eat up whatever has been voted as the various provincial departments of health's budget.

5.42 Nel says that, as in England, the Contingency Fees Act has been designed to encourage legal practitioners to undertake speculative actions on behalf of their clients.[70] According to the South African Medical Malpractice Lawyers' Association (SAMMLA), the legal practitioner accepts the risk on a "no win-no pay" basis and finances all expenditure in relation to obtaining treatment and other records; briefing and obtaining medico-legal opinions from experts and securing their attendance at court to give evidence; briefing an advocate on advice, pre-trial preparation and trial; obtaining radiological and/ or pathological studies and travelling and accommodation expenses.[71]

5.43 The risk taken by the legal practitioner is substantial because of the following reasons:

(a) *The client's version may be found to be implausible after a thorough investigation, resulting in a substantial loss to the attorney in respect of disbursements disbursed and for time spent;*
(b) *The client might die before litis contestasio is reached, resulting in all costs incurred having to be written off;*
(c) *No major financial institutions are prepared to provide credit for the financing of disbursements in personal injury cases;*

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68 Road Accident Fund website https://www.raf.co.za/Documents/ (accessed on 01 December 2018).
69 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.
70 Nel G "Decoding s2(1)(a) and (b) of the Contingency Fees Act" available at https://www.derebus.org.za/?s=decoding+s+2%281%29%28a%29 (accessed on 15 January 2020).
71 South African Medical Malpractice Lawyers' Association "Submission by the South African Medical Malpractice Lawyers' Association to the South African Law Reform Commission" 11.

(d) Obtaining payment from parastatals and the State is notoriously slow; and

(e) *High levels of skill and judgement are required on the part of the attorney in a complex, multifactorial field where any decision may adversely affect the most vulnerable of the vulnerable*.[72]

5.44 A question is asked whether it is justifiable that the Contingency Fees Act be retained as is, or whether the monetary limits of 25% are set too high and therefore the courts should play an interventionist role in setting caps for CFAs. Put differently, the question is whether CFAs advance the course of access to justice and whether they are being used in matters where if the Act was not in place, litigation could still have taken place.

5.45 The RAF is of the view that the majority of the RAF matters do not involve any speculation or risk on the part of the legal practitioner since success is all but guaranteed, particularly in respect of the following claims where a very low threshold is required:

(a) Claims by the deceased breadwinner's dependents for loss of support;

(b) Claims for funeral expenses;

(c) Instances where the claimant was a minor below the age of 7 at the time of the accident; and

(d) *Instances where the claimant was a passenger in, or on, any of the motor vehicles involved in the accident*.[73]

5.46 This is confirmed by Slabbert who states that from the facts of the *Motswai v Road Accident Fund*,[74] it is clear that there was no need to institute an action, yet the lawyers proceeded and experts even wrote lengthy opinions on a bruised ankle.[75] The facts of this case are that litigation was instituted on behalf of a "so-called" victim of a road accident who sustained no more than a swollen right ankle. The plaintiff is a packer who only works three days a week. Summons were issued in the High Court against the RAF claiming R390 000 plus costs. The particulars of claim averred that the plaintiff suffered severe bodily injuries; had undergone past medical treatment; would incur future medical and related expenses, and his future earning capacity will be compromised. The claim for past loss of income was baffling as the plaintiff deposed to an affidavit stating that he

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72 *Ibid*, 12.
73 RAF "Comments on the Investigation into Legal Fees" (27 August 2019) 8.
74 [2012] SA (GSJ) No.2010/17220.
75 Slabbert M "Superfluous litigation, in a wrong forum about nothing: When lawyers and experts collude" (2013) *Obiter* Vol 34, Issue 1 Nelson Mandela University P166-173

was unemployed except for being a packer for three days a week.[76] The matter did not proceed to trial in court as a settlement was reached on the day of the trial and a draft order presented to the judge in chambers. According to Slabbert, the only inference the judge drew from this was that the lawyers were only concerned about being paid even if it meant being paid from the funds intended to compensate road accident victims.[77] The judge concluded by saying that neither the plaintiff's nor defendant's attorney should receive any fees and ordered that the cost of experts be met by the legal representatives *de bonis propriis*.

5.47 In its report on speculative and contingency fees, the Commission noted that to curb the abuse of contingency fees agreements, a substantial number of safeguards have either been introduced or are being considered by other jurisdictions.[78] These include placing a cap on the increased fees and review of contingency fee agreements by the controlling bodies and the court. Section 2(1) of the Contingency Fees Act provides that a CFA may be entered into if a legal practitioner "in his or he opinion there are reasonable prospects that his or her client may be successful in any proceedings". It is not a requirement that there be a "foreseeable risk" of success involved and a need to enhance access to justice. As is evident from *the Masango and Another v Road Accident Fund and Others* matter, there is strong evidence from case law that points to widespread abuse of contingency fees agreement contrary to the objective that the legislature had in mind.[79] To curb the conflict of interest that actually arises between a legal practitioner's own interest and those of his or her client, it is recommended that it be made a peremptory requirement that CFAs be entered into in circumstances whereby a legal practitioner if in his or he opinion, there is some foreseeable risk involved and that there are reasonable prospects that his or client may be successful in any proceedings. Legal practitioners bear the liability for costs and disbursements whilst the matter is pending resolution. Therefore, there is some risk transferred to legal firms pending the outcome or finalization of the matter.

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76 *Ibid*, 169.
77 *Ibid*, 166.
78 SALRC "Report on speculative and contingency fees" 21.
79 In *Mofokeng v Road Accident Fund*, *Makhubele v Road Accident Fund*, *Mokatse v Road Accident Fund*, *Komme v Road Accident Fund* (2009/22649, 2011/19509, 2010/24932, 2011/20268) [2012] ZAGPJHC 150, Mojapelo DPJ held that "the clear intention of the legislature is that contingency fees be carefully controlled" par 41.

5.48. **Recommendation 5.1:** The Commission recommends that section 2(1) of the Contingency Fees Act be amended by the substitution for subsection 2(1) of the following subsection 2(1):

> "2(1) *Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there is some foreseeable risk in the matter and there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed-*
>
> *(c) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;*
> *(d) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement."*

5.49 The RAF submits that the use of contingency fees agreements in RAF matters, particularly the success fee, should be reviewed because the speculative aspect that gives rise to a risk that justifies the uplift fee is absent.[80] In the alternative, RAF proposes that in exceptional RAF cases, prior approval of agreements contemplated in subsection 2(1)(b) of the CFA be obtained from the court or legislated regulator, based on a thorough motivation by the attorney of the exceptional circumstances that inform the speculative nature of the claim and the consequential risk to the attorney.[81]

5.50 The LSSA is opposed to this recommendation on the following grounds, among others:

> "(i) The inclusion of the phrase adds an unnecessary complexity which will impose a superfluous burden upon the legal practitioner, whilst not adding any meaningful control mechanism.
>
> (ii) There are various risks at the time of concluding the agreement. Risk not only pertains to liability, but also to the credibility of the client; the nature and extent of the injuries; whether the injuries translate into a financial loss and to what extent if any; rehabilitation at work; and the nature and extent of the quantum. The test is a subjective one that needs to be made at the time of taking instructions, rather than looking back once a matter has been finalised.

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80 RAF "Comments on the investigation into legal fees" (27 August 2019) 9.
81 *Idem*.

> The costs incurred in investigating personal injury claims are dependent on medical and other experts, which are necessary to prove a case in court. Failing to investigate the full extent of the injuries (medically) opens the legal practitioner up for a case of negligence. The clients benefit from a full array of experts to define the nature and extent of such injuries and by implication to rule out injuries and sequelae. In this context, it is impossible for a legal practitioner to assess the risk unless medical and other expert evaluations are conducted.
>
> (iii) The introduction of this additional test will discourage practitioners from taking on cases with less risk involved, thus denying those claimants access to justice.
>
> (iv) Accordingly, we believe that the implementation of this recommendation will be counterproductive and have an adverse effect on access to justice."[82]

5.51 It is stated above that one of the essential safeguards that have been introduced by other jurisdictions in an effort to curb the widespread abuse of CFAs is the review and control of CFAs by the courts. In *Masango and Another v Road Accident Fund and Other,*[83] Mojapelo DPJ held that:

> "*These questions arise in the context of the supervisory power and duty that rest on the court to ensure that contingency fees agreements comply with the provisions of the CFA. Contingency fees agreements were at common law and in terms of English law unlawful and unenforceable. In terms of both our law and the English law, which the development of our law on the subject mirrored, contingency fees agreements are allowed and recognised as 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*."

5.52 Responding to the question of whether courts should 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, MPS submits that:

> *Courts should be granted the discretion to determine the reasonableness of contingency fees payable in terms of the agreement. Courts, other than the Constitutional Court, follow the customary rule that "the costs follow the result." Only in exceptional grounds or in exceptional circumstances do the courts deviate from this general rule and award costs on a higher scale or disallow costs. Courts should be granted wider powers to make*

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82 LSSA, *op cit*, 52-53.
83 [2016] (6) SA 508 par 3.

> *orders for costs on appropriate scales as in keeping with the interests of justice and which approximate the actual legal costs incurred by parties. The requirement that justice should be done as between litigants will be far more likely to promote the awarding of cost orders which fairly and justly compensate litigants for their role in litigation, particularly where such role has been a negative one with respect to the administration of justice*.[84]

5.53 **Recommendation 5.2:** It is recommended that courts should be encouraged to impose appropriate monetary limits and set a lower amount on contingency fees agreements, and differ from the agreement reached by the parties in the exercise of their discretion and in the interest of justice, regard being had to what may be a reasonable fee taking into account the risk factor.

5.54 The LSSA is opposed to this recommendation on the following grounds, among others:

> "(i) It is submitted that the Contingency Fees Act sufficiently provides for the protection of the client, as well as remedies that a client may consider. In addition, the case law that developed clearly shows that contingency fees agreements are in any event closely scrutinised by the courts.
>
> (ii) The courts have no knowledge, at the time that a settlement agreement is made an order of court, of how much work went into the matter, the time spent and what fees should be charged. As such, they cannot make a value judgement."[85]

5.55 In Chapter 6 of this Report **(Recommendation 6.2),** it is stated that in the RSA, the award of costs, unless expressly stated otherwise, is in the discretion of the presiding judicial officer and that costs generally follow the event. It is recommended that courts should consider applying the proportionality test in addition to that of reasonableness when awarding costs on a party-and-party scale and attorney-and-client scale. The aim of the proportionality test is to maintain a sensible correlation between costs, on the one hand, and the value of the case, its complexity and significance on the other hand.

5.56 The following table provides a breakdown of claims paid by the RAF in respect of legal fees and other costs:[86]

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84 Medical Protection Society "Response to the SALRC Issue Paper 36" 5.

85 LSSA, *op cit*, 54.

86 Road Accident Fund "Comments on the Investigation into Legal Fees Project 142 Issue Paper 36" (27 August 2019) 4.

Financial Year Ended: 31 March	**2019 R'b**	**2018 R'b**	**2017 R'b**	**2016 R'b**	**2015 R'b**
A. Claimant Compensation	26 473	23 258	22 287	21 644	15 525
B. Claimant Medical Costs	3 521	2 498	2 120	1 510	1 306
C. Claimant, RAF, Legal & Other Costs	9 799	8 293	7 547	5 473	4 635
	39 793	34 049	31 954	28 627	21 466

5.57 The table above shows that the amount of legal fees and disbursements has been escalating from R4.6 billion in 2015 to R9.7 billion in 2019. The Fund is the biggest litigant in the Republic.[87] Legalbriefs reports that in the 2018/19 financial year, the Fund paid R40 billion in claims, R6 billion more than in the previous year.[88] Although claims to the tune of R11.2 billion had been finalised, however, these claims could not be paid due to cash constraints.[89] National Treasury has warned that the "state's contingent liabilities due to the RAF will dwarf that of Eskom's R450 billion by 2022/23.[90]

5.58 The SALRC takes note of the apparent withdrawal by the Portfolio Committee on Transport of the Road Accident Benefit Scheme Bill (RABS) which was mooted to replace the Road Accident Fund.[91] The main objective of the Bill is, among others, to provide an effective social security benefit scheme in respect of bodily injury or death caused by or arising from road accidents, which is reasonable, equitable, affordable and sustainable. Chapter 2 of the Bill makes provision for the establishment of an Administrator that will be responsible for handling claims of beneficiaries under the scheme, and for the payment of defined benefits from the benefit account. The proposed

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87 Williams NO v Taxing Mistress of the High Court, Port Elizabeth; In re: Williams NO v Road Accident Fund and Others (942/2015) [2019] ZAECPEHC 34 par 4. On 4 September 2019, the online Cape Argus reported that "The cash-strapped Road Accident Fund yesterday painted a bleak picture of its finances. RAF officials told Parliament that the entity was saddled with R15.5 billion in unpaid claims, and had experienced a R262 billion deficit" available at https://capeargus.pressreader.com//epapers/showarticle.aspx? (accessed on 06 September 2019).

88 Legalbrief Issue No.4800 dated 10 October 2019.

89 *Idem*.

90 Legalbrief Issue No.4822 dated 11 November 2019. Rapport reports that the RAF contingent liabilities are estimated to increase from R341 billion in 2018/19 financial year to R650 billion in the next three year, *idem*.

91 Road Accident Benefit Scheme Bill [B17B-2017], Legalbrief Issue No 5005 dated 21 August 2020.

benefits (Chapter 6) include health care services; income support benefit; family support benefit and funeral benefit. Section 64(2) which provides that "The Administrator must assist the injured person, claimant or beneficiary to obtain the documents required to submit a claim and to process a benefit" appears to limit, if not eliminate, the role of legal practitioners in Road Accident Benefit Scheme matters.

5.59 Business Day reports that-

> *RABS was widely criticised by the legal and medical fraternity as well as opposition parties for proposing no-fault compensation for road accident victims. This means a person injured in a road accident would have been entitled to compensation irrespective of fault, and there was no need to prove the liability of the person who caused the crash. This would have resulted in drunk and reckless drivers being awarded for their conduct, making them eligible for the same benefits as innocent accident victims. Also, victims would have been required to negotiate a cumbersome and complex administrative process on their own because RABS sought to exclude road accident victims' rights and access to legal representation*.[92]

5.60 **Recommendation 5.3**: It is recommended that consideration be given to implementing the recommendations of the Parliamentary process initiated by the Department of Transport to bring about new legislation to address the shortcomings encountered with the Road Accident Fund as rapidly as possible.

5.61 According to a submission received from the Western Cape Provincial Department of Health,[93] the following are some of the abuses of contingency fee agreements identified by the Department:

(a) *There is no actual regulation as to what constitutes the "normal fee" and a lay client would not be aware of what constitutes "normal" and whether the fees being agreed to are "normal";*

(b) *It has occurred that work done by everyone at a law firm, irrespective of rank and experience, is billed at the same fee, whereas this is not what would normally be the case;*

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92 Droppa D, Business Day available at https://www.businesslive.co.za/bd/life/motoring/2020-08-27-scrapping-of-monstrous-road-accident-bill-welcomed/ (accessed on 27 August 2020).

93 Office of the Premier, "Submission from the Western Cape Department of Health in Relation to Issue Paper 36 dated 16 March 2019" September 2019 48-51.

(c) Even administrative costs become part of contingency fee agreements to be recouped at hourly rates when this is not normal;

(d) The normal fee becomes subject to annual increases recorded in contingency fee agreements that are higher than inflationary rates, often 10%. As litigation in all likelihood would span over years, this results in significant increases, not readily apparent to the lay client;

(e) There is no obligation to provide an attorney-and-client bill of costs and these are not prepared in the ordinary course or taxed. There is not even an obligation to provide the lay client with a detailed invoice and when one is provided, it is of general and rudimentary nature;

(f) There is no oversight by either the taxing master and/or the court in relation to these bills at all (bearing in mind that most cases are settled before ever reaching the court and this is so even why they are not);

(g) *It is left to the legal practitioner to make the assessment that the enhanced legal fees are lower (or higher) than the 25% and if the latter, 25% of the gross damages award is simply deducted as legal fees, more often than not without any proper accounting from the legal practitioner*;

(h) *Contingency fee agreements permit, and give, the legal practitioner full power of attorney to conclude interest-bearing loans on behalf of the lay client, which is then ostensibly used to finance the litigation and the lay client is charged interest. It is not apparent whether the legal practitioner also pays himself from such funds pending finalisation of the matter*;[94]

(i) *It appears that the lay client is not even provided with copies of the expert reports that are generated, nor consulted in relation to whether those reports are factually accurate*;

(j) *Advocates seldom sign the contingency fee agreement*, contrary to the provisions of section 3(2) of the Contingency Fees Act. This section provides that "A contingency fees agreement shall be signed by the client or, if a client is a juristic person, by its duly authorised representative, and the attorney representing such client and, where applicable, shall be countersigned by the advocate concerned, who shall thereby become a party to the agreement."

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94 The respondent submits that 'these loans have been used to pay off historic debt, to purchase vehicles, to finance the birth of other children and to finance holidays. These should not be permitted" at 52.

5.62 On 4 October 2019, the LPC published draft Rules in terms of section 6 of the Contingency Fees Act.[95] Legalbriefs reports that the LPC tightens rules to end rip-offs to the tune of millions in contingency fees.[96] The new rules, which have taken more than a decade to be published, "leave very little wriggle room for lawyers to charge more than the Act intended".[97] It notes that ambiguities in the Contingency Fees Act have created loopholes that have been exploited by lawyers.

5.63 The Rules define "normal fees" to mean "reasonable fees which may be charged by such practitioner for such work, if such fees are taxed or assessed on an attorney-and-own client basis, in the absence of a Contingency Fees Agreement, as defined in Section 1 of the Act."

5.64 The draft Rules define success fee to mean:

> *a fee contemplated in Section 2(1)(b) read together with Section 2(2) of the Act which is in addition to the normal fee. To be clear: the entire higher fee to be charged, comprising the normal fee together with the additional amount will constitute the success fee. The success fee is not just the additional amount, but the total of those two amounts, being the normal fee plus the additional amount*.

5.65 Furthermore, the draft Rules stipulate that a contingency fees agreement should be completed prior to signature by the client, all the legal practitioners involved, including an advocate if applicable. In line with the *Mofokeng v Road Accident Fund*[98] decision, the Rules stipulate that "a contingency fees agreement may not provide for party-and-party costs to be retained in addition to a normal or higher than normal fee."

5.66 According to Millar, RAF 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.[99] What complicates the matters

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95 *The Government Gazette* No.42739 dated 4 October 2019. Section 6 of the Contingency Fees Act provides as follows"
6. "Any professional controlling body or, in the absence of such body, the Rules Board for Courts of Law, established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No.107 of 1985), may make such rules as such professional controlling body or the Rules Board may deem necessary to give effect to this Act."

96 Legalbrief Issue No.4807 dated 21 October 2019.

97 *Idem*.

98 (2009/11101) [2014] ZAGPJHC 160 par 49.

99 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.

is that legal practitioners who have an interest in the outcome of the matter inflate the claims to increase their share of the spoils. The higher the damages, the greater the fee earned by attorneys.

5.67 The Western Cape Provincial Department of Health makes the following proposals:[100]

(a) *There should be a requirement that where contingency fee agreements are concluded, an itemised bill reflecting all attendances and indicating precisely how the attorney's fee has been calculated, must be rendered to the client. Further, that it should also be provided to the court prior to a settlement agreement being made an order of court, or prior to judgement being handed down;*

(b) *One way to remove/lessen the impact of this perverse incentive is for the percentage to be claimed by the legal practitioner to be calculated on the damages award less the cost of disbursements (not as currently contemplated by the CFA, especially given that the latter is incurred by the legal practitioner who has a self-interest therein. In other words, the 25% should be calculated not on the gross award but as a percentage of the net award which would then serve as a disincentive to legal practitioners to incur extensive costs;*

(c) *There should be a requirement that the contingency fee agreement together with any ancillary agreement be it styled as a power of attorney or otherwise, be filed at court when the summons is issued. The judge presiding in the first Rule 37 judicial management hearing, should approve such agreement and be satisfied that the plaintiff fully understands the contents of the agreement.*

(d) *Although section 4(3) provides that settlements made where a contingency fee agreement has been entered into, shall be made an order of court if the matter was before court. This should be amended to provide that in every matter where a contingency fee has been concluded irrespective of whether a summons had been issued, and in respect of which a settlement had been reached, should be made an order of court and the affidavits contemplated in section 4(1) and 4(2) should be filed at court irrespective of whether or not*

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100 Office of the Premier, "Submission from the Western Cape Department of Health in Relation to Issue Paper 36 dated 16 March 2019" and September 2019 50-64. The difficulty with the recommendation in paragraph (e) is that the Act also makes provision for the role of the LPC in respect of CFAs that are not before court.

there was a complete or partial trial or even if a trial had already commenced.[101]

(e) *A quotation of likely costs to be incurred, the details and anticipated fees of counsel and the details of and likely costs of experts and the need for and cost of a correspondent and any other attorney should be provided;*

(f) *Extraneous payments, loans and advances from the legal practitioner to the lay client whilst litigation is pending should not be permitted;*

(g) *Advocates' fees must be deducted from the 25%, alternatively that all legal fees collectively should not exceed 25%, including counsel and correspondent attorney, where the latter applies*.

(h) *Trustees' fees should legislatively be excluded from the contingency fee agreement and should not be regarded as constituting part of the award of damages on which the contingency fee is calculated*.

5.68 Legalbriefs reports that the Eastern Cape provincial government has set aside R3.2 million to establish a litigation unit within the Office of the Premier with a view to helping curb medico-legal claims against the provincial Department of Health.[102] The Auditor-General revealed that in the 2018/19 financial year, provincial medico-legal claims had increased to R29 billion from R24 billion in the preceding year.[103] This figure exceeds the department's entire annual budget by R5 billion. It is unsustainable and places more pressure on the fiscus.[104]

5.69 Austin[105] provides the following illustration of the application of the 25% cap provided for in section 2(1)(b) read with section 2(2) following the decisions in Mofokeng, *Masango and Tjatji cases*:[106]

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101 Section 4(1) of the Contingency Fees Act already provides that "[a]ny offer of settlement made to any party who has entered into a contingency fees agreement may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the [professional controlling body] Legal Practice Council, if the matter is not before court, stating-" It is however recommended that reference to the "professional controlling body" be replaced wherever it appears in the Act with reference to the LPC.

102 Legalbrief Issue No.4831 dated 22 November 2019.

103 *Idem*.

104 *Idem*.

105 Austin GW "Contingency fees in the South African law: Submitted in fulfilment of the requirement for the degree Master of Laws" (August 2017) Faculty of Law, University of Pretoria 76.

106 According to Austin, in these cases "Mojapelo DPJ and Boruchowitz J respectively held that the wording of the section which had reference to costs being excluded, only meant that one could not add the recovered costs to the capital amount to calculate what the 25% cap would be." *Idem*.

	Scenario 1: success fee not reaching 25% cap	**Scenario 2: success fee exceeding 25% cap**
Capital awarded:	R100 000	R100 000
Normal fees (say):	R10 000	R20 000
Success fee (say 100%):	R10 000	R20 000
Total fees before applying Act:	R20 000	R40 000
Success fee allowed (lesser of 100% uplift or 25% cap):	R20 000	R25 000
Costs cannot be retained by an attorney as they are excluded from cap calculation:	0	0
Total fees to an attorney	R20 000	R25 000

5.70 The LSSA submits that "disbursements in personal injury cases can be significant and can far exceed 25% of the capital on their own. The party-and-party disbursements recovered often only partly pay these expenses. The balance is an attorney-and-client charge in respect of disbursements, not fees."[107]

5.71 The Western Cape Department of Health confirms that:

> *[i]n some instances the costs associated with experts exceed the amount that the plaintiff was awarded in relation to the area of expertise of that speciality. By way of example*:
>
> *By the time the education psychologist testified, the plaintiff's claim to which her evidence related had been quantified in the amount of R239 205. The costs of her services and disbursements totalled R215 112.30 and the award handed down amounted to R30 594.*
>
> *The cost for the neurosurgeon was provided as R17 100 but the award emanating from his evidence amounted to R9 151.*
>
> *The costs and disbursements in relation to the psychiatrist were given as amounting to R73 816 but the award emanating from this came to R19 460*.[108]

5.72 According to the LSSA, if the 75% rule is applied, the excess expenses will have no consequence as all that is required is for the legal practitioner to adjust her fees to

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107 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 65.

108 Office of the Premier, "Submission from the Western Cape Department of Health in Relation to Issue Paper 36 dated 16 March 2019" September 2019 29.

comply.[109] However, there is nowhere in the Contingency Fees Act where the client is guaranteed 75% of the proceeds, particularly in the event that there is a shortfall of disbursements in relation to actual disbursements incurred.[110]

5.73 On the question of whether the Contingency Fees Act should be amended, if necessary, to ensure that the 25% cap includes every expenditure incurred as part of the contingency litigation, including expert fees and counsel fees, it is noted that in its report on Project 93 the Commission recommended that:

> "the payment of disbursements in an action concluded on the basis of a contingency fee agreement providing for an uplift fee be a matter of contract between lawyer and client; and that in the case of claims sounding in money, lawyers' uplift fees should not exceed 25% of the proceeds of an action thus conducted, and that costs awards not be regarded as proceeds for purposes of calculating the 25% portion."[111]

5.74 Ellis, *et al*, observe that some legal practitioners contend that since fees are payable by the client to a legal practitioner, and a legal practitioner is defined in section 1 of the Contingency Fees Act to mean an attorney or an advocate, section 2(2) of the Act could be interpreted to mean that an attorney and an advocate are each entitled to a maximum of 25% of the capital awarded by the court, that is to say, 50% of the capital in total.[112] However, the court in *Mathimba and Others v Nonxuba and Others*[113] expressed solid disagreement with this view. The court held that:

> "In our view, the 25% cap is a global limitation on the fees recoverable by all legal practitioners involved in a case."[114]

5.75 The SALRC concurs with the respondents' view that the 25% cap does require clarity as it is clear from the case law reviewed above that there is widespread abuse of

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109 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 65.

110 Austin GW "Contingency fees in the South African law: Submitted in fulfilment of the requirement for the degree Master of Laws" (August 2017) Faculty of Law, University of Pretoria 77.

111 SALRC "Project 93: Speculative and Contingency Fees Report" (November 1996) 62.

112 Ellis P, *et al*, "The South African Legal Practitioner- A Commentary on the Legal Practice Act" 2018 6-12.

113 [2019] (1) SA 550 (ECG) par 106.

114 *Idem*. Ellis P, et al, point out that "Rule 7.10.5 of the Uniform Code of Conduct of the GCB adopted the view confirmed by court in *Mathimba and Others v Nonxuba and Others*, where it provides that the higher fee charged by counsel shall be taken together with the fees charged by the attorney for the purpose of applying the 25 percent limit in the proviso to section 2(2) of the Act."

this provision by legal practitioners. The Commission also concurs with the respondents' view, which is also the view confirmed by the court in *Mathimba and Others v Nonxuba and Others,*[115] that the 25% limit must include advocates' fees. In other words, all legal fees collectively, that is, attorneys' fees; advocates' fees and correspondent attorneys' fees, where the latter applies, must be deducted from the 25% limit. The 25% limit will exclude disbursements (expert fees). It is recommended that section 1 of the Act be amended by the inclusion of the definition of success fee as follows:

> **Success fee** means "a fee contemplated in section 2(1)(b) read together with section 2(2) of this Act, comprising of all legal fees collectively, that is, attorneys' fees; advocates' fees and correspondent attorneys' fees, which is in addition to the normal fee."

5.76 The Contingency Fees Act needs to be amended to update, among others, obsolete terminology like references to the previous controlling bodies. The LPC has, in terms of section 4 of the LPA, been established to exercise jurisdiction over all legal practitioners and candidate legal practitioners as contemplated in the LPA.

5.77 Sections 1 (definitions); sections 5(1) [Client may claim review of agreement or fee] and 6 [Rules] respectively of the Contingency Fees Act, make reference to a "professional controlling body". Since the Act was passed prior to the establishment of the LPC on 1 November 2018, it is recommended that reference to the "professional controlling body" and to former Law Societies be removed and substituted by reference to the LPC.

5.78 **Recommendation 5.4**: The following is recommended:

(a) that the definition of "professional controlling body" in section 1 of the Act be deleted;
(b) that section 1 of the Act be amended by the inclusion of the following definition of success fee:

> **Success fee** means "a fee contemplated in section 2(1)(b) read together with section 2(2) of this Act, comprising of all legal fees collectively, that is, attorneys' fees; advocates' fees and correspondent attorneys' fees, which is in addition to the normal fee."

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115 Footnote 464 above.

(c) that section 4(1) of the Act be amended as follows:

"Any offer of settlement made to any party who has entered into a contingency fees agreement may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, or has filed an affidavit with the **[professional controlling body]** Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), if the matter is not before court, stating-"

(d) that 5(1) of the Contingency Fees Act be amended as follows:

"A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), **[professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the Gazette for the purposes of this section]**.

(e) that section 6 of the Contingency Fees Act be amended as follows:

The Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), [**Any professional controlling body]** or **[, in the absence of such body,]** the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No.107 of 1985**)**,] may make rules as **[such professional controlling body or the Rules Board]** it may deem necessary in order to give effect to this Act.

5.79 The LSSA does not support Recommendation 5.4 (b) regarding the proposed amendment of the definition of "**success fee**" on the following grounds, among others:

"(i) an advocate is not obliged to become a party to a contingency fees agreement and in deciding not to become a party, his/her fees would fall outside of the ambit of such contingency fees agreement. The same applies to correspondent attorneys.

(iii) where an advocate has not entered into the contingency fees agreement and only charges his/her normal fee, the advocate's account will be considered a disbursement. It is not a "success fee" and cannot be part of

the restriction. The definition of the word "fee" is confined to the fee as described in the Contingency Fees Act, being the fee that the legal practitioner is entitled to.

(iv) The recommendation, which in effect lumps the attorney's fees with disbursements together, is thus unreasonable. Disbursements advanced (e.g., correspondent attorneys' and advocates' accounts) are covered by the legal practitioner on behalf of the client in the event of the case been (sic) unsuccessful. It is illogical to consider these disbursements as part of a legal practitioner's fee.

(v) In Magistrates' Courts matters, the disbursement of the advocates' accounts may outweigh the 25% fee that the legal practitioner is entitled to in terms of the Act."[116]

5.80 **Recommendation 5.5**: On the question of whether a mechanism should be created specifically to deal with allegations of excessive fees being charged in contingency fees litigation to ensure that those fees remain reasonable in the light of the circumstances of a case, in other words, whether there should be a body focusing specifically on preventing the abuse of contingency fee arrangements, the Commission recommends that the LPC, as the regulator for the legal profession, is the appropriate Mechanism to deal with allegations of excessive fees in terms of section 5(b) of the LPA.[117] In its submission to the Commission, the LPC points out that:

> "The Act already has a mechanism to adjudicate disputes not only about the terms in a contingency fees agreement but also any fees chargeable in terms thereof. The Legal Practice Council adopted the Contingency Fee Tribunals established in terms of section 5 of the Act by the former Law Societies and these functions. Furthermore, additional tribunals will be established for each of the nine provinces."[118]

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116 LSSA, *op cit*, 57-58.

117 Section 5(b) of the LPA 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."

118 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs; Memorandum" (12 September 2019) 13.

5.81 According to Millard and Joubert, the recoverable tariffs do not make provision for agreed fees or contingency fees.[119] Since the Rules Board does not prescribe tariffs for agreed fees (attorney-and-clients fees) and contingency fee agreements, it follows that such fees fall outside of the scope of operation of section 35(3) of the LPA. However, the Commission recommends that the LPC, as part of its responsibility to make rules in terms of section 6 of the Contingency Fees Act, should provide clarity as to what constitutes normal fees and the 25% cap, as it is clear from the comments received that there is widespread abuse of contingency fees agreements by some members of the legal profession.

5.82 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.[120] 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 be become paralysed if no action is taken.[121]

5.83 Independent Online reports that "the government is sticking to its guns to bring a law that would cut down on spiralling medical claims and allow for staggered payments instead of lump sums paid to victims of medical malpractice."[122] One of the proposals in the State Liability Amendment Bill, 2018, is that a court will make an order for structured payments in respect of all claims against the State in medico-legal matters worth more than R1 million.[123] The structured payments will provide for, among others, past expenses and damages, necessary immediate expenses and periodic payments for the future.[124]

5.84 Responding to the question of whether CFAs should be prohibited in medico-legal claims, Legal Aid SA does not believe that contingency fee arrangements in a medico-legal claim should be prohibited, as these arrangements are what make most of these

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119 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.
120 SALRC, "Issue Paper 33: Project 141: Medico-legal claims" (20 May 2017), 4.
121 *Idem*.
122 Mkhwanazi M, Independent Online available at https://www.iol.co.za/news/politics/the government-to-bring-in-a-law- (accessed on 16 March 2020).
123 *Idem*. See also Memorandum on the Objects of the State Liability Amendment Bill, 2018.
124 *Idem*.

claims possible because they are very expensive to initiate.[125] Contingency fee arrangements should, however, be strictly regulated.[126]

5.85 According to the LSSA, contingency fee arrangements should not be prohibited in medico-legal claims.[127] Such claimants are often indigent and would otherwise not have access to justice to remedy the wrong that they have suffered.[128] BASA does not support such a prohibition, as it impacts on a party's right to contractual freedom.[129]

5.86 **NB**: The Memorandum on the Objects of the State Liability Amendment Bill, 2018, states that the Bill is promoted in the interim pending the outcome of the larger investigation into medico-legal claims by the SALRC.

G. Impact of class action claims on contingency fees

5.87 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.[130] This can be achieved through legal fee arrangements, such as contingency fees, that can facilitate access to justice for the poor and indigent.

5.88 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.[131] 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

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125 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 30.
126 *Idem*.
127 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 54.
128 *Idem*.
129 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 8.
130 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 LJ,* 30.
131 *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 a written argument, which must raise new contentions that may be useful to the court.[132]

5.89 According to McQuoid-Mason:

> *[c]ontingency fees are an exception to the general rule in South Africa that a lawyer should not acquire a propriety interest in the cause of action or subject matter of litigation that he or she is conducting for a client".*[133] *Under South African common law, contingency fee arrangements were frowned upon as "traffic in litigation*.[134]

5.90 The CFA was regarded as a "champertous agreement" that funds third party litigation, and this was also found to be unprofessional.[135] 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".[136] It is submitted that the introduction of the class action procedure in a consumer protection environment will further facilitate access to justice for consumers.[137] This can also be

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132 Section 38 of the Constitution of the Republic of South Africa, 1996.
133 See McQuoid-Mason, D, "The delivery of civil legal aid services in South Africa", 2000, *Fordham Int'l L,*.111, 137.
134 See *Campbell v Welverdiend Diamonds Ltd,* [1930] TPD 287.
135 See *Lekeur v Santam* [1969] (3) SA 1 (C) 6C-D, and *Law Society v Tottentam and Longinotto* [1904] TS 802.
136 See comments of Rose-Innes CJ in *Patz v Salzburg* [1907] TS 526.
137 *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

achieved through legal fee arrangements such as contingency fees.[138] 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.[139]

5.91 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.[140]

5.92 Respondents submit that contingency fee arrangements do encourage legal practitioners to assist impecunious clients who would otherwise not afford to litigate against big corporate clients and therefore facilitate access to justice for the poor and indigent.[141] However, since class actions do not proceed without court certification, respondents are of the view that it is not necessary that they be specifically provided for in the Contingency Fees Act. Furthermore, the current contingency fee regime is everything but irrelevant for this type of case.[142]

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study", 2004, *Journal of Empirical Legal Studies*, 27-78. See also Eisenberg & Miller, "Attorney's fees in class action settlements: An empirical study", 2004, *Journal of Empirical Legal Studies*, 32.

138 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.

139 *Jacobs v Waks* [1992] (1) SA 521 (A).

140 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.

141 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 48.

142 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs: Memorandum" (12 September 2019) 15.

5.93 Responding to the question of whether contingency fee arrangements in class action claims do facilitate access to justice for the poor and indigent, and if so, why, CAOSA submits that the profession and the courts have allowed this aspect of litigation to develop organically.[143] Further, Legal Aid South Africa's Impact Litigation Fund has greatly supported public interest litigation organisations to service the vulnerable communities through class actions involving, and directly affecting, these communities.[144]

5.94 Legal Aid SA explains that class action claims, by their very nature, require extensive work and research, and can therefore be prohibitively expensive to initiate.[145] Contingency fee arrangements can go a long way to fund class actions.[146]

5.95 The LSSA believes that contingency fee agreements in class actions facilitate access to justice for the indigent.[147] Most victims do not have the financial means to access the services of specialised legal practitioners otherwise.[148] BASA believes that contingency fee arrangements promote access to justice for people who would not ordinarily be able to afford to litigate these types of matters for long periods of time.[149]

H. Position in other jurisdictions

5.96 The following jurisdictions will be considered: The United States of America, the United Kingdom, Australia, Canada, India, Brazil, Nigeria, Kenya, and Uganda.

5.97 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?

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143 CAOSA "Submission to Issue Paper 36-Investigation into Legal Fees" (30 August 2019) Chapter 2 para 17.

144 *Idem*.

145 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 30.

146 *Idem*.

147 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 54.

148 *Idem*.

149 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 8.

1. The United States of America

5.98 It has been accepted that contingency fee agreements have existed since the 18th century.[150] Such agreements have been described as "the poor man's key to the courthouse".[151] 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 types of litigation. Most jurisdictions prohibit the use of contingency fees in criminal cases or certain family cases.[152]

5.99 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.[153] 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.[154] 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.

2. The United Kingdom

5.100 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, lawyers use a conditional fee agreement (CFA) where there is a 70% chance of success on the merits.[155] The solicitor takes on the case on the understanding that if he

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150 See *Wylie v Coxe* 56 US 415 [1853].

151 *Matter of Estate of Weeks* 627 NE 2D 736 [1994].

152 Rule 1.5(d) of the Model Rules of Professional Conduct of the American Bar Association.

153 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.

154 *Idem*.

155 Cassim, F, "Contingency fees – International perspectives". Paper presented at the international conference on Access to Justice, Legal Costs and Other Interventions, 01-02 November 2018 https://doi.org/10.25159/2520-9515/1735ISSN2520-9515. See also Di

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.[156] Conditional fee agreements are not allowed in family proceedings or criminal cases.[157] 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 upfront 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%.

5.101 In Scotland, it is lawful to agree that the lawyer will receive payment only if the case is won. Although the parties cannot 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.

5.102 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.[158] 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.[159] 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 statutorily capped success (bonus or uplift) fee if the case was successful.[160]

5.103 Thus lawyers have been charging contingency fees in England and Wales since 2013. These fees are used only when they provide a clear financial advantage for lawyers that is equal to the risk taken. However, evidence shows a reluctance by the

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Stefano, M, "Study on the transparency of costs of civil judicial proceedings in the European Union" (December 2007).

156 *Ibid,* 44.

157 International newsletter 1/2018/2019: *High cost of legal services as barrier to access to justice,* 11.

158 EU Cost Study,128-129.

159 See "UK contingency fees: A user's guide for the in-house lawyer", Jan 2015. https://financierworldwide.com (accessed January 2018).

160 Nel, G, "Decoding s 2(1)(a) and (b) of the Contingency Fees Act". *De Rebus* (June 2018), 14-18, 16.

legal profession to use contingency fees, possibly due to confusion about regulation and the impact of cost-shifting.[161]

5.104 Over the past six years, the UK has implemented an important change that has dramatically changed the way in which personal injury claims arising from a road traffic accident, workplace injuries and public liability claims for personal injuries are managed. These claims are the equivalent of Road Accident Fund Claims and Compensation Fund Claims in South Africa.[162]

5.105 A fixed recoverable cost regime for all personal injury claims under £25 000 was implemented in the UK in 2013.[163] This regime was published as a binding Practice Directive for all civil courts in the UK. The Constitutional Reform Act 2005 (UK) gives the power to make practice directions for the civil courts to the Lord Chief Justice. Practice Directive 45[164] limits the costs that lawyers can recover for services in processing a personal injury claim to a fixed amount, in accordance with the scale set out in Table 1 below. This means that lawyers can no longer recover billable hours, but only the stipulated fixed fee. The additional result has been to incentivise lawyers to only do the necessary work on claims rather than to run up billable hours.[165]

5.106 The recoverable fees escalate as milestones in the process are reached[166]. According to Kotze, the escalation is, however, such that it does not really incentivise

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161 Victoria Law Commission, "Contingency fees", available at https://www.lawreform.vic.gov.au/content/introduction-24 (accessed on 23 July 2018).

162 Kotze H, "Fixed Recoverable Cost Regime in the UK" email dated 15 August 2019.

163 Idem. Some 85% of personal injury cases in the UK fall in this bracket. Likewise, in Western Australia there is a tariff that makes provision for a separate dispensation in respect of motor vehicle personal injury claims and catastrophic personal injury claims.

164 Available at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs

165 The impact of the Fixed Recoverable Cost Regime has been assessed as follows:
"An "overall net reduction in legal fees" was likely. "This is therefore likely to represent a cost to lawyers from reduced income per case. It may result in lawyers reducing the resource they spend on each case, as any increase in expenditure would reduce their profit margins."
On the other hand, the MoJ said the reforms might generate "business process efficiencies in the form of reduced management costs or overheads, in order for solicitors to maintain their profit margins, and cases may be settled more quickly which means they can take on more cases". A further benefit would be that solicitors would no longer have to "maintain documentation required for costs assessment or spend time arguing about costs".
More broadly, the assessment said the loser-pays model "creates an incentive for both sides to a dispute to over-invest in legal advice and may explain why the costs of litigation in the UK are among the highest in the world".
See https://www.litigationfutures.com/news/fixed-costs-impact-less-income-per-claim-but-more-cases/

166 For sake of clarifying terminology, "Issue" equates to Summons, "Allocation" roughly equates to close of pleading, and "Listing" refers to when a case is allocated a trial date.

lawyers to see cases through to a trial. This process has been so successful that the UK is contemplating expanding the fixed recoverable cost regime to other areas of the law[167].

5.107 Although medical negligence cases were excluded in the fixed recovery costs regime, however, a Civil Justice Council working group was set up in February 2018 to consider the inclusion of medical negligence cases in the fast-track bracket within the fixed recovery costs regime. The downside of Lord Justice Jackson's reforms is that some of the claimant firms could not sustain their businesses because they could no longer recover CFA success fees and ATE in personal injury matters and had to close down. However, insurers benefited from the savings.[168]

3. Australia

5.108 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.[169] 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 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.[170] The report proposes that a percentage-based contingency fee regime be used in personal injury matters and that it provides no cap, or set a cap at 35% or 40%. However, it should not apply to family law, criminal law, or migration law matters.

5.109 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.[171] The Commission had to consider whether allowing lawyers to charge

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167 See "Extending Fixed Recoverable Costs in Civil Cases: Implementing Sir Rupert Jackson's proposals". https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/supporting_documents/fixedrecoverablecostsconsultationpaper.pdf.

168 *Idem*.

169 Law Council of Australia, "Percentage-based contingency fees agreements" (May 2014), 1-44.

170 *Idem*.

171 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

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.[172] 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.[173]

5.110 The Victorian Law Commission has also advocated a balanced approach when considering the interests of clients and the legal profession.

5.111 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 for the litigation costs. This is problematic, as there is a need for action to regulate losing litigation funders to protect claimants and defendants.

4. Canada

5.112 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. Quebec has been described as the "paradise" of class action funding since the government established and annually funds a Class Action Fund for purposes of financing class actions. The Fund was felt necessary because of the costs

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Commission, "Contingency fees", available at https://www.lawreform.vic.gov.au/content/introduction-24 (accessed on 23 July 2018).

172 *Idem*.

173 *Idem*.

of litigation and the risk of losing class representatives being held liable for (even low) costs awards.[174]

5.113 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 usually on a lower basis than those awarded against unsuccessful class action defendants.[175] 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 bases 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.[176] 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.[177] 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.[178] It should be noted that the Law Society believes in protecting consumers and promoting the public interest; hence their decision.

5. India

5.114 It should be noted that lawyers in India are prohibited by the Bar Council of India rules from charging contingency fees.[179] 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".

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

175 *Idem*.

176 Law Society of Ontario, "Contingency fees", available at https://lso.ca/getdoc/e6b83846-07d7-43f4-9865-da7e7a2755ac/contingency-(accessed on 15 October 2018).

177 Victoria Law Commission, "Contingency fees", available at https://www.lawreform.vic.gov.au/content/introduction-24 (accessed on 23 July 2018).

178 "Canada rules out capping contingency fees", available at https://litgationfinancejournal.com/Canada-rules-capping-contingency-fees/ (accessed on 15 October 2018).

179 Part IV, Chapter II, Section II, Rule 20.

5.115 The above Rule was upheld in the case of *Ganga Ram v Devi Das*.[180] 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.

5.116 In *Sunitha v The State of Telangana*,[181] 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 the 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 claims towards Advocate's fee based on a percentage of the result of the litigation was illegal".[182]

6. Brazil

5.117 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.[183] 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

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180 61 PR [1907].

181 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 percent of the total compensation received by the woman in a motor accident case. After the cheque was dishonoured, 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.

182 *Sunitha v The State of Telangana* Criminal Appeal No. 2068 of 2017, para 9.

183 See Brazilian Civil Procedure Code.

Court of Justice recently ruled that lawyers may be paid a fixed percentage of the final amount received by their clients.[184]

7. Nigeria

5.118 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.[185] Legal counsel who accepts briefs in court professes to practise for a professional fee that is dependent on the length and difficulty of the case.[186] 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.[187] 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.

8. Kenya

5.119 The Code of Ethics and Conduct of Advocates Act, 2016 (The Code) regulates the legal profession. Both undercutting fees and overcharging of fees by advocates are regarded as professional misconduct in terms of the rules.[188] 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

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184 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.

185 25/9/1979.

186 See Rules of Professional Conduct, Legal Practitioner Act, chapter 207.

187 See *Oyo v Mercantile Bank (Nigeria) Ltd* Court of Appeals case.

188 See Rule 4 of the Code.

clients upfront so that clients are aware of what the legal costs or fees will be.[189] Case law has confirmed the prohibition of contingency fees.[190]

9. Uganda

5.120 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 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.[191]

5.121 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 some legal practitioners are abusing CFAs, 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.[192]

5.122 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.[193] 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

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189 See section 71, "Professional fees", in the Code.
190 *JMM v Mohammed Ismael Jin and 2 Others* [2005] eKLR.
191 See section 26 of the Advocates Act.
192 EU cost study, 324.
193 *Ibid*, 54.

step in the right direction towards facilitating access to justice for all clients and reducing abuse and exploitation by the legal profession.

I. Recovery of costs by legal practitioner rendering free legal services

5.123 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).*
>
> (1) *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*.

5.124 In *Thusi v Minister of Home Affairs and Another and 71 other cases* matter,[194] 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 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:*

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194 [2011] (2) SA 561 (KZP).

> *(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 bear no resemblance whatsoever to the substantially increased fees which would in normal circumstances be charged by Goodway & Buck for the rendering of such services*.[195]

5.125 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*,[196] 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 with – 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*.[197]

5.126 The court noted that there are exceptions to the general indemnity principle. The first one is in the High Court rules[198] and the second in statutes.[199] The statutory exceptions include provisions of the Legal Aid Act and section 79A of the Attorneys Act, which entitle the Legal Aid Board and a law clinic as defined in the Act respectively to recover costs.

5.127 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

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195 *Ibid,* para 95.
196 [2003] (3) SA 54 (SCA) par 18.
197 *Thusi v Minister of Home Affairs and Another and 71 other cases* [2011] (2) SA 561 (KZP), para 99.
198 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.
199 *Thusi v Minister of Home Affairs and Another and 71 other cases* [2011] (2) SA 561 (KZP), para 108.

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".[200]

5.128 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*.[201]

5.129 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.

5.130 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?

5.131 **NB:** The respondents are of the view that there is no danger at all if a litigant is represented by a legal practitioner who is rendering free legal services.[202] There will certainly be no consequences, particularly where both parties are indigent. However, the

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200 *Ibid,* para 110.

201 *Ibid,* para 111.

202 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs: Memorandum" (12 September 2019) 16.

provisions of Section 92 do have a consequence for losing litigants who are not indigent.[203]

J. Summary of the recommendations

In this Chapter 5, the following recommendations are made:

1**. Recommendation 5.1:** The Commission recommends that section 2(1) of the Contingency Fees Act be amended by the substitution for subsection 2(1) of the following subsection 2(1):

> "2(1) *Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there is some foreseeable risk in the matter and there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed-*
>
> *(c) that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;*
>
> *(d) that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement."*

2. **Recommendation 5.2:** It is recommended that courts should be encouraged to impose appropriate monetary limits and set a lower amount on contingency fees agreements, and differ from the agreement reached by the parties in the exercise of their discretion and in the interest of justice, regard being had to what may be a reasonable fee taking into account the risk factor.

3. **Recommendation 5.3:** It is recommended that consideration be given to implementing the recommendations of the Parliamentary process initiated by the

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203 Idem.

Department of Transport to bring about new legislation to address the shortcomings encountered with the Road Accident Fund as rapidly as possible.

4. **Recommendation 5.4**: The following is recommended:

(a) that the definition of "professional controlling body" in section 1 of the Act be deleted;

(b) that section 1 of the Act be amended by the inclusion of the following definition of success fee:

Success fee means "a fee contemplated in section 2(1)(b) read together with section 2(2) of this Act, comprising of all legal fees collectively, that is, attorneys' fees; advocates' fees and correspondent attorneys' fees, which is in addition to the normal fee."

(c) that section 4(1) of the Act be amended as follows:
"Any offer of settlement made to any party who has entered into a contingency fees agreement may be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before the court, or has filed an affidavit with the **[professional controlling body]** Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), if the matter is not before the court, stating-"

(d) that 5(1) of the Contingency Fees Act be amended as follows:

"A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), **[professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the Gazette for the purposes of this section]**.

(e) that section 6 of the Contingency Fees Act be amended as follows:

The Legal Practice Council, established by section 4 of the Legal Practice Act, 2014 (Act No.28 of 2014), [**Any professional controlling body]** or **[,**

in the absence of such body,] the Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No.107 of 1985**)**,] may make rules as **[such professional controlling body or the Rules Board]** it may deem necessary to give effect to this Act.

5. **Recommendation 5.5**: On the question of whether a mechanism should be created specifically to deal with allegations of excessive fees being charged in contingency fees litigation to ensure that those fees remain reasonable in the light of the circumstances of a case, in other words, whether there should be a body focusing specifically on preventing the abuse of contingency fee arrangements, the Commission recommends that the LPC, as the regulator for the legal profession, is the appropriate Mechanism to deal with allegations of excessive fees in terms of section 5(b) of the LPA.[204] In its submission to the Commission, the LPC points out that:

"The Act already has a mechanism to adjudicate disputes not only about the terms in a contingency fees agreement but also any fees chargeable in terms thereof. The Legal Practice Council adopted the Contingency Fee Tribunals established in terms of section 5 of the Act by the former Law Societies and these functions. Furthermore, additional tribunals will be established for each of the nine provinces."

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[204] Section 5(b) of the LPA provides that "The objects of the Council are to-
(c) ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice."

Chapter 6: Mechanism for Party-and-party costs

A. Introduction

6.1 Section 35(4)(c)-(e) of the LPA provides that the Commission must investigate: the

> (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 process 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)*.

6.2 In line with the categorisation (definition) of legal costs provided in Chapter 1 of this Report, the Mechanism contemplated in sections 35(4)-(5) of the LPA is discussed in two chapters. This Chapter focuses on the mechanism for party-and-party costs. Chapter 7 focuses on the mechanism for attorney-and-client fees. Recommendations for legislative (law reform) and non-legislative intervention, where applicable, are made.

6.3 The current mechanism for determining party-and-party costs is discussed first, looking at its composition at both institutional and functional levels. At a functional level, the following matters are discussed in detail:

- General rule;
- Fee structure; and
- Taxation of legal fees

6.4 Under taxation of legal fees, the following issues are discussed: role of taxing masters; pre-litigation costs; detail assessment; factual and expert evidence; and legal cost consultants.

6.5 Other matters that are invariably linked to the topic of the party-and-party costs, that is, lack of statutory tariffs for advocates' fees and lack of tariffs in criminal matters, are also discussed in this Chapter.

6.6 Section F looks at the desirability of establishing a mechanism that will be responsible for determining fees and tariffs payable to legal practitioners.

6.7 Section G looks at the process that the mechanism should follow in determining fees and tariffs payable to legal practitioners.

6.8 Section H looks at the option to voluntarily pay less or in excess of the amount that may be determined by the mechanism. Last, but not least, section I looks at the enforcement of the proposed mechanism.

B. Composition of the mechanism (institutionally)

6.9 Section 35(4) of the LPA mandates the Commission to investigate and report back to the Minister with recommendations on the following:

> "(d) the composition of the mechanism contemplated in paragraph (c) and the process it should follow in determining fees and tariffs;"

6.10 The existing mechanism for determining legal fees and tariffs payable to legal practitioners and juristic entities that are recoverable by a successful party in litigious matters as well as tariffs for sheriffs of the court is the Rules Board for the Courts of Law (Rules Board).[1]

6.11 The Rules Board is established by section 2 of the Rules Board for Courts of Law Act 107 of 1985. The Rules Board is empowered by section 6 of the Act to make, amend, and/ or repeal procedural rules for the Small Claims Court; Magistrates' Court, High Court and the SCA.

6.12 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;[2]
(b) the regulation of tariff of fees chargeable by advocates, attorneys, and notaries;[3] and
(c) the taxation of bills of costs and the recovery of costs.[4]

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1 The remuneration of an executor in administration of estates matters, of a trustee or curator *bonis* in wills, trusts, liquidation and insolvency matters, are all determined by the Master of the High Court.
2 Section 6(1)(l).
3 Section 6(1)(r).
4 Section 6(1)(s).

6.13 The Act was enacted prior to the advent of democracy. According to the DOJ&CD, 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.[5]

6.14 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.*[6]

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

6.16 The current mechanism for recovery tariffs in South Africa 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.[7] 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.

6.17 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,[8] and, in respects of scales C and D, such maximum amounts as are determined by the Minister from time to time.[9] The amount of fees payable per item of

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

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

7 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.

8 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.

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

work or court process per quarter of an hour in line with the four scales mentioned above is provided.

6.18 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.

6.19 The statutory party-and-party tariff for attorneys in the High Court is largely the same as the tariff in the Supreme Court of Appeal. The rationale underlying the use of the same tariff for attorneys with a right of appearance both in the High Court and the SCA is a good one and should be supported. 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,[10] whereas a folio[11] is defined to consist of 100 words in the Magistrates' Court.

6.20 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.[12] These tariffs do not reflect what members of the public are paying to their legal practitioners, but the recovery of legal fees expended on the litigation.

6.21 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

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10 Rule 70(9) of the High Court Rules.
11 Item 10 of the General Provisions in Table A of Annexure 2 to the Rules.
12 Government Notice No.R.1055 dated 29 September 2017.

basis may be recovered on an attorney-and-client basis. The latter basis for the assessment of costs is less stringent than the former one.

6.22 As the custodian of the recovery tariffs, the Rules Board is composed of the following members who are all appointed by the Minister:[13]

(a) a judge of the Constitutional Court, the Supreme Court of Appeal or the High Court, or a judge who held the office of judge of the Constitutional Court, the Supreme Court of Appeal or the High Court and who is discharged from active service in terms of section 3 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No.47 of 2001), whom the Minister designates as the chairperson;
(b) a judge of the Constitutional Court, the Supreme Court of Appeal or the High Court, or a judge who held the office of judge of the Constitutional Court, the Supreme Court of Appeal or the High Court and who is discharged from active service in terms of section 3 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No.47 of 2001), whom the Minister designates as the vice-chairperson;
(c) one magistrate appointed for a district and one magistrate appointed for a regional division under section 9(1) of the Magistrates' Courts Act, 1944 (Act No.32 of 1944);
(d) two practicing advocates, after consultation with the General Council of the Bar of South Africa;
(e) two practicing attorneys, after consultation with the Association of Law Societies of the Republic of South Africa;
(f) a lecturer in law at a university in the Republic;
(g) an officer of the DOJ&CD;
(h) Not more than two (2) persons who, in the opinion of the Minister, have the necessary expertise to serve as members of the Board;
(i) a sheriff appointed under section 2(1) of the Sheriff's Act, 1986 (Act No.90 of 1986), who is nominated by the South African Board for Sheriffs established by section 7 of the Sheriff's Act, 1986.

6.23 Furthermore, section 5(1) of the Act provides that the Minister or the Board may establish committees consisting of such members of the Board as may be designated

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13 Section 3(1)(a)-(h) of the Rules Board for Courts of Law Act 107 of 1985.

by the Board and such other persons, if any, as the Minister may appoint for that purpose and for the period determined by him or her.

6.24 The Rules Board is seen by many as a neutral body that may bring about objectivity in the process of determining legal fees and tariffs payable to legal practitioners and juristic entities. The Board is led by judges of the highest courts in the Republic. Two persons with the necessary expertise serve as members of the Board.

6.25 Responding to the question as to which parties or institutions should be involved in the determination of the tariff, Legal Aid SA points out that "any institution that is tasked with setting maximum fees for the legal profession would require a diversity of skills to adequately dispense with this complex task. The representation of parties and institutions may not provide all the necessary skills required to adequately achieve this objective."[14] Legal Aid SA proposes that the following parties should be represented, namely: LPC; Rules Board; Minister, or his/her representative; Competition Commission; Human Sciences Research Council; State Legal Services; NEDLAC; and Consumers of legal services. Under recommendation 14 below, the Commission recommends that, prior to determining fees and tariffs, the Rules Board must adopt a consultative process that includes, among others, consumers of legal services; representatives of civil society organisations as well as NEDLAC.

6.26 Section 35(1) of the LPA signals the intention of the Legislature to extend the mandate of the Rules Board to include the determination of tariffs in non-litigious matters. In its submission to the Commission, the Rules Board has indicated that the Board has commenced work on creating and constructing tariffs as envisaged in sections 35(1) and (2) notwithstanding that the mandate in terms of the aforesaid sections of the LPA had not vested.[15] Harpur SC *et al* say that the Rules Board's mandate is to provide for an interim tariff taking into account the various considerations set out in section 35(2) of the LPA.[16]

6.27 **Recommendation 6.1**: The Commission is of the view that the Rules Board, as presently constituted institutionally in terms of section 3 of the Rules Board for Courts of Law Act 107 of 1985, read with section 5(1) of the Act, is the appropriate existing

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14 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 38.
15 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) Page 4.
16 Harpur GD SC, *et al*, "Transformative Costs" Advocate (April 2019) 43.

Mechanism for determining legal fees and tariffs payable to legal practitioners and juristic entities in litigious matters.

C. Composition of the mechanism (functionally)

1. General rule

6.28 According to Van Loggerenberg,[17] costs fall into two categories, that is, 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.[18] Party-and-party costs are necessary and proper legal costs that a prevailing party may expect to receive from the losing party. They are determined strictly according to the prescribed tariffs, that is, Tables A-D of Annexure 2 to the Magistrates' Court Rules, Rules 67-70 of the Uniform Rules, and Rule 17–19 of the Rules of the Supreme Court of Appeal.

6.29 The basic rules governing the law of costs in the RSA were laid down by the Constitutional Court in *Ferreira v Levin NO and Others*[19] as follows:

> *The Supreme Court has, over the years, developed a flexible approach to costs which proceed from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs*.

6.30 The *Ferreira* case listed several factors that may be taken into account by the court in awarding costs. These factors are, among others, the conduct of the parties, the conduct of the legal representative, whether a party has achieved partial or technical success, and the nature and complexity of the issues involved in the proceedings.[20]

6.31 In South Africa, like in many other common law jurisdictions,[21] the general "costs follow the event" or "loser pays" rule does not apply in the Constitutional Court. Bishop

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17 Van Loggerenberg (n82) 33-23.

18 Rule 33 (costs) of the Magistrates' Courts Rules read in conjunction with Annexure 2 to the Magistrates' Court Act of 1944; Rules 69-70 (69-Tariff of Maximum Fees for Advocates on Party-and-party Basis in certain Civil Matters; 70-Taxation and Tariff of Fees of Attorneys) of the High Court Rules and Rules 17–18 (17-Taxation of costs; 18-Attorney's fees) of the Supreme Court Rules do not define the concepts "party-and-party" and "attorney-and-client costs".

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

20 *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC) para 3.

21 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 (Rule 44.3(1) of the Civil Procedure Rules 1998). The general rule is that the unsuccessful party is required to pay the costs of the

remarks that "[T]he Constitutional Court has departed from this basic principle in constitutional matters because the 'loser pays' principle is often outweighed by other competing rationales."[22] In *Biowatch Trust v Registrar Genetic Resources and Others*,[23] the Constitutional Court deemed it necessary to lay down the general principles governing costs awards in constitutional matters. The first issue to be decided by the court was whether a distinction should be drawn between parties on the basis of whether it is a public interest group acting in the public interest, or whether it is a private party pursuing a private or commercial interest. The underlying problem was the question of legal costs and whether or not public interest groups who lose their claims in their endeavour to promote constitutional litigation in the public interest should be mulcted with legal costs. The court held that:

> *Equal protection under the law requires that cost awards not be dependent on whether the parties are acting in their own interest or in the public interest. Nor should they be determined by whether the parties are financially well-endowed or indigent. The primary consideration in*

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prevailing party. This position was confirmed by Nourse LJ in *Re Elgindata Ltd* (No.2) [1992] 1 WLR 1207, 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".

In the UK, 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* [2005] EWCA Civ 358, 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.

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. 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 (Glen, HP "Costs and fees in common law Canada and Quebec." Faculty of Law and Institute of Comparative Law, McGill University, 6).

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-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.

22 Woolman *et al Constitutional Law of South Africa* (Juta1999) 6-2.

23 *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (10) BCLR 1014 (CC).

> *constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice*.[24]

6.32 The second issue considered by the court in *Biowatch* was legal costs awards in litigation between the government and a private party. The court held that in bona fide litigation between the government and a private party, the established principle is that in the event that the government loses, it should pay the legal costs of the private party. However, in the event that the government wins, each party should bear its own legal costs.[25] The court held that the reasons for departing from the "loser pays" principle in constitutional matters are, first, that the high costs of civil litigation might deter litigants from pursuing their otherwise meritorious claims. Second, it is the government's primary responsibility to ensure that all legislation and state conduct should be consistent with the Constitution. Third, *bona fide* constitutional litigation fulfils a public purpose.[26]

6.33 In Canada, 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.[27] 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.[28]

6.34 In South Africa, there are only a few statutes that provide for a deviation from the abovementioned general rule. For instance, section 32(2) of the National Environmental Management Act, 1998 (Act No.107 of 1998) (NEMA), and section 21(2)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No.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. [29]

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24 *Ibid*, para 16.
25 *Ibid*, para 22.
26 *Ibid*, para 23.
27 *Ibid,* 5.
28 Glenn, HP "Costs and fees in common law Canada and Quebec." Faculty of Law and Institute of Comparative Law, McGill University, 3, available at http://www-personal.umich.edu/~purzel/national_reports/Canada.pdf/ (accessed on 03 December 2019).
29 Erasmus HJ *The Interaction of Substantive and Procedural Law: The Southern African Experience in Historical and Comparative Perspective* (1990) 6.

2. Fee structure

6.35 The factors to be taken into account by the Rules Board when determining the tariffs are provided for in section 35(2) of the LPA as follows:[30]

(a) the importance, significance, complexity and expertise of the legal services required;
(b) the seniority and experience of the legal practitioner concerned, 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.

6.36 The Commission is not required to determine the creation of the actual tariff itself (that is, the actual factors that constitute the tariff)[31] as this is the responsibility of the mechanism (Rules Board) to determine.[32] Likewise, questions like what would inform an increase of the tariffs determined by the mechanism, and what benchmark would they use to come to the conclusion that is an acceptable tariff, are matters that fall within the purview of the Rules Board to determine. It is, however, the responsibility of the Commission to determine the process that should be followed by the mechanism in determining the tariffs.

3. Taxation of legal fees

3.1 Role of taxing masters

6.37 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

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30 The use of the factors enumerated under section 35(2) of the LPA as basis for the creation of a tariff is generally supported by the LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 19.

31 Questions like whether the mechanism must use a combination of fee models such as fixed costs, hourly/daily rates, capped or uncapped fees, and in what type of matters are all matters that must be decided by the mechanism (Rules Board), and not the Commission.

32 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 21.

with the general principle that costs follow the event and that courts have discretion over costs.[33]

6.38 Generally, legal costs are determined (taxed) after the court's final judgement.[34] 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 the contract to 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.[35]

6.39 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.[36]

6.40 Regarding the question of whether the court can substitute its decision for that of the taxing master, the court in the *City of Cape Town* [37] 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*.

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33 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.

34 In the United Kingdom, 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,[34] 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.[34] Detailed assessment generally takes place at the conclusion of a marathon trial.

35 *Idem*.

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

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

6.41 Section 5(b) of the LPA provides that "the objects of the Council are to ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice." The LPA is silent on the requirement that the legal fees must also be proportional to the value of the case. Professor Zuckerman describes the principle of proportionality as follows:

> *The aim of the proportionality test is to maintain a sensible correlation between costs, on the one hand, and the value of the case, its complexity and importance on the other hand*.[38]

6.42 In 2002 in the matter of *Lownds v Home Office*,[39] the court held that the proportionality test played no part in the taxation of costs on a standard basis. The only test that was applicable is that of reasonableness. In 2007, in the matter of *Willis v Nicolson*,[40] the Court of Appeal in the UK observed that the proportionality test had not proved effective in controlling costs. Delivering the judgement, Buxton LJ said that:

> "The very high costs of civil litigation in England and Wales are a matter of concern not merely to the parties in a particular case, but for the litigation system as a whole. The costs system as it at present operates cannot do anything about that, because it assesses the proper charge for work on the basis of market rates charged by the professions, rather than attempting the no doubt difficult task of placing an objective value on the work."41

6.43 Reflecting upon the judgement delivered in *Lownds v Home Office* above, Justice Jackson felt that this decision is not satisfactory. His view is "that the test of reasonableness, standing on its own, institutionalised, as reasonable, the level of costs which were generally charged by the profession at the time when professional services were rendered. If a rate of charges was commonly adopted it was taken to be reasonable and so allowed on taxation even though the result was far from reasonable."[42] Justice Jackson is of the view that "disproportionate costs should be disallowed in an assessment of costs on the standard basis. If a judge assessing costs concludes that the total figure, alternatively some element within that total figure, was disproportionate, the judge should say so." He recommended that proportionate costs be applied on a global basis and be defined in the CPR by reference to the sum in issue, the value of

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38 Justice Jackson "Review of Civil Litigation Costs: Final Report" (2009) 36.
39 [2002] 1 WLRC 2450, Justice Jackson, 34.
40 [2007] EWCA Civ 199, paras 18-19.
41 Ibid, 37.
42 Justice Jackson "Review of Civil Litigation Costs: Final Report" (2009) 34.

non-monetary relief, the complexity of litigation, conduct and any wider factors, such as reputation or public importance.[43]

6.44 **Recommendation 6.2**: It is stated above that in the RSA, the award of costs, unless expressly stated otherwise, is in the discretion of the presiding judicial officer and that costs generally follow the event. It is recommended that courts should consider applying the proportionality test in addition to that of reasonableness when awarding costs on a party-and-party scale and attorney-and-client scale. The aim of the proportionality test is to maintain a sensible correlation between costs, on the one hand, and the value of the case, its complexity and significance on the other hand.[44]

6.45 Most of the respondents are of the view that taxation should be the responsibility of the taxing master, or registrar/ clerk in the Magistrates' Court. Requiring judicial officers to tend to taxation of bills of costs may be a waste of resources, more so because the outcome of taxation may be taken on judicial review in terms of Rule 35 of the Magistrates' Court Rule, and Rule 48 of the Uniform Rules.[45] The function of the taxing master, therefore, is to decide whether the services have been performed, whether the charges are reasonable or according to the 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.[46]

6.46 Bills of costs are taxed in a variety of litigious matters.[47] 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.[48]

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43 *Ibid*, 39.

44 The LSSA submits that it is not prudent to prescribe as to how judicial officers should discharge their discretion. Presiding officers should have unfettered discretion in awarding legal costs, *op cit*, 61.

45 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 17.

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

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

48 *Idem*.

6.47 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.[49]

6.48 Responding to the question, first, whether taxation should be the responsibility of the taxing master, or should the presiding officer provide greater guidance in the judgment to the taxing master as to costs, and, second, whether the OCJ and DOJ&CD should put in place appropriate resources to tax bills of costs, the RAF believes that taxation should remain the preserve of the taxing master, but that the courts must play a larger role in complex matters.[50]

6.49 According to MPS, under the current system, the court in making the decision as regards the award of costs is divorced from the process of the calculation of those costs.[51] Conceivably, this could lead to a result in which the court believes that the value of the costs award that it makes is "X," whereas, after taxation by the taxing master, the actual award amounts to "Y."[52] There is no provision in the Rules for the court to review and/or approve the actual allocation of costs by the taxing master.[53] Provision should therefore be made for the taxing master to refer his/her taxation award to the court for approval. The court, in turn, should have the discretion to increase or decrease the costs allocated, with reference to the actual costs incurred by the successful litigant.[54]

6.50 Legal Aid SA's position is that the taxing master can still assume the responsibility of taxation, as aggrieved parties still have a right of review to the presenting officer.[55] The complexity of the taxation function can be substantially simplified if tariffs are applied per matter or cause of action, and not per every individual action taken in the litigation process.[56] This would eliminate costs like charging per phone call or per letter and would prescribe a set fee for litigating claims sounding in money, an uncontested divorce, etc.[57]

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49 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.

50 RAF “Comments on the investigation into legal fees” (27 August 2019) para 36.

51 Medical Protection Society “Response to the SALRC Issue Paper 36” 48.

52 *Idem*.

53 *Idem*.

54 *Idem*.

55 Legal Aid SA “Response by Legal Aid South Africa Part A” (September 2019) 29.

56 *Idem*.

57 *Idem*.

6.51 The Rules Board states that the taxation process should be the responsibility of the taxing master.[58] The lack of skill or expertise, that is, most taxing masters have not practiced or drafted any pleadings, is of some concern.[59] Some guidance from the presiding officer in respect of costs would assist the taxing master.[60] Taxation carried out by taxing masters is preferable, given the shortage of judges and the expertise of judges (and other judicial officers). Requiring judges, highly skilled professionals, to tend to the taxation of bills of costs would be a waste of resources.[61] Furthermore, the effect on the public purse would be substantial given that skilled professionals would expect to be paid commensurately. Taxations may be taken on review, hence there is no reason for taxations to be the responsibility of judges/judicial officers.[62]

6.52 The LSSA submits that taxation should remain the responsibility of the taxing master.[63] However, currently, there are long waiting periods for dates to tax. More taxing masters need to be appointed and trained.[64]

6.53 ENSafrica notes that, ideally, taxation (like everything else in the legal process) should be attended to by the most experienced and qualified legal practitioners.[65] Although judges/magistrates would fit this description, state resources are limited and the number of judges/magistrates is limited.[66] It seems unwise to divert judges'/magistrates' attention away from the merits of matters, to perform the taxing master's duties. Most of them will, in any event, not have had the kind of experience that would be pertinent for the task. Judges do give a certain amount of guidance already, as regards the basis on which costs should be taxed, and also in some cases the number of counsel for whom costs should be allowed. In ENSafrica's view, resources would be better spent by improving the services provided by taxing masters, including revising the tariffs so as to be a fairer reflection of costs incurred by successful litigants.[67]

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58 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 17.
59 *Idem*.
60 *Idem*.
61 *Idem*.
62 *Idem*.
63 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 52.
64 *Idem*.
65 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 22.
66 *Idem*.
67 *Idem*.

6.54 According to BASA it is unnecessary to shift the responsibility from the taxing master, who, properly qualified and trained, is competent to fulfil this function.[68] ABSA states that taxation should be the responsibility of the taxing master.[69]

6.55 **Recommendation 6.3**: It is recommended that taxation should remain the responsibility of the taxing master (in the High Court, and registrars and clerks in the Magistrates' Courts). More taxing masters need to be appointed and trained to avoid long waiting periods for dates to tax.

3.2 Pre-litigation costs

6.56 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 in 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*.[70]

6.57 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. It is not sound practice to attempt to recover such non-agreed, unawarded, 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.[71]

6.58 The respondents submit that pre-litigation costs are a significant problem in cost recovery. 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*[72] 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. This is confirmed by LSSA who

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68 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 7.

69 ABSA "ABSA Bank's Commentary-Issue Paper 36" para 2.47.

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

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

72 1983 (2) SA 465 (O).

states that “there is a very fine line between attendances that are essential or form part of a cause of action, such as a formal notice in terms of The Institution of Actions against Certain Organs of State Act 40 of 2002, and attendances that strictly speaking do not further the litigation process.”[73]

6.59 Legal Aid SA explains that pre-litigation costs are costs that are incidental to legal proceedings.[74] Generally, these costs are incurred prior to issuing a summons or notice of application.[75] These fees can be exorbitant. An initial deposit just to get access to an attorney is often beyond the means of most citizens.[76] Consideration could be given to setting a flat fee for an initial consultation by a natural person with a legal practitioner.[77] This could ensure that the client obtains advice at the earliest possible stage, which could prevent or reduce disputes.[78]

6.60 Pre-litigation costs are only rarely recoverable in terms of a voluntary settlement.[79] The payment cannot be enforced if no litigation has commenced. There is no framework to regulate pre-litigation costs.[80] In the LSSA's view, pre-litigation costs are a significant problem in cost recovery.[81] The principle is that these are attorney-and-client expenses, and thus not recoverable from the losing party.[82] However, there is a very fine line between attendances that are essential or form part of a cause of action, such as a formal notice in terms of The Institution of Actions Against Certain Organs of State Act 40 of 2002, and attendances that, strictly speaking, do not further the litigation.[83] Many essential attendances are attacked and disallowed as "pre-litigation," including "premature" briefing of counsel.[84]

6.61 This should be addressed by amendments to the tariff to ensure that reasonable pre-litigation costs, some of which may be significantly less than they would be if incurred

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73 LSSA “Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees” (30 September 2019) 36 Regarding the Investigation into Legal Fees”41
74 Legal Aid SA “Response by Legal Aid South Africa Part A” (September 2019) 15.
75 *Idem.*
76 *Idem*.
77 *Idem*.
78 *Idem*.
79 Medical Protection Society “Response to the SALRC Issue Paper 36” 12.
80 *Ibid*.
81 LSSA “Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees” (30 September 2019) 36 Regarding the Investigation into Legal Fees” (30 September 2019) 40.
82 *Idem*.
83 *Ibid,* 40-41.
84 *Ibid,* 41.

at a later stage in the process, are allowed as party-and-party costs.[85] Pre-litigation costs should be governed by the same principles as are applicable to litigation costs.[86] Pre-litigation costs should at least include reasonable consultations, research, investigations and correspondence (letters of demand and settlement negotiation).[87]

6.62 ENSafrica argues that, because of the fact that most pre-litigation costs are not currently allowed, the incentive is for litigants to initiate the legal process as soon as possible to make more of their costs recoverable. This counteracts attempts to achieve pre-litigation resolution of disputes.[88] The taxation tariff should be expanded to include all pre-litigation costs, provided that they were directly related to the matter in question.[89]

6.63 BASA submits that it may be used as a measure to try to settle the matter before instituting action (that is, pre-litigation costs, calling the debtor for a payment arrangement, drafting a settlement agreement or acknowledgement of debt).[90]

6.64 The SALRC concurs with the view that prelitigation costs that further the litigation process should be governed by the same principles as applicable to litigation costs. Accordingly, the relevant Court Rules must ensure that reasonable recoverable prelitigation costs that were necessary and properly incurred are allowed as party-and-party costs.

6.65 **Recommendation 6.4**: Regarding prelitigation costs that do not further the litigation process, the Commission recommends that the LPC should consider developing service-based attorney-and-client fee guidelines for an initial consultation between a legal practitioner and a client whose total income/turnover per annum does not exceed the amount determined by the Minister by notice in the Gazette. This could take the form of a fixed or flat fee. The purpose will be to ensure that advice is obtained at the earliest possible stage, which could prevent possible disputes.

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85 *Idem*.

86 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 41.

87 *Idem*.

88 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 13.

89 *Idem*.

90 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 2.

3.3 Detailed assessment

6.66 According to Legal Aid SA, a detailed assessment is a fair process that deals with the determination of costs in any litigation matter in which costs need to be determined.[91] These costs then still need to be taxed and vetted by the officials responsible (that is, the taxing master or LPC). [92]

6.67 Depending on the type of case, assessment is cumbersome, as each and every item must be billed and taxed separately, and it is necessary to use a costs consultant to assist with the assessment.[93] LASA recommends that the fee structures be revised to simplify costs.[94]

6.68 According to the RAF, challenging a bill of costs is prohibitive in that it often requires the services of a cost consultant or attorney.[95] Other factors that deter opposition to a bill of costs are that large amounts are involved, and attendance fees can also be quite large.[96]

6.69 The Rules Board submits that a detailed assessment of the costs is particularly beneficial to the party that is ordered to pay.[97] Such party is afforded an opportunity to interrogate the fees of the other party, agree or object to same, and then in the case of an objection, the matter is considered by the taxing master or the clerk/registrar of the court seized with taxations.[98] This process has no bearing or impact on the fees charged by the legal practitioner to his/her client.[99]

6.70 The LSSA states that a detailed assessment is desirable, as it assures a fair recovery of costs by the successful party or of the liability of the client in an attorney-and-own-client bill.[100]

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91 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 23.
92 *Idem*.
93 *Idem*.
94 *Idem*.
95 RAF "Comments on the investigation into legal fees" (27 August 2019) para 28.
96 *Idem*.
97 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 15.
98 *Idem*.
99 *Idem*.
100 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 46.

6.71 Fee guidelines and party-and-party tariffs should be simplified with a uniform format between the various courts.[101] As to the assessment process, it can potentially be simplified with the grouping together of items on the bill of costs.[102] However, that makes it more difficult for parties to challenge particular items on the bill of costs.[103] For the latter reason, the current format could be retained.[104] This enhances transparency.[105]

6.72 BASA notes that a detailed assessment form uses technical language "legalese" that might be difficult for a lay person to understand and might therefore be a barrier to access to justice.[106]

3.4 Factual and expert evidence

6.73 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.[107]

6.74 Respondents submit that expert evidence by way of medico-legal reports and *viva voce* is expensive and ever-increasing.[108] This problem, according to the respondent, can be addressed by capping the fees allowed to experts when providing their testimony and reports.

6.75 The Western Cape Department of Health submits that the role and impact of experts in medico-legal litigation are not regulated, nor are there guidelines for costs that they charge.[109] Furthermore, experts have an interest in litigation because, according to the respondent, “a positive outcome for the plaintiff would certainly always serve the interest of the expert who would want to seek favour with the plaintiff’s attorney to get repeat work.”[110]

6.76 In *Schneider No and Others v AA and Another*,[111] Davis J held that

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101 *Idem*.
102 *Idem*.
103 *Idem*.
104 *Idem*.
105 *Idem*.
106 Banking Association of SA “Comments on the investigation into legal fees” (30 August 2019) 4.
107 Legal Aid SA “Response by Legal Aid South Africa Part A” (September 2019) 15.
108 RAF “Comments on the investigation into legal fees” (27 August 2019)13.
109 Office of the Premier, “Submission from the Western Cape Department of Health in Relation to Issue Paper 36” (September 2019) 74.
110 *Ibid*, at 75
111 2010 (5) SA 203 (WCC) para 15.

An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence that goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.

6.77 In *Road Accident Fund v Kerridge*, [112] the court held that:

Too readily, our courts tend to accept the assumptions and figures provided by expert witnesses in personal injury matters without demure.

6.78 The respondent identifies the following factors and circumstances in relation to the role of experts as giving rise to unattainable legal fees:[113]

(a) There is no regulation of any agreements that are concluded between plaintiffs and experts;

(b) In cases where experts do not bill at the time they do the work but at the end of a brief, their fees are higher than what they would ordinarily charge, alternatively they do render an invoice but only get paid at the end of the trial.

(c) Experts render alleged invoices without disclosing hourly rates and yet invoices are paid by attorneys and can only result in a lack of accountability and in increased legal fees.

(d) Experts are given every report of every other expert irrespective of relevance to the advice they meant to render. Fees become increased as they are burdened with unnecessary reports.[114]

(e) *Experts who are provided with a number of other expert reports tend to regurgitate and even quote verbatim, conclusions and passages from those reports. It causes increased costs for the opposing party whose legal representative and like experts now have to read all the extraneous material. This results in increased costs for the client whose own experts and legal representatives also have to peruse this report and it wastes the court's time*.

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112 [2018] JOL 40588 (SCA).

113 Office of the Premier, "Submission from the Western Cape Department of Health in Relation to Issue Paper 36" (September 2019) at 74-77.

114 In one case study submitted by the respondent to the Commission, the plaintiff filed 18 different medico-legal expert reports in relation to quantum and amended particulars of claim from R10 140 004 to R32 156 874 of which R23 071 800 related to future medical and related expenses. Of these expert reports, 15 were medical experts (mobility expert, bio kineticist, dietician, eye specialist, orthoptist, orthopaedic surgeon, speech therapist, physiotherapist, maxilla facial surgeon, urologist, paediatric neurologist and various psychologists) at 27.

6.79 The Road Accident Fund also confirms that the cost of expert reports is substantial. The respondent states that "experts are instructed to assist with the quantification of the claim, by both the Plaintiff and the RAF. Since the cost of expert reports is substantial, in an attempt to save on costs, and where possible, the RAF endeavours to agree on experts with the Plaintiff, or to make use of the Plaintiff's expert reports. This is however not ideal."[115]

6.80 The respondent makes the following recommendations:

(a) *That the rules relating to expert evidence require revamping to improve the advice rendered to court and to ensure that the costs are curtailed*.
(b) *Fees charged by experts should be regulated by the relevant professional bodies*. The fees should be reasonable and relate to work done by the expert and not a repetition of what had been done by others.
(c) Expert reports must be truthful, impartial and only relate to the area of expertise for which the expert is qualified.

6.81 Rule 36: Inspections, Examinations and Expert Testimony of the Uniform Rules now provide that parties should endeavour, as far as possible, to appoint a single joint expert on any one or more or all the issues in the case and file a joint minute of experts relating to the same area of expertise.[116] Furthermore, Rule 36 provides that no party shall, save with the leave of the court or consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert unless the party concerned complies with the time frame and notice requirements as stipulated in the Rules. In terms of Rule 30A, non-compliance with the rules may lead to striking out of the claim or defence.

6.82 Legal Aid SA notes that, although some exceptional cases may require the production and reproduction of vast quantities of documents, documentary evidence would not ordinarily prove to be prohibitively expensive.[117] The practicalities of securing a witness to provide *viva voce* evidence could, however, prove a challenge, especially for a litigant with severely limited means.[118] In this regard, expenses such as travelling could increase exponentially where the witness has to travel long distances to attend

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115 Road Accident Fund "Comments on the Investigation into Lega Fees Project 142 Issue Paper 36" (27 August 2019) 5.
116 Rules 36(9).
117 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 15.
118 *Ibid,* 16.

court. This could also entail accommodation for the witness, who may be required to remain in attendance for an extended period. In many matters, such as medical negligence, the use of expert witnesses is unavoidable.[119] Many experts practice in lucrative fields and require a "king's ransom" to become involved in the court process. This hampers access to justice. Engaging experts could result in exorbitant fees, especially in instances where the expert reports are more comprehensive than they need to be, or address matters that are irrelevant or at best peripheral, or address matters that ought not to be covered at all.[120]

6.83 Because of high costs, a legal practitioner could decide not to use an expert, because the client cannot afford one.[121] The more experts that are involved in a case, the higher the legal costs will be.[122]

6.84 Legal Aid SA points out that the regulation of expert fees in the Government *Gazette* has been regarded as *pro-non-scripto*.[123] Regulation of expert fees should be explored, to ensure access to justice.[124] Consideration could also be given as to whether the required expert notices as per the rules of court cannot be used more effectively to decide if oral testimony of the experts is necessary.[125]

6.85 According to the MPS, factual evidence seldom entails any costs being incurred, except for travel costs and nominal loss of income.[126] Expert evidence, on the other hand, can be as expensive as other disbursements, such as counsel fees, depending on the complexity and duration of the expert evidence required. The costs of expert evidence can account for the bulk of disbursements incurred in a given matter.[127]

6.86 The RAF notes that expert evidence by way of medico-legal reports and *viva voce* evidence is expensive and ever-increasing, with a resultant impact on the affordability of justice.[128] This can be countered by capping the fees of experts for their testimony and reports.[129]

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119 *Idem.*
120 *Idem*.
121 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 16.
122 *Idem*.
123 *Idem*.
124 *Idem*.
125 *Idem*.
126 Medical Protection Society "Response to the SALRC Issue Paper 36" 13.
127 *Idem*.
128 RAF "Comments on the investigation into legal fees" (27 August 2019) para 16.
129 *Idem*.

6.87 The LSSA submits that the cost of producing factual evidence varies, but is usually significantly less than the costs associated with obtaining expert reports and evidence.[130] Where voluminous records are required to establish facts in dispute, methods should be devised to reduce the costs associated with producing court bundles and copies for the other side.[131] In the case of lay witnesses, a reduction in costs might be achieved if the parties are obliged to swap summaries of the evidence to be led with the object of obtaining concessions and/or reducing the facts in dispute, thus reducing court time. The current regulations for case management, implemented with effect from 1 July 2019, paves the way for improvement in this area. Currently, it is quite rare that opposing parties agree to appoint a single expert. The only real exception to this is the appointment of an actuary.[132] A credible panel needs to be appointed from which single expert witnesses can be drawn, failing which there will have to be an expedited mechanism to deal with disputes relating to the selection of the expert.[133]

6.88 The cost of factual and expert evidence will inevitably impact on access to justice.[134] Where parties agree to a single expert, this will reduce costs.[135] The mandate of the SALRC, in addition to considering access to justice, includes a review of the impact of costs of expert witnesses in litigation.[136]

6.89 ABSA states that the cost of factual and expert evidence is significantly high.[137] Therefore, fair and reasonable statutory tariffs should be considered in this regard.[138] Since most experts ordinarily have other sources of revenue/practice, the system must operate in a sufficiently commercial manner not to discourage experts from agreeing to participate in court proceedings.[139] It should be borne in mind that, as a practical consideration, experts cannot be compelled to testify.[140]

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130 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 41.
131 *Idem*.
132 *Idem*.
133 *Idem*.
134 *Ibid,* 42.
135 *Idem*.
136 *Idem*.
137 ABSA "ABSA Bank's Commentary-Issue Paper 36" par 2.
138 *Idem*.
139 *Idem*.
140 *Idem*.

6.90 **Recommendation 6.5**: Expert evidence should be avoided when it is not necessary because it leads to excessive legal fees. The Commission concurs with the recommendations made by the respondents that:

(a) That the rules relating to expert evidence require revamping to improve the advice rendered to court and to ensure that the costs are curtailed.
(b) Fees charged by experts should be regulated by the relevant professional bodies. The fees should be reasonable and relate to work done by the expert and not a repetition of what had been done by others.
(c) Expert reports must be truthful, impartial and only relate to the area of expertise for which the expert is qualified.
(d) The LPC should inform all relevant professional bodies of the need for guidelines to be determined with regard to the fees that may be charged. The guidelines should be published for purposes of transparency and that disciplinary action will be taken where experts charge unreasonable and disproportionate fees.

6.91 The SALRC also takes note of the Road Accident Benefit Scheme Bill, which envisages the establishment of a tariff for the provision of health care services and medical report. Section 68(1) of the Bill provides that:

(1) The Minister (of Transport) must prescribe-

(a) After consultation with the Minister of Health and the Minister of Finance, the tariff and treatment protocols for the liability of the Administrator for the provision of health care services, medical reports and vocational ability assessments;
(b) The Minister may, with the concurrence of the Minister of Finance, by notice in the Gazette, adjust upwards the tariff, with the concurrence of the Minister of Health, and the average annual national income, the pre-accident annual income cap and the lump-sum funeral benefit referred to in section 46, to take into account the effect of inflation."

3.5 Legal costs consultants

6.92 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

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

6.93 According to Reinecke, cost consultants (and candidate attorneys) probably draw and settle the bulk of bills of costs produced annually.[141] Cost consultants often, and over time, accumulate specialist knowledge about costs that serve to expedite matters, render a professional service to the cost 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* (Pty) Ltd and Another v The Registrar, Cape, NO and another[142] and *Alberts v Malan*.[143]

6.94 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 legal practitioners and those who are. Those who are not legal practitioners act in their own capacity as experts in legal costs matters.[144]

6.95 Although any person may draw a bill of costs, however, only a legal practitioner with a right of appearance may present such a bill before a taxing master.[145] Lourens submits that in the well-known *Alberts v Malan* review of taxation matter in which he was involved as the cost consultant, Selikowitz J "clearly acknowledge the practice of Legal Costs Consultants attending taxation if a practicing attorney is present or there is no objection from the other side."[146] Speaking at the Legal Cost Indaba, Ms Zeelie confirmed

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141 Reinecke, AJ, *The legal practitioner's handbook on costs* (2011), 440. See also Lourens M "Submission to the South African Law Reform Commission" (12 August 2019) 7.

142 1979 (3) SA 925 (A). At par 946B Galgut AJA held that "It follows from what has been said above that traditionally taxation has been, and still is, regarded as an integral part of the judicial process and that the rights and obligations of the parties to a suit are not finally determined until the costs ordered by the Court have been taxed. Accordingly, the only persons who can appear before a Taxing Master in a Supreme Court are persons who are permitted to practice in such Court."

143 Case No: A 765/01 delivered by the Cape of Good Hope Provincial Division on 26 August 2004. At par 8, Selikowitz J held that "I am advised by the current Taxing Master of this Court that in practice, in the absence of any objection from the opposing side, and where the attorney is present, cost consultants are permitted to take part in taxation hearings. It is unnecessary for me to rule on this practice as whatever the position, I am satisfied that the objection cannot be upheld."

144 Lourens M "Submission to the South African Law Reform Commission" (12 August 2019) 8.

145 *Bills of Costs (Pty) Ltd v Registrar Cape N.O* 1979(3) SA 925 (AD). See also Kruger and Mostert *Taxation of Costs in the Higher and Lower Courts A Practical Guide* (2010) 64.

146 Lourens M "Submission to the South African Law Reform Commission" (12 August 2019) 7.

that "cost consultants appear and present the bill of cost" at the Gauteng Local Division.[147]

6.96 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.[148] 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.

6.97 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:

> (1) *For drawing the bill of costs, making the necessary copies and attending settlement, 11 percent 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 percent on the first R10 000,00 or portion thereof, 6 percent on the next R10 000,00 or portion thereof, and 3 percent on the balance of the total amount of the bill*.[149]

6.98 On the question of whether the role of legal costs consultants should be regulated, and if so, why, one respondent submits that it is recommended that the industry be regulated since many candidate attorneys, secretaries and persons without legal costs taxation experience are making attempts to join the market. The LPA does not make express provision for legal costs consultants.[150] 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. It also provides the users of legal services with more product choices and competitive prices which is an important tenet of a free market system.

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147 De Rebus available at http://www.derebus.org.za/tax-master-middle-man-reasonable-billing-attorney-client/ (accessed on 13 May 2020). The Legal Cost Indaba was held in Johannesburg on 7 October 2016.

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

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

150 Legal costs consultants are not expressly included in the code of conduct that must be developed by the LPC in terms of section 36(1) of the LPA. The code of conduct is applicable to all legal practitioners, candidate legal practitioners and juristic entities.

6.99 On the question of whether legal costs consultants without a right of appearance should be allowed to continue drawing and possibly presenting bills of costs, and if so, will the form of regulation of costs consultants without right of appearance require at least 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, the Board of Legal Costs Mediators (BLCM) provides a private dispute resolution platform as an alternative to formal taxations in the Republic.[151] The BLCM members are bound by a Code of Conduct and apply "case-law predetermined legal costs practices to all mediation and assessments."[152] Only experienced legal costs consultants who are subject to the BLCM Code of Conduct should be allowed to draft and present bills of costs.[153]

6.100 According to the RAF, costs consultants generally charge a smaller fee than attorneys for the same work. [154] The role of costs consultants is sufficiently regulated at present.[155]

6.101 Likewise, the MPS notes that the charge-out rate of attorneys is invariably higher than that applied by legal costs consultants.[156] Legal costs consultants play a valuable role in ensuring the appropriate taxation and allocation of cost awards.[157] In the absence of legal costs consultants, attorneys would have to undertake to prepare and taxing bills of costs, which would increase the cost of litigation.[158]

6.102 Legal Aid SA points out that the complexities and extras allowed in legal fees is the reason why costs consultants exist, and they play an important role in ensuring the correct taxation of cases.[159] Legal costs consultants contribute to access to justice, rather than inhibit it.[160] The fee structure of costs consultants should be simplified and regulated to ensure certainty and transparency.[161]

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151 http://www.blcm.co.za/News-Blog/ (accessed on 12 December 2019).
152 *Idem*.
153 Lourens M "Submission to the South African Law Reform Commission" (12 August 2019) 6, 7.
154 RAF "Comments on the investigation into legal fees" (27 August 2019) para 37.
155 *Idem*.
156 Medical Protection Society "Response to the SALRC Issue Paper 36" 49.
157 *Idem*.
158 *Idem*.
159 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 29.
160 *Idem*.
161 *Idem*.

6.103 The LSSA submits that an honest costs consultant would not contribute to unaffordable legal services.[162] Ultimately, the legal practitioner should accept the responsibility that the bill of costs is accurate. To the extent that it is not, the legal practitioner should bear the consequences, be it in the taxation process or charges before the LPC.[163]

6.104 Legal costs consultants are not the litigators in the matter, and therefore they do not have personal knowledge of all the attendances.[164] To regulate them will give unnecessary standing to them in the taxation process.[165]

6.105 The large commercial firms appoint costs consultants to assist in the taxation process. In ENSafrica's experience of commercial cases in the higher courts, the fees charged by the costs consultant in challenging a bill of costs is usually less than the discount achieved by the tax consultant on the draft bill, justifying his or her fee in almost all cases.[166]

6.106 Costs consultants, with their highly specialised skill set and low overheads, thus generally pay for their own fees in terms of value delivered, and so their participation in the legal process should be encouraged.[167] Regulation of their activities should be kept to a minimum, so as not to increase the burden placed on them of operating their businesses cost-effectively.[168]

6.107 BASA's experience has indicated that it is often more cost-effective to make use of a legal cost consultant.[169]

6.108 The RAF believes that the establishment of the BLCM will only add to the already burdensome legal fees that litigants have to bear.[170] In addition, having costs consultants with the right of appearance alone appear before a taxing master would ensure that the attorneys' regulatory body has oversight over the conduct of such cost consultants.[171]

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162 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 53.
163 *Idem*.
164 *Idem*.
165 *Idem*.
166 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 22.
167 *Idem*.
168 *Idem*.
169 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 7.
170 RAF "Comments on the investigation into legal fees" (27 August 2019) para 38.
171 *Idem*.

6.109 The MPS takes the view that legal costs consultants should not be required to have the right of appearance to undertake their work.[172] It does agree, however, that a separate regulatory body – which could be adjunct to the Legal Practice Council – should be established to regulate the conduct of legal costs consultants.[173]

6.110 Legal Aid SA answers this question in the affirmative.[174] Legal costs consultants should be allowed to draw and present bills of costs, as that will influence their costs, and there should be some minimum regulation of costs consultants.[175] BASA supports the establishment of a regulatory body in this regard to ensure fair treatment, and ensure that norms are applied across the board.[176]

6.111 **Recommendation 6.6**: It is recommended that an investigation be conducted by the DOJ&CD into the feasibility of establishing an administrative body that will be responsible for prescribing minimum norms and standards and code of conduct for legal costs consultants without a right of appearance in court. Legal costs consultants are not expressly included in the code of conduct that must be developed by the LPC in terms of section 36(1) of the LPA. The code of conduct is applicable to all legal practitioners, candidate legal practitioners and juristic entities. 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. It also provides users of legal services with more product choices and competitive prices, which is an important tenet of a free market system.

D. Tariffs for advocates' fees

6.112 The drawback of the statutory party-and-party tariffs is that they make insufficient provision for advocates' fees in a number of matters. Save for the few items set out in Rule 69 Uniform Rules of the High Court, this Rule does not make sufficient provision for the recovery of counsels' fees.[177] Since the tariffs provide for counsel fees in limited matters, this means that counsels' fees on matters that are excluded by the tariffs are

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172 Medical Protection Society "Response to the SALRC Issue Paper 36" 50.
173 *Idem*.
174 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 29.
175 *Idem*.
176 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 7.
177 Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 203. Uniform Rule 69 deals with counsel fees that may be recovered at the conclusion of the litigation process.

largely determined by arrangement between the attorney and the advocate, to the exclusion of the client who must bear the costs. [178]

6.113 In the *President of Republic of South Africa and Others v Gauteng Lions Rugby Union* case,[179] 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 with 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".[180] The court held that "of course what underlies this consistent and vehement rejection is that such piecemeal charging often serves to camouflage excessive fees".[181]

6.114 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 the "current practice has moved away from charging a combined fee for preparation and the 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".[182]

6.115 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".[183]

6.116 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)(b) of the LPA now makes

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

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

180 *Ibid,* para 32.

181 *Ibid,* para 32.

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

183 *Idem*.

provision for an advocate to receive a brief directly from a member of the public, which was not the case in the past.[184] The Rules Board has indicated in its submission to the SALRC that the Board has, on the strength of the opinion obtained from the Office of the Chief State Law Adviser, commenced work on creating and constructing tariffs as envisaged in section 35(1) and (2) notwithstanding that the mandate in terms of the aforesaid section of the LPA had not vested.[185]

6.117 On 14 November 2019, the Rules Board issued a notice requesting comment and input on Uniform Rule 69 (Tariff for Advocates and Attorneys with Right of Appearance) and Uniform Rule 70 (Tariff for Attorneys). The notice states that "Uniform Rule 69 is proposed to be amended to provide a tariff to guide taxing masters in the taxation of advocates' fees and to establish uniformity in the taxation of fees for attorneys who have the right to appear in the High Court, with the fees of advocates in the High Court."

6.118 The general rule is that the High Court has an inherent power to regulate the fees claimed by attorneys and advocates.[186] 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".

6.119 Counsel's fees are treated as disbursements in an attorney's Bill of Costs.[187] 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.[188]

6.120 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 counsels' fees as between party-and-party in limited matters falling within scales B,

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184 That is, an advocate with a Trust Account and a Fidelity Fund Certificate. This section provides as follows:
"34(2)(a) An advocate may render legal services in expectation of a fee, commission, gain or reward as contemplated in this Act or any other applicable law-
(ii) Upon receipt of a request directly from a member of the public or from a justice centre for that service, subject to paragraph (b)."

185 Rules Board for the Courts of Law "South African Law Reform Commission Investigation into Legal Fees: Project 142" (9 September 2019) 4.

186 Rule 69 of the Uniform Rules.

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

188 *Ibid,* 91.

C, or D of the tariff.[189] However, the Magistrates' Court tariff only provides for minimum amounts for counsels' fees unless the court orders higher amounts.[190] According to Francis-Subbiah,[191] maintaining minimum costs in the Magistrates' Court is a further attempt to make access to justice more affordable to indigent persons.

6.121 Presently, there is some degree of inconsistency in the structure of the recoverable tariffs. There is also a concern that recoverable tariffs are not market-related because they are not updated on a regular basis. Accordingly, there is a need for the review of the tariffs that apply in the different courts. The review must be done in respect of attorneys' fees and counsels' fees. The recoverable tariffs for attorneys and advocates in relation to each other and in respect of the various hierarchies of court need to be calibrated to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Court level right up to the Supreme Court of Appeal and Constitutional Court.

6.122 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".[192]

6.123 Responding to the question of whether the lack of statutory tariffs for advocates' fees inhibits access to justice, and if so, in what way, the RAF responds to the question in the affirmative, stating that it is because advocates are allowed to charge whatever they deem to be reasonable.[193] If the client is unhappy with the fees charged, the client would be required to have the account taxed, subject to the taxing master's wide discretion in respect of counsel fees. However, most clients would be discouraged from bringing the matter before the taxing master in the first instance, because of the ancillary costs involved.[194]

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189 Notice No.R.33 dated 23 January 2015.
190 Item 6 of the General Provisions in Table A of Annexure 2.
191 Francis-Subbiah, R, *Taxation of legal costs in South Africa* (2013), 194.
192 Mlambo, D. "The reform of the costs regime in South Africa", 2012, 11.
193 RAF "Comments on the investigation into legal fees" (27 August 2019) para 12.
194 *Idem*.

6.124 Legal Aid SA opines that it would be remiss to only work on the premise that advocates' fees and the lack of regulation thereof inhibit access to justice.[195] Attorneys' fees, although more regulated, are a mystery to most, and the lack of transparency in this regard can also inhibit access to justice.[196] If the idea is put forward that fees must be regulated, then it should include both professions.[197]

6.125 It is the view of the Cape Bar Council that tariffs for counsel are neither necessary nor desirable.[198] They are not necessary because of certain competitive dynamics. First, the Bar comprises of advocates in direct competition with one another for, among other things, briefs from attorneys. In the competition for briefs, counsel competes directly on the basis of the quality of work and fees.[199]

6.126 Second, the fees that counsel charge are transparent. Where attorneys have a previous relationship with selected counsel, they already know what those fees are. Where they do not have a previous relationship, attorneys can, and often do, ask, before briefing counsel, what counsel's hourly rate is.[200] Third, the relationship between client and attorney, on the one hand, and attorney and counsel on the other, is essentially consensual. The consensual nature of the relationship extends to the selection of the attorney and counsel, and the fees that are to be charged.[201] Fourth, section 35 of the LPA expressly exempts clients who consensually agree to fees in excess of or below any tariffs as contemplated in that section.[202] Fifth, all Bars have committees serving the function of a fee ombudsman to which attorneys may have recourse if they are unhappy with fees charged by counsel.[203]

6.127 Sixth, until September 2008 the Cape Bar published fee guidelines that served as benchmarks to counsel in seniority brackets as to the rate at which they might charge. However, the Competition Commission indicated to the GCB that it considered the fee guidelines to be anti-competitive. Hence, the GCB was required to call on its members to desist from publishing fee guidelines.[204] Finally, nature and circumstances in which counsel are briefed differ greatly. For example, counsel may be briefed in highly urgent

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195 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 12.
196 *Idem*.
197 *Idem*.
198 Capebar "Investigation into legal fees-Issue Paper 36" (16 August 2019) 5.
199 *Ibid,* 2.
200 *Ibid,* 3.
201 *Idem.*
202 *Ibid* 3-4, 5.
203 *Ibid,* 4.
204 *Ibid,* 5.

matters requiring the dedication of time overnight and over weekends, under great stress, and with substantial adverse professional consequences were the work to be defective. On the other hand, run-of-the-mill briefs involving little specialisation, with little or no time constraints, require very different skills and application from counsel. Tariffs could not realistically and reasonably reflect such great variations in the nature and circumstances of briefing. [205]

6.128 According to the Cape Bar, tariffs are also not desirable, because of their possible anti-competitive effects, for example in encouraging counsel who would otherwise demand a lower hourly rate to charge a higher rate.[206] Broadly speaking, the Cape Bar notes that section 35 of the LPA and the legal system, in general, strive to provide a large portion of South Africans with access to lawyers and to the justice system at an affordable rate.[207] The regulation of advocates' fees will not resolve this problem and other meaningful means need to be adopted. The Cape Bar believes that education and an improved administrative judicial infrastructure, coupled with affordability, will achieve the goals of section 35 of the LPA.[208]

6.129 The GCB states that the fact that there is a referral profession, namely advocates who take work only from attorneys who instruct them, certainly is neither an impediment to access to justice nor a factor that increases costs in litigation unnecessarily.[209] Far from it: attorneys have the right to determine whether and when counsel should be employed.[210] Experience will tell that, in the vast majority of cases, counsel are not briefed.[211] The system where the referral advocate is briefed by an attorney also creates additional layers of protection for the public.[212] The attorney has the obligation to protect his client by ensuring that counsel charges reasonable fees. On his/her part, the advocate is briefed to present the case in court and so ensures the best possible assistance to the lay client.[213] In these circumstances, there are adequate checks and balances to ensure that counsel charge fair fees. A system of new or additional rules, as prescribed through legislation, will simply not be able to cater for all circumstances that could possibly arise in litigation.[214] Broad and flexible rules, which are already in

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205 *Idem*.
206 *Idem*.
207 *Ibid,* 14.
208 *Idem*.
209 Louw A SC, "GCB Comments on investigation into legal fees" (30 August 2019) 4.
210 *Idem*.
211 *Idem*.
212 *Idem*.
213 *Idem*.
214 *Idem*.

existence and are clear and trite as a result of many precedents in the law reports, must be applied as far as litigation costs in general and counsel's fees, in particular, are concerned.[215]

6.130 The Rules Board submits that the lack of a tariff with specified fees may inhibit access to justice, as there is no uniform approach to the taxing of advocates' fees by taxing masters, which results in a higher or lower recovery of advocates' fees in different jurisdictions.[216] A tariff (for recovery of costs) provides clarity and guidance to taxing masters when taxing bills. It has a uniform application in all taxations, it provides information to litigants that assist in their estimating the rate of recovery of advocates' fees, and it assists persons objecting to a bill of costs at taxation.[217]

6.131 The LSSA answers this question in the affirmative.[218] There is always a lack of certainty with advocates' fees and that is what the LPA aims to correct. Clients should know what they are expected to pay. The LSSA does not, however, believe that tariffs are necessary. Guidelines would suffice.[219] Fee guidelines will allow market forces to prevail.[220] In the absence of guidelines, it is a difficult task to explain to clients the different fees that can be charged by advocates.[221]

6.132 The LSSA also believes that the courts too easily award costs of two counsel.[222] Such awards should only be made in well-motivated, exceptional cases. There is a counter view that there must be skills transfer, which is best achieved when an inexperienced junior appears with a senior. The question that the SALRC must consider is what is the more fundamental, the transformation imperative or the cost savings for the client. The lack of fee guidelines creates an even bigger problem when an attorney is to explain to a client the necessity to appoint a senior counsel because that senior counsel will require a junior to assist him/her. That leaves the client with fees for three lawyers.[223]

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215 *Idem*.
216 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 7.
217 *Idem* 8.
218 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 37.
219 *Idem*.
220 *Idem*.
221 *Idem*.
222 *Idem*.
223 *Idem*.

6.133 The question can also be raised as to whether a day fee enhances access to justice.[224] Where the matter is concluded very early in the day, the legal practitioner can go back to offices/chambers and do other work. The client should not be paying for such instances. The use of day fees opens up the billing system to potential abuse. The transformation of the legal profession also requires a concerted effort to move away from the stereotype view that an advocate is a senior practitioner and an attorney is a junior practitioner. In this regard, the silk system also poses problems. Inasmuch as there is a silk system, deserving senior attorneys should be awarded similar accolades.[225]

6.134 Section 34(2)(b) advocates are a new creation in terms of the LPA.[226] The public will be engaging directly with them. This underscores the need for proper guidelines to assist members of the public to know what these advocates would be charging. In terms of Section 35(7)(d), it would seem that a Section 34(2)(b) (non-referral advocate) might instruct a referral advocate.[227] This seems to be counter-productive to the reason why Section 34(2)(b) advocate was created.[228] The direct access advocate, inasmuch as it was intended to minimise costs, might in fact become something else.[229]

6.135 BASA believes that the lack of a statutory tariff for advocates' fees inhibit access to justice.[230] Advocates' fees are unregulated and are unaffordable to the general public.[231]

6.136 According to ABSA, it will definitely assist in lowering legal costs if advocates' fees had fair and reasonable statutory tariffs placed on them.[232] Currently, advocates' fees make up the major portion of legal costs in most High Court litigation, are not subject to any tariffs, nor can they be taxed by the taxing master.[233]

6.137 **Recommendation 6.7**: It is recommended that the recoverable tariffs that apply in respect of attorneys' fees and counsels' fees, that is, Rules 33 read with Tables A and B of Annexure 2 to the Magistrates' Courts Rules; Rules 69 (Tariff for Advocates and Attorneys with Right of Appearance) and 70 (Tariff for Attorneys) of the Uniform Rules;

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224 *Ibid,* 38.
225 *Idem*.
226 *Idem*.
227 *Idem*.
228 *Idem*.
229 *Idem*.
230 Banking Association of SA "Comments on the investigation into legal fees" (30 August 2019) 2.
231 *Idem*.
232 ABSA "ABSA Bank's Commentary-Issue Paper 36" par 2.7.
233 *Idem*.

and Rule 18 of the SCA Rules (Tariff for Attorneys' Fees), must be reviewed in relation to each other and in respect of the various hierarchies of court to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Courts level right up to the Supreme Court of Appeal and Constitutional Court. The review must be informed by the legal practitioner service-based Fee Guidelines principles discussed in Chapter 7 of this Report.

6.138 Subsequent to the publication of Discussion Paper 150, Rule 69 of the Uniform Rules now provides that in the High Court, fees on a party-and-party basis for an advocate referred to in section 34(2)(b) of the LP, in respect of legal services that fall within the domain of work usually carried out by attorneys, is to be recovered from the tariff for attorneys under Uniform Rule 70.[234] Furthermore, Magistrates' Courts Rule 33 and Part I, III and IV of Table A of Annexure 2 to the Magistrates' Courts Rules provide that in the Magistrates' Courts, fees on a party-and-party basis for an advocate referred to in section 34(2)(b) of the LPA may be recovered on any of the items in Table A whereas the fees for advocates taking instructions from attorneys are limited to specified items in Table A.

6.139 It is submitted that the latest amendment to Rule 69 of the Uniform Rules and Rule 33 and Part I, III and IV of Table A of Annexure 2 to the Magistrates' Court Rules above, does not sufficiently provide the kind of solution envisaged under Recommendation 6.7.

E. Tariffs in criminal matters

1. Lack of tariffs in criminal matters

6.140 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. Responding to the question as to why there are no tariffs in litigious criminal matters, respondents submit that tariffs in criminal matters are not necessary because costs orders are not granted against the State in criminal matters.[235] The respondents are of the view that the distinction between litigious

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234 Rules Board "SALRC Investigation into Legal Fees Project 142" 2. See also *The Government Gazette* No.43856 dated 1 December 2020.

235 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 24; LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 15.

matters, on the one hand, and non-litigious matters, on the other hand, should be kept intact. According to the LSSA, a legal practitioner doing criminal work can agree on a fee or payment basis to do a case for the client and make the fee more affordable for those clients who have legitimate financial constraints.[236] However, other respondents are of the view that tariffs in criminal matters are recommended and will be a positive move towards transparency, certainty and possibly increase access to legal services for the public.[237]

6.141 Section 275 of the Legal Profession Act 2008 (Western Australia) empowers the Legal Costs Committee, which is the equivalent of the South African Rules Board, with a mandate to make costs determinations in both contentious business and non-contentious business.

6.142 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*.

6.143 Furthermore, section 275(3) 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 (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, namely-

(a) Clerk/Paralegal;
(b) Restricted Practitioner;
(c) Junior Practitioner; and
(d) Senior Practitioner.

6.144 A further distinction is made between two categories of counsel, namely-

(a) Counsel (C);

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236 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 62.
237 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 42.

(b) Senior Counsel (SC).

6.145 The party-and-party tariff for contentious business, with the exception of 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 like memorandum of appearance, a notice requiring the 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

6.146 In Germany, the reimbursement of costs in criminal matters depends on whether costs can be refunded in terms of section 464a *II Nr. 2 StPO* [Duty of convicted persons to pay costs] of the German Code of Criminal Procedure.[238] 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.*
>
> *If a convicted person dies before the judgment enters into force his estate shall not be liable for the costs.*

6.147 Fees and expenses for lawyers' professional services are governed by the Law on the Remuneration of Attorneys (*Rechtsanwaltsvergütungsgesetz* "RVG") or on the basis of fee agreements.[239] Section 2 [English translation] of the *RVG* states that:

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238 Polten EP, *et al*, "Rules of Costs and Fees for Lawyers- A Comparison of German Law and the Law of the Province of Ontario/ Canada" (February 2011) 10.

239 European Justice "Costs of proceedings-Germany" available at https://e-justice.europa.eu/content_costs_of_proceedings-37-de-en.do (accessed on 4 November 2019). The article states that "fee agreements are always possible as an alternative to the

> *(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 annexe 1 of this Law. Fees shall be rounded up or down to the nearest cent. 0.5 cents shall be rounded up.*

6.148 Although lawyers' fees above those determined by the RVG are possible, however, fees below the statutory recoverable tariffs (RVG) are not permitted.[240]

6.149 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 matters are all provided for.[241] Polten, *et al*, point out that, to bill a client, the lawyer will have to consult Appendix 1 of the RVG, where all services provided are connected to either a concrete amount or a fee ratio. The RVG also provides a list of flat charges that a legal practitioner can charge, such as copies, travel disbursements and communication expenses. 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.[242]

6.150 Part 4: Criminal Matters of Annex 1 to section 2(2) Remuneration Schedule of the RVG (Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte) provides for a detailed tariff structure.[243] As would appear from the RVG, Part 4 (Criminal matters) of Annex 1 to section 2(2) Remuneration Schedule of the RVG is divided into several divisions. Division 1 deals with defence counsel's fees. This division is further subdivided into five subdivisions, namely:

- Subdivision 1: general fees
- Subdivision 2: preparatory proceedings
- Subdivision 3: court proceedings (first instance, appeal, and appeal on points of law)

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statutory charges." See also Thomashausen A "Legal Fees in Germany" (6 November 2019 2.

240 Reiman M *Costs and Fee Allocation in Civil Procedure A Comparative Study* 155.

241 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 available at https://www.crosschannellawyers.co.uk/wp-content/uploads/German-Legal-Fees-Comparison-2007.pdf (accessed on 04 November 2019).

242 *Idem*.

243 Bundesministeriums der Justiz und für Verbraucherschutz "(Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte - RVG) available at http://www.gesetze-im-internet.de/englisch_rvg/index.html (accessed on 19 February 2020).

- Subdivision 4: reopening proceedings
- Subdivision 5: additional fees

6.151 Division 2 deals with fees in penal enforcement; and Division 3 deals with individual activities. Fees for selected attorney and attorney appointed or assigned as counsel by a court are provided.

6.152 The position in Canada is that the defendant is not entitled to any refund of costs from the Crown. However, exceptions to this rule apply in cases whereby the defendant's rights as guaranteed by the Canadian Charter of Rights and Freedoms have been violated by the criminal proceedings.[244]

6.153 Legal Aid SA has over the years developed a comprehensive tariff of fees and disbursements for the reimbursement of legal practitioners instructed by the Board in criminal matters. The tariff covers matters such as appearance in court when a postponement is granted or where a matter has been set down for trial on a running roll, preparation fees, increased trial day fees, bail applications and interlocutory applications, criminal appeals, disbursements and other general matters. Legal Aid SA's tariff of fees and disbursements in criminal matters cover the following matters, among others:

- appearance fees in criminal trials in the District Magistrate's Court, Regional Court, High Court and SCA;
- preparation fees;
- bail applications;
- criminal appeals;
- disbursements; and
- other general matters.

6.154 Likewise, the Legal Services Society of British Columbia has developed a criminal tariff (updated as of October 2019) for use in legal aid criminal matters by legal practitioners instructed by the Legal Services Society.[245]

6.155 **Recommendation 6.8**: Although there is no provision in the Rules Board for the Courts of Law Act barring the Rules Board from making rules regulating the practice and procedure in connection with litigation in criminal matters in the Magistrates' Courts, High Court and SCA, however, cost orders are generally not granted against either the State

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244 *Idem* 23.
245 Available at https://lss.bc.ca/ (accessed on 23 January 2020).

or the accused party in litigious criminal matters. It is recommended that service-based attorney-and-client fee guidelines be developed by the LPC in all branches of the law including criminal matters.

2. Section 342A(3)(e) of Criminal Procedure Act 51 of 1977

6.156 Section 342A(3)(e) of the Criminal Procedure Act 51 of 1977 provides as follows:

342A.Unreasonable delays in trials

(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.

(2) In considering the question of whether any delay is unreasonable, the court shall consider the following factors:

(a) The duration of the delay;
(b) the reasons advanced for the delay;
(c) whether any person can be blamed for the delay;
(d) the effect of the delay on the personal circumstances of the accused and witnesses;
(e) the seriousness, extent or complexity of the charge or charges;
(f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;
(g) the effect of the delay on the administration of justice;
(h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;
(i) any other factor which in the opinion of the court ought to be taken into account.

(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-

(a) refusing further postponement of the proceedings;
(b) granting a postponement subject to any such conditions as the court may determine;
(c) where the accused has not yet pleaded to the charge, that the case be struck off the roll and the prosecution not be resumed or instituted de novo without the written instruction of the attorney-general;
(d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;
(e) that-

(i) the State shall pay the accused concerned the wasted costs incurred by the accused as a result of an unreasonable delay caused by an officer employed by the State;

(ii) the accused or his or her legal adviser, as the case may be, shall pay the State the wasted costs incurred by the State as a result of an unreasonable delay caused by the accused or his or her legal adviser, as the case may be; or

(The commencement date of para. (e): to be proclaimed)

(f) that the matter be referred to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.

(5) Where the court has made an order contemplated in subsection 3(e)-

(a) the costs shall be taxed according to the scale the court deems fit; and
(b) the order shall have the effect of a civil judgement of that court.

6.157 Section 342A(3)(e) of the Criminal Procedure Act thus 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 as the date of coming into operation has not yet been proclaimed.

6.158 The proposal regarding wasted costs against either the State or the accused was made previously by the Commission but could not be implemented by the DOJ&CD due to implications of what it means by costs against the State. Among the factors and circumstances contributing to the malfunctioning of the courts are problems with the court filing system which results in files and dockets being lost and matters being postponed as a result of court files being unavailable. The majority of the litigants that appear before the court are poor and indigent people who are dependent upon the State for legal representation. Many of them do not incur any legal costs because of the Constitutional right to legal representation at State expense. Adverse cost orders against the State may have a negative impact on an already fragile fiscus.

3. Section 300 of Criminal Procedure Act 51 of 1977

6.159 Section 300 of the Criminal Procedure Act, 1977 (Act 51 of 1977) provides as follows:

300. Court may award compensation where offence causes damage to or loss of property

(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: Provided that-

(a) a regional court or a magistrate's court shall not make any such award if the compensation applied for exceeds the amount determined by the Minister from time to time by notice in the Gazette *in respect of the respective courts.*

(b) …….

(2) For the purposes of determining the amount of the compensation or the liability of the convicted person therefor, the court may refer to the evidence and the proceedings at the trial or hear further evidence either upon affidavit or orally.

(3)

(a) An award made under this section-

(i) by a magistrate's court, shall have the effect of a civil judgment of that court;

(ii) by a regional court, shall have the effect of a civil judgment of the magistrate's court of the district in which the relevant trial took place.

(b) Where a superior court makes an award under this section, the registrar of the court shall forward a certified copy of the award to the clerk of the magistrate's court designated by the presiding judge or, if no such court is designated, to the clerk of the magistrate's court in whose area of jurisdiction the offence in question was committed, and thereupon such award shall have the effect of a civil judgment of that magistrate's court.

(4) Where money of the person convicted is taken from him upon his arrest, the court may order that payment be made forthwith from such money in satisfaction or on account of the award.

(5)

(a) A person in whose favour an award has been made under this section may within sixty days after the date on which the award was made, in writing renounce the award by lodging with the registrar or clerk of the court in question a document of renunciation and, where applicable, by making a repayment of any monies paid under subsection (4).

(b) Where the person concerned does not renounce an award under paragraph (a) within the period of sixty days, no person against whom the award was made shall be liable at the suit of the person concerned to any other civil proceedings in respect of the injury for which the award was made.

6.160 In terms of the above-mentioned section, 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.[246] The amount awarded to the victim will depend on the court that heard the case.[247] The Minister determines limitations on the amounts that can be awarded: R300 000 for Magistrates' Courts; R100 000 for Regional Courts whilst High Courts may determine an amount without any limitation. This provision requires that an application be made by the injured person. Using the provisions of this section would prevent victims of crime from having to institute civil proceedings thus saving them from paying legal fees that they may not afford in the first place.

4. Section 154(6) of Criminal Procedure Act 51 of 1977

6.161 This section provides as follows:

> ***Prohibition of publication of certain information relating to criminal proceedings***
>
> *(6) The provisions of section 300 are applicable, with the changes required by the context, upon the conviction of a person in terms of subsection (5) and if-*
>
> *(a) the criminal proceedings that gave rise to the publication of information or the revelation of identity as contemplated in that subsection related to a charge that an accused person committed or attempted to commit any sexual act as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, towards or in connection with any other person or any act for the purpose of procuring or furthering the commission of a sexual act, as contemplated in that Act, towards or in connection with any other person; and*
> *(b) the other person referred to in paragraph (a) suffered any physical, psychological or other injury or loss of income or support."*

6.162 This section, added by Act 32 of 2007, provides for order as contemplated in section 300, with the necessary changes, against a person convicted of an offence relating to the publication of information prohibited in terms of sections 153(2) or 154 (for example, revealing the identity of an accused or witness in matters relating to a sexual

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246 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.

247 *Idem*.

act) to compensate either an accused or a witness for physical, psychological or other injury or loss of support or income.

5. Section 301 of Criminal Procedure Act 51 of 1977

6.163 This section provides for the reimbursement of an innocent purchaser of goods stolen or unlawfully obtained out of money taken from an accused upon his arrest. It reads as follows:

> ***Compensation to the innocent purchaser of property unlawfully obtained***
>
> *Where a person is convicted of theft or of any other offence whereby he has unlawfully obtained any property, and it appears to the court on the evidence that such person sold such property or part thereof to another person who had no knowledge that the property was stolen or unlawfully obtained, the court may, on the application of such purchaser and on the restitution of such property to the owner thereof, order that, out of any money of such convicted person taken from him on his arrest, a sum not exceeding the amount paid by the purchaser be returned to him.*

6. Section 297 of Criminal Procedure Act 51 of 1977

6.164 Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the judicial officer has discretion in terms of section 297 of the Criminal Procedure Act, to postpone for a period not exceeding five years the passing of sentence and release the person concerned on one or more conditions, including payment of compensation for damage or pecuniary loss or the rendering of some service or benefit in lieu thereof, by the accused to the injured person or to suspend the sentence on such condition.

6.165 This section reads as follows:[248]

> ***297. Conditional or unconditional postponement or suspension of sentence, and caution or reprimand***
>
> *(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion-*
>
> *(a) postpone for a period not exceeding five years the passing of sentence and release the person concerned-*

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248 Section 297(1)(aa) of the Criminal Procedure Act 51 of 1977.

(i) on one or more conditions, whether as to-

(aa) compensation;
(bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;
(cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

(ccA) submission to correctional supervision;

(dd) submission to instruction or treatment;
(ee) submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991 (Act No. 116 of 1991);
(ff) the compulsory attendance or residence at some specified centre for a specified purpose;
(gg) good conduct;
(hh) any other matter,

and order such person to appear before the court at the expiration of the relevant period; or

(ii) unconditionally, and order such person to appear before the court, if called upon before the expiration of the relevant period; or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order; or
(c) discharge the person concerned with caution or reprimand, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.

6.166 The provisions of sections 154, 297, 297, 300 and 301 of the Criminal Procedure Act have been in operation for many years. However, it appears that members of the public are not aware of their existence and/or their operation. Respondents submit that the public must be informed of the various sentencing options that are provided for in terms of section 297 of the Criminal Procedure Act so that they are aware.

6.167 **Recommendation 6.9**: It is recommended that the DOJ&CD should consider amending sections 297 and 300 of the Criminal Procedure Act, 1977 Act to compel the

State to inform complainants and injured parties of the existence of the sentencing and compensation options where it is relevant, [249] or where applicable, to compel presiding officers to enquire whether the provisions have been explained and whether any compensatory order is sought. Although the provisions of the Criminal Procedure Act do not assist the accused in reducing her/his legal costs, however, this may assist the injured party in not having to institute civil action to recover his/her damages from the accused and thus prevent the expenditure of further legal fees.[250]

7. Section 191(3) and (4) of Criminal Procedure Act 51 of 1977

6.168 This section provides that persons who attend criminal proceedings on behalf of the State shall be entitled to such allowances to be determined by the Minister by notice in the Gazette. The tariffs prescribed by the Minister determine the allowances that may be paid to witnesses including witnesses for the accused or any other person necessarily required to accompany a witness on account of youth, old age or infirmity. The allowances so determined include tariffs payable to ordinary witnesses[251] as well as experts such as psychiatrists and psychologists[252] who perform services required in terms of section 79 of the Criminal Procedure Act.

6.169 In criminal matters, ordinary witness fees per day is R20.00 or reasonable actual expenses incurred for meals, plus an allowance for transport and, should proof be produced, a maximum of R2084.00 per day for income forfeited. Deviations may be authorised by the Director-General if satisfied that financial hardship will be caused. Similar provisions are made for witnesses in civil matters but the fee is R50.00.

6.170 The tariff for clinical psychologists is R3825.00 for a day`s testimony, R2 295.00 for testimony in the morning and R1530 for testimony in the afternoon. For psychiatrists, it is R5000.00, R3000.00 and R2000.00 respectively. If not in the full-time employment of the state, provision is also made for an hourly tariff for a maximum of hours to be spent on assessment of the accused and the preparation of the report. The hourly tariff for

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249 Legal Aid South Africa, at 41.

250 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 61; Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 41

251 Notice R391 of 11 April 2008 as amended by Notice R967 published in *The Government Gazette* No.41096 dated 6 September 2017.

252 Notice R392 of 11 April 2008 as amended by Notice R969 published in *The Government Gazette* No.41096 dated 6 September 2017.

clinical psychologists is R420.00 per day and for psychiatrists, R590.00. Previous determinations occurred in 2002.

6.171 **Recommendation 6.10**: As is the case with other fee determinations, these allowances are not regularly revised. It is recommended that the DOJ&CD should consider amending section 191 of the Criminal Procedure Act, 1977 (Act 51 of 1977) to include a provision that will provide for a bi-annual review or an automatic annual adjustment of allowances payable to witnesses attending criminal proceedings in line with inflation as per the consumer price index.

F. Desirability of establishing a mechanism

1. Tariff in litigious matters

6.172 One of the major causes of the huge gap between what a winning party has to pay to her/his or its attorney and what is recovered on a party-and-party basis is the lack of annual update of the party-and-party tariffs to keep up with inflation.[253] It has been stated above that in Canada there is a tariff of costs and fees which bears a closer relationship to market amounts. To be fully effective as a mechanism that broadens access to legal services for most people, it is recommended that the party-and-party tariffs must be updated on an annual basis to keep up with inflation.[254] At the present moment, the existing recovery tariff determined by the Rules Board in the Magistrates' Court, High Court and SCA do not serve as an alternative basis for charging legal fees by legal practitioners as it is not commensurate with the market rates. In its submission to the Commission, the Rules Board states that:

> "The tariffs in Tables A and B are premised on providing for the recovery of legal costs on a party-and-party basis. The affordability of users for

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253 Lourens M "Submission to the South African Law Reform Commission" (12 August 2019) 6. Glenn "Costs and fees in common law Canada and Quebec" states that "party-and-party costs in Canada are usually estimated at 50-60% of lawyers' actual fees, and solicitor-client costs will cover up to 90% of such fees" at 6. The Rules Board differs with this view. In its submission to the Commission, the Rules Board argues that "the mechanism is effective as the Board annually reviews the tariffs to ensure that the tariffs do not lag." at 19.

254 Section 68(4) of the Road Accident Benefit Scheme makes provision for the annual increment of the benefits proposed in the Bill. This section provides as follows:
"(4) The Minister (of Transport) may, with the concurrence of the Minister of Finance, by notice in the Gazette, adjust upwards the tariff, with the concurrence of the Minister of Health, and the average annual national income, the pre-accident annual income cap and the lump-sum funeral benefit referred to in section 46, to take into account the effect of inflation."

> legal costs and the sustainability of legal practices have not necessarily been factored into the tariffs.
>
> In this regard, the Board has engaged from as early as 2016 with the LSSA and the GCBSA to obtain empirical data that would assist in determining the recovery rate via the party-and-party tariffs as juxtaposed to attorney-and-client costs, which data would inform increases required to be made to the tariffs in future. Unfortunately, the information has not been forthcoming. The implications of Mr Lourens' submission, however, is that the tariffs may require substantial increases to bridge the gap between the party-and-party and attorney-and-client costs."[255]

6.173 The tariffs are discussed below.

Tables A and B of Annexure 2 to the Magistrates' Courts Rules: Tariff for Attorneys' Fees

6.174 The tariff in Tables A and B of Annexure 2 to the Magistrates' Courts Rules was increased as follows:

Pre-2012

- Date of publication in GG: 11 June 2010 [Commencement date: 16 July 2010];

Post-2012

- Date of publication in GG: 11 October 2013 [Commencement date: 15 November 2013];
- Date of publication in GG: 23 January 2015 [Commencement date: 24 February 2015]. The methodology that was applied to the increase was the application of the annual average CPI compounded annually;[256]
- Date of publication in GG: 29 September 2017 [Commencement date 1 November 2017] following the use of compounded annual average CPI rates for the periods' May 2014 to April 2015 (i.e., 5.5%) and May 2015 to April 2016 (i.e., 5.3%) respectively.

Uniform Rule 70: Tariff of Fees for Attorneys

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255 Rules Board "SALRC Investigation into Legal Fees Project 142" 3.

256 Memorandum to the Minister of Justice and Correctional Services dated 2 June 2017.

6.175 The tariff in Uniform Rule 70 was increased as follows:

Pre-2012

- Date of publication in GG: 1 June 2010 [Commencement Date: 16 July 2010];

Post- 2012

- Date of publication in GG: 11 October 2013 [Commencement date: 15 November 2013] following the use of compounded annual average CPI rates for the periods August 2010 to July 2011 and August 2011 to July 2012 respectively;
- Date of publication in GG: 23 January 2015 [Commencement date: 24 February 2015] following the use of compounded annual average CPI rates for the periods August 2012 to July 2013 (i.e., 5.7%) and August 2013 to April 2014 (i.e., 5.8%) respectively;
- Date of publication in GG: 29 September 2017 [Commencement date: 1 November 2017];
- On 30 November 2018, the tariff in Uniform Rule 70 was amended by the substitution for Section E-Bill of Costs of new Section E-Bill of Costs (commencement date: 10 January 2019).

6.176 The following table provides a history of the updates effected to the High Court tariff over the past twenty-one years: [257]

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257 According to Lourens M, "Submission to the South African Law Reform Commission" (12 August 2019) 3, Rule 70 of the Uniform Rules (tariff of fees for attorneys) was updated as follows over the past twenty-eight (28) years:

- The tariff that existed prior to 30/09/1991 was increased by 70% flat multiplication up to 31/10/1991 and by 100% up to 30/06/1993;
- Same tariff was replaced with an entirely new tariff with effect from 01/07/1993. The latter tariff was again replaced by a new tariff as from 21/10/1996. There was a huge increase between the 01/07/1993 and 21/10/1996 tariffs;[257]
- From 05/01/2004 (that is, 8 years latter), the 21/10/1996 tariff was increased with a numeral of "x 0.25"
- The 05/01/2004 tariff was then only updated 5 years later as follows:
  From 15/06/2009 to 15/07/2010 (14% VAT);
  From 16/07/2010 to 14/11/2013 (14% VAT);
  From 15/11/2013 to 23/02/2015 (14% VAT);
  From 24/02/2015 to 31/10/2017 (14% VAT);
  From 01/11/2017 to 31/03/2018 (14% VAT);
  From 01/04/2018 (15% VAT).

Table 1: Rule 70: Tariff of Fees for Attorneys[258]

	From 21/10/ 1996	From 05/01/ 2004	From 15/06/ 2009	From 16/07/ 2010	From 15/11/ 2013	From 24/02/ 2015	From 01/11/ 2017
Hourly	R400	R500	R710	R852	R940	R1052	R1170
Per quarter	R100	R125	R177.5	R213	R235	R263	R292.50
Tel Calls p/min	R6.66	R8.30	R11.80	R14.20	R15.60	R88/ 3min	R98/ 5min
Perusal p/page	R20	R25	R35.50	R43	R47	R53	R59.50
Drawing important docs p/page (250 w)	R100	R125	R177.50	R213	R235	R263	R292
Drawing formal notices	R40	R50	R71	R85	R94	R105.50	R117.50
Instructions to counsel	R100	R125	R177.50	R213	R235	R263	R292.50
Brief to counsel	R140	R175	R248.50	R298	R329	R368.50	R410
Attendance to peruse & pay a/c	R60	R75	R106.50	R128	R141	R158.50	R177
Letters written	R40	R50	R71	R85	R94	R105.50	R117.50
Letters received	R20	R25	R35.50	R43	R47	R53	R59.50
Copies	R1	R1.25	R1.80	R2	R2.50	R3.50	R4.00
Candidate attorney p/h	R100	R152	R216	R260	R288	R324	R362

258 Information supplied by the Taxing Master and Registrar: High Court (Pretoria).

Candidate attorney p/ quarter	R25	R38	R54	R65	R72	R81	R90.50
Warrants					R72	R81	R90.50
Re-issue					R118	R132	R146

Rule 18 of the Supreme Court of Appeal Rules: Tariff for Attorneys' Fees

Post- 2012

6.177 The tariff in Supreme Court of Appeal Rule 18 was increased as follows:

- Date of publication in GG: 15 February 2013 [Commencement date: 22 March 2013] following the use of compounded annual average CPI rates for the periods August 2010 to July 2011 (i.e., 4.1%) and August 2011 to July 2012 (i.e., 6%) respectively.[259]
- Date of publication in GG: 29 September 2017 [Commencement date: 1 November 2017] following the use of compounded annual average CPI rates for the periods August 2012 to July 2013 (i.e., 5.7%) and August 2013 to April 2014 (i.e., 5.8%) respectively.
- On 30 November 2018, the tariff in the Supreme Court of Appeal Rule 18 was amended by the substitution for Section G-Bills of Costs of a new Section G-Bills of Costs (commencement date: 10 January 2019).

6.178 Lourens submits that of the 550 attorneys who make use of his services as cost consultant, not a single one of them charges on the party-and-party rates as determined by the Court Rules (mechanism).[260] Although the mechanism is effective in enabling litigants to recover or pay a proportion of the legal fees incurred in litigation and the fees determined by the mechanism are more reasonable and predictable, however, the mechanism is not fully effective in determining recovery costs on commercial rates,[261]

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259 Memorandum to the Minister of Justice and Correctional Services dated 18 July 2016.

260 Lourens M "Submission to the South African Law Reform Commission" (12 August 2019) 5.

261 The Rules Board submits that "the effectiveness of the tariffs made by the mechanism (the Rules Board" requires empirical evidence as to the recoverability rates and the benchmarking of the tariffs. The Board has attempted to measure the benchmark in the

hence the gap between party-and-party costs and attorney-and-client costs had increased from 30% to 70% over the years.[262] This means in effect that the taxing masters have to fill in for the gap that is created by the mechanism by determining "reasonable" attorney-and-client fees in executing their duties.[263]

6.179 From the information supplied above by the respondent, it would appear that the Rules Board updated the recovery tariffs on a two-year cycle from 2010 to roughly 2018 to make provision for, among others, VAT.

6.180 The tariffs in Uniform Rule 70, Rule 18 of the SCA Rules and Tables A and B of Annexure 2 to the Magistrates' Court Rules, are reviewed annually by the Rules Board based on the Consumer Price Index (CPI) approved by the Rules Board on 17 August 2012.[264] The Rules Board publishes the increases by notice in the Government *Gazette* (GG) every second year. Since the date of approval by the Rules Board of the use of CPI to effect increases, the tariffs have been updated as discussed above.

2. Possible options for attorney-and-client fees (tariff with limited targeting)

6.181 Chapter 7 of this Report analyses four scenarios to deal with attorney-and-client fees. The scenarios are the following:

(a) Current status quo (no tariffs and no fee guidelines);
(b) Universal compulsory tariff;
(c) Tariffs with limited targeting; and
(d) Service-based attorney-and-client fee guidelines.

6.182 Scenarios (a); (b) and (d) are discussed in detail in Chapter 7. The section below analyses three possible options for public comment.

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tariffs for fees for attorneys by requesting empirical data from the Law Society of South Africa, unfortunately the information has not been forthcoming. Without meaningful input the tariffs whilst appearing effective, when measured with empirical data might not be effective" at 19.

262 Lourens M "Submission to the South African Law Reform Commission" (12 August 2019) 6.

263 Lourens M agrees with this view when he says that "the taxing masters are to be placed in a position to truly understand the current value of counsel's work in comparison to party-and-party practices." at 5. Plasket J also confirms that "taxation (is) the means by which the reasonableness of a fee is assessed" Mfengwana v Road Accident Fund at par 26.

264 Memorandum to the Minister of Justice and Correctional Services dated 20 October 2014.

6.183 The Commission is of the view that the current status quo in terms of which there is neither a statutory tariff nor fee guidelines for legal services is contrary to the purpose of the LPA as envisaged in section 3(b)(i) and therefore undesirable. Furthermore, it is clear from the representations received, that the current status quo is denying a large number of people access to justice. For the reasons advanced in Chapter 7 of this Report, the Commission concurs with the view of many respondents who submitted that the imposition of a universal and compulsory tariff is undesirable not only for the legal profession but for the economy of South Africa too.

6.184 The proposal of having attorney-and-client fees pegged at the same level and determined on the same tariff as party-party costs in litigious matters in respect of users of legal services in the lower and middle-income bands might at first glance not find favour with many legal practitioners. However, there are credible arguments in favour of this option. First, this proposal is limited to a certain category of users of legal services, and second, only to certain fora (district and regional/ Magistrates' Courts), where it is not in dispute that legal fees will be lower compared to other fora. Third, the fact that a successful litigant in all respects is still required to pay legal (attorney-and-client) fees despite his/her/ or its success in the matter seem unreasonable to many potential users that legal fees are payable regardless of the outcome of the case. Fourth, considering that courts only grant costs on the attorney-and-client scale in exceptional circumstances, these factors taken as a whole may serve as a deterrent to anyone contemplating litigation, notwithstanding the advice a user may obtain to the effect that the prospect of winning the case are high. This cannot be in the interest of justice that someone who has an imminently winnable case is deterred from going to court or other fora by the prospect, even in the event of success, of having to pay attorney-and-client fees.

6.185 It is against this background that the proposal to equate attorney-and-client fees with party-party costs in litigious matters in respect of users of legal services in the lower and middle-income bands is made. Alternatively, the proposal is that if attorney-and-client fees should be higher than the party-and-party tariff, then this must be in terms of a fixed percentage so that it is predictable and determinable upfront. Taking away the option to pay fees in excess of the fee determined by the mechanism will create greater confidence in this category of users of legal services.

6.186 In *City Council of Pretoria v Walker*, Langa DP held that "not all differentiation amounts to discrimination" as envisaged in the equality provision of the Constitution, that

"cross-subsidisation is an accepted, inevitable and unobjectionable aspect of modern life" and that "cross-subsidisation will occur even where uniform tariffs exist."[265]

6.187 The options for attorney-and-client fees presented below are premised on the division of users of legal services into three socio-economic bands, namely: the lower-income; middle-income; and higher income bands. This three-tier distinction is based largely upon the submissions received and public consultations and workshops held in response to Issue Paper 36, which point out clearly that users of legal services who fall within the lower to middle-income bands have problems with access to justice and the cost of legal services is a prohibitory factor to them. According to information before the Commission, middle-income users of legal services struggle to pay legal fees and do not qualify for free or nominal charge legal service through Legal Aid South Africa and university law clinics.[266] The Commission also took into account the interests of the legal profession and arguments made in this regard when considering the categorisation of users of legal services as outlined above. The Commission has identified three options for attorney-and-client fees as follows:

1. Option 1: Use of Rules Board's litigious tariff with limited targeting

6.188 This Option entails that:

(a) the litigious tariff determined by the Rules Board for use in the Magistrates' Courts be extended by default or operation of law as a basis for determining service-based attorney-and-client fees payable to legal practitioners;
(b) this will be in respect of the users of legal services whose total income/turnover per annum is below the maximum threshold to be determined by the Minister by notice in the Gazette; and
(c) the user will have no option of voluntarily agreeing to pay such fees less or in excess of any amount that may be determined by the mechanism (Rules Board).

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265 1998 (2) SA 363 (CC) pars 26; 63; and 61 respectively.

266 This view is confirmed by CALS who submits that "[i]n order for Legal Aid to be accessible to middle-income users, the income threshold to qualify for legal assistance has to be increased and reviewed annually. We submit that the threshold of 7400 for singles and 8000 for households excludes an enormous amount of the population and further marginalises the missing middle," *op cit*, 8.

6.189 This option is not applicable to all other users of legal services and all juristic persons. The effect of Option One is that attorney-and-client fees will be the same as the party-and-party tariff in respect of the users of legal services who fall within the lower and middle-income bands in litigious matters. This recommendation is supported by CALS.[267]

6.190 It is to be noted that the existing recovery (party-and-party) tariff is applicable in litigious matters only as the mandate of the Rules Board does not at present incorporate non-litigious matters. Thus, Option One does not address the *lacuna* that exists at present. This *lacuna* is, however, addressed by Option Three, which calls for the development of guidelines in litigious and non-litigious matters as discussed in Chapter 7 of this Report.

6.191 Option One will bring about a significant reduction in legal fees payable by users of legal services in the lower and middle-income categories in litigious matters, taking into account that party-and-party costs constitute in the region of about 30%-60% of the attorney-and-client fees.[268]

6.192 The GCBSA (Johannesburg Society of Advocates (JSA), Pretoria Society of Advocates (PSA), and the Society of Advocates of KwaZulu-Natal); the LSSA, and the LPC are among the stakeholders who are opposed to the recommendation (Option 1) for a mandatory targeted tariff in respect of the users of legal services in the lower and middle-income categories. These stakeholders are of the view that, if approved, implementation of the Commission's recommendation may have the following unintended consequences:

(a) The proposal (Option 1) is arbitrary, irrational and unjustifiable

6.193 The respondents argue that "there is no rational connection between the means and the ends. The Commission's recommendations as regards Options One and Two to ensure access to justice are, in our view, arbitrary and not rational and justifiable in an open and democratic society based on freedom and equality."[269]

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267 *Ibid*, 21.

268 The view that party-and-party costs constitutes in the region of about 30-60% of attorney-and-clients costs is anecdotal and not based on any empirical evidence. However, Lourens M projects the gap between party-and-party costs and attorney-and-clients costs to be roughly 70%, "Submission to the SALRC" (12 August 2019) 5.

269 LSSA, *op cit*, 21.

6.194 In *Prinsloo v Van der Linde and Another*,[270] the Constitutional Court held that the constitutional state "should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate government purpose, for that would be inconsistent with the rule of law." In *City Council of Pretoria v Walker*,[271] Langa DP held that the rationality criterion adopted in *Prinsloo* should "be equally applicable whether we are dealing with "equality before the law" or "equal protection of the law." In this case, the majority judgement agreed that "the difference in treatment regarding levying of rates and service charges did not constitute unfair discrimination."[272] According to Langa DP, "what is clear is that not all differentiation amounts to discrimination as envisaged in section 8."[273] Indeed, Constitutional interpretation must be informed by the values that underlie an open and democratic society based on human dignity, equality and freedom.[274] The Constitution envisions a distributive form of justice and a commitment to the establishment of a society based on, among others, social justice.[275]

6.195 In *Hoffman v South African Airways*,[276] Ngcobo J held that challenges to statutory provisions and government conduct alleged to infringe the right to equality involve the following three basic enquiries:

> "[F]irst, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application."

6.196 The purpose of the LPA is, among others, to "broaden access to justice by putting in place a mechanism to determine fees chargeable by legal practitioners for legal

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270 1997 (3) SA 1012 (CC) par 25.
271 1998 (2) SA 363 (CC) par 27.
272 De Vos P "A bridge too far? History as context in the interpretation of the South African Constitution" 29.
273 *City Council of Pretoria v Walker* supra, par 26.
274 Section 39(1) of the Constitution.
275 Mbazira C "Appropriate, just and equitable relief in socio-economic rights litigation: The tension between corrective and distributive forms of justice" 84.
276 [2000] 12 BLLR 1365 (CC) par 24.

services rendered that are within the reach of the citizenry."[277] It is submitted that the proposed measure is rationally connected to the legitimate government purpose mentioned above and justifiable for the same reason. The LPA is a law of general application. The SALRC is mandated by sections 35(4) and (5) of the LPA to investigate and report to the Minister on, inter alia, "the desirability of establishing a mechanism which will be responsible for determining fees and **tariffs** payable to legal practitioners."

(b) The absence of an opt-out provision (in Option 1) is contrary to the provisions of the LPA

6.197 Section 35(4)(e) of the LPA invites the Commission to express a view on "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)." Having identified the recoverable tariffs determined by the Rules Board in litigious matters as the mechanism envisaged in Section 35(4)(c), the Commission is of the view that it is not desirable that users of legal services whose total income/turnover per annum does not exceed the maximum threshold to be prescribed by the Minister be given the option of voluntarily agreeing to pay fees for legal services less or in excess of the amount so determined by the mechanism for the reasons provided under Recommendation 6.15.

6.198 In view of the strong objections against this proposed mechanism in the light of its potential unintended consequences on contractual freedom; freedom of trade, occupation and profession;[278] and access to justice, it is recommended that it should be adopted as an interim arrangement pending the development of service-based attorney-and-client fee guidelines by the LPC. The LSSA submits that "[t]o address the problem of access to justice for the "missing middle" these guidelines can provide for limited targeting, without being prescriptive."[279]

6.199 The JSA's view that the litigant is not always the party that pays the legal fees is taken note of. [280] The power imbalance between a plaintiff and a defendant is discussed

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277 Section 3(b) of the LPA.

278 The JSA submits that "the proposed mandatory tariff that comes without an opt-out provision would constitute a barrier to entry into the profession," *op cit*, par 5.

279 LSSA "Submission by the LSSA on Discussion Paper 150" 73.

280 *Ibid*, par 6.2.

in Chapter 2 of this Report.[281]

6.200 The adoption of Option One as an interim arrangement will make room for undertaking a "detailed economic analysis in respect of what the effect of the proposed fees regime will have on practitioners and a predicative model of the impact on access to justice before such far-reaching changes will have when implemented" as proposed by the JSA.[282] The HSRC may be commissioned by the DOJ&CD to conduct such an economic study.

(c) The proposal (Option 1) will lead to a significant reduction in access to legal services; a decline in the quality of legal services provided and possible closing down of law practices and firms

6.201 Some respondents are of the view that implementation of the proposed measure, if approved by the Minister, may lead to the potential closure of legal practices, reduction of supporting staff and withdrawal of legal practitioners and juristic entities from legal practice in litigation matters within the jurisdiction of the Magistrates' Courts.[283]

6.202 First, as stated above, the proposed tariff will have limited application in that it will apply only to users in the lower and middle-income categories in the Magistrates Courts only. Juristic persons as well as persons who can afford to pay for legal services will also be excluded from the operation of the proposed measure. Legal fees in the Magistrates' Courts are generally lower compared to other fora. It is clear from the provincial workshops held with community members that the majority of the users in these categories do not, in any event, afford to pay the fees charged by legal practitioners.

6.203 Second, it is not immediately clear as to why the proposed measure will on its own lead to a reduction in access to justice and legal services for users in the lower and middle-income categories in the light of a whole range of other interventions proposed by the Commission to promote access to justice (refer to Chapter 2 of this Report). These interventions include taking legal matters on contingency fees arrangements; recovery

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281 *Ibid*, par 6.4. The Respondent submits that "the plaintiff may be a low-income earner and thus entitled to the lowest tariff, but be litigating against a wealthy defendant not restrained by a tariff and litigating at full stretch."

282 JSA, *op cit*, par 6.8.

283 Rules Board "SALRC Investigation into Legal Fees Project 142: Discussion Paper 150" 4.

of costs by legal practitioners rendering free legal services in terms of section 92 of the LPA; and ADR mechanisms.

6.204 Third, the JSA submits that a mandatory tariff "would directly infringe on the livelihoods of the younger members of the Bar, particularly since work done by these members in the local and regional Magistrates' Courts is largely for individuals in what would be the lower and middle-income bands as determined by the Minister"[284] However, junior members of the Bar equally provide services to users in the upper-income band too. They also appear in other fora, like the Small Claims Courts, HC, SCA, Constitutional Court and others. The same applies to the majority of attorneys who operate as sole proprietors within small firms referred to in the submission from the LSSA.[285] Langa DP confirmed that "cross-subsidisation will occur even where uniform tariffs exist. Cross subsidisation between different categories of consumers and within the same category is unavoidable."[286] The volume of work done is another business technique that can be employed by junior members of the Bar to improve their income.

6.205 Fourth, the Society of Advocates of KwaZulu-Natal submits that "[i]f there is to be a tariff, then option 1 should be preferred, provided that it is limited to operation in the Magistrates' Courts, and excludes from its ambit artificial (juristic) persons, and persons who can afford to pay for legal services."[287] The Commission supports this view. Accordingly, the proposed amendment to section 35(3) should make provision for the exclusion of juristic persons from the operation of the proposed tariff with limited targeting.

6.206 Fifth, the argument that the proposal may lead to a reduction in the quality of services rendered appears to fly in the face of clause 3.3 of the Code of Conduct which provides that "[l]egal practitioners, candidate legal practitioners and juristic entities shall treat the interests of their clients as paramount, provided that their conduct shall be

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284 JSA, *op cit*, par 4.

285 The LSSA submits that "these firms, who serve mostly the poor and middle-income persons, will in particular be negatively affected. Many of them are already struggling to make ends meet, because they are unable to compete with larger firms in the metropolitan areas," op *cit*, 9.

286 *City Council of Pretoria v Walker supra,* par 61.

287 Society of Advocates of KwaZulu-Natal "Memorandum on the SALRC Discussion Paper 150" par 74. The Respondent submits that "[t]his is because it is relatively easy to set up company structures to render a company's financial position such that it has so few assets and annual profit that it would fall within the means test to qualify for the beneficial tariff in its favour," *idem*.

subject always to the maintenance of the ethical standard prescribed by this code, and any ethical standards generally recognised by the profession."[288]

(d) The proposal (Option 1) does not represent a reasonable fee for services rendered

6.207 It is common knowledge that all legal practitioners are entitled to a reasonable fee for services rendered.[289] This is an internationally accepted norm. The proposed measure does not necessarily deviate from this widely recognised norm. Much as the gap that exists between party-and-party tariffs and attorney-and-client costs is currently unknown owing to lack of empirical evidence in this regard, the gap itself is acknowledged in this report. It is based on the gap between these two scales that the Commission recommends that the party-and-party tariffs must be reviewed annually and updated to keep up with inflation. It is also important to note that clause 29.5 of the Code of Conduct provides that "[c]ounsel may, in calculating a fee, on the grounds of a client's lack of means to pay fees, charge the client an amount less than would otherwise be reasonable for the services rendered, or charge no fee at all."[290]

(e) The proposal (Option 1) will detract from the principle of independence of the legal profession and contractual freedom

6.208 The LPC points out that the proposal does not "address the question of whether the legal representative will have the right to decline acceptance of the mandate. It should be made clear that this is not intended to compel a legal practitioner to agree to the provision of services at the tariff amount and that the legal practitioner, therefore, has the right to refuse to accept a mandate subject to that tariff."[291] The LSSA adds by stating that "[l]egal practitioners, particularly those who provide service to people within the lower and middle-income bands, will be obliged to refuse to provide services to those clients, or work at uneconomic rates."[292]

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288 Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in *The Government Gazette* No.42337 dated 29 March 2019

289 See clauses 3.12 and 29.1 of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in *The Government Gazette* No.42337 dated 29 March 2019.

290 Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in *The Government Gazette* No.42337 dated 29 March 2019.

291 LPC, *op cit*, 10, 15.

292 LSSA, *op cit*, 77.

6.209 The Commission concurs with the LPC's view that legal practitioners are not compelled to agree to the provision of legal services at the tariff amount. Legal practitioners have a right to refuse to accept a mandate subject to the tariff amount. Compulsion is certainly not a contract. The subject of independence of legal practitioners is sufficiently provided for in the Code of Conduct. The Code of Conduct provides in the relevant sections as follows:

> 3 Legal practitioners, candidate legal practitioners and juristic entities shall
> 3.7 respect the freedom of clients to be represented by a legal practitioner of their choice;
> 3.11 use their best efforts to carry out work in a competent and timely manner and not take on work which they do not reasonably believe they will be able to carry out in that manner;
> 26. Acceptance of briefs and the cab-rank rule
> 26.1 Counsel are at liberty to limit in what areas of practice, and in which courts, they wish to accept briefs and to appear, and to profess to practice in such limited areas and courts.293

(f) The proposal (Option 1) will become the floor price and may substantially lessen or prevent competition

6.210 Sections 4(1) and 5(1) of the Competition Act provide as follows:

> **4. Restrictive horizontal practices prohibited**
>
> (1) An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-
>
> (a) 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; or
>
> (b) it involves any of the following restrictive horizontal practices:
>
> (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
>
> (ii) dividing markets, by allocating customers, suppliers, territories, or specific types of goods or services; or
> (iii) collusive tendering.

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293 Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published in *The Government Gazette* No.42337 dated 29 March 2019.

5. Restrictive vertical practices prohibited

(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.

6.211 It is submitted that based on the definitions of "horizontal relationship" and "vertical relationship" contained in section 1 of the Competition Act, 1998,[294] neither section 4(1) nor section 5(1) of the latter mentioned Act will be applicable to the proposal. Furthermore, there is no credible argument supported by evidence that the proposal will substantially lessen or prevent competition in the market. If anything, the proposal will facilitate expediency and provide certainty for the client as well as the legal practitioner. The Commission is of the view that that having users of legal services in the lower to middle-income bands represented in the Magistrates' Courts is actually pro-competitive.

(g) The proposal (Option 1) may present administrative challenges for legal practitioners to implement

6.212 Personal Injury Plaintiff Lawyers Association (PIPLA) submits that "the provisions may encourage some litigants to be less honest about their incomes to bring themselves within the definition of low or middle-income earners. To determine which income brackets litigants fall under will present an administrative nightmare to legal practitioners and the staff of the LPC."[295]

6.213 It has been stated above that, the Rules Board will determine the monetary value of the socio-economic three-tier distinction among the users of legal services in the lower, middle- and upper-income bands. It is submitted that the application of the means test by legal practitioners to users in the lower and middle-income bands could be similar to the approach and the system adopted by the Legal Aid SA.

6.214 **Recommendation 6.11**: In view of the objections against Option One by members of the legal profession, it is recommended that this proposal be adopted as an interim arrangement pending the development of service-based attorney-and-client fee

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294 In terms of section 1 of the Competition Act, "horizontal relationship" means a relationship between competitors. "Vertical relationship" means relationship between firms and its suppliers, its customers or both."

295 PIPLA "SALRC's Discussion Paper 150 Regarding Project 142" 9.

guidelines by the LPC in all the branches of the law. The adoption of Option One as an interim arrangement will make room for undertaking a detailed economic analysis in respect of what effect the proposed fees regime will have on legal practitioners and a model of the impact on access to justice before such far-reaching changes are implemented. Such a study could be commissioned by the DOJ&CD to a research organisation such as the HSRC.

6.215 At the advisory committee meeting held on 10 March 2021, the Deputy Chairperson of Project 142, Ms Francis-Subbiah, expressed a view that much as she supports Options One and Two, however, the preferred option should apply across all the courts, and should not be limited to the Magistrates' Courts only. "Judges have strongly commented on advocate/counsel fees being exorbitant. These comments have appeared in matters in the High Court, SCA and Constitutional Courts and not in the magistrates' court. Instead in the magistrates' courts, counsel's fees on a party-and-party basis are limited by the tariff. Regularly individuals falling within the lower- and middle-income bracket are drawn into high court litigation in commercial matters relating to evictions, executions, loan repayments and family matters who find themselves without the much-needed legal representation because they cannot afford the costs thereof. In the magistrates' courts, access to justice is easily accessible due to the built-in process and procedures. In criminal matters, the accused is represented by Legal Aid SA, in domestic violence and harassment courts litigants are awarded legal aid if the opposing side has a legal representative. In Children's Court, children are always provided legal aid representation and social workers appointed to assist the court. In maintenance court, a maintenance investigator and prosecutor assist in the process which contributes to fairness and equity in the enquiry. However, litigating parties are left alone and unassisted in higher courts if they do not have their own legal representative. Only counsel and attorneys with the right of appearance can appear in higher courts or the litigant himself or herself. Therefore, it will better serve access to courts if the options are extended to apply in all courts in South Africa in relation to lower- and middle-income individuals."[296]

2. Option 2: Use of Rules Board's litigious tariff with limited targeting subject to an additional surcharge to be approved by Minister

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296 The advisory committee meeting held on 10 March 2021 decided that the Deputy Chairperson's view will be presented at the Commission meeting scheduled for 23 March 2021 for consideration.

This Option entails that:

(a) the litigious tariff determined by the Rules Board for use in the Magistrates' Courts be extended by default or operation of law as a basis for determining service-based attorney-and-client fees payable to legal practitioners;
(b) this will be in respect of the users of legal services whose total income/turnover per annum is below the maximum threshold to be determined by the Minister by notice in the Gazette;
(c) the user will have no option of voluntarily agreeing to pay such fees less or in excess of any amount that may be determined by the mechanism (Rules Board); and
(d) subject to allowing not more than 20% surcharge, or such percentage as may be approved by the Minister acting upon the recommendation of the Rules Board, on the tariff amount to be determined at taxation by the registrars and clerks.

6.216 This option is not applicable to all other users of legal services and all juristic persons. The effect of Option Two is that attorney-and-client fees will not be the same as the party-and-party tariff in respect of the users of legal services who fall within the lower and middle-income bands in litigious matters.

6.217 Option 2 is generally not supported by many stakeholders. According to Legal Aid SA, allowing a 20% surcharge could in itself become quite expensive given that on a R20 000 party-and-party bill, it will cost a litigant R4000 more which is substantial for a low to a middle-income litigant.[297] Likewise, the LPC submits that "[i]f there is to be a tariff then option 1 should be preferred."[298]

3. Option 3: Development of service-based fee guidelines by the LPC in litigious and non-litigious matters

6.218 The Commission is of the view that the LPC, as the regulatory body for the legal profession in the Republic, is the appropriate body to develop service-based attorney-and-client Fee Guidelines for determining legal fees in respect of all branches of the law. Section 18(1)(ii) of the LPA empowers the LPC to establish a committee comprising of members of the LPC and any other suitable persons except employees of the LPC, to assist the LPC in the exercise of its powers and performance of its functions. Section

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297 Legal Aid SA, *op cit*, 38.
298 LPC, *op cit*, 14.

18(2)(a)–(b) of the LPA empowers the LPC to determine the powers and functions of a committee and to appoint a member of a committee as chairperson of such committee. It is recommended that the LPC must establish a Committee to be responsible for determining service-based attorney-and-client fee guidelines. The Committee should comprise of fit and proper persons drawn from the following sectors of society:

(a) Legal profession;
(b) Judiciary;
(c) Government; and
(d) Civil society.

6.219 The detail about the composition of the Committee and the number of members who may constitute such a Committee are all matters to be decided by the LPC. The Commission is of the view that there is no need for another mechanism to be established when an existing mechanism can be adapted for this purpose.

6.220 It is recommended that for the sake of certainty, party-and-party tariffs should regulate attorney-and-client fees in respect of users of legal services in the lower and middle-income bands in litigious matters as an interim arrangement.

6.221 A summary of these three options is presented in the table below.

Table 1: Possible options for attorney-and-client fees

Options	**Attorney & Client Fee**		
	Users of legal services in the lower & middle-income bands to be determined by the Minister		**All other users of legal services**
	Litigious matters	Non-litigious matters	Litigious and non-litigious matters
Option 1	• Party-and party tariff (in litigious matters) to apply as a default position (that is, an attorney-and-client fee to be same as party-and-party tariff); • without choice to opt-out in the Magistrates' Courts	Not applicable	Not applicable
Option 2	• Party-and-party tariff (in litigious matters) to apply as default position;	Not applicable	Not applicable

	• without choice to opt-out in the Magistrates' Court; • not more than 20% surcharge on the tariff amount to be determined by the registrar or clerk		
Option 3	Development of service-based attorney-and-client fee guidelines by the LPC	Development of service-based attorney-and-client fee guidelines by the LPC	Development of service-based attorney-and-client fee guidelines by the LPC
Question for comment	• Whether option 1 or 2 should be a permanent arrangement?	Not applicable	Not applicable
Question for comment	• Whether option 1 or 2 should be an interim arrangement pending the development of fee guidelines by the LPC and further review by the SALRC?	Not applicable	Not applicable

6.222 Section 6 of the Rules Board for the Courts of Law Act provides as follows:

> *(1) The Board may, with a view to the efficient, expeditious and uniform administration of justice in the Supreme Court of Appeal, the High Court of South Africa and the Lower Courts, from time to time on a regular basis review existing rules of court and, subject to the approval of the Minister, make, amend or repeal rules for the Supreme Court Appeal, the High Court of South Africa and the Lower Courts regulating-*
>
> *(r) the tariff of fees chargeable by advocates, attorneys and notaries.*

6.223 Section 94 of the LPA provides that:

> *(1) The Minister may, and where required in the circumstances, must, subject to subsection (2) make regulations relating to-*
>
> *(k) the implementation of recommendations emanating from the investigation of the South African Law Reform Commission in respect of fees as contemplated in section 35.*

6.224 In Western Australia, section 275 of the Legal Profession Act 2008 empowers the Legal Costs Committee 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 –
    (i) the Supreme Court; or
    (ii) the District Court; or
    (iii) the Magistrates Court; or
    (iv) a court of summary jurisdiction; or
    (v) the State Administrative Tribunal; or
    (vi) the Family Court of Western Australia; or
    (vii) any other court declared by the Attorney General under subsection (7) to be a court to which this section applies.
(c) Counsel (C);
(d) Senior Counsel (SC)."

6.225 The Legal Costs Committee's 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,[299] as well as fixed amounts for certain specified items such as a memorandum of appearance, notice requiring discovery, and many more.[300]

6.226 Although not operational yet, section 35(1) of the LPA signals the intention of the Legislature to extend the mandate of the Rules Board to include non-litigious matters.[301] As stated in the previous paragraph, the Legal Costs Committee of Western Australia is mandated to make costs determination in contentious and non-contentious business matters. Furthermore, the UK and the German legal costs regimes also make provision for a system of fixed recoverable costs, which is not the case in South Africa.[302]

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299 That is, Clerk/ Paralegal; Restricted Practitioner; Junior Practitioner and Senior Practitioner as well as Counsel (C) and Senior Counsel SC).

300 In the UK, 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, 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" (Jackson, R, "Review of civil litigation costs: Final report" (December 2009), (n33), xviii). According to Jackson, the concept of a fast-track trial was introduced to remove uncertainty about excessive costs with the object of promoting access to justice.

301 The Rules Board stated in its submission to the Commission that "the Rules Board wants to be responsible for litigious matters only" at 21.

302 According to Thomashausen, A: "The RVG provides for several types of attorney's fees. They are either fixed or fees within a fixed range. Fees within a fixed range either depend on the value in dispute and are then called *Satzrahmengebühren*, or a minimum and a maximum amount is prescribed and these are called *Betragsrahmengebühren*. The level

6.227 One of the respondents to Issue Paper 36 submits that most of the non-reserved and non-litigious work is not performed solely by legal practitioners who are regulated by the LPC, but a wide range of non-legal professionals and service providers also render these services. Examples of these are accounting firms, boutique companies that offer M & A and corporate financing services, legal process outsourcing industry drafts thousands of contracts on daily basis, labour law and human resources related legal advisory services, self-service companies like www.legalzoom.com, www.rocketlawyer.com/, https://www.divorce-online.co.uk/, and https://www.doyourownwill.com, E-discovery and due diligence document review work is outsourced to private companies and forensic services.[303]

6.228 It is recommended that a distinction be drawn between reserved non-litigious matters and non-reserved non-litigious matters. The former (that is, reserved non-litigious matters) should be subject to regulation in terms of the existing legal framework by the LPC based on service-based Fee Guidelines as discussed in Chapter 7 of this Report. The latter (that is, non-reserved non-litigious matters) should be subject to de-regulation as proposed by the respondent.

6.229 Section 35(4) of the LPA mandates the Commission to investigate and report back to the Minister with recommendations on the following:

> "(c) the desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners."

6.230 The LPC supports the idea of a selective tariff, provided it is not prescriptive but can at best serve as a guide. In its submission to the Commission, the LPC states that:

> "In the alternative, if there is to be some form of tariff imposed, it should be subject to mechanisms that limit its operation to the assistance of citizens who are unable to afford the payment of legal fees such that they are deprived of or hindered in their access to justice.[304] The selective/limited tariff, according to the LPC, should-

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of the fee that is dependent on the value in dispute is given in the fee scale in the annex to § 13 RVG. The appropriate fee in each individual case within this prescribed fee range has to be determined by the lawyer at his own discretion in an equitable manner, taking into account all the circumstances linked with a case, in particular the scope and difficulty of the legal work, the importance of the matter and the income and financial situation of the client." "Legal Fees in Germany" (6 November 2019) 2.

303 Van Tonder K "Comments on Issue Paper" (17 June 2019) 3.

304 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs; Memorandum" (12 September 2019) 5; 4.

(i) be applicable to legal services rendered to persons other than

1. Artificial (juristic) persons;
2. Non-SA citizens; and
3. Persons who can afford to pay for legal services.[305]

(ii) If tariffs are to be set, then these can at best only serve as a guide but cannot be prescriptive;

(iii) There needs to be some distinction drawn between legal services user categories. Separation of users into the categories of corporate, high income/ asset users (threshold to be determined) and lower to middle-class users (again an appropriate threshold or means test must be determined)."[306]

6.231 Sections 6(6) and (7) of the Rules Board for Courts of Law Act, 1985 provide as follows:

(6) *The Board may advise the Minister on the monetary jurisdiction limits of lower courts, the limitation of the costs of litigation and any other matter referred to the Board by the Minister.*

(7) *The power to make, amend or repeal rules under subsection (1) shall include the power to make, amend or repeal rules in order to give effect to the provisions of sections 2 and 3 of the Foreign Courts Evidence Act, 1962 (Act No.80 of 1962)*.

6.232 To give effect to the recommendations of the Commission, it is recommended that the Rules Board for the Courts of Law Act, 1985 be amended so as to empower the Board to advise the Minister on the legal fees and tariffs payable by users of legal services in the lower and middle-income categories for legal services rendered. It is recommended that Act 107 of 1985 be amended as follows:

"(6) The Board may advise the Minister on the monetary jurisdiction limits of lower courts, the limitation of the costs of litigation, the tariff of legal fees applicable to users of legal services in the lower and middle-income bands, and any other matter referred to the Board by the Minister.

(7) The power to make, amend or repeal rules under subsection (1) shall include the power to make, amend or repeal rules in order to give effect to the provisions of sections 2 and 3 of the Foreign Courts Evidence Act, 1962 (Act No.80 of 1962)[**.**] and section 3(b)(i) of the Legal Practice Act, 2014 (Act No.28 of 2014)."

6.233 Section 3(b) of the LPA provides that:

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305 *Ibid*, 3.
306 *Ibid*,1.

[T]he purpose of this Act is to-

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;

6.234 **Recommendation 6.12**: The Commission recommends that it is desirable that the existing mechanism for determining recoverable (party- and- party) legal fees and tariffs in litigious matters in the Magistrates' Courts be extended by default, without the opt-out option as provided for in section 35(3) of the LPA, for use as a basis for determining attorney-and-client fees payable to legal practitioners by users of legal services whose total income/turnover per annum does not exceed the maximum threshold determined by the Minister by Notice in the Gazette,[307] subject to the following modifications:

(i) that the party-and-party tariffs must be reviewed annually and updated to keep up with inflation;[308]

(ii) that the party-and-party tariffs in respect of attorneys' and counsels' fees must be reviewed in relation to each other and in respect of the various hierarchies of court to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Court level right up to the Supreme Court of Appeal and Constitutional Court. A tariff for counsels' fees is required to guide taxing masters in the taxation of counsels' fees and to establish uniformity in the taxation of counsels' fees with those of attorneys with the right of appearance in the High Court.

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307 Section 5(2)(b) of the Consumer Protection Act, 2008 provides that "This Act does not apply to any transaction-
(b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister (Cabinet member responsible for consumer protection matters) in terms of section 6."
According to Eeden and Barnard, the Minister must at intervals of not more than five years, determine by notice in the Gazette, a monetary threshold applicable to the value of transactions for the purposes of section 5(2)(b) of the Act, *Consumer Protection Law in South Africa* (2017) 53.

308 Legal Aid SA submits that "these tariffs should, however, in accordance with the SALRC's recommendation, be reviewed annually (and not every 2 years as current) to provide for inflation-based increases," *op cit*, 30.

(iii) that the party-and-party tariffs should also make provision for the recovery of section 34(2)(b) counsel's fees who have the right to receive a brief directly from a member of the public.[309]

6.235 The Commission is of the view that there is no need for another mechanism to be established when an existing mechanism can be adapted for this purpose.

Alternatively, it is recommended that:

6.236 **Recommendation 6.13**: The Commission recommends that it is desirable that the existing mechanism for determining recoverable (party- and- party) legal fees and tariffs in litigious matters in the Magistrates' Courts be extended by default, without the opt-out option as provided for in section 35(3) of the LPA, for use as a basis for determining attorney-and-client fees payable to legal practitioners by users of legal services whose total income/turnover per annum does not exceed the maximum threshold determined by the Minister by Notice in the Gazette, subject to the following modifications:

(i) additional surcharge of not more than 20%, or such percentage as may be approved by the Minister, on the tariff amount to be determined at taxation by the registrar or clerk;

(ii) that the party-and-party tariffs must be reviewed annually and updated once every two years to keep up with inflation;

(iii) that the party-and-party tariffs in respect of attorneys' and counsels' fees must be reviewed in relation to each other and in respect of the various hierarchies of court to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Court level right up to the Supreme Court of Appeal and Constitutional Court. A tariff for counsels' fees is required to guide taxing masters in the taxation of counsels' fees and to establish uniformity in the taxation of counsels' fees with those of attorneys with the right of appearance in the High Court.

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309 This recommendation has been implemented by the Rules in latest amendment to Rule 69 of the Uniform Rules, and Rule 33 and Part I, III and IV of Table A of Annexure 2 to the Magistrates' Courts Rules, see *The Government Gazette* No.43856 dated 1 December 2020.

(iv) that the party-and-party tariffs should also make provision for the recovery of section 34(2)(b) counsel's fees who have the right to receive a brief directly from a member of the public.

6.237 Since **recommendation 6.13** goes hand in hand with Option 2 which is generally not supported by many stakeholders, it follows that this recommendation falls to be dismissed.

Proposed legislative intervention

6.238 Should the recommendation be approved by the Minister; section 35(1) of the LPA could be amended to read as follows:

> "35(1**)[Until the investigation contemplated in subsection (4) has been completed and the recommendations contained therein have been implemented by the Minister, [f]**Fees in respect of litigious **[and non-litigious]** legal services rendered by legal practitioners[**,**] and juristic entities, **[law clinics or Legal Aid South Africa referred to in section 34]** must be in accordance with the tariffs made by the Rules Board for the Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No.107 of 1985)."
>
> Sections (6) and (7) of the Rules Board for the Courts of Law Act, 1985 could be amended to read as follows:
>
> "(6) The Board may advise the Minister on the monetary jurisdiction limits of lower courts, the limitation of the costs of litigation, the tariff of legal fees applicable to users of legal services in the lower and middle-income bands, and any other matter referred to the Board by the Minister.[310]
>
> (7) The power to make, amend or repeal rules under subsection (1) shall include the power to make, amend or repeal rules in order to give effect to the provisions of sections 2 and 3 of the Foreign Courts Evidence Act, 1962 (Act No.80 of 1962)[**.**] and section 3(b)(i) of the Legal Practice Act, 2014 (Act No.28 of 2014)."

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310 This proposed amended essentially means that the Rules Board will determine the monetary value of the socio-economic three-tier distinction between the lower, middle- and upper-income bands.

6.239 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)".[311] This pre-supposes a typing error in the legislation, which should be rectified.

6.240 One of the delegates from CALS who attended the public stakeholder hearings stated that legal services provided by law clinics are not cost-effective but free. Likewise, section 24 of the Legal Aid South Africa Act 39 of 2014 provide as follows:

> "24(1) The Board must compile, amend and approve a Legal Aid Manual and must at least every second-year review the Legal Aid Manual relating to-…
>
> (2) The Board must submit the Legal Aid Manual and any amendment thereof to the Minister who must-
>
> (a) table the Legal Aid Manual and any amendment thereof in Parliament; and
>
> (b) simultaneously give notice thereof by notice in the Gazette."

6.241 It is recommended that for the sake of certainty, party-and-party tariffs (Option 1) should regulate attorney-and-client fees in respect of users of legal services in the lower and middle-income bands in litigious matters as an interim arrangement.

G. Process to be followed by the mechanism in determining recoverable legal fees and tariffs

6.242 Section 35(4) of the LPA mandates the Commission to investigate and report back to the Minister with recommendations on the following:

> *(d) the process it (mechanism) should follow in determining fees or tariffs*

6.243 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.[312] Research is conducted, and a draft working document is developed and submitted to the

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

312 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.

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.

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

6.245 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 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.

6.246 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 the determination of each cost 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.

6.247 Most respondents concur with the view that a one-size-fits-all approach will not be desirable for all types of legal services. Financial modelling of the various

methodologies should be undertaken by the Rules Board to determine the best model for setting fees and tariffs for the lower and middle-income users and small and mediums enterprises.[313]

6.248 **Recommendation 6.14**: It is recommended that the mechanism (Rules Board) must adopt an effective consultative process of all the stakeholders involved prior to determining fees and tariffs. The following stakeholders and role players, among others, must be consulted:

(a) the LPC;
(b) consumers of legal services;
(c) members and representatives of the legal profession;
(d) members and representatives of the judiciary;
(e) representatives of civil society organisations;
(f) the Minister, or his/ her representative;
(g) the Competition Commission;
(h) Legal Aid SA;
(i) Law clinics;
(j) Juristic entities;
(k) NEDLAC; and
(l) Human Sciences Research Council.

H. Option to voluntarily pay less or in excess of the amount determined by the mechanism

6.249 It is stated above that the purpose of taxation is, first, to fix the costs at a certain amount so that execution can be levied on the judgement; and second, 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.[314]

6.250 Sections 35(3) and 35(4)(e) of the LPA go hand in hand and must be read together. Section 35(3) provides as follows:

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313 Legal Aid South Africa "Response by Legal Aid South Africa" 39.
314 Van Loggerenberg, DE *Jones and Buckle, The civil practice of the Magistrates' Courts in South Africa,* 10th Ed. Juta SR 16/2017, Rule 33.

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.

6.251 Section 35(4)(e) mandates the Commission to investigate and report back to the Minister with recommendations on the following:

(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)

6.252 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 how to prevent so-called "undercharging".

6.253 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.[315] 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 provides that the agreement may stipulate that the legal practitioner shall be entitled to fees equal to or higher than his/her normal fees. According to Millard and Joubert, the recoverable tariffs do not make provision for agreed fees or contingency fees.[316] Since the Rules Board does not prescribe tariffs for agreed fees (attorney-and-clients fees) and contingency fee agreements, it follows that such fees fall outside of the scope of operation of section 35(3) of the LPA. It is submitted that there is nothing preventing any user of legal services from agreeing to pay fees that are lower than a legal practitioner's normal fees in the context of contingency fees agreements. For section 35(12) of the LPA provides that:

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315 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 Competition 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, Competition Commission "Submission to the DOJC&CD on the Legal Practice Bill" (27 July 2012) 6.

316 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.

> *The 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)*.

6.254 The Issue Paper asked whether 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. It is submitted that there may be instances whereby a legal practitioner refuses to render legal services at the fee determined by the mechanism (Rules Board) for the category of the user in question.

6.255 The LSSA has 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.[317] 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.*
>   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*318*. 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.319*

6.256 Likewise, the LPC also stated that the wording of section 35(3) is problematic "in that it is not clear what is meant by "on his or her own initiative". On the face of it, it seems to be one-sided, that is, it is only the client who may agree to pay fees in excess

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317 LSSA, letter dated 4 July 2018.

318 LSSA submits that juristic persons also be given the right to opt-out. This view is supported by the Commission.

319 LSSA, letter dated 4 July 2018*,* 1.

of or below any tariff. If this is what it means, what client will actually ever want to agree to pay fees in excess of any tariff?".[320]

6.257 According to the LPC, "[t]he assumption that section 35(3) does afford a wide exemption may not be correct, as the wording seems to be that there can only be a "contracting out" at the instance of the client. However, on the assumption that it does provide a wide exemption, then the answers are as follows: If there is a wide discretion to contract out, then this is desirable and there should be no amendment to remove this wide discretion".[321]

6.258 The question 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?[322]

6.259 Currently, the means test applied by Legal Aid South Africa is as follows:[323]

(a) applicant' income= R7400 net income after income tax deduction from gross salary, R8000 for Household;
(b) value of the immovable property should not exceed R640 000; and

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320 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs; Memorandum" (12 September 2019) 5.

321 *Ibid*, 1.

322 Section 4 (Application of Act) of the National Credit Act 34 of 2005 provides that:
Subject to sections 5 and 6, this Act applies to every credit agreement between parties dealing at arm's length and made within, or having an effect within, the Republic, except-
(a) a credit agreement in terms of which the consumer is-
(i) a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement is made, equals or exceeds the threshold value determined by the Minister in terms of section 7(1);
(ii) the state; or
(iii) an organ of state;
(b) a large agreement, as described in section 9(4), in terms of which the consumer is a juristic person whose asset value or annual turnover is, at the time the agreement is made, below the threshold value determined by the Minister in terms of section 7(1);
(c) a credit agreement in terms of which the credit provider is the Reserve Bank of South Africa; or
(d) a credit agreement in respect of which the credit provider is located outside the Republic, approved by the Minister on application by the consumer in the prescribed manner and form.

323 Legal Aid South Africa "Response by Legal Aid South Africa" Part B 10

(c) value of movable property not exceeding R128 000.

6.260 Discretion is provided to managers to grant legal aid within certain limits if the means test is exceeded. Legal aid in civil matters may be refused on the following grounds;

(a) where the matter is excluded by the Legal Aid scheme;[324], [325]
(b) where the applicant exceeds the means test; and
(c) where the matter lacks merit.

7.261 The number of requests for legal aid that were refused for some or other reason from 2016/17 through to 2018/19 financial year is as follows:

FY	No. of new civil applications nationally	No. of excluded matters	% of total
2016/17	61786	1762	3%
2017/18	58606	1808	3%

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[324] In terms of Regulation 11 of the Regulations to the Legal Aid South Africa Act, 2014, the following matters are excluded:
(a) a financial enquiry in terms of section 65 of the Magistrate's Court Act; 1944;
(b) an administrative order in terms of section 74 the Magistrate's Court Act; 1944;
(c) the administration of an estate, subject to the provisions of regulation 23;
(d) the voluntary surrender or sequestration of an estate;
(e) the liquidation of a legal person;
(f) an application for the rehabilitation of a rehabilitated insolvent;
(g) debt review; and
(h) an act claiming damages on the grounds of
  (i) defamation;
  (ii) infringement of dignity, excluding infringement as a result of adultery;
  (iii) infringement of privacy

[325] Legal Aid is further excluded in the following matters:
(a) any action that can be brought in a Small Claims Court in terms of the Small Claims Court Act, 1984, provided that Legal Aid SA may grant legal aid for a claim that does not exceed monetary jurisdiction of the Small Claims Court by more than 50%;
(b) for instituting or defending an action in a burial dispute, provided that legal aid may be granted when a burial dispute can be resolved through ADR;
(c) For purposes of giving security;
(d) For a claim that has prescribed;
(e) For any notarial or conveyancing matters, provided that conveyancing involving children may be done through *Pro bono*;
(f) Where the applicant is entitled to representation at the expense of the state attorney or a government department;
(g) For bringing a claim against RAF, or any personal injury claim, subject to the provisions of Regulation 23;
(h) For a hearing before an administrative tribunal, provided that legal aid may be granted to review a decision of an administrative tribunal; and
(i) Legal representation at CCMA and arbitration or bargaining councils.

2018/19	58308	1785	3%
2016/17	506852	1546	0.3%
2017/18	483348	1311	0.3%
2018/19	470959	1171	0.2%

6.262 Suggestions put forward by the respondents is that the Mechanism should have limited application to those who require the protection to achieve the legitimate aim of ensuring access to legal services (including access to justice). Therefore, it should cover consumers who do not qualify for legal aid services or are excluded as per the information supplied by Legal Aid South Africa in the table above including those who are said to be the "missing middle".[326]

6.263 Access to legal services for the "missing middle" can be enhanced through several interventions, including a discount for persons earning between identified amounts, for instance, between R12 500.00 to R25 000.00 per month.[327] The same could be done in respect of the movable and immovable property. The actual figures to be determined by the Minister could be ascertained by the mechanism by making use of the best model for setting fees and tariffs for the lower to a middle-income category of users of legal services.

6.264 Furthermore, the respondents have suggested that the following persons and entities be excluded from the operation of the mechanism:

(a) all juristic 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.[328]

6.265 Some of the respondents support the proposal to set a limited tariff that can be charged to the missing middle (the view is that no amount of fee regulation will substantially assist indigent persons in improving their access to justice) in critical areas

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326 Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 37

327 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 12

328 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs; Memorandum" 5. ENSafrica state that "for corporate clients (including foreign clients located outside South Africa and high net worth individuals), fee regulation is unnecessary and in fact would have unintended adverse consequences as it would (among others) reduce competition" at 3.

such as family matters, employment and land-related matters, and that it may be possible to determine a set fee or tariff for legal services or products that can be commoditised in a manner that generally reflects the level of effort and value of the service or product produced.[329]

6.266 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.

6.267 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".[330] As stated above, the proposed tariff will have limited application in the sense that corporate clients and high net worth individuals will be excluded.

6.268 If the Legislature has provided an unlimited capacity for users of legal services to opt-out, whatever the mechanism can do in terms of determining a reasonable fee and/or tariff for the protected category of users, section 35(3) of the LPA as currently formulated could be a kind of escape. Mandatory fee agreements with pre-populated opt-out clauses will simply be the order of the day. These consequences will not be avoided by requiring the protected category of users of legal services who agree to pay in excess of the fee determined by the mechanism to have such agreement reduced to writing and to provide reasons for doing so. On these grounds, it is not desirable that users of legal services in the lower and middle-income bands be given the option of voluntarily agreeing to pay for legal services in excess of any amount that may be determined by the mechanism. However, it is desirable that all other users of legal services be given the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be determined by the Mechanism (service-based attorney-and-client fee guidelines to be determined by the LPC).

6.269 **Recommendation 6:15**: The Commission recommends that it is not desirable that users (natural persons) of legal services whose total income/turnover per annum

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329 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 3.
330 LSSA, letter dated 4 July 2018, 2.

does not exceed the maximum threshold to be prescribed by the Minister by notice in the Gazette, be given the option of voluntarily agreeing to pay fees for legal services in excess of any amount that may be set by the Mechanism (tariffs prescribed by the Rules Board) in the Magistrates' (district and regional) Court on the following grounds:

(a) If the Legislation provides an unlimited capacity for users of legal services to opt-out, this could have the effect of emasculating and seriously undermining the mechanism put in place to determine a reasonable fee and/or tariff for the protected category of users;
(b) Mandatory fee agreements with pre-populated opt-out clauses will simply be the order of the day; and
(c) These consequences will not be avoided by requiring the protected category of users of legal services who agree to pay in excess of the fee determined by the mechanism to have such agreement reduced to writing and to provide reasons for doing so.

6.270 **Recommendation 6:16**: However, the Commission recommends that it is desirable that all other users of legal services, including users of litigious legal services in the HC; SCA and Constitutional Court and non-litigious legal services whose total income/turnover per annum does not exceed the maximum threshold to be prescribed by the Minister by notice in the Gazette*,* be given 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 (service-based attorney-and-client Fee Guidelines to be developed by the LPC). Parties who opt to pay in excess of the fee determined by the mechanism will have to reduce their agreement into writing and provide reasons for doing so. Since it is the responsibility of the LPC to promote access to justice, to promote and protect the public interest, it follows that the implementation of the limited tariff as determined by the Mechanism will be overseen by the LPC as part of the complaints handling mechanism.

I. Summary of the recommendations

The recommendations made in Chapter 6 are the following:

1. Recommendation 6.1: The Commission is of the view that the Rules Board, as presently constituted institutionally in terms of section 3 of the Rules Board for Courts of Law Act 107 of 1985, read with section 5(1) of the Act, is the appropriate existing

mechanism for determining recoverable legal fees and tariffs payable to legal practitioners and juristic entities in litigious matters.

2. Recommendation 6.2: It is stated above that in the RSA, the award of costs, unless expressly stated otherwise, is in the discretion of the presiding judicial officer and that costs generally follow the event. It is recommended that courts should consider applying the proportionality test in addition to that of reasonableness when awarding costs on a party-and-party scale and attorney-and-client scale. The aim of the proportionality test is to maintain a sensible correlation between costs, on the one hand, and the value of the case, its complexity and significance on the other hand.

3. Recommendation 6.3: It is recommended that taxation should remain the responsibility of the taxing master (in the High Court, and registrars and clerks in the Magistrates' Courts). More taxing masters need to be appointed and trained to avoid long waiting periods for dates to tax.

4. Recommendation 6.4: Regarding prelitigation costs that do not further the litigation process, the Commission recommends that the LPC should consider developing service-based attorney-and-client Fee Guidelines for an initial consultation between a legal practitioner and a client whose total income/turnover per annum does not exceed the amount determined by the Minister by notice in the Gazette. This could take the form of a fixed or flat fee. The purpose will be to ensure that advice is obtained at the earliest possible stage which could prevent possible disputes.

5. Recommendation 6.5: Expert evidence should be avoided when it is not necessary because it leads to excessive legal fees. The Commission concurs with the recommendations made by the respondents that:

(a) That the rules relating to expert evidence require revamping to improve the advice rendered to court and to ensure that the costs are curtailed.

(b) Fees charged by experts should be regulated by the relevant professional bodies. The fees should be reasonable and relate to work done by the expert and not a repetition of what had been done by others.

(c) Expert reports must be truthful, impartial and only relate to the area of expertise for which the expert is qualified.

(d) The LPC should inform all relevant professional bodies of the need for guidelines to be determined with regard to the fees that may be charged.

The guidelines should be published for purposes of transparency and that disciplinary action will be taken where experts charge unreasonable and disproportionate fees.

6. Recommendation 6.6: It is recommended that an investigation be conducted by the DOJ&CD into the feasibility of establishing an administrative body that will be responsible for prescribing minimum norms and standards and code of conduct for legal costs consultants without a right of appearance in court. Legal costs consultants are not expressly included in the code of conduct that must be developed by the LPC in terms of section 36(1) of the LPA. The code of conduct is applicable to all legal practitioners, candidate legal practitioners and juristic entities. 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. It also provides users with legal services with more product choices and competitive prices which is an important tenet of a free market system.

7. Recommendation 6.7: It is recommended that the recoverable tariffs that apply in respect of attorneys' fees and counsels' fees, that is, Rules 33 read with Tables A and B of Annexure 2 to the Magistrates' Courts Rules; Rules 69 (Tariff for Advocates and Attorneys with Right of Appearance) and 70 (Tariff for Attorneys) of the Uniform Rules; and Rule 18 of the SCA Rules (Tariff for Attorneys' Fees), must be reviewed in relation to each other and in respect of the various hierarchies of court to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Court level right up to the Supreme Court of Appeal and Constitutional Court. The review must be informed by the legal practitioner service-based principle discussed in Chapter 7 of this Report.

8. Recommendation 6.8: Although there is no provision in the Rules Board for the Courts of Law Act barring the Rules Board from making rules regulating the practice and procedure in connection with litigation in criminal matters in the Magistrates' Courts, High Court and SCA, however, cost orders are generally not granted against either the State or the accused party in litigious criminal matters. It is recommended that service-based attorney-and-client Fee Guidelines be developed by the LPC in all branches of the law including criminal matters.

9. Recommendation 6.9: It is recommended that the DOJ&CD should consider amending section 297 of the Criminal Procedure Act, 1977 to compel the State to inform complainants and injured parties of the existence of the sentencing options where it is relevant, or where applicable, to compel presiding officers to enquire whether the provisions have been explained and whether any compensatory order is sought. Although the provisions of the Criminal Procedure Act do not assist the accused in reducing her/his legal costs, this may reduce the legal fees of the injured party when instituting civil action to recover his/her damages from the accused.

10. Recommendation 6.10: It is recommended that the DOJ&CD should consider amending section 191(3) and (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977) to include a provision that will provide for a bi-annual review or an automatic annual adjustment of allowances payable to witnesses attending criminal proceedings in line with inflation as per the consumer price index.

11. Recommendation 6.11: In view of the strong objections against Option 1 by members of the legal profession, it is recommended that this proposal be adopted as an interim arrangement pending the development of service-based attorney-and-client fee guidelines by the LPC in all the branches of the law. The adoption of Option 1 as an interim arrangement will make room for undertaking a detailed economic analysis in respect of what the effect of the proposed fees regime will have on legal practitioners and a predicative model of the impact on access to justice before such far-reaching changes will have when implemented as proposed by members of the legal profession. Such a study could be commissioned by the DOJ&CD to a research organisation such as the HSRC.

12. Recommendation 6.12: The Commission recommends that it is desirable that the existing mechanism for determining recoverable (party- and- party) legal fees and tariffs in litigious matters in the Magistrates' Courts be extended by default, without the opt-out option as provided for in section 35(3) of the LPA, for use as a basis for determining attorney-and-client fees payable to legal practitioners by users of legal services whose total income/turnover per annum does not exceed the maximum threshold determined by the Minister by Notice in the Gazette,[331] subject to the following modifications:

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331 Section 5(2)(b) of the Consumer Protection Act, 2008 provides that "This Act does not apply to any transaction-

(i) that the party-and-party tariffs must be reviewed annually and updated to keep up with inflation.

(ii) that the party-and-party tariffs in respect of attorneys' and counsels' fees must be reviewed in relation to each other and in respect of the various hierarchies of court to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Court level right up to the Supreme Court of Appeal and Constitutional Court. A tariff for counsels' fees is required to guide taxing masters in the taxation of counsels' fees and to establish uniformity in the taxation of counsels' fees with those of attorneys with the right of appearance in the High Court.

13. The Commission is of the view that there is no need for another mechanism to be established when an existing mechanism can be adapted for this purpose. Alternatively, it is recommended that:

14. Should the recommendation be approved by the Minister, section 35(1) of the LPA could be amended to read as follows:

"35(1)[Until the investigation contemplated in subsection (4) has been completed and the recommendations contained therein have been implemented by the Minister, [f]Fees in respect of litigious [and non-litigious] legal services rendered by legal practitioners[,] and juristic entities, [law clinics or Legal Aid South Africa referred to in section 34] must be in accordance with the tariffs made by the Rules Board for the Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No.107 of 1985)."

15. Section 35(3) could be amended as follows:

"Despite any other law to the contrary, and save for the users of legal services whose total income/turnover per annum does not exceed the maximum threshold to be determined by the Minister by Notice in the Gazette, nothing in this section precludes

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(b) in terms of which the consumer is a juristic person whose asset value or annual turnover, at the time of the transaction, equals or exceeds the threshold value determined by the Minister (Cabinet member responsible for consumer protection matters) in terms of section 6."

According to Eeden and Barnard, the Minister must at intervals of not more than five years, determine by notice in the Gazette, a monetary threshold applicable to the value of transactions for the purposes of section 5(2)(b) of the Act, *Consumer Protection Law in South Africa* (2017) 53.

any user of litigious or non-litigious legal services, on his, [or] her or its own initiative, from agreeing with a legal practitioner in writing, to pay fees for the service in question above or below any tariff determined as contemplated in this section."

16. Sections (6) and (7) of the Rules Board for the Courts of Law Act, 1985 could be amended to read as follows:

"(6) The Board may advise the Minister on the monetary jurisdiction limits of lower courts, the limitation of the costs of litigation, the tariff of legal fees applicable to users of legal services in the lower and middle-income bands, and any other matter referred to the Board by the Minister.

(7) The power to make, amend or repeal rules under subsection (1) shall include the power to make, amend or repeal rules to give effect to the provisions of sections 2 and 3 of the Foreign Courts Evidence Act, 1962 (Act No.80 of 1962)[.] and section 3(b)(i) of the Legal Practice Act, 2014 (Act No.28 of 2014)."

17. Recommendation 6.14: It is recommended that the mechanism (Rules Board) must adopt an effective consultative process of all the stakeholders involved prior to determining fees and tariffs. The following stakeholders and role players, among others, must be consulted:

(a) the LPC;
(b) consumers of legal services;
(c) members and representatives of the legal profession;
(d) members and representatives of the judiciary;
(e) representatives of civil society organisations;
(f) the Minister, or his/ her representative;
(g) the Competition Commission;
(h) Legal Aid SA;
(i) Law clinics;
(j) Juristic entities;
(k) NEDLAC; and
(l) Human Sciences Research Council.

18. Recommendation 6:15: The Commission recommends that it is not desirable that users (natural persons) of legal services whose total income/turnover per annum does not exceed the maximum threshold to be prescribed by the Minister by notice in

the Gazette, be given the option of voluntarily agreeing to pay fees for legal services above any amount that may be set by the Mechanism (tariffs prescribed by the Rules Board) in the Magistrates' (district and regional) Court on the following grounds:

(a) If the Legislation provides an unlimited capacity for users of legal services to opt-out, this could have the effect of emasculating and seriously undermining the mechanism put in place to determine a reasonable fee and/or tariff for the protected category of users;
(b) Mandatory fee agreements with pre-populated opt-out clauses will simply be the order of the day; and
(c) These consequences will not be avoided by requiring the protected category of users of legal services who agree to pay above the fee determined by the mechanism to have such agreement reduced to writing and to provide reasons for doing so.

19. Recommendation 6:16: However, the Commission recommends that it is desirable that all other users of legal services, including users of litigious legal services in the HC; SCA and Constitutional Court and non-litigious legal services whose total income/turnover per annum does not exceed the maximum threshold to be prescribed by the Minister by notice in the Gazette*,* be given the option of voluntarily agreeing to pay fees for legal services less or above any amount that may be set by the Mechanism (service-based attorney-and-client Fee Guidelines to be developed by the LPC). Parties who opt to pay above the fee determined by the Mechanism will have to reduce their agreement into writing and provide reasons for doing so. Since it is the responsibility of the LPC to promote access to justice, to promote and protect the public interest, it follows that the implementation of the limited tariff as determined by the Mechanism will be overseen by the LPC as part of the complaints handling mechanism.

Chapter 7: Mechanism for Attorney-and-client Fees

A. Introduction

7.1 Section 35(4)(c)-(e) of the LPA provides that the Commission must investigate:

> *(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 process 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)*.

7.2 As stated in Chapter 7, the mechanism contemplated in sections 35(4)-(5) of the LPA is discussed in two Chapters. Chapter 7 focused on the mechanism for party-and-party costs. This Chapter looks at the mechanism for attorney-and-client fees. Recommendations for legislative (law reform) and non-legislative intervention, where applicable, are made.

7.3 The mechanism for determining attorney-and-client fees is discussed first, by looking at the position in other jurisdictions. Second, the most important question, which is, whether it is desirable to establish a mechanism for determining legal fees and tariffs payable to legal practitioners is discussed. This question is discussed by analysing four options, namely: (1) current status quo; (2) universal compulsory tariff; (3) tariff with limited targeting; and (4) fee guidelines.

7.4 Third, final recommendations are made in line with the Commission's mandate as follows:

(a) The desirability for a mechanism;
(b) Composition of the mechanism;
(c) The process to be followed;
(d) The desirability of giving users of legal services the option to voluntarily pay less or in excess of the amount to be set by the mechanism.

7.5 Fourth, the question of how should fees in non-litigious matters be determined is discussed. Fifth, the position in other jurisdiction with regard to this topic is discussed. Last, but not least, the enforcement mechanism is discussed.

B. Position in other jurisdictions

7.6 The University of Oxford prepared a comparative study of costs and funding of civil litigation across thirty-fourth (34) jurisdictions from East Asia, Central and Eastern Europe and Scandinavia.[1] The study found that common law and civil law jurisdictions have distinct architectural features of civil procedure, which give rise to different roles for lawyers and judicial officers, and thus typically different levels of legal costs and fees between the two broad traditions.[2]

7.7 The main factor attributable to high legal costs and fees among the common law jurisdictions is lawyers' fees. There are significant differences in the manner in which legal fees are regulated. Very often, there is a wide scope of discretion as to the exact arrangements between legal practitioners and their clients.[3] The general common law rule, which also applies in many civil law jurisdictions, is that lawyers' fees are freely negotiated.[4] Despite the rule that lawyers' fees should be reasonable, however, the highest lawyers' fees can be observed in Australia, England and Wales, and Denmark.[5]

7.8 The study found that:

> *[f]ees payable by clients may sometimes be based on a tariff established by law, but no such tariff appears to be bindingly exclusive. Lawyers in Germany, for example, may decide to charge the tariff sum or charge on some other basis, and the state of the market is such that a lawyer who will be prepared to work on the tariff basis can currently always be found*.[6]

7.9 The study also found that a proper market does not apply in relation to most legal services offered by lawyers because individual clients lack the expertise or sophistication to differentiate between the quality and the fees charged by different service providers

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1 University of Oxford "Costs and Funding of Civil Litigation: A comparative Study" (December 2009)
2 *Ibid*, 5.
3 *Ibid*, 18.
4 *Ibid*, 21.
5 *Ibid*, 19.
6 *Ibid*, 14.

or to negotiate a lower or capped fee. Where this practice occurs, the issue is one of market capture by lawyers.[7]

7.10 To promote access to justice and legal services, government and market forces in the below-mentioned jurisdictions have taken steps to control and seek alternatives to the high cost of litigation.

1. United Kingdom

7.11 In November 2008, the Master of the Rolls, Sir Anthony Clarke MR, appointed Lord Justice Jackson to carry out an independent review of the rules and principles governing the costs of civil litigation in England and Wales and to make recommendations to promote access to justice at proportionate cost.[8]

7.12 On the question of whether legal fees should be regulated, Justice Jackson states that:

> *I have consulted both the Solicitors Regulation Authority (SRA) and the Legal Services Board (LSB) about the matter. Officers of both bodies have responded to the effect that regulation of solicitors' fees might be anti-competitive. The SRA points out that a client can complain about overcharging to the Legal Complaints Service. The Director of Strategy and Research at the LSB writes*:
>
> *We understand the concern that Citizen Advice has about the problem of costs of and access to legal services. It is our view however that to seek to regulate it is not the best means of addressing the matter. Opening up the legal services market to more competition will bring new entrants with more innovative products which will, in turn, drive existing law firms to respond by focusing more on what clients want and being ever more efficient in the way services are delivered. Our expectation is that the net effect will be consumers having a greater choice about how they access legal services and increased flexibility from the market regarding price and quality. Regulating solicitors' costs will stifle a market that is already insufficiently responsive to the needs of consumers*.
>
> *I see force in the points raised by the SRA and the LSB. Therefore, despite the arguments of Citizen Advice, I do not recommend the regulation of legal fees*.[9]

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7 *Idem*.
8 Jackson, R "Review of civil litigation costs: Final Report" (December 2009) 2.
9 Justice Jackson "Review of Civil Litigation Costs: Final Report" (December 2009) 51.

7.13 Legislative and non-legislative interventions were taken to implement some of Lord Justice Jackson's reforms. [10] The following are some of the reforms which were brought about by Lord Justice Jackson's investigation into the costs of civil litigation in the UK:

(a) Successful claimants could no longer recover success fees and after-the-event (ATE) insurance premiums from defendants.

(b) The introduction of qualified one-way costs shifting removing the need by claimants to pay defendant's legal costs in personal injury matters in the event that they are unsuccessful.

(c) Lawyers were prohibited from paying referral fees to claims managers in personal injury matters.

(d) A system of judicial costs managements (costs budgeting) was introduced for multi-track cases, that is, cases £25,000 in the county courts and the High Court.

(e) A new proportionality test was introduced for costs. This test provided that costs that were globally disproportionate could be refused or reduced even if they were reasonably incurred.[11]

(f) The technique of concurrent expert evidence, also called 'hot-tubbing' was introduced to save time and money.[12]

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10 Some of the reforms were implemented through passing of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) which came into operation on 1 April 2013, and amendments made to the CPR. Some of the reforms were implemented by Legal Aid, see "A Guide to the Jackson Reforms and Civil Litigation Costs" available at https://www.fenwickelliot.com/research-insight/newsletters/insights592019/10/16/ accessed on 30 October 2019.

11 The court in *Lownds v Home Office* [2002] EWCA Civ 365 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.

12 "A Guide to the Jackson Reforms and Civil Litigation Costs" available at https://www.fenwickelliot.com/research-insight/newsletters/insights592019/10/16/ accessed on 30 October 2019.

2. Australia

7.14 In June 2013, David Bradbury, Assistant Treasury, and pursuant to Parts 2 and 3 of the Productivity Commission Act 1998, instructed the Productivity Commission to undertake an inquiry into Australia's system of civil dispute resolution with a view to constraining costs and promoting access to justice and equality before the law.[13]

7.15 Among the concerns noted by the Productivity Commission is that the civil justice system remains inaccessible to many Australians. According to Wayne Martin, the Chief Justice of Western Australia:

> *The hard reality is that the cost of legal representation is beyond the reach of many, probably most, ordinary Australians. In theory, access to that legal system is available to all. In practice, access is limited to substantial business enterprises, the very wealthy, and those who are provided with some form of assistance*.[14]

7.16 The Australian civil justice system offers many options for the resolution of disputes. These range from informal dispute resolution mechanisms, like ombudsmen and complaint bodies, to formal mechanisms like tribunals and civil courts.[15] The Productivity Commission recommended the following reforms to the Assistant Treasury, among others, namely:

> ***Consumers lack information****: Legal Assistance Forums should establish Community Legal Education Collaboration Funds to develop high-quality education resources. Legal aid commissions should enhance their existing activities to develop well-recognised entry points for the provision of legal information, advice and referrals.*
>
> ***Aspects of the formal system contribute to problems in accessing justice****: Tribunals should enforce processes that enable disputes to be resolved in ways that are fair, economical, informal and quick. All courts should examine their processes in terms of consistency with a leading practice in relation to case management, case allocation, discovery and use of expert witnesses. Lower-tier*

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13 Productivity Commission "Access to Justice Arrangements" (September 2014) iv.

14 *Idem* 6.

15 The Productivity Report identified 71 Ombudsmen and complaint bodies (22 at national level, and 49 at state and territorial level); 58 tribunals; and 43 Courts (4 Commonwealth, 21 at general States/ territorial level, and 18 at specialist States/ territorial level).

courts should award costs based on fixed scales. Higher-tier courts should further explore the introduction of processes for cost management and capping.

***Assisting the "missing middle"**: Governments should develop a single set of rules to offer consumers the option of purchasing unbundled assistance*.[16]

3. Canada

7.17 In Canada, lawyers' fees are subject to market forces and there is no statutory or regulatory control of them.[17] Empirically fees vary according to province, rural or urban environment, and large or small firm size. A survey conducted by The Canadian Lawyer in 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."[18]

C. Cost of legal services in South Africa

7.18 It has been stated above that attorney-and-client costs are legal costs that an attorney may expect to receive from his or her client for legal services rendered including disbursements made on behalf of the client. Francis-Subbiah explains that attorney-and-client costs have a double meaning. Firstly, they refer to costs that are paid by one party to the opposing party. Secondly, they refer to costs that a client has to pay to her attorney for legal services rendered.[19] The commentator remarks that strictly speaking the latter mentioned type of costs should be called attorney-and-own client costs.[20] Costs *de bonis propriis* are punitive costs ordered by the court to be paid by a legal representative from his or her own pocket for acting in an improper, dishonest and seriously negligent matter.[21]

7.19 Section 35(4) of the LPA mandates the Commission to investigate and report back to the Minister with recommendations on the following:

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16 *Ibid*, 35.

17 Glenn, HP, "Costs and fees in common law Canada and Quebec" Faculty of Law and Institute of Comparative Law, McGill University, 4.

18 *Idem*.

19 Francis-Subbiah, R Taxation of Legal Costs in South Africa (2013) 91. See also *Masango and Another v Road Accident Fund* [2016] (6) SA 508 par 17.

20 One of the respondents states that "Please note that there is no such thing as attorney and "own" client costs. Attorney-and-client costs and attorney and "own" client costs are one and the same thing" Lourens M "Submission to the South African Law Reform Commission" (12 August 2019) 3.

21 Francis-Subbiah, R Taxation of Legal Costs in South Africa (2013) 119.

(a) The manner in which to address the circumstances giving rise to legal fees that are unattainable for most people

7.20 Legal fees in South Africa are largely determined by market forces.[22] Although the Commission is not required to investigate the question of whether legal fees are affordable or not,[23] however, reference is made in the paragraphs below of evidence-based socio-economic and legal research conducted by other institutions in South Africa in recent years on the subject of legal fees and access to justice, and anecdotal evidence supplied by members of the public and stakeholders alike in response to Issue Paper 36: Investigation into Legal Fees.

7.21 The empirical study conducted by the Human Sciences Research Council found in no uncertain terms that legal costs in South Africa are high. [24] On the subject of legal costs, the report states that:

> *Costs are an essential issue in relation to access to justice in all legal matters. Fifty-nine percent of SASAS respondents in the most recent survey on courts in 2014 indicated that they felt that lack of funds to pay legal expenses were a significant barrier to accessing justice from the courts. People in traditional authority areas indicated the highest agreement (63.9%) with this, followed by respondents from rural formal areas (59%) which are perhaps indicative of the barrier that rural poverty may pose to accessing the legal system. Young people between the ages of 16 and 19 (66.7%) were the most emphatic of all age groups that legal costs are a significant barrier to justice, potentially indicating the need to support minors in particular to access the court system*.[25]

7.22 The study conducted by SERI into the public interest legal services sector in South Africa found that "the cost of legal services, and particularly counsel's fees, were simply

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22 SERI "Public Interest Legal Services Project Report" (July 2015) 103.

23 It is submitted that this question is predetermined by Parliament. At the middle-income users of legal services workshop held on 15 November 2019, the Chairperson of the Commission, Judge Kollapen, stated that the legislature has already taken the decision that legal fees are unattainable for most people and the Commission needs to find out what the cause is.

24 See HSRC study into the Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society: Final Report (November 2015 23. The report states that "Theme 4 focused on access to justice in more general terms. Qualitative interviews were conducted with litigants of landmark socio-economic rights cases and other key role-players, including members of NGOs and Public Interest Litigation (PIL) firms. The aim was to ascertain experiences with regard to the socio-economic rights cases, including costs and time taken to finalise these cases" at 14.

25 *Ibid*, 159.

too high."[26] The study also found that "there is no publicly available tariff or illustration of counsel's fees" and that "commercial rates are significantly higher than these guides might suggest"[27]

7.23 The SERI study found that:

> *[a] first-year junior counsel would charge approximately R550.00 per hour or R5500.00 per day. Counsel of 10 years standing would charge between R1500.00 and R2400.00 per hour, or between R15 000.00 and R24 000.00 per day. Senior counsel who has been granted silk status by the President would charge between R25 000.00 and R35 000.00 per day, with some counsel rumoured to be charging up to R60 000.00 per day in high-value commercial matters*.[28]

7.24 Costs vary by province. In 2015, it was reported by a High Court judge that parameters for counsel fee in KwaZulu-Natal were between R2400.00 and R4500.00 per hour for consultations on a daily basis and between R19200.00 and R36000.00 for opposed application fees (eight times the consultation fee).[29] Gauteng advocates charge more than those based in and between KwaZulu-Natal.[30] In Magistrates' Court matters, counsel still charge their normal fees on an attorney-and-client basis.[31]

7.25 A candidate attorney charges on average R1200.00 per hour; a junior admitted attorney of 1 year standing R1 800.00 per hour; a junior partner R2500.00 per hour and senior partner up to R6000.00 per hour.[32] According to one respondent, "an attorney-and-client rate for a UK solicitor would be £450.00 to £500.00 for a matter with fair

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26 The study conducted by SERI was commissioned by the Ford Foundation and the RAITH Foundation in 2014 and was completed in July 2015 "Public Interest Legal Services in South Africa Project Report (July 2015) available at https://www.pils.org.za/about/research-project/ (accessed on 02 December 2019). This view was, however, expressed by the respondents who were not privately practicing. See also Klaaren J "Towards Affordable Legal Services: Legal Costs in South Africa and a Comparison with Other Professional Sectors" (19 October 2018) 6 available at https://www.lssa.org.za/upload/files/Costs%20conference/Prof%20Jonathan%20Klaaren%20Paper%20SALRC%20v%201a.pdf/ (accessed on 02 December 2019).

27 Ibid, 103. One respondent submits that the fee guidelines that were issued by the Bar Council of the different provinces in South Africa fell away in 2009, Lourens M "Submission to the South African Law Reform Commission (12 August 2019) 5.

28 *Idem*.

29 Klaaren J "Towards Affordable Legal Services: Legal Costs in South Africa and a Comparison with Other Professional Sectors" (19 October 2018) 6 available at https://www.lssa.org.za/upload/files/Costs%20conference/Prof%20Jonathan%20Klaaren%20Paper%20SALRC%20v%201a.pdf/ (accessed on 02 December 2019) 7.

30 *Idem*.

31 Lourens M "Submission to the South African Law Reform Commission (12 August 2019) 6.

32 *Ibid*, 5.

complexity and operating from London central."[33] In Germany, fee agreements are usually based on an hourly and daily basis. In 2017, attorney fees averaged at 408 Euro per hour and 6000 Euro per day in complex matters.[34] However, in international commercial matters, the fees of experienced and senior attorneys can easily double the average amounts, which can go up to 1000 Euro per hour and 12000 Euro per day.[35]

7.26 Statistics SA also found that "for over three-quarters of the population the financial impact of the process of resolving their dispute or problem was a lot and significant. Less than 10% of the population felt that the financial impact was insignificant."[36] It is interesting to note that Statistics SA found that the average amount of money spent by individuals in resolving their disputes through impartial formal and informal institutions varies between R1700.00 and R200 000.00.[37]

7.27 On 9 November 2020, Legalbriefs reported that "top legal minds leading evidence in the Zondo Commission of Inquiry into State Capture cost up to R38 000 a day. A breakdown of the costs shows that 13 of the 32 legal officers appointed by the Commission are senior counsel whose rates range from R23 000 to R38 000 per day."[38] The fee parameters for counsel acting on the instruction of the State are provided in Annexure F of this Report.[39] Deviation from the fee parameters is permissible only in exceptional circumstances. The following principles apply when considering exceptional circumstances: the experience of senior counsel; whether the client has approved the deviated rate for the particular senior counsel; no deviation is allowed in respect of junior counsel; the reasons for the deviation must be provided in writing.

7.28 An important feature of the Legal Aid SA's tariff of fees and disbursements in civil matters is that it is largely service-based unless the context requires otherwise. In the notes to the civil tariffs, the singular phrase of "legal practitioners" is used more frequently compared to that of "attorney" and advocate" respectively. The pricing of disbursements

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33 *Idem*. It is assumed that the respondent quotes recent (2019) figures as his submission is dated 19 August 2019.

34 Thomashausen A "Legal Fees in Germany" (6 November 2019) 2.

35 *Idem*.

36 Statistics South Africa "Governance, Public Safety and Justice Survey 2018/2019" 43.

37 *Ibid*, 42.

38 Legalbrief Issue No.5060 dated 9 November 2020.

39 Information obtained from the Office of the State Attorney, Pretoria. Deviation from the fee parameters is permissible only in exceptional circumstances. The following principles apply when considering exceptional circumstances: the experience of senior counsel; whether client has approved the deviated rate for the particular senior counsel; no deviation is allowed in respect of junior counsel; the reasons for the deviation must be provided in writing.

is also based on the same service-based instead of practitioner-based principle. The tariff harmonises the fees payable to senior counsel and specialist attorneys in the High Court; SCA and Constitutional Court. At the Magistrates' Court level, the tariff opens up the playing ground to all the legal practitioners, subject to the experience levels of legal practitioners as provided in Table 1 below. [40]

Table 1: Legal Aid SA Experience levels of Legal Practitioners

Level	Minimum required experience
1	Entry-level (for reserved work must be legally permitted to undertake the work)
2	Minimum 1-year full-time general practice as a Legal Practitioner
3	Minimum 3 years full-time general practice as a Legal Practitioner
4	Minimum 5 years full-time general practice as a Legal Practitioner and must be permitted to appear before the High Court if High Court work is to be undertaken
5	Minimum 10 years full- time general practice as a Legal Practitioner and must be permitted to appear before the High Court if High Court work is to be undertaken

7.29 The fee parameters for counsel acting on the instruction of Legal Aid SA in civil impact services matters is provided in Table 2 below.[41]

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40 Legal Aid SA "Legal Aid Manual" available at https://legal-aid.co.za/wp-content/uploads/2018/11/Legal-Aid-Manual.pdf (accessed on 23 March 2020).

41 *Idem*.

Table 2: Legal Aid SA tariff of fees in civil impact services matters

Matter	**District Mag Court**	**Regional Mag Court**	**HC**	**SCA**	**CC**
Impact services (subject to negotiation)					
Attorneys	N/A	N/A	Not more than double the amount allowed on taxation on attorney & client scale on applicable statutory tariff		
Junior counsel	N/A	N/A	Not more than 2/3 of Senior counsel		
Hourly rate Senior counsel/ Specialist attorneys	N/A	N/A	R1602-R2401p/h	R1602-R2401p/h	R1602-R2401p/h
Senior counsel/ Specialist attorneys per 10-hour day	N/A	N/A	R16015-R24003p/d	R16015-R24003p/d	R24003p/d

7.30 Section 34 of the LPA draws a distinction between an attorney and an advocate. The divided bar and the referral rule both originate from Roman-Dutch and English law and have been the subject of many court challenges in the past.[42] The recognition of the two categories of legal practitioners in the LPA came as no surprise, following the compromise reached prior to the introduction of the Bill into Parliament that the whole Bill be premised on the continuation of the two categories of legal practitioners.[43] However, section 34(2)(b) of the LPA has introduced a third category of a legal

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42 Ellis P, at al, *The South African Legal Practitioner-A Commentary on the Legal Practice Act*, (2018) 2-11.

43 *Ibid*, 1-13. See also PMG "Legal Practice Bill [B20-2012]: deliberations on amendments proposed by negotiating mandates" minutes of meeting held on 26 February 2014 available at http://www.pmg.org.za/report/20140226-permanent-delegates-presentation (accessed on 4 September 2014).

practitioner, that is, an advocate that can accept a brief directly from a member of the public or from a Legal Aid SA Local Office centre for that service, provided that she/he is in possession of a Fidelity Fund Certificate and has notified the LPC of her/his intention of doing so.

7.31 The disparity in legal fees chargeable between attorneys and advocates, on the one hand, and the effect of the divided bar in the development of party-and-party tariffs and attorney-and-client fees, on the other hand, has always been a contentious matter. Currently, Rule 70 of the Uniform Rules allows R292.00 per page for an attorney for drawing an important document, yet an advocate is allowed about R750.00 per page for the same type of document. The referral rule that an attorney instructs an advocate at times has the effect of duplicating costs.

7.32 Ellis, *et al*, point out that "whilst it is acknowledged that legal services are diverse, many such services are rendered in teams: One only needs to be reminded about the different roles played by advocates, attorneys and candidate attorneys in High Court litigation. If the fostering of a team spirit between practitioners is what the legislature had in mind, it is commendable."[44] In *Rösemann v General Council of the Bar of SA*,[45] Heher had this to say on the subject of the divided bar:

> *People choose to become attorneys or advocates not because they are forced to select one profession or the other but because of the different challenges which they offer, one, the attorney, mainly office-based, people-orientated, usually in partnership with other persons of like inclinations and ambitions, where administrative skills are often important, the other, the advocate, court-based, requiring forensic skills, at arm's length from the public, individualistic, concentrating on referred problems and usually little concerned with administration*.

7.33 If legal practitioners are to be encouraged to strive to work together, and if fostering of a team spirit is consistent with the purpose of the LPA, the development of service-based tariffs and attorney-and-client fee guidelines, instead of practitioner-based tariffs and fee guidelines, providing a narrative of the services to be rendered and the cost thereof, regardless of which practitioner will provide the service in question, will go a long way towards achieving this objective.

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44 Ellis P, at al, *The South African Legal Practitioner-A Commentary on the Legal Practice Act*, (2018) 2-7.

45 2004 (1) SA 568 (SCA), par 26.

7.34. There is currently also a lacuna at the level of the LPC in determining legal fees chargeable by legal practitioners. There is a need for service-based attorney-and-client fee guidelines to be developed by the LPC in respect of all branches of the law. Such service-based attorney-and-client fee guideline must show some connection with the recoverable tariffs developed by the Rules Board. In the UK, Justice Jackson discouraged costs that are disproportionate to the sums in the proceedings; or to the value of any non-monetary relief in issue in the proceedings; or to the complexity of the litigation.[46]

7.35 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.[47] On numerous occasions, courts have expressed concern about the exorbitant fees that legal practitioners charge their clients.[48] For instance, in *Camps Bay Ratepayers and residents Association and Another v Harrison and Another*, [49] the court held that much as there is no doubt that many clients are willing to pay market rates to secure the best legal services and that skilful professional work deserves reasonable remuneration, however, the court feels obliged to express its disquiet at how counsel's fees have skyrocketed in recent years."

7.36 In *Graham and Others v Law Society of the Northern Provinces and Others*,[50] the court held that –

> *this application is another Chapter in the saga involving allegations of serious impropriety and misconduct against the firm by an erstwhile client. In Pretoria Society of Advocates v Geach and Others,[51] 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*

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46 Justice Jackson "Review of Civil Litigation Costs: Final Report (2009) 37.

47 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".

48 See Mfengwana v Road Accident Fund (1753/2015) [2016] ZAECGHC 159 par 5.

49 [2012] ZACC 17 par 11, and Nedbank Ltd v Thobejane and Similar Matters (2019, (SA) 594 (GP) par 63.

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

51 2011 (6) SA 441 par 19.

> *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.*

7.37 In *Mpambaniso v Law Society of the Cape of Good Hope*,[52] 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*.

7.38 Likewise, Parliament has also raised similar concerns, as evidenced in the various minutes of the Justice and Constitutional Development Portfolio Committee.[53]

7.39 Most of the respondents to Issue Paper 36: Investigation into Legal Fees attribute the huge gap between party-and-party costs and attorney-and-client fees to the laxity of the lawmaker in updating the statutory tariff to align with commercial rates. It is estimated that the gap between party-and-party costs and attorney-and-client fees has increased from 30% to 70%.[54] The respondent argues that the problem is not so much about attorneys overcharging their clients, as it is more about the recovery tariff being outdated.[55]

7.40 Most of the participants who attended the Commission's provincial community workshops and public stakeholder hearings on Issue Paper 36 agreed generally that legal fees are unaffordable for them. The participants indicated that they do not have the money to pay for legal services, that the government must intervene and that people

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52 542/ 2014 [2016] ZAECGHC 114(3) November 2016 par 8.

53 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).

54 Lourens M "Submission to the South African Law Reform Commission" (12 August 2019) 6. Glenn "Costs and fees in common law Canada and Quebec" states that "party-and-party costs in Canada are usually estimated at 50-60% of lawyers' actual fees, and solicitor-client costs will cover up to 90% of such fees" at 6.

55 *Idem*.

must be educated about what they can do.[56] Participants who responded to the online survey also felt the same.[57] Other participants, however, expressed different views.[58]

7.41 One of the participants at the middle-income workshop indicated that middle-income users are in a very precarious position since they can sometimes not find assistance from the law clinic because they fall outside of the criteria of the clinic's means test, but still earn too little to afford the legal fees of a lawyer. According to the participant, law clinics are afraid of helping middle-income users because they run the risk of losing their funding for helping clients who fall outside of the means test.

7.42 Another participant stated that middle-income earners would naturally include small to medium businesses. The economy needs to put more people into the business. Most of the small to medium businesses generate ideas and products that can easily be duplicated. Like natural persons, small and medium-size businesses also lack access to legal services because of their size. The participant recommended that the Commission should also look at the experiences of small business in terms of access to legal support.

D. Desirability of establishing a mechanism for determining legal fees and tariffs payable to legal practitioners

7.43 Section 35(4) of the LPA mandates the Commission to investigate and report back to the Minister with recommendations on the following:

> *(c) the desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners.*

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56 "The problem is that we do not have the money at all and we have no idea how much a lawyer cost. Legal fees must be reduced so that those who are dependent on social welfare can be able to afford to pay legal services" (Nomandindi S), "The government must intervene so that lawyers are employed by the government in order for poor and disadvantaged clients to pay half the price" (Rolo X).

57 "A reasonable maximum fee should be set out in the Act. The Act should determine a reasonable price based on a criteria" (Makore AK); "Legal fees should be determined according to household income" (Josephus K); "Overhead costs of firms could be cut down which would lead to lower legal costs" (De Jager J); "I think it would be best to categorise legal fees charged to people according to the different income brackets" (Adams O); "More *pro bono* offices should be established by bigger law firms such as the big five law firms to accommodate those who cannot afford the hefty legal fees" (Scullard S).

58 "I personally believe that there are no external means to make legal fees more affordable. It is the prerogative of the practitioner to decide whether the costs can be decreased or not. You must take into account the expenses that are incurred and decide on the appropriate fee" (Gravenorst A); "The first point of call is more commitment from the State to assist citizens in attaining legal assistance at a reasonable cost. Even though Legal Aid exists to address the aforementioned issue, there is room for improvement" (Mcengwa N).

7.44 According to the respondents generally, the abovementioned question must be considered by the Commission against the following test, criteria or considerations:

(i) The whole question of tariffs fundamentally affects the independence of the profession, the continuation of which is vital for the rule of law and the separation of powers, in that legal practitioners need to be sufficiently well remunerated to maintain the requisite independence from clients, and to enable them to fulfil their vital role of representing the client's interests whilst maintaining the requisite duty to the court and other persons.[59]

(ii) The mechanism must comply with:
   (a) competition law;
   (b) the principle of freedom of contract;
   (c) the right to choose a profession (section 22 of the Constitution-which could be rendered illusory by a compulsory universal tariff);
   (d) equality (section 9 of the Constitution-since legal practitioners would be treated unequally to other persons, in particular, their own clients, and to other professionals, and generally to all workers;
   (e) The commercial realities of operating as a practicing legal practitioner.[60]

(iii) Whether the regulation of fees by tariff will address the intended purpose of the legislation. In other words, what is the purpose of creating a Mechanism to determine fees and tariffs;

(iv) Whether a tariff that is benchmarked using commercially viable rates charged by legal practitioners (which may be in excess of the fees the poor and middle-income earners can pay) achieves the purpose envisaged in the LPA;

(v) The complexity in benchmarking the fees taking into account, *inter alia*, specialisation of practitioners, area of service (urban, rural), overheads and other operational costs, type of work and type of clients;

(vi) Non-litigious fees cover a wide spectrum of services and some of these services are rendered by other professions that are not subject to the proposed tariff regulation;

(vii) The impact of the proposed tariff on the sustainability of legal practitioners, their support staff and suppliers of services to these practitioners as well as

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59 *Ibid*, 8.
60 *Ibid*, 10-11.

the effect of the proposed tariff on access to legal services, must be considered from a practical point of view; and

(viii) There would be enormous difficulties in arriving at a fair rate. Assuming the imposition of an hourly rate, it would be necessary first to understand what particular hourly rate can reasonably be expected to generate a total annual fees amount. The anticipated rate would have to be benchmarked against the annual earnings of related professions. The most appropriate point of comparison could be accountants, auditors, engineers and medical practitioners, as these are all professions requiring postgraduate qualifications, a period of professional training thereafter and professional examinations. These would also have to be compared against employment in other endeavours that legal practitioners are capable of doing, for example, the remuneration packages of judges, magistrates or legal advisers.[61]

7.45 It is stated in Chapter 1 of this Report that the mechanism must, among others, comply with competition law; promote the spirit, purport and objects of the Bill of Rights and the values underpinning the democratic State;[62] it must promote the independence of the judiciary and the legal profession, and uphold the principle of the rule of law and contractual freedom.

7.46 The former Chief Justice of the Republic of South Africa, Arthur Chaskalson, had this to say about the independence of the legal profession:

> *The independence of the legal profession, like that of the judiciary, is required in the public interest. But there is a corresponding obligation that flows from this, and that is, that the profession must conduct its affairs in a manner consistent with the public interest*.[63]

7.47 At the public stakeholder hearings, the delegation from the LSSA submitted that reference to the old LSSA rules in the Issue Paper is dated.[64] There are now new rules and there is a new dispensation currently in place under the auspices of the LPC. Whatever is recommended by the SALRC must be in line with the Competition Act (No.89

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61 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs; Memorandum" 7.

62 Office of the Chief State Law Adviser "Request for comment and input into SALRC Issue Paper 36" (2 August 2019) 2.

63 Arthur Chaskalson "The Rule of Law: The importance of independent courts and legal professions" Address to the Cape Law Society (9 November 2012) 13.

64 The public stakeholder hearings were held on 8-9 July, and 1 August 2019, in Centurion.

of 1998). According to the LSSA delegation, fees can be regulated to a certain extent. This must be done such that it does not have the consequence of closing down law firms because this will have an adverse effect on access to justice. There is a need for law practices to survive. There is a bottom line that all practitioners must meet to survive. The meeting noted that the bottom line is one part of the equation that cannot be ignored. The other part of the equation is access to justice.

7.48 The purpose of establishing a mechanism to determine legal fees and tariffs is to broaden access to justice by ensuring that legal services rendered are accessible and within the reach of the citizenry. Most of the participants who attended the Commission's provincial workshops and the public stakeholder hearings confirmed, albeit anecdotally, that legal fees are not affordable for them. Although some of the participants expressed a different view, however, it is imperative that legislative and other interventions are found to control the circumstances that give rise to unattainable legal fees for most people.

7.49 First and foremost, the LPC submitted to the Commission that "the policy of the LPC is that a universal and compulsory fixed tariff is undesirable for a number of reasons apparent from the remainder of this position paper."[65] The Commission concurs with the LPC's policy position that a universally compulsory attorney-and-client tariff is undesirable as it may lead to unintended consequences and will be unlawful. Therefore, on the question of whether a tariff that is benchmarked using commercially viable rates charged by legal practitioners (which may be in excess of the fees the poor and middle-income earners can pay) achieves the purpose envisaged in the LPA, it is submitted that the recovery (Magistrates' Court, High Court and SCA) tariff that is benchmarked using commercially viable rates and operates as a default tariff for consumers of legal services who earn below the maximum threshold prescribed by the Minister by notice in the Gazette, will achieve the purpose of the LPA, subject to checks and balances provided for in the LPA.[66] It is recommended that a "commercially" viable recovery (party-and-party) tariff will entice legal practitioners to charge for legal services at lower prices compared to attorney-and-client fees, which are freely determined by the legal practitioner and the client.

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65 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs; Memorandum" 3.

66 Sections 35(3) and 35(4)(e) of the LPA.

7.50 On the question of the "complexity in benchmarking the fees taking into account, *inter alia*, specialisation of practitioners, area of service (urban, rural), overheads and other operational costs, type of work and type of clients", again it was noted at the public stakeholder hearings that the bottom line is one part of the equation which cannot be ignored. The other part of the equation, which should also not be ignored, is access to justice.

7.51 On the question of "the impact of the proposed tariff on the sustainability of legal practitioners, their support staff and suppliers of services to these practitioners as well as the effect of the proposed tariff on access to legal services," it has been stated above that the option of a universal and compulsory tariff is undesirable. It will have a negative effect on the legal profession and the economy of South Africa and will also be unlawful. The proposed mechanism will generally not affect the parties' contractual freedom, nor will it adversely impact on the legal practitioner's freedom of trade, occupation and profession.

7.52 On the question that non-litigious fees cover a wide spectrum of services and some of these services are rendered by other professions that are not subject to the proposed tariff regulation; one of the respondents to Issue Paper 36 submitted that:

> *There are two ways to approach the legal fee challenge:*
> 1. *The first is via regulation in contentious and reserved matters.*
> 2. *The second relates to the broader access to legal advisory services and legal products that help the economy to grow. If we want to make commercial legal services more accessible to the broader community, then regulation is not the answer. On the contrary, more de-regulation is needed to stimulate competition which will drive down pricing. This trend is already* apparent in the United Kingdom with the creation of alternative business structures.[67]

7.53 The Danish Bar and Law Society asked the Copenhagen Economics (the Committee) to carry out an economic analysis of the consequences of liberalizing the legal profession. The Committee found that the regulation of the legal profession can have both economic advantages and disadvantages that must be balanced together.[68]

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67 Van Tonder K "Comment on Issue Paper" (17 June 2019) 5. The respondent states "that the first three generations of the legal profession, that is, Generation 1: Paper based, Generation 2: Electronic, and Generation 3: Digital, were largely inside looking. Now (Generation4: AI, NLP and deregulation of the industry) it is a case of outside looking in, which changes the ball-game completely, 4.

68 Copenhagen Economics "The Legal Profession Competition and liberalisation" (January 2006) 8 of 72 available at https://www.ccbe.eu/fileadmin/speciality distribution/public/documents/ (accessed on 8 November 2019).

According to the Committee-

> "The advantages are that regulation can solve market failures that would otherwise occur in a free market. It is, for example, difficult to maintain good quality without regulation when the clients themselves find it difficult to assess the quality of the lawyer's work. The disadvantages of regulation are that it reduces competition by creating high entry barriers or by limiting the competition between existing law firms"[69]

7.54 The respondent submitted that most of the non-reserved and non-litigious work is not performed solely by legal practitioners who are regulated by the LPC, but a wide range of non-legal professionals and service providers also render these services. Examples of these are accounting firms; boutique companies that offer M & A and corporate financing services; legal process outsourcing industry drafts thousands of contracts on daily basis, labour law and human resources related legal advisory services; self-service companies like www.legalzoom.com, www.rocketlawyer.com/, https://www.divorce-online.co.uk/, and https://www.doyourownwill.com; E-discovery and due diligence document review work is outsourced to private companies and forensic services.[70]

7.55 Accordingly, it is recommended that the LPC, as the regulatory body for the legal profession in the Republic, is the appropriate body (an existing mechanism) to develop service-based attorney-and-client fee guidelines for determining legal fees in respect of all branches of the law. This includes the development of service-based fee guidelines in non-litigious matters that are reserved for legal practitioners.

7.56 On the question of developments in the other professions like accountants, auditors, engineers and medical practitioners, in November 2013, the Competition Commission initiated a health market inquiry (HMI) into the state of competition in the private health sector following observation by the Competition Commission that private health care expenditure and prices were rising above headline inflation and were at levels which only a minority of South Africans can afford.[71] Healthcare services are provided by health practitioners such as general practitioners, specialists, nurses, pharmacists and other professionals. The health professionals are subject to regulation

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69 Idem.
70 Van Tonder K "Comments on Issue Paper" (17 June 2019) 3.
71 Competition Commission "Health Market Inquiry: Final Findings and Recommendations Report" (September 2019) 39. The review found that the private health sector is subject to a myriad of statutes, regulations and by-laws and there are approximately 107 statutes administered by the National Department of Health, at 47.

by various professional bodies such as the Health Professions Council of South Africa (HPCSA); South African Nursing Council (SANC); South African Pharmacy Council (SAPC); and the Allied Health Professions Council of South Africa (AHPCSA).[72]

7.57 The inquiry found that "[t]here is significant information asymmetry in all healthcare markets. Doctors generally have more medical knowledge and training and patients must trust their decisions. The HMI found that the context in which private practitioners operate in South Africa makes this market prone to competition problems."[73]

7.58 Furthermore, the inquiry found that there is undersupply of medical practitioners in South Africa which limits access to healthcare. This factor "contributes to the bargaining power of medical practitioners who increase prices and resist (performance-based) reimbursement methods intended to increase efficiency in the use of resources, reduce costs and prices and thereby increase access."[74]

7.59 In 2003/4, the Competition Commission brought an end to the practice of determining tariffs collectively by health practitioners. The health practitioners were represented by the South African Medical Association (SAMA), the Hospital Association of South Africa (HASA) and the Board of Healthcare Funders (BHF) in the process of collective determination of tariffs.[75] Since then, practitioners' fees were determined in one of the following four ways:

(i) a medical scheme/ administrator will determine the fees that it is willing to pay practitioners and provide this information to practitioners;

(ii) a practitioner grouping may negotiate fees with a medical scheme/ administrator on behalf of its members;

(iii) a practitioner grouping publishes guideline tariffs and codes for use by its members; and/or

(iv) a practitioner may determine the fees that he/she will charge to patients individually.[76]

7.60 A number of similarities can be drawn between the health profession and the legal profession. These include the following:

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72 *Ibid*, 45.
73 *Ibid*, 134.
74 *Ibid*, 135.
75 *Ibid*, 144, see also Webber Wentzel, at 4.
76 *Ibid*, 144.

(a) The HMI found that there is an undersupply of medical practitioners in South Africa, a factor that limits access to healthcare.[77] The same could be said of the legal profession. The report compiled by LexisNexis in 2016 estimates the total number of attorneys to be 24330.[78] Of this total, 60% are male and 40% females. 60.1% are white attorneys and 39.9% black (including African, coloured and Indian). The total estimated number of candidate attorneys is 4909. Of this number, 60% are female and 40% male. 59.8% are black candidate attorneys and 40.2% white candidate attorneys. Of the total 12 373 attorney law firms in South Africa, 49% are located in Gauteng; 20% in Western Cape; 13% in KwaZulu-Natal; 5% in Eastern Cape; 3% in Mpumalanga; 3% in North West; 3% in Free State; 2% in Limpopo and 2% in Northern Cape.

(b) The HMI found that there is significant information asymmetry in all healthcare markets and that the context in which private practitioners operate in South Africa makes this market prone to competition problems.[79] The same problem prevails in the legal services market.[80]

(c) The HMI found that the private health sector is subject to a myriad of statutes, regulations and by-laws.[81] This used to be the case with the legal profession prior to the introduction of the LPA.

7.61 To address the problem of the vacuum in tariff determination which arose largely as a result of the prohibition of collective bargaining in the private healthcare industry by the Competition Commission, the HMI recommended that a multilateral forum constituted by representatives of practitioners, funders, the government and civil society be established to be called the Supply-Side Regulator of Health (SSRH).[82] The negotiations will be governed by a negotiations framework developed by the SSRH. The SSRH will be mandated by law to organise, lead and govern the multilateral forum.[83]

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77 The Health Market Inquiry found that the number of practitioners in the private sector has increase year-on-year from 7 702 GPs in 2010 to 8 000 GPs in 2014, and from 6565 specialists in 2010 to 7513 specialists in 2014. These practitioners are not evenly distributed nationally, with more practitioners in Gauteng, Western Cape and KwaZulu Natal than in other provinces, at 45.

78 LexisNexis "Attorneys' Profession in South Africa" (2016) 5. The LSSA submission estimates the total number of attorneys in South Africa to be approximately 30 000.

79 Health Market Inquiry at 134.

80 See Klaaren J "Towards Affordable Legal Services: Legal Costs in South Africa and a Comparison with Other Professional Sectors" (19 October 2018) 4.

81 Health Market Inquiry 47.

82 *Ibid*, 181.

83 *Idem*.

7.62 According to the comparative study of civil litigation costs and funding across (36) thirty-six international jurisdictions conducted by Hodges, *et al*,[84] (Annexure F of this Report), it is evident that in all the jurisdictions that were studied, legal (attorney-and-client) fees are freely negotiated between legal practitioners and clients. Legal fees are determined by market forces and not by statute.[85]

7.63 The responses received by the Commission on the subject of tariffs in the context of attorney-and-client fees can be classified into four broad categories. These categories are the following:

(a) Current status quo (no tariffs and no fee guidelines)

7.64 As stated in paragraph 8.54 above, lawyers' fees in South Africa are freely negotiated between the legal practitioner and the client. Lawyers' fees are charged mainly on an hourly or daily basis or monthly retainer as the case may be, taking into account, among other factors, the seniority of the legal practitioner, the complexity of the matter and the amount of time spent.[86] CFAs are widely used in, among others, road accident fund, medical malpractice, class action and other claims against the State in a variety of matters. The status quo in terms of which there is neither a statutory tariff nor fee guidelines for legal fees is contrary to the purpose of the LPA as envisaged in section 3(b)(i) and therefore undesirable. [87]

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84 Hodges C, Vogenauer S and Tulibacka M, *The Costs and Funding of Civil Litigation: A Comparative Perspective* 2010 Hart Publishing 114.

85 The study found that although in Italy lawyers' fees were regulated by statute which established minimum and maximum amounts that lawyers can charge, however, in anticipation of the European Court of Justice (ECJ) judgement in joined cases C-94/04 and C-202/04 concerning minimum lawyers' fees and the restrictive effect they have on freedom to provide services within the EU, the minimum levels were abolished in July 2006 by the Decreto Bersani. The Commission has brough an infringement action against Italy in 2008 (case C-586/08), claiming that the maximum caps on lawyers' fees contravene the EU Treaty's principles of freedom of establishment and freedom to provide services, Ibid 123.

86 See Rules Board for Courts of Law "Request for Comment: Uniform Rule 69 (Tariff for Advocates and Attorneys with Right of Appearance) and Uniform Rule 70 (Tariff for Attorneys) dated 14 November 2019.

87 Section 3(b)(i) of the LPA provides that:
"The purpose of this Act is to-
(d) 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."

(b) Universal compulsory tariffs

7.65 According to the LPC, a fixed universal tariff is undesirable for the following reasons:

(i) The input expenses of legal practitioners are determined by normal market forces, not by any tariff. The danger accordingly exists that if the tariff is set at a particular rate the practice may be rendered uneconomic because on the one hand expenses could continually rise but the income could remain the same, being fixed by the tariff from which it is not possible to escape;[88]

(ii) One must be cautious about unintended consequences that could follow from the imposition of a compulsory tariff. What would seem on the one hand to promote access to justice by containing legal costs at a fixed level may ultimately have exactly the opposite effect –namely driving legal practitioners out of business due to economic reasons and disincentivising prospective new entrants into the legal profession. One cannot have access to practitioners who are no longer there and it would accordingly be potentially counterproductive to have a compulsory tariff;[89]

(iii) This could adversely affect the entire system of the administration of justice, thereby overall decreasing access to justice;[90]

(v) Also, what about other occupations, and where will this end? Will the government next prescribe a fixed compulsory tariff in respect of plumbers, or electricians, or other types of contractors, or indeed all workers?[91]

(vi) The application of a universal compulsory tariff between the legal practitioner and client would mean that the legal profession would be unique in that it would be the only profession in South Africa whose income is controlled in this manner;[92] As far as the LPC is aware, the imposition of a compulsorily fixed tariff to operate between legal practitioners and their own clients would

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88 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs; Memorandum" (12 September 2019)6.
89 *Idem*.
90 *Ibid*, 7.
91 *Idem*.
92 *Ibid*, 9.

be unique in world terms, and there appears to be nothing in the report to indicate that this is presently the position anywhere else in the world;[93]

7.66 **Recommendation 7.1**:[94] For the reasons stated above, the Commission concurs with the views of many respondents who submitted that the imposition of a universal and compulsory tariff is undesirable not only for the legal profession but for the economy of South Africa too.

(c) Tariffs with limited targeting

7.67 The LPC states that "in the alternative, if there is to be some form of tariff imposed, it should be subject to mechanisms that limit its operation to the assistance of citizens who are unable to afford the payment of legal fees such that they are deprived of or hindered in their access to justice.[95] The selective/limited tariff, according to the LPC, should-

(i) be applicable to legal services rendered to persons other than

1. *Juristic persons;*
2. *Non-SA citizens; and*
3. *Persons who can afford to pay for legal services.*[96]

(ii) If tariffs are to be set, then these can at best only serve as a guide but cannot be prescriptive;

(iii) There needs to be some distinction drawn between legal services user categories. Separation of users into the categories of corporate, high income/ asset users (threshold to be determined) and lower to middle-class users (again an appropriate threshold or means test must be determined).[97]

7.68 Three options for attorney-and-client fees are discussed in Chapter 6 of this Report. The first two options, that is, Options 1 and 2, make proposals for a tariff with

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93 *Ibid*,10.

94 The recommendation is supported by a majority of the stakeholders, including PIPLA, *op cit*, 2.

95 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs; Memorandum" (12 September 2019)5 4.

96 *Ibid*, 3.

97 *Ibid*, 1.

limited targeting. Option three, that service-based attorney-and-client fee guidelines, are discussed below.

(d) Service-based fee guidelines

7.69 According to the respondents, the LPC should be the custodian of the fee guidelines because it possesses sufficient expertise and practical experience to design fair, just and equitable fee guidelines.[98] The LPC is responsible to ensure that legal fees charged by legal practitioners for legal services are reasonable.[99] It already serves as the assessment mechanism for unreasonably high legal fees. Most of the respondents are of the view that it will be desirable for the LPC to also determine fees and tariffs for legal services as this will strengthen the independence of the profession.

7.70 The perception created in the Issue Paper that the legal profession sits as judge and jury in its own affairs could have been valid before the advent of the LPA.[100] Presently, the LPC is a regulatory body that is well suited to look after the interests of the legal profession and the public interest. This is consistent with its mandate as provided for in section 5(b) of the LPA of ensuring that fees charged by legal practitioners for legal services rendered should be reasonable and promote access to legal services, thereby enhancing access to justice."[101]

7.71 Section 35(4) of the LPA mandates the Commission to investigate and report back to the Minister with recommendations on the following:

> "(c) the desirability of establishing a mechanism (institutional) which will be responsible for determining fees and tariffs payable to legal practitioners."

7.72 The LPC as the existing body comprising of legal and non-legal practitioners should determine legal fees in respect of litigious and non-litigious legal service to be

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98 LSSA "Submissions by the LSSA on Issue Paper 36 regarding the investigation into legal fees-Project 142" 19 of 72. See also section 4 of the LPA. See also Cape Bar "Investigation into Legal Fees: Project 142, Issue Paper 36 Comment by the Cape Bar" (16 August 2019) 4.

99 Section 5(b) of the LPA.

100 *Idem*, page 2 of the Issue Paper states that "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"

101 *Idem*. The composition of the LPA includes two law teachers, a person designated by the Minister of Justice and Correctional Services and a person designated by the Legal Practitioners' Fidelity Fund.

provided by legal practitioners and juristic entities. It is also the body to which a person may complain if he or she has been charged more than a reasonable rate or tariff.

7.73 In its submission to the DOJ&CD on the Legal Practice Bill, the Competition Commission stated that as a transitional arrangement, the "Competition Commission, the DOJ&CD and the LSSA should discuss interim measures to close the gap between the current period and the establishment of the Council."[102] The delegation from the LSSA stated that the intention of the legal profession is to submit another application of the rules to the Competition Commission for exemption in terms of Schedule 1 to the Competition Act.

7.74 Ellis, *et al*, point out that "whilst it is acknowledged that legal services are diverse, many such services are rendered in teams: One only needs to be reminded about the different roles played by advocates, attorneys and candidate attorneys in High Court litigation. If the fostering of a team spirit between practitioners is what the legislature had in mind, it is commendable."[103] In *Rösemann v General Council of the Bar of SA*,[104] Heher had this to say on the subject of the divided bar:

> *People choose to become attorneys or advocates not because they are forced to select one profession or the other but because of the different challenges which they offer, one, the attorney, mainly office-based, people-orientated, usually in partnership with other persons of like inclinations and ambitions, where administrative skills are often important, the other, the advocate, court-based, requiring forensic skills, at arm's length from the public, individualistic, concentrating on referred problems and usually little concerned with administration*.

7.75 If legal practitioners are to be encouraged to strive to work together, and if fostering of a team spirit is consistent with the purpose of the LPA, the development of service-based tariffs and attorney-and-client fee guidelines, instead of practitioner-based tariffs and fee guidelines, providing a narrative of the services to be rendered and the cost thereof, regardless of which practitioner will provide the service in question, will go a long way towards achieving this objective.

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102 Competition Commission "Submission to the Department of Justice and Constitutional Development on the Legal Practice Bill" (7 April 2011) 4.

103 Ellis P, at al, *The South African Legal Practitioner-A Commentary on the Legal Practice Act*, (2018) 2-7.

104 2004 (1) SA 568 (SCA), par 26.

E. Recommendations

(a) Desirability for a mechanism

7.76 Section 35(4) of the LPA mandates the Commission to investigate and report back to the Minister with recommendations on the following:

> *(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 process it should follow in determining fees or tariffs*;

7.77 Section 5(b) and (c) of the LPA provides as follows:

> **Objects of Council**
> 5. 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.
> (c) promote and protect the public interest.

7.78 Section 36 of the LPA provides that the LPC must develop a code of conduct for all legal practitioners, candidate legal practitioners and juristic entities.[105] Section 37 of the LPA empowers the LPC to establish investigating committees, consisting of a person or persons appointed by the Council to conduct investigations of all complaints of misconduct against legal practitioners, candidate legal practitioners and juristic entities.

7.79 The LPC is currently constituted as follows:

> **Composition of Council**
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> 7(1) The Council consists of the following members:
> (a) 16 legal practitioners, comprising of 10 practicing attorneys and six practicing advocates, elected in accordance with the procedure prescribed by the Minister-;

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105 Section 36 of the LPA provides as follows:
Code of conduct
36.(1) The Council must develop a code of conduct that applies to all legal practitioners and all candidate legal practitioners and may review and amend such code of conduct.

(b) two teachers of law, one being a dean of a faculty of law at a university in the Republic and the other being a teacher of law, designated in the prescribed manner;

(c) subject to subsection (3), three fit and proper persons designated by the Minister, who, in the opinion of the Minister and by virtue of their knowledge and experience, are able to assist the Council in achieving its objective; [106]

(d) one person designated by Legal Aid South Africa; and

(e) one person designated by the Board, who need not necessarily be a legal practitioner.

7.80 Of the twenty-three (23) persons who serve in the LPC, only about four (4) of them or less are potentially non-lawyers. The domination of legal practitioners in the LPC may pose challenges from a competition perspective unless more non-lawyers are appointed into the LPC. In its submission to the DOJ&CD on the Legal Practice Bill, the Competition Commission stated that "it should be a requirement that other members of the Council should not have active interests in the legal profession to ensure their independence from the industry."[107]

7.81 Responding to the question on the composition of the Fees Committee, the delegation from the GCB stated that the LPC's Fees Committee must comprise of people who are knowledgeable about the matter of legal fees. The bigger part of the constituent members of the Fees Committee will have to be legally qualified persons. Creating something outside of the LPC will not make the situation better. The LPC is the body that has been established. The Fees Committee will have to be a body that is mandated by the LPC. However, the same person sitting on the Fees Committee must not be the same person sitting in the Appeals Committee. An outside person can be brought in, however, substantially the Committee should comprise predominantly of legal persons.

7.82 The Commission concurs with the view expressed by the GCB that the Fees Committee (mechanism) will have to be a body that is mandated by the LPC and that

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106 This provision is similar to section 3(h) of the Rules Board for the Courts of Law Act which provides that "not more than three persons who, in the opinion of the Minister, have the necessary expertise to serve as members of the Board" must be appointed to serve in the Rules Board.

107 Competition Commission "Submission to the DOJ&CD on the Legal Practice Bill" (April 2011) 3.

the body should comprise of people who are knowledgeable about the matter of legal fees. Section 18 of the LPA provides that-

> *(1) The Council may-*
> *(a) establish one or more committees, consisting of –*
> *(ii) members of the Council and any other suitable persons except employees of the Council, to assist the Council in the exercise of its powers and performance of its functions;*
>
> *(2) The Council-*
> *(a) must determine the powers and functions of a committee;*
> *(b) must appoint a member of a committee as chairperson of such committee*
> *(c) may, after complying with due process of law, remove a member of a committee at any time; and*
> *(d) may determine a committee's procedure.*
>
> *(3) The Council must, in the rules, determine the procedure for the conduct of meetings of a committee.*

7.83 Section 18 of the LPA makes provision for the establishment by the LPC of a committee (Fees Committee/ mechanism) that will be responsible for developing attorney-and-client Fee Guidelines in all branches of the law. The powers and functions of the Fees Committee (mechanism) and the appointment of a member of the Fees Committee as chairperson of such committee are all matters to be decided upon by the LPC. In light of the comment made by the Competition Commission above that the domination of legal practitioners in the composition of the mechanism may pose challenges from a competition perspective, it is recommended that the Fees Committee should include fit and proper persons drawn from the following sectors of society:

(a) Legal profession;

(b) Judiciary; [108]

(c) Government; and

(d) Civil society.

The detail about the composition of the Committee and the number of members who may constitute such a Committee are all matters to be decided by the LPC.

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108 The LSSA noted a concern about the inclusion of members of the judiciary in the proposed Fees Committee. According to the Respondent, this will constitute a conflict of interest as members of the judiciary will be expected to adjudicate on these matters when they come before them, *op cit*, 68.

7.84 **Recommendation 7.2**: The Commission is of the view that the LPC, as the regulatory body for the legal profession in the Republic,[109] is the appropriate body to develop service-based attorney-and-client Fee Guidelines for determining legal fees in respect of all branches of the law. Section 18(1)(ii) of the LPA empowers the LPC to establish a committee comprising of members of the LPC and any other suitable persons except employees of the LPC, to assist the LPC in the exercise of its powers and performance of its functions. Section 18(2)(a) –(b) of the LPA empowers the LPC to determine the powers and functions of a committee and to appoint a member of a committee as chairperson of such committee. It is recommended that the LPC must establish a Committee to be responsible for determining attorney-and-client fee guidelines. The Committee should comprise of fit and proper persons drawn from the following sectors of society:

(e) Legal profession;
(f) Judiciary;
(g) Government; and
(h) Civil society.

The detail about the composition of the Committee and the number of members who may constitute such a Committee are all matters to be decided by the LPC.

7.85 The Commission is of the view that there is no need for another Mechanism to be established when an existing mechanism can be adapted for this purpose.

7.86 The recommendation is supported by the LSSA. The Respondent submits that "the LSSA is in principle in favour of the LPC developing service-based fee guidelines in respect of all branches of the law (Option 3). This is also in line with the international position. In respect of non-litigious matters, guidelines will facilitate expediency and provide certainty for the client, as well as the legal practitioner."[110]

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109 Section 4 of the LPA provides as follows:
Establishment of Council
4. The South African Legal Practice Council is hereby established as a body corporate with full legal capacity, and exercises jurisdiction over all legal practitioners and candidate legal practitioners as contemplated in this Act.

110 LSSA, *op cit*, 72; 73.

Legislative intervention:

7.87 Section 95 (1) of the LPA empowers the LPC to make rules by publication in the Gazette relating to a wide variety of matters. Save for paragraph 95(1)(zO) which provides that rules must be made in respect of "any other matter in respect of which rules may or must be made in terms of this Act", there is no other provision that directly empowers the LPC to make rules in respect of fees and tariffs payable to legal practitioners. The Attorneys Act 53 of 1979,[111] which empowered the council of a law society to prescribe the tariff of fees payable to any practitioner in respect of professional services rendered in cases where no tariff is prescribed by any other law, was repealed as a whole by section 119 of the LPA with effect from 1 February 2015.

7.88 It is recommended that section 95 of the LPA be amended by-

(a) the deletion in subsection (1) of the article [**or**] at the end of paragraph (Zn); and

(b) the insertion in subsection (1) of the following paragraph preceding paragraph (zO):

"(zNA) fees and tariffs payable to legal practitioners and juristic entities in respect of litigious and non-litigious legal services; or"

7.89 It has been stated above that the Commission is not required to determine the creation of the actual tariff itself (that is, the actual factors that constitute the tariff)[112] as this is the responsibility of the mechanism (LPC) to determine.[113] Likewise, questions as to whether the mechanism will determine fees and tariffs 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, what would inform an increase of the tariffs determined by the mechanism, and what benchmark would they use to come to the conclusion that that is an acceptable tariff, are matters that fall within

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

(a) 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.

112 Questions like whether the mechanism must use a combination of fee models such as fixed costs, hourly/daily rates, capped or uncapped fees, and in what type of matters are all matters that must be decided by the mechanism (Rules Board), and not the Commission.

113 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 21.

the purview of the LPC to determine. It is, however, the responsibility of the Commission to determine the process that should be followed by the mechanism in determining the fees and tariffs.

7.90 In its submission to the DOJ&CD on the Legal Practice Bill, the Competition Commission submitted that one of the important principles of the pricing model is that "legal practitioners should be allowed to charge below the recommended tariff structure."[114]

7.91 According to the respondents, fee guidelines will be the desirable mechanism for determining legal fees and tariffs in respect of all areas of the law.[115] They will be developed by the LPC on the basis of the factors enumerated under section 35(2) of the LPA. Parties will be able to deviate from fee guidelines in justifiable circumstances. Fee Guidelines will serve as a yardstick to determine a reasonable fee.[116]

7.92 The delegation from the GCB submitted that there used to be Fee Guidelines prepared by the Bar Council for its members.[117] Over time, these became a proposed fee. The delegation does not believe that this was a limitation of legal fees. According to the delegation, the Fee Guidelines were sort of fair parameters to be used by advocates. Advocates who charged more than the proposed fee parameters were allowed to explain and provide reasons. In its submission to the Commission, the GCB states that:

> *The attack by the Competition Commission on the rules of conduct of legal practitioners that those rules are anti-competitive is simply incorrect. The legal profession must be allowed to lay down broad parameters of acceptable rates per hour or per day and for particular types of work. Such parameters were done away with on the insistence of the Competition Commission but had served the laudable purpose of ensuring that reasonable fees are charged by counsel. Such parameters set a standard that ensures that those legal practitioners that deviate substantially from the proposed fee structures, must be able to motivate the acceptability of the deviation. In addition, the parameters served the purpose of informing*

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114 Competition Commission "Submission to the DOJ&CD on the Legal Practice Bill" (April 2011) 3.

115 LSSA "Submissions by the LSSA on Issue Paper 36 regarding the investigation into legal fees-Project 142" 19.

116 *Idem*.

117 According to Lourens M "Submission to the SALRC", "[t]he Bar Council of the different provinces of South Africa used to regulate Counsel's fees by increasing the guidelines each year. Unfortunately, the guidelines have fallen away as same was made out to be wrong under the competition law. The Cape Bar Council's guidelines fell away in 2009" (12 August 2019) 5. See also Annexure…for the Pretoria and Johannesburg Bars' fee guidelines.

> *all and sundry, including attorneys and their clients what can be regarded as reasonable fees for particular types of work*.[118]

7.93 The Fee Guidelines served as benchmarks to counsel in seniority brackets in terms of the rate at which they may charge fees.[119] They provided the maximum limit and were not mandatory. According to the Cape Bar-

> *Counsel were able to deviate from the guidelines, although on taxation the guidelines could serve the purpose of providing an indication as to the general level of fees that counsel of equivalent seniority were charging. The Competition Commission indicated to the General Council of the Bar that it considered the fee guidelines to be anti-competitive. The position of the GCB, which was that the guidelines were merely guidelines, and were intended to limit fees, received an unsympathetic response from the Competition Commission, and the GCB was therefore required to call on its members to desist from publishing fee guidelines*.[120]

7.94 The delegation from the GCB submitted that it is strange that Fee Guidelines were regarded as anti-competitive by the Competition Commission. The medical profession also has a system of Guideline Tariffs.[121] There is flexibility in the mechanism, but a legal practitioner is obliged to explain why he/she wants to exceed the fee parameters.

7.95 The application of the Competition Act, 1998 (Act No.89 of 1998) in the South African legal services market was discussed at the stakeholder public hearings held by the SALRC in July and August 2019.[122] Delegates from the Competition Commission submitted that even if Fee Guidelines are prepared, the tendency is that legal practitioners will align themselves with the maximum fee that is recommended and inform clients that this is what is recommended. The tendency by legal professionals to align themselves with the set maximum fee undermines free competition.

7.96 **Recommendation 7.3**: The Commission is of the view that the LPC, as the regulatory body for the legal profession in the Republic, should develop service-based attorney-and-client fee guidelines for determining legal fees in respect of all branches of the law. Although this matter will be decided by the LPC, however, the service-based

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118 Louw A SC "GCB Comments Investigation into Legal Fees: Project 142: Issue Paper 36" (30 August 2019) 3.

119 Cape Bar "Investigation into legal fees: Project 142, Issue Paper 36-Comment by the Cape Bar" (16 August 2016) 4 of 16.

120 *Idem*.

121 See Board Notice 152 of 2012 published in *The Government Gazette* No.35684 dated 14 September 2012.

122 SALRC "Minutes of the Stakeholder Public Hearings Project 142: Investigation into legal fees" 8-9 July and 1 August 2019.

attorney-and-client fee Guidelines may be developed on the basis of the factors enumerated under section 35(2) of the LPA. Attorney-and-client fee guidelines will serve as a yardstick to determine a reasonable fee. Parties will be able to deviate from the fee guidelines in justifiable circumstances. This includes the development of fee Guidelines in non-litigious matters that are reserved for legal practitioners.

(b) Process to be followed by the mechanism

7.97 Section 35(4) of the LPA mandates the Commission to investigate and report back to the Minister with recommendations on the process the Mechanism should follow in determining fees or tariffs;

7.98 In its submission to the DOJ&CD on the Legal Practice Bill, the Competition Commission submitted that one of the important principles of the pricing model is that "the process should be independent and objective."[123]

7.99 Since it is recommended that the LPC should not only be the body that decides complaints against unreasonable fees (overreaching) but should also determine the fees and tariffs, it has been recommended that 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. Most respondents concur with the view that a one size fits all approach will not be desirable for all types of legal services. Financial modelling of the various methodologies should be undertaken by the LPC to determine the best model for setting fees and tariffs.[124]

7.100 **Recommendation 7.4**: It is recommended that the mechanism (LPC) must adopt an effective consultative process of all the stakeholders involved prior to determining fees and tariffs. The following stakeholders and role players, among others, must be consulted:

(a) the Rules Board;
(b) consumers of legal services;
(c) members and representatives of the legal profession;
(d) members and representatives of the judiciary;

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123 Competition Commission "Submission to the DOJ&CD on the Legal Practice Bill" (April 2011) 3.
124 Legal Aid South Africa "Response by Legal Aid South Africa" 39.

(e) representatives of civil society organisations;
(f) the Minister, or his/ her representative;
(g) the Competition Commission;
(h) Legal Aid SA;
(i) Law clinics;
(j) Juristic entities;
(k) NEDLAC; and
(l) Human Sciences Research Council.

7.101 The LSSA is of the view that the Rules Board and the LPC "should have the discretion to consult with other bodies, including regulatory and representative bodies of other professions, which can also provide valuable input."[125] As such, the legislation should not be over-prescriptive.

(c) Desirability of giving users of legal services the option of voluntarily agreeing to pay less or more of the amount set by the mechanism

7.102 Section 35(4) of the LPA mandates the Commission to investigate and report back to the Minister with recommendations on the following:

> "(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)."

7.103 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.[126]

7.102 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.[127] 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.[128] 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*

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125 LSSA, *op cit*, 72; 73.
126 Competition Act 89 of 1998.
127 Rautenbach, F, "Compromising counsel's fees" (April 2012), *The Advocate*, 49.
128 *Idem*.

> *later than one month after it has been marked unless the consent of the Bar Council to make such alteration is obtained.*[129]

7.104 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*.

7.105 The scope of the Ugandan Advocates (Remuneration and Taxation of Costs) Rules covers both contentious and non-contentious matters.[130] 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*.[131]

7.106 Although there is a ceiling for court-related work and out-of-court work in Germany, however, a higher amount can be charged on the grounds of complexity or duration of the matter. A lawyer is generally not allowed to accept a fee lower than is provided for by the RVG, save for flat fees or time-related fees that are lower than the statutory fees.[132]

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129 *Idem*.

130 See Rule 2 of the Advocates (Remuneration and Taxation of Costs) Rules of Uganda.

131 The statutory tariffs for fees in respect of non-litigious matters in Kenya are dealt with in Chapter 4 of this issue paper.

132 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 available at https://www.crosschannellawyers.co.uk/wp-content/uploads/German-Legal-Fees-Comparison-2007.pdf/ (accessed on 04 November 2019)Id 8.

7.107 The GCB points out that, under section 26 of the LPA Code,[133] 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.[134]

7.108 In May 2003, the Association of Pretoria Attorneys had to pay a penalty of the amount of R223 000.00 to the Competition Commission, after its guidelines for attorneys and own client fees were found to be in contravention with the Competition Act.[135] 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*.[136]

7.109 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.[137] 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*.

7.110 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.[138] Section 4 of the Competition Act of 1998 prohibits agreement or

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133 Section 26 of the LPA Code deals with acceptance of briefs and the cab-rank rule.

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

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

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

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

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

practice by parties on a horizontal relationship if such agreement or practice has the effect of preventing or lessening competition in a market.

7.111 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 tariffs determined as contemplated in this section.*

7.112 Section 35(3) of the LPA provides a user of litigious or non-litigious legal services with the option to voluntarily agree in writing with a legal practitioner to pay for the services in question in excess of or below any fee or tariff determined by the mechanism. From the wording of this section, it appears that the "opt-out" option is one-sided as there can only be an "opt-out" at the instance of the client, to the exclusion of the provider of legal services. This section is not operational yet.

7.113 Section 35(4)(e) invites the Commission to make a determination on 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. Thus, the question before the Commission is under what circumstances can a user of legal services contract to opt-out of the fee and/or tariff set by the mechanism? Should this option not be extended to the providers of legal services as well and what are the implications of the opt-out provision on the principle of contractual freedom?

7.114 The implications of the opt-out provision on the principle of contractual freedom (*pacta sunt servanda*) are discussed under section E: Policy Questions of Chapter 1 of this Report. In *Barkhuizen v Napier*,[139] Ngcobo J had this to say on the subject of contractual autonomy:

> *I do not understand the Supreme Court of Appeal as suggesting that the principle of contract pacta sunt servanda is a sacred cow that should trump all other considerations. That it did not, is apparent from the judgement. The Supreme Court of Appeal accepted that the constitutional values of equality and dignity may, however, prove to be decisive when the issue of parties' relative bargaining positions is an issue. All law, including common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and*

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139 [2007] (5) SA 323 CC par 15.

the values that underlie our Constitution. The application of the principle pacta sunt servanda is, therefore, subject to constitutional control.

7.115 It is important that the proposed mechanism recognise and protect contractual freedom; independence of the legal profession and the right to choose trade, occupation or profession freely. However, there are several other factors that must be taken into consideration and balanced against each other, such as the need to broaden access to justice to ensure that legal services rendered are within the reach of the citizenry; and the state's obligation to respect, promote and fulfil the rights in the Bill of Rights as contemplated in the Constitution.

7.116 Discussion Paper 150 invited input and comment on the following two options in relation to the proposed operation of the opt-out provision contained in section 35(3) of the LPA:

Option 1

7.117 Whether all users of legal services should have the choice to opt-out (pay fees for legal services less or in excess) of the fee determined by the mechanism. For users in the lower and middle-income bands to be determined by the Minister, this choice refers to the litigious tariff as determined by the Rules Board, which will apply to them by default or operation of law as the basis for determining attorney-and-client fees payable to legal practitioners. For all other users of legal services, this choice refers to service-based attorney-and-client fee guidelines to be determined by the LPC in litigious and non-litigious matters.

Option 2

7.118 Whether all users of legal services should have no choice to opt out (pay fees for legal services less or in excess) of the fee determined by the mechanism. For users in the lower and middle-income bands to be determined by the Minister, this choice refers to the litigious tariff as determined by the Rules Board, which will apply to them by default or operation of law as the basis for determining attorney-and-client fees payable to legal practitioners. For all other users of legal services, this choice refers to service-based attorney-and-client fee guidelines to be determined by the LPC in litigious and non-litigious matters.

7.119 In Chapter 6 of this Report, the Commission recommends (recommendation 6:15) that it is not desirable that users of legal services whose total income/turnover per annum does not exceed the maximum threshold to be prescribed by the Minister by notice in the Gazette, be given the option of voluntarily agreeing to pay fees for legal services in excess of any amount that may be set by the Mechanism (tariffs prescribed by the Rules Board) in the Magistrates' (district and regional) Court on the following grounds:

(a) If the Legislation provides an unlimited capacity for users of legal services to opt-out, this could have the effect of emasculating and seriously undermining the mechanism put in place to determine a reasonable fee and/or tariff for the protected category of users.
(b) Mandatory fee agreements with pre-populated opt-out clauses will simply be the order of the day.
(c) These consequences will not be avoided by requiring the protected category of users of legal services who agree to pay in excess of the fee determined by the mechanism to have such agreement reduced to writing and to provide reasons for doing so.

7.120 However, the Commission recommends (recommendation 6:16) that it is desirable that all other users of legal services, including users of litigious legal services in the HC; SCA and Constitutional Court and non-litigious legal services whose total income/turnover per annum does not exceed the maximum threshold to be prescribed by the Minister by notice in the Gazette, be given 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 (service-based attorney-and-client Fee Guidelines to be developed by the LPC). Parties who opt to pay in excess of the fee determined by the mechanism will have to reduce their agreement into writing and provide reasons for doing so. Since it is the responsibility of the LPC to promote access to justice, to promote and protect the public interest, it follows that the implementation of the limited tariff as determined by the Mechanism will be overseen by the LPC as part of the complaints handling mechanism.

7.121 Respondents are of the view that with respect to service-based attorney-and-client fees, parties should be given the choice to opt-out (pay fees for legal services less

or in excess) of the fee determined by the mechanism.[140] The Commission concurs with this view as captured under recommendation 7.5 below.

7.122 In light of recommendation 6.15, section 35(3) of the LPA could be amended to read as follows:

> "**[Despite any other law to the contrary]**, Save for the users of legal services in Magistrates' Court matters whose total income/turnover per annum does not exceed the maximum threshold to be determined by the Minister by Notice in the Gazette, nothing in this **[section]** Act precludes any user of litigious or non-litigious legal services, on his**, [or]** her or its own initiative, from voluntarily agreeing with a legal practitioner in writing, to pay fees for the service in question in excess of or below any tariffs determined as contemplated in this **[section]** Act."

7.123 According to the LPC, if the assumption that the "opt-out" provision in section 35(3) provides a wide exemption, then this is desirable and there should be no amendment to remove this wide discretion.[141] It is submitted that the "opt-out" provision does provide wide discretion to all the users of the legal services, including those that are intended to be protected by the proposed limited tariff. However, section 35(3) of the LPA may require amendment in light of the Commission's recommendation 6:15 and the reasons provided thereunder.

7.124 It has been stated above the fee guidelines developed by the LPC will be the desirable Mechanism for determining reasonable legal fees in respect of all branches of the law. Since fee Guidelines will serve as a yardstick to determine a reasonable fee, parties will be free to deviate from the fee guidelines in justifiable circumstances. Furthermore, since lawyers' (attorney-and-client) fees in South Africa are freely negotiated between the legal practitioner and the client, subject to them being reasonable taking into account the fee Guidelines to be determined by the LPC, it follows that any user of legal services is free to voluntarily agree to pay either less or in excess of what may be determined by the legal practitioner or juristic entity. The view that users of legal services should be given the option of voluntarily agreeing to pay fees for legal

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140 Werkmans Attorneys "Second submission to the SALRC on Legal Fees" par 1.2.

141 Legal Practice Council "Position Paper on SALRC Issue Paper; Desirability of Establishing a Mechanism that is responsible for Determining Legal Fees and Tariffs; Memorandum" (12 September 2019) 1.

services less or in excess of any amount that may be set by the mechanism is supported by the respondents to Issue Paper 36.[142]

7.125 **Recommendation 7.5**:[143] The Commission recommends that, with respect to service-based attorney-and-client fee guidelines, it is desirable that users of legal services be given 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 (LPC).

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

7.126 Issue Paper 36 posed the following three pertinent questions with regard to tariffs in non-litigious matters: first, whether there are any sound reasons for not having statutory tariffs in non-litigious civil and criminal matters; second, whether there should be tariffs in non-litigious civil and criminal matters; and third, what impact would the introduction of tariffs have on the current system.

7.127 Prior to 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 the Government *Gazette* No.5804 (Government Notice R2365) dated 18 November 1977. 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.[144] 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 practitioner may lodge an appeal with the relevant law society for recourse, failing which the client may approach the court for appropriate relief.

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142 See LSSA's response at 62 and ABSA "ABSA Bank's Commentary" at 8. According to the Bank "[t]his honours everyone freedom of choice to contract with whomever they wish to and on whatever terms they wish to. It will be moving into the realm of unconstitutionality to propose that you may no longer contract freely on legal costs."

143 The recommendation is supported by Werkmans Attorneys, *op cit*, par 1.2; and PIPLA, *op cit*, 7.

144 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".

7.128 The Law Societies also published tariff guidelines in conveyancing- and property-related matters. 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.

7.129 Since taxing masters in the past could only tax bills of costs in connection with litigious work and no other work, it was apparently also, for this reason, coupled with the fact that the Rules Board only prescribed tariffs in civil litigious matters only, that there are no statutory tariffs in many of the non-litigious matters.[145]

7.130 Although there are tariffs in respect of certain non-litigious matters such as administration of trusts and deceased estates and conveyancing,[146] 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, curatorship, and collections.[147] Fee guidelines are prescribed and approved by each provincial law society, as well as by State Litigation Services, law clinics, and Legal Aid SA.[148]

7.131 Most of the respondents agree that 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.[149]

7.132 First, respondents are of the view that a distinction should be drawn between the recovery tariffs prescribed by the Rules Board in civil litigious matters, on the one hand, and attorney-and-client fees charged by practitioners, on the other hand.

7.133 Second, a distinction should also be drawn between areas of legal practice where a particular legal service can be commoditised to the point where it can effectively be

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145 Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 21 and 23.

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

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

148 *Ibid*, 32.

149 The Rules Board confirms that "there is a tariff for recovery of fees in civil litigious matters. There is no tariff for what a practitioner can charge his or her client. Empirical evidence should be used to narrow the gap between what is recovered via the party-and-party tariffs and what is paid by a client to his or her legal practitioner" at 23.

sold as a product or definable service to clients generally, on the one hand, and more complex, specialised and customised legal services.[150] In relation to the former, a tariff could conceivably be determined having regard to the value thereof and the level of effort required to complete the task. In relation to the latter, it is difficult to imagine on what basis a reasonable tariff would be arrived at, other than on hourly rates of legal practitioners.[151] Furthermore, the numerous possible non-litigious matters that may arise cannot be codified, since no *numerus clausus* of possible exceptions exist.[152]

7.134 Third, most of the non-reserved and non-litigious work is not performed solely by legal practitioners who are regulated by the LPC, but a wide range of non-legal professionals and service providers also render these services. It has been stated above that it is recommended that a distinction be drawn between reserved non-litigious matters and non-reserved non-litigious matters. The former should be subject to regulation in terms of the existing legal framework by the Rules Board based on a tariff, and by the LPC on the basis of Fee Guidelines. The latter should be subject to de-regulation because most of the providers of these legal services are non-legal practitioners.

7.135 Against the above background, respondents are of the view that there are sound reasons not to have statutory tariffs in all non-litigious matters because it is not desirable to do so.[153]

7.136 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.[154] 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

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150 ENSafrica "Comments and input: SALRC Issue Paper 36" (30 August 2019) 30.

151 *Idem*.

152 LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" 62

153 ENSafrica is of the view that there are sound reasons for not generally having statutory tariffs in non-litigious matters, at 30. See also LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 regarding the Investigation into Legal Fees" 62 and Rules Board "Comments/ Submissions from the Rules Board for Courts of Law" (9 September 2019) 24.

154 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.

fee, having regard to the fact that certain services are rendered by non-legal practitioners.[155]

7.137 The LSSA explains the concept of non-litigious legal matters as all matters that do not involve litigation.[156] These would include, among other things, the following:

(i) Corporate and commercial work (other than commercial litigation);[157]
(ii) labour law matters (excluding labour litigation in the courts);[158]
(iii) other forms of alternative dispute resolution;
(iv) conveyancing;
(v) notarial services;
(vi) drafting of wills;
(vii) estates and trust law;[159]
(viii) intellectual property law;
(ix) patents;
(x) agreements relating to immovable property;[160]
(xi) company documents;[161]
(xii) partnership agreements;
(xiii) debt collection and counselling;
(xiv) environmental law;
(xv) shipping law;
(xvi) sports law; and
(xvii) the law applicable to mining and minerals.

7.138 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:

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155 *Ibid,* 6.
156 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.
157 Corporate and commercial work such as banking law; tax law; financial regulatory advice; business rescue; competition law; contracts administration.
158 Employment law such as retrenchments, dismissals; business restructuring; and employment contracts.
159 Estates and trust law such as administration of deceased estates and trusts; advice on estate planning.
160 Such as acquisition and disposal of property; sectional title schemes; and registration of mortgage bonds.
161 Company documents including licensing of facilities; e-mail and internet policies for workplaces; privacy policies.

(i) work in respect of criminal law;
(ii) (administration side of) insolvent estates;
(iii) interrogations;
(iv) child and family law matters, such as maintenance;
(v) Children's court matters; and
(vi) mediation and arbitration proceedings where no agreement was made an order of the court.[162]

7.139 The criteria to be taken into account when determining a fee or tariff for non-litigious legal work could include the following:[163]

(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;[164]
(xii) the quality of work done;[165] and
(xiii) the skill, labour, specialised knowledge, and responsibility involved on the part of the legal practitioner.[166]

7.140 Vorster cautions that pre-determined tariffs for non-litigious matters may not necessarily be an equitable assessment of the work done by attorneys.[167] The research

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162 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.
163 *Ibid,* 6.
164 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 *The Government Gazette* 5804 dated 18 November 1977.
165 *Idem*.
166 *Idem*.
167 Vorster, Henry, *De Rebus*, August 1979, 416.

contemplated in Sections 35 (4)(c) and (d) of the LPA will no doubt determine the way 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

7.141 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

7.142 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;*[168]
> *(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.*

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

> *(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.*

7.143 An executor is entitled to remuneration.[169] 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% of the gross value of the assets (subject to a minimum remuneration of R350).[170] 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.[171] The following tariff of remuneration of executors is prescribed in the regulations:

> *(a)* on the gross value of assets: 3.5 percent;
> *(b)* on income accrued and collected after the death of the deceased: 6 percent, provided the remuneration in respect of any deceased estate is not less than R350.[172]

(c) Company and insolvency matters

7.144 Company work is much like litigation and should be treated as such.[173]

(d) Labour law

7.145 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.[174]

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

170 *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.

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

172 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).

173 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 *The Government Gazette* 5804 dated 18 November 1977, 17.

174 *Idem*.

(e) Conveyancing matters

7.146 Conveyancing fees are not legislated. The LSSA has provided guidelines in which conveyancers can charge 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 titles registered in terms of the Sectional Titles Act 95 of 1986; and the apportionment of fees with regard to wasted costs.

7.147 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.[175]

(f) Commercial work

7.148 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.[176]

(g) Wills and Trusts

7.149 The Wills Act defines a will as including "a codicil and any other testamentary writing".[177] A will has been described as a legal document concerning the disposition of assets after the death of the testator.[178] The requirements of a will are set out in section 2(1) (a) of the Wills Act.[179]

7.150 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

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175 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 *The Government Gazette* 5804 dated 18 November 1977.

176 *Idem*.

177 Section 1 of the Wills Act 7 of 1953; Corbett, MM, Hofmeyer, GYS and Kahn, E, *The law of succession in South Africa,* 51.

178 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.

179 Wills Act No.7 of 1953.

ownership does not pass on to the beneficiary, the trustee becomes the owner of the asset, but only on behalf of the beneficiary.[180]

7.151 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 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)*.

7.152 A trust contract is created for the benefit of a third party or beneficiary who acquires an absolute right under the trust.[181] The creation and cancellation of trusts and the acquisition of the beneficiary's rights are governed by the principles of the law of contract.[182]

7.153 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;[183]

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180 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.

181 Honoré, T and Cameron, E, *Honoré: The South African Law of Trusts* (1992). Juta and Co., 26.

182 *Idem*.

183 Kgole, DD, "A comparative analysis of the fiduciary duties of trustees in South Africa and Namibia" (May 2018), North West University, 21.

(b) the trustee administers the trust and has to conform to the provisions of sections 6(1)[184] and 7(1)[185] of the Trust Act.[186]

(c) The beneficiary is the person, whether born or unborn, natural or juristic, who will benefit from the trust.[187]

7.154 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 reasonable remuneration. In the event of a dispute, the remuneration will be set by the Master.

(h) Liquidation and Insolvency

7.155 The remuneration of a trustee or *curator bonis* is governed by section 63(1) of the Insolvency Act,[188] which reads as follows:

> *Every trustee or curator bonis shall be entitled to 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.*

7.156 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 percent

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184 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".

185 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".

186 Kgole, DD, "A comparative analysis of the fiduciary duties of trustees in South Africa and Namibia" (May 2018), 22-23.

187 *Ibid,* 21-22.

188 Insolvency Act 24 of 1936.

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 percent
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 percent
4. On sales by the trustee in carrying on the business of the insolvent, or any part thereof, in terms of section 80	6 percent
5. On the amount distributed in terms of composition, excluding any amount on which remuneration is payable under any other item of this tariff	2 percent
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 percent: Provided that the total remuneration of a trustee in terms of this tariff shall not be less than two thousand five hundred Rands.	5 percent

7.157 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.[189]

7.158 These tariffs are minimum tariffs that a liquidator can claim. In *Klopper NO v Master of the High Court,*[190] 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

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189 Tariff B (Remuneration of Trustee: section 63 of Second Schedule of the Insolvency Act 24 of 1936).

190 *Klopper NO v Master of the High Court* [2008] JOL 22824 (SCA).

his remuneration for the administration of the insolvent estate.[191] 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.[192]

7.159 The application was refused, and the applicant appealed against that decision.[193] 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. [194]

7.160 Referring to previous case law, De Waal *et al.*[195] point out that:

> *Where there is no express agreement regarding remuneration, the rates of 5 percent on gross income and 1 percent 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 trustee directed to manage a business for the benefit of the trust is entitled to a salary as manager.*

7.161 **Recommendation 7.3 (above)**: The Commission recommends that the LPC, as the regulatory body for the legal profession in the Republic,[196] is the appropriate body (an existing mechanism) to develop attorney-and-client and fee guidelines for determining legal fees in respect of all branches of the law. This includes the development of fee Guidelines in non-litigious matters that are reserved for legal practitioners.

7.162 The following paragraphs discuss the position in other jurisdictions with regard to regulation of non-litigious matters.

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191 *Ibid,* para 7.

192 *Idem*.

193 *Ibid,* para 8.

194 *Ibid,* para 7.

195 *Adendorff v Executor Estate Martens* 1910 NPD 100; *Jamieson v Board of Executors* (1859) 3 S 250; *Volkwyn NO 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.

196 Section 4 of the LPA provides as follows:
Establishment of Council
5. The South African Legal Practice Council is hereby established as a body corporate with full legal capacity, and exercises jurisdiction over all legal practitioners and candidate legal practitioners as contemplated in this Act.

G. Position in other jurisdictions

1. Uganda

7.163 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.[197] Schedules one to five of the Rules provide for statutory tariffs in respect of the following non-litigious matters:

First schedule	*Scales of charges on sales of purchases, mortgages, and debentures and for commission on sales, purchases and loans affecting certain land.*
Second schedule	*Scales of charges for leases or agreements of leases at rack-rent and for building leases, reserving rent, etc.*
Third schedule	*Floatation of companies.*
Fourth schedule	*Trademarks, patents and chattels transfer.*
Fifth schedule	*Scale of fees in respect of business the remuneration for which is not otherwise prescribed.*

7.164 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

7.165 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:

Schedule 1	*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.*
Schedule 2	*remuneration in respect of leases, agreements for lease or conveyances reserving rents or agreements for the same.*

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197 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".

Schedule 3	*remuneration in respect of business in connection with the formation, incorporation and registration of a company.*
Schedule 4	*remuneration for business in connection with the registration of and proceedings concerning trademarks.*
Schedule 5	*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.*
Schedule 10	*remuneration for business in connection with probate and the administration of estates.*
Schedule 12	*remuneration for business in connection with the registration of patents, designs and utility models as well as proceedings concerning patents, designs and utility models.*

3. Ireland

7.166 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.[198] 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.[199]

4. Nigeria

7.167 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 the power to make orders regulating generally the charges of legal practitioners…"

7.168 Likewise, the LPRC made the following order regulating the remuneration of advocates in non-contentious matters:[200]

Scale I of Schedule	*remuneration for sale, purchase or mortgage that is completed.*

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198 Section 2, Solicitors Act, 1881.

199 *The Irish Times*, 31 July 2018.

200 Section 1 of the Legal Practitioners (Remuneration for Legal Documentation and other Land Matters) Order 1991 (Nigeria).

Scale II of Schedule	*remuneration for lease and agreement for lease in which the transactions have been completed.*
Scale III of Schedule	*remuneration in respect of all other legal documents not provided for in scales I and II.*

H. Enforcement Mechanism

7.169 In its submission to the Commission, the LPC states that "if there is to be a tariff, it was felt that it is the LPC that should be responsible for the implementation and administration of the tariff, in particular the imposition of annual increases. This is by virtue of Section 5(b) of the LPA."[201]

7.170 **Recommendation 7.6:**[202] It is recommended that the LPC, as the regulator for the legal profession, is the appropriate mechanism to deal with allegations of excessive legal fees in terms of section 5(b) of the LPA.[203] The LPC has adopted the Contingency Fee Tribunals established in terms of section 5 of the Act by the former Law Societies and their functions. Additional tribunals will be established by the LPC for each of the nine provinces of the Republic. Furthermore, it is recommended that section 6 of the Contingency Fees Act, which provides for rules to be made to give effect to the provisions of the Act, be amended as proposed in Chapter 6 of this Report.

I. Summary of the recommendations

The recommendations made in Chapter 7 are the following:

1. Recommendation 7.1: For the reasons stated above, the Commission concurs with the views of many respondents who submitted that the imposition of a universal and compulsory tariff is undesirable not only for the legal profession but for the economy of South Africa too.

2. Recommendation 7.2: The Commission is of the view that the LPC, as the regulatory body for the legal profession in the Republic, is the appropriate body to develop service-based attorney-and-client Fee Guidelines for determining legal fees

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201 LPC "Submission Position Paper" 9.

202 The recommendation is supported by the LSSA, *op cit*, 77; and PIPLA, *op cit*, 7.

203 Section 5(b) of the LPA provides that "The objects of the Council are to-
(e) ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice."

in respect of all branches of the law. Section 18(1)(ii) of the LPA empowers the LPC to establish a committee comprising of members of the LPC and any other suitable persons except employees of the LPC, to assist the LPC in the exercise of its powers and performance of its functions. Section 18(2)(a) –(b) of the LPA empowers the LPC to determine the powers and functions of a committee and to appoint a member of a committee as chairperson of such committee. It is recommended that the LPC must establish a Committee to be responsible for determining attorney-and-client fee guidelines. The Committee should comprise of fit and proper persons drawn from the following sectors of society:

(a) Legal profession;
(b) Judiciary;
(c) Government; and
(d) Civil society.

3. The detail about the composition of the Committee and the number of members who may constitute such a Committee are all matters to be decided by the LPC.

4. The Commission is of the view that there is no need for another Mechanism to be established when an existing mechanism can be adapted for this purpose.

Legislative intervention:

Section 95 (1) of the LPA empowers the LPC to make rules by publication in the Gazette relating to a wide variety of matters. Save for paragraph 95(1)(zo) which provides that rules must be made in respect of “any other matter in respect of which rules may or must be made in terms of this Act”, there is no other provision that directly empowers the LPC to make rules in respect of fees and tariffs payable to legal practitioners. The Attorneys Act 53 of 1979, which empowered the council of a law society to prescribe the tariff of fees payable to any practitioner in respect of professional services rendered in cases where no tariff is prescribed by any other law, was repealed as a whole by section 119 of the LPA with effect from 1 February 2015.

It is recommended that section 95 of the LPA be amended by-

(a) the deletion in subsection (1) of the article [or] at the end of paragraph (Zn); and

(b) the insertion in subsection (1) of the following paragraph preceding paragraph (zO):

"(zNA) fees and tariffs payable to legal practitioners and juristic entities in respect of litigious and non-litigious legal services; or"

5. Recommendation 7.3: The Commission is of the view that the LPC, as the regulatory body for the legal profession in the Republic, should develop service-based attorney-and-client fee guidelines for determining legal fees in respect of all branches of the law. Although this matter will be decided by the LPC, however, the service-based attorney-and-client fee Guidelines may be developed on the basis of the factors enumerated under section 35(2) of the LPA. Attorney-and-fee guidelines will serve as a yardstick to determine a reasonable fee. Parties will be able to deviate from the fee guidelines in justifiable circumstances.

6. Recommendation 7.4: It is recommended that the mechanism (LPC) must adopt an effective consultative process of all the stakeholders involved prior to determining fees and tariffs. The following stakeholders and role players, among others, must be consulted:

(a) the Rules Board;
(b) consumers of legal services;
(c) members and representatives of the legal profession;
(d) members and representatives of the judiciary;
(e) representatives of civil society organisations;
(f) the Minister, or his/ her representative;
(g) the Competition Commission;
(h) Legal Aid SA;
(i) Law clinics;
(j) Juristic entities;
(k) NEDLAC; and
(l) Human Sciences Research Council.

7. Recommendation 7.5: The Commission recommends that, with respect to service-based attorney-and-client fee guidelines, it is desirable that users of legal services be given the option of voluntarily agreeing to pay fees for legal services less or above any amount that may be set by the mechanism (LPC).

8. Recommendation 7.6: It is recommended that the LPC, as the regulator for the legal profession, is the appropriate mechanism to deal with allegations of excessive legal fee in terms of section 5(b) of the LPA. The LPC has adopted the Contingency Fee Tribunals established in terms of section 5 of the Act by the former Law Societies and their functions. Additional tribunals will be established by the LPC for each of the nine provinces of the Republic. Furthermore, it is recommended that section 6 of the Contingency Fees Act, which provides for rules to be made to give effect to the provisions of the Act, be amended as proposed in Chapter 6 of this Report.

Chapter 8: Legal services for the upper-income band natural persons and juristic entities

A. Introduction

8.1 It was stated in Chapter 3 that in conducting the investigation contemplated in sections 35(4) and (5) of the LPA, the Commission deemed it proper to categorise the population of interest into three bands, namely: the poor; "missing middle"; and the wealthy. Chapter 3 looks at legal services for users in the lower-income band. Chapter 4 discusses legal services in the context of the so-called "missing middle" users of legal services. This Chapter focuses on legal services for the upper-income band natural persons and juristic entities.

B. Background

8.2 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.

8.3 Issue Paper 36 posed a question as to whether it is desirable to establish a mechanism that will be responsible for determining fees and tariffs payable to a commercial juristic entity and high net worth individuals in respect of litigious and non-litigious legal services rendered.

8.4 During August and September 2018, the Commission invited representatives of large corporate business law firms in South Africa to give input at the international conference hosted by the Commission. 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 –

(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 a 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 –

(d) compete with a range of competitors who are not traditional law firms;
(a) 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;

(b) *maintain global best practice in certain non-litigious legal services disciplines and sectors.*[1]

8.5 The view expressed by almost all corporate clients is that legal services provided to them should be excluded from the proposed mechanism contemplated under section 35(4) of the LPA. They submit that corporate clients are not the "most people"; "citizenry" or "members of the public" referred to in sections 35(4)(a); 3(b)(i) and 35(4)(b) respectively of the LPA.[2]

8.6 The type of legal services rendered to large corporate and institutional entities is described as being highly specialised legal services, which are generally complex, often transnational and involve interdisciplinary expertise and collaboration, with exceptionally high values at stake.[3] Legal services rendered to corporate clients in the top band are provided in a highly competitive market, combined with sophisticated clients who have bargaining power. The pool of providers of corporate and business legal services includes "newer law firms, foreign law firms, alternative legal service providers, global accounting, audit and advisory firms and a revision to in-house capability by corporate and business clients to self-provide such services."[4]

8.7 Accordingly, corporate clients require:

(a) specialist expertise;
    (i) on-going training and market salary parity for professional and talent retention to remain competitive as a human capital business;
    (i) risk management, including in the service offering, sophisticated information technology and/or cybersecurity and reputational risk management; and
    (iii) occupying geographical spaces close to where the client's management and business are directed from.[5]

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

2 Bowmans "Comments in response to the South African Law Reform Commission's Investigation into Legal Fees: Project 142: Issue Paper 36 dated 16 March 2019" (29 August 2019) 2.

3 *Ibid*, 3

4 *Ibid*, 4.

5 *Ibid*, 3.

8.8 There is a need to distinguish between corporate buyers of legal services and individuals attempting to access justice. The business-to-business sale of legal services should not be regulated.[6] One of the respondents submits that:

> *[t]o the extent that there is a regulation or a tariff, the aim thereof should be to create a mechanism for the individual user of legal services in the lower to the middle-income bracket to be empowered and to have fair and equitable access to justice, rather than restricting the corporate and higher-income individual brackets. This space should remain a free market to ensure entrepreneurial and competitive principles of business together with sustainability of the legal industry*.[7]

8.9 Section 5(b) of the LPA states that "the objects of the Council are to ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice." Thus, the purpose of the Act is to curtail excessive costs, irrespective of whether a user is able to afford them or not. It is not the business of those who can afford to pay excessive costs to do so, but the business of everybody else to pay reasonable legal fees. Paying exorbitant fees does not enhance a culture of consciousness with regard to legal fees where one can say that one sector is but not the concern of theirs. Accordingly, it is imperative that all users of legal services ensure that they are not challenged by excessive fees and that the LPC is available to everyone for assistance.

8.10 **Recommendation 8.1**: The Commission concurs with the respondents' views that corporate clients in the upper-income band as well as high net worth individuals should be excluded from the protection of the mechanism for determining legal fees and tariffs as contemplated under section 35(4) of the LPA. Much as this matter does not require any regulatory intervention, however, it is imperative that all users of legal services ensure that they are not challenged by excessive fees and that the LPC is available to everyone for assistance. Paying exorbitant fees does not enhance a culture of consciousness with regard to legal fees. The purpose of the Act is to curtail excessive costs, irrespective of whether a user is able to afford them or not.

8.11 BASA submits that "the exclusion of high-net-worth individuals from the protection of section 35(4) of the LPA may lead to unfair consequences for these individuals and possible abuse by legal practitioners. BASA recommends that these unfair consequences may be avoided by ensuring that a fee agreement is in place between the

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6 Webber Wentzel "Investigation into Legal Fees: Issue Paper 36" (30 September 2019" 3.
7 *Idem*.

high net worth individual and the legal practitioner. This further highlights BASA's support for mandatory fee agreements for all users including corporate clients and high net worth individuals."[8]

C. Summary of the recommendations

In this Chapter 8, the following recommendation is made:

1. Recommendation 8.1: The Commission concurs with the respondents' views that corporate clients in the upper-income band as well as high net worth individuals should be excluded from the protection of the mechanism for determining legal fees and tariffs, as contemplated under section 35(4) of the LPA. Much as this matter, does not require any regulatory intervention, however, it is imperative that all users of legal services ensure that they are not challenged by excessive fees and that the LPC is available to everyone for assistance. Paying exorbitant fees does not enhance a culture of consciousness with regard to legal fees. The purpose of the Act is to curtail excessive costs, irrespective of whether a user is able to afford them or not.

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8 BASA "Investigation into legal fees, Project 142 Discussion Paper 150" 6.

Chapter 9: Public Response to Issue Paper 36 & Discussion Paper 150

A. Introduction

9.1 Following the release of Issue Paper 36 for general information and comment on 7 May 2019, provincial community workshops were held in each of the nine provinces of the RSA. In November 2020, the second round of provincial community workshops was again held to discuss the Commission's preliminary recommendations contained in Discussion Paper 150, among other matters. A schedule of the provincial community workshops held is provided in Annexure B of this Report. A synopsis of the issues discussed is provided below.

B. Matters discussed throughout the provinces

(a) Cost of legal services

9.2. The view expressed by many community members is that legal fees are expensive and unaffordable for the majority of the people of South Africa. The poor and marginalised people of this country depend on social grants and other forms of social assistance from the government to survive. When faced with civil disputes, they are subjected to and capitulate to the whims of wealthier opponents who can afford legal assistance. The government ought to intervene by regulating legal fees in such a manner that average South Africans can obtain the legal assistance that they require.

9.3 The three options for service-based attorney-and-client fees contained in Discussion Paper 150 were discussed in English and local languages and input and comment sought. Community members were generally in favour of the Commission's recommendation for use of the Rules Board's tariff in litigious matters as the basis for determining attorney-and-client fees with respect to users of legal services in the lower and middle-income bands. This is subject to the determination of the income thresholds for the lower and middle-income users by the Minister acting upon the recommendation of the Rules Board.

9.4 The discussions also took note that legal practitioners are also businesswomen and men who must make a profit to sustain their businesses. The question of the proposed tariff must be balanced with the interests of the legal profession.

9.5 A participant at the Ga Matlala workshop, Limpopo, raised a concern that justice favours those who afford to pay for legal services. The problem that is created by a power imbalance in opposing wealthier litigants is discussed in Chapter 2 of this Report.

9.6 Community members expressed different views on the question of the option to voluntarily pay less or more of any amount that may be set by the mechanism. Participants at the workshop held in Stellenbosch, Western Cape, were strongly opposed to Option 2. They expressed their support for Option 1 on the grounds that they are unemployed and therefore depend on social grants to mitigate the impact of poverty. Only 3 out of 40 participants at the workshop indicated that they make use of services provided by legal practitioners. The rest of the community members stated that they do not afford to pay for legal services provided by legal practitioners.[1]

9.7 A participant at the Hammersdale workshop asked whether legal practitioners will require proof of income from users in the lower and middle-income group. How will potential corruption be avoided when clients bring about falsified proofs of income before the legal practitioners. Will there be a given list of legal practitioners who will be designated by the legal profession to serve users in the lower and middle-income groups based on Option 1.

9.8 The Advisory Committee Member from Legal Aid SA explained that there is a prescribed form that is used to apply for legal aid and proof of income is required. However, the information supplied by users who qualify for legal aid without proof of income is in many instances accepted as true, unless otherwise proven. In cases where users supply falsified information, the user is penalised by Legal Aid SA.

9.9 Regarding the question of whether there will be a given list of practitioners who buy into the tariff (Option 1), the Commission's view is that legal practitioners will not be

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[1] A closer interrogation of the reasons why community members engaged the services of a lawyer in the first place reveals that it was mainly due to lack of knowledge. Several community members engaged legal practitioners on a matter like transfer of title of household property worth less than R200 000 when they could easily have approached CAOs for information without having incurred any legal expenses.

compelled to agree to the provision of legal services at the tariff amount and will have a right to refuse to accept a mandate subject to the tariff amount.

9.10 A participant at the Hammersdale workshop proposed that legal practitioners who buy into Option 1 must be those who practice in many branches of the law and serve a wide variety of clients, not just users in the lower and middle-income groups. They should be easily available at Magistrates' Courts offices when needed. This question was raised in the context of conveyancers who are not available from Legal Aid SA. There is a huge demand for conveyancers by people who want to transfer ownership of inherited immovable property.

9.11 A participant at the Bethlehem workshop asked who will determine the means test in respect of Option 1. The response provided was that it will be the Rules Board. The participant proposed that unless children who are heads of households qualify automatically, they should generally be excluded from the application of the means test.

9.12 A participant at the Ga Matlala workshop was concerned as to whether the Commission's proposal may lead to legal practitioners prioritising clients with bigger pockets over those who are poor and unable to pay for legal services. The Commission's motivation for Option 1 is discussed in detail in Chapter 6 of this Report.

9.13 A participant at the Hammersdale workshop made reference to a couple who was divorcing. The wife was charged 15 000 for divorce by one attorney. Her husband was charged 8 000 by another attorney. The participant supported the regulation of legal fees for users in the lower and middle-income groups.

(b) Language

9.14 The language used in the courts, and accompanying documentation, is mainly English. For the people who do not speak English at home, the language creates a barrier in terms of people's ability to fairly and meaningfully participate in the process. The input made by all communities that language acts as a barrier to access justice was discussed. Community members noted that this problem is sufficiently captured in the Discussion Paper. People with special needs have appropriate resources made available for them in court. Translation services are also made available.

(c) Geographical location

9.15 Magistrates' Courts, police stations, Legal Aid SA offices, Independent Police Investigative Directorate (IPID) offices and other government offices are often too far away from these communities. The majority of the community members are unemployed and survive on government grants and other forms of social assistance. Consequently, they do not have the money to spend on the taxi fare that they need to travel to and from the courts and other relevant government offices. One participant at the Stellenbosch workshop provided information about a person who had to pay up to R300 a day to go to CCMA offices in Cape Town. Employees who lose their jobs struggle to have their matters heard at CCMA offices that are situated far away from where they live due to a lack of money to pay for transport costs.

(d) Courts

9.16 Magistrates postpone matters too often and this results in matters taking too long to reach finality. People eventually give up on trying to obtain justice. Every magistrates' court must have a community advice office adjacent to it to assist self-represented litigants.

(e) Small Claims Court

9.17 A small claims court will hear a matter where an individual member of a stokvel or social club institutes an action against the other members (as long as the monetary claim falls within the court's jurisdiction), but it will not hear a matter where a social club wants to bring action against an individual member who has stolen from the social club where the monetary claim falls within its jurisdiction.

9.18 Sheriffs' fees in small claims court matters defeat the purpose of the small claims court by making the whole process unnecessarily expensive. Even where the sheriff has served the order of the court it has no practical effect until the judgment creditor approaches the magistrates' court to enforce it. Community members proposed that other cost-effective methods like the use of e-mail address and WhatsApp message be used to deliver court process and acknowledgement of receipt.

(f) Traditional Courts

9.19 Traditional leaders tend to be ignorant of the law. Their decisions in matters of domestic violence, kidnapping of girls for purposes of forced marriages, inheritance of

immovable property by widows and women can be harsh and unjust. This view was again reiterated at the workshops held in Ga Matlala (Limpopo), Hammersdale (KwaZulu-Natal), and Port St Johns (Eastern Cape). One participant at the Ga Matlala workshop submitted that the administration of justice by some traditional leaders is inconsistent with the Bill of Rights, particularly on matters affecting women such as gender-based violence and the allocation of communal land. A participant at Port St Johns submitted that disputes from members of the regal family are generally not heard before the traditional court. There is no uniformity in the amount paid for opening a case before a traditional court.[2] The amount differs from one court to another, and from one province to another. There are no proper administration systems in place, like taking of written statements and documents management.

9.20 In some areas people need to pay an arbitrary amount of money to the traditional leader to have their matter adjudicated upon. There is no uniform set amount and this is unfair. In other areas, people can only approach the police station or the magistrates' court once they have gained permission from the traditional leader to do so. If permission is denied then a person's grievance ends there.

9.21 Some communities, like the coloured community, are not accommodated by the traditional court system. Therefore, they do not participate in the activities of traditional courts. It is proposed that traditional courts should have multi-cultural jurisdiction to enable community members from other cultures, like the Khoisan community and other marginalised cultural groups, to access justice that is dispensed by these courts.

9.22 Legal representatives are usually not allowed to argue for people or to advise the traditional leader on constitutional matters. As a result, people's rights are not sufficiently protected in these courts and people lose their property and children among other things.

9.23 A participant proposed at the Ga Matlala workshop proposed that adequate training be provided to traditional leaders.

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[2] A nominal amount of R20 or R30, depending on the matter, is payable to open a file.

(g) Legal Aid South Africa

9.24 Community members felt that the quality of service offered by legal aid practitioners is not the same as that provided by private attorneys.[3] Legal Aid SA is severely understaffed and under-resourced in general. The public feels that representatives from Legal Aid SA are too quick to broker a settlement or plea and do not fight for them as private attorneys would normally do for their clients.[4] They are constantly changing in the midst of the matter. People are assigned one practitioner at the outset of the matter. They consult with one legal practitioner and set a court date. Subsequently, the initial practitioner is substituted by another Legal Aid SA legal practitioner at the eleventh hour. This causes the matter to be postponed in order for the new legal practitioner to be afforded an opportunity to bring themselves up to speed on the matter. This drags out the process and has a negative effect on the accused or the represented party. [5]

9.25 Legal Aid SA does not follow up after judgment has been granted to ensure enforcement of the court order. Legal Aid SA's focus is mainly on criminal matters and not enough on civil matters like housing matters.[6]

9.26 Legal Aid SA's means test does not properly consider the expenses of the applicant once they have decided that they earn too much to qualify for help. Black tax is a reality for many people but is not fully considered. This matter was again discussed at the Discussion Paper workshops held in November 2020. Community members submitted that users of legal services who earn above the prescribed threshold for

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3 Responding to this finding by the Commission, Legal Aid SA refers to the GPSJS 2018/19 report (page 47 at para 8.3) wherein Statistics SA found that "those who were represented by Legal Aid lawyers had the greatest percentage (89%) of people who were satisfied with the service." The Respondent states that "Legal Aid SA takes the quality of legal services very seriously and therefore has developed an extensive quality monitoring and intervention programme." This programme is discussed in detail in the submission to the Commission, *op cit*, 52.

4 The Respondent submits that Legal Aid practitioners "do not have any specific targets to achieve. Supervisors are required to monitor productivity by ensuring that practitioners plan cases for all court days, and that cases are not unreasonably delayed or that guilty pleas are not tendered when this is not supported by the facts and client's instructions" *ibid*, 60.

5 The Respondent states that "Legal Aid SA uses a court coverage programme in criminal courts, where practitioners are allocated to a dedicated court. Practitioners that start trials finishes it unless there is a natural attrition such as resignations" *ibid*, 61.

6 The Respondent confirms that "[t]here is a small component of dedicated civil practitioners at each local office." *idem*.

qualification for legal aid, which is currently R7400 for individual applicants and R8000 for households, are unable to have access to justice.[7]

9.27 In its response to Report 150, Legal Aid SA responds by saying that "[t]he means test is set in the Legal Aid Regulations which is approved by Parliament. The means test is informed by various factors and where legal aid is refused on the means, there are 2 levels of appeals. Currently, there is a contribution policy in Criminal Matters and the Board of Legal Aid SA has also made a recommendation to the Minister that a Contribution Policy should also be implemented in civil matters to assist clients who are beyond the Means Test. Legal Aid SA cannot address the legal needs of all applicants especially those beyond the means test, on our available budget and resources, which is a gap. There are however Legal Insurance Providers that seek to address this gap."[8]

9.28 Community members at the Ga Matlala workshop asked whether the government will be able to increase the budget of Legal Aid SA as proposed by the Commission. This concern was raised in the context of the R350 social relief of distress grant the payment of which was temporarily terminated by the government owing to unavailability of funds. The community's concern was noted by the research team from the Commission.

9.29 The DOJ&CD should inform communities exactly where they can complain should they be unhappy with the service that they receive from Legal Aid South Africa.[9] Legal Aid South Africa should make a legal practitioner available in the different CAOs as well as the traditional courts around the country. Legal Aid SA should employ at least one civil law practitioner in every single town who will deal exclusively with civil matters. More practitioners should be employed in bigger towns and cities.

(h) Private legal practitioners

9.30 Clients have to pay for correspondent attorneys due to the fact that attorneys are jurisdictionally bound and cannot represent their clients throughout the republic. This severely impacts legal fees.

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7 According to the Respondent, to qualify for legal assistance "the applicant must have an amount not exceeding R7400 remaining after deduction of income tax from gross income. For an applicant who is a member of a household, the amount is R8000," *op cit*, 10.

8 Legal Aid SA "Response to the Questions Raised and Recommendations made by the SALRC in Discussion Paper 150" 64.

9 Legal Aid SA has a toll-free number that is extensively publicised for general information. complaints mechanism that are currently in place are client complaints; stakeholder complaints; ethics hotline complaints and advice line complaints, *ibid* 61-62.

9.31 There is an abuse of the conflict-of-interest rule: People who do not qualify for legal aid are often directed by presiding officers in the high court to secure the services of either ProBono.Org or of a private attorney on a contingency fee agreement basis. In many instances, these matters involve property matters (e.g., bond repossessions) against one of the major banks in the country. Upon approaching private law firms, they are invariably informed that the law firm is unable to extend their *pro bono* services in matters involving the banks. However, where the firm is representing the bank in a credit card matter against someone previously represented by the firm, the instruction of the bank on a bond repossession matter does not conflict in any way with the other instruction. Certain law firms nonetheless refuse to assist individuals who go up against the banks thereby abusing the rule.

9.32 Attorneys tactically institute matters in the high court even though they properly fall within the jurisdiction of the magistrates' court. This results in the opponent finding it difficult to represent themselves thereby financially bullying and frustrating them.

9.33 Private legal practitioners should be required to provide every client with an estimate of how much the matter will cost the client at the outset of taking the matter. The quotation is required in order for the client to determine whether he/ she will afford the services of a lawyer. This recommendation enjoyed unanimous support from all the communities that were consulted.

(i) Road Accident Fund

9.34 A participant at the Port St Johns workshop submitted that there are many victims of road accidents who take their matters through legal practitioners but end up not getting any compensation for their injuries from their attorneys. The workshop supported the suggestion that the law must be amended to ensure that the money that is awarded to the plaintiff in road accident fund matters taken on contingency fees arrangement is paid directly into the plaintiff's account. Only the legal fees due to the legal practitioner should be paid into the legal practitioner's account.

(j) Legal Expenses Insurance Service Providers

9.35 People sign up for policies with Scorpion, LegalWise, Clientele Legal and others with the expectation that they are covered in the event of being embroiled in a legal

dispute only to find out that they are in fact not covered for all legal disputes. They are told that their premiums do not cover certain disputes only when these disputes arise. This fact is not properly communicated to them when they sign on for this cover and they feel duped and swindled by these legal insurance providers.

(k) Community Advice Offices and Paralegals

9.36 There is an overwhelming unanimity of opinion on the fact that these offices offer an invaluable service to communities. However, they are severely understaffed and under-resourced. Telephone costs constitute one of the highest expenditure line items. The paralegals cannot offer representation in certain forums due to a lack of recognition and regulation. Trade union representatives and paralegals are not allowed to represent community members at certain forums like the Commission for Conciliation, Mediation and Arbitration (CCMA), the small claims court and the magistrates' court. Their matters are handled by people who do not have the same level of care or understanding as these initial representatives. The Port St Johns workshop recommended that consideration be given by the DOJ&CD to allowing paralegals to represent indigent community members in the above-mentioned fora, subject to training and capacity building provided to CBPs.

9.37 Community members support the following Commission's recommendations:

(a) that section 29(2) of the LPA be amended to include community advice offices in the list of institutions in which community service should be provided by legal practitioners on a *pro bono* basis. This will provide an opportunity for training of community-based paralegals;
(b) that consideration be given by the LPC and the DOJ&CD to permitting trained paralegals to represent clients in limited matters subject to supervision;
(c) that consideration be given by the DOJ&CD and other relevant stakeholders to enhancing the financial and other operational resources of CAOs.

9.38 The Stellenbosch workshop proposed that the South African Revenue Service (SARS) should consider granting tax exemption to companies that provide legal services to the needy and indigent people of South Africa on a *pro bono* basis. This means that legal practitioners can provide quality legal services to the needy and claim a percentage of their operating costs from SARS.

9.39 Since victim centres in police stations are overburdened, understaffed and ineffective, CAOs should also be capacitated to handle the services provided by these centres where necessary.

(l) Breakdown in service delivery

9.40 The police take hours to arrive upon the scene whenever they are called upon. When a victim of crime has been physically assaulted and is bleeding or battered, the police at times expect them to give their statement in front of everyone at the front desk. They rarely provide a private office for this type of situation and it further traumatises the victim. The police also do not accompany the victim to the hospital to fill out the J88 form. This results in rape victims having to walk or catch a taxi to the nearest public hospital in their torn and bloody clothing at times.

9.41 There is a need for translation services to be made available in all police stations. Police sometimes refuse to take a statement or open a case when abuse victims cannot show physical bruises or marks whilst claiming abuse. Corruption in police stations is rife. Dockets are constantly going missing and victims become disillusioned.

9.42 Men are sneered at and generally ridiculed whenever they attempt to report sexual or physical abuse at the hands of women. They have therefore learned to suffer in silence. Communities feel failed by the law and are actually no longer reporting a crime to the police station as they know that it is a fruitless exercise.

9.43 Poor communities are dealing with a serious drug and HIV/AIDS epidemic. These two factors lead to young parents dying prematurely or abandoning their children in favour of using drugs. The fathers of these children, having never been officially identified, deny paternity and are absent themselves. Grandparents or good Samaritans then step in and raise these orphaned or abandoned children.

9.44 These children then invariably end up not having birth certificates or any other form of identification. Without this identification, guardians cannot access the child support grants provided by the state for such children to help raise them.

9.45 Without any legal identification of these children, and where they are allowed to register and attend school in their area (which they sometimes are not), they cannot

register for their matric examinations. They become discouraged and loiter around the home. The Department of Home Affairs (DHA) is usually quite far away from these townships and villages and it requires taxi fare to get to their offices. Since there is no income coming into the household, they rarely can afford to make the trip.

9.46 When they do make the trip to DHA they are informed that without the parents' attendance, there is no proof that the children are in fact South African citizens. The DHA has refused to accept affidavits to this effect. The DHA has even gone as far as demanding that the grandparents take blood tests at their own expense to prove a familial tie with the children. The grandparents cannot afford this.

9.47 After months and years of this hopeless situation the undocumented children become despondent and fall into a life of crime or drugs. And so, the vicious cycle continues. There are people who are 50 years of age and more who live without identification documents, or incorrect identification documents. The question is why must the consequences of this problem be borne by the people and not the DHA who created it in the first place. The Stellenbosch workshop proposed that the DHA should consider placing officials in some of the banks in the remote areas of South Africa to help citizens without identification documents to obtain them.

9.48 The view held by many community members is that people are not knowledgeable about their legal rights. There is generally a lack of information.[10] The DOJ&CD must do enough to educate communities about their legal rights. Although different community advice offices invite the department to attend community workshops geared towards raising awareness of people's rights, DOJ&CD officials hardly attend these workshops. The DOJ&CD should also offer legal training to community-based paralegals free of charge.

(m) Alternative Dispute Resolution Mechanisms

9.49 Community members also expressed the view that litigation through the courts should not be seen as the only route to resolving legal disputes. There are other more effective ways of resolving disputes, like mediation and strengthening of institutions like

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[10] For instance, one participant at the workshop held in Mabopane on 6 November 2020 stated that about 95% of people who consult CAOs confuse the *pro bono* advisory services provided by the centre with services provided by legal practitioners.

CAOs and Legal Aid SA. Some of the legal problems that people experience at a grassroots level can be resolved at CAOs provided that the CAOs are capacitated to do so.[11] The Stellenbosch community workshop noted that more than 90% of the cases dealt with by CAOs are resolved through negotiation and mediation successfully. The court officials at the Fezeka Community Court, Gugulethu, Western Cape, also echoed the same sentiment that over 90% of the disputes brought by community members are resolved successfully through mediation, despite the fact that the process starts at the police station where a charge sheet is opened. This is largely due to the backlog of cases that take too long to resolve in the regional court.

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11 Another example mentioned at the Mabopane workshop is that a whole range of CCMA forms and templates should be made available at CAOs so that workers whose services are terminated by their employers can access them from these centres.

Annexure A: List of Respondents to Issue Paper 36

No.	**Date of Submission**	**Name and Respondent**
1.	11/06/2019	Pauline Pretorius Legal Cost Consultant
2.	17/06/2019	Kevin van Tonder General Counsel Legal Shared Services Schlumberger, Paris France
3.	26/06/2019	Kaajal Ramjathan-Keogh Executive Director Southern Africa Litigation Centre
4.	01/08/2019	Sherizad Sacks ABSA Bank
5.	02/08/2019	Office of the Chief State Law Adviser
6.	13/08/2019	Matthys Lourens Director: Legal Cost Consultant
7.	15/08/2019	Advocate Kotze Project 94: Advisory Committee Member
8.	15/08/2019	Andrew Breitenbach SC Cape Bar Society of Advocates
9.	16/08/2019	André van Jaarsveldt Legal Serve Document Exchange
10.	26/08/2019	Advocate B.C. Harker
11.	28/08/2019	Road Accident Fund
12.	29/08/2019	Robert Legh Chairman and Senior Partner Bowmans
13.	29/08/2019	David Hertz Chairperson: Werksmans Attorneys
14.	29/08/2019	Loraine Viljoen Scorpion Legal Protection (Pty) Ltd
15.	29/08/2019	Thomas Reynolds Policy & Public Affairs Manager Medical Protection Society (MPS)
16.	29/08/2019	Tshenolo Masha: Executive Director Centre for the Advancement of Community Advice Offices in South Africa (CAOSA)

17.	30/08/2019	Siva Gengan – Chief Executive Officer LegalWise
18.	30/08/2019	Jacqueline Biddlecombe Senior Specialist Legislation & Regulatory Oversight Banking Association South Africa
19.	30/08/2019	Lee Mendelsohn Chief Operating Officer ENSafrica
20.	30/08/2019	William Mailula Black Lawyers Association
21.	30/08/2019	Anne-Marie Event Health and Safety
22.	30/08/2019	Hennie Van Rensburg Gauteng Society of Advocates
23.	30/08/2019	Abraham Louw SC The Club Advocates' Chambers General Council of the Bar of South Africa
24.	29 August 2019	Mr Rob Smith Managing Director Scorpion Legal Protection
25.	August 2019	Andre Calitz Chief Operating Officer South African Medical Malpractice Lawyers' Association
26.	30 August 2019	Adv Hennie van Rensburg (SC) The Gauteng Society of Advocates
27.	09/09/2019	Rules Board for Courts of Law
28.	12/09/2019	Legal Practice Council
29.	27/09/2019	Patrick Hundermark Chief Legal Executive Legal Aid South Africa
30.	30/09/2019	Lizette Burger Senior Professional Affairs Manager Law Society of South Africa
31.	30/09/2019	Alisdair Lawson Webber Wentzel
32.	September 2019	Melaine Faure Senior Assistant State Attorney Office of the Premier Western Cape Department of Health

Annexure B. Schedule of Provincial Community Workshops

PROVINCE	TOWN/CITY	Issue Paper 36	Discussion Paper 150
		DATE	DATE
Eastern Cape	Port St Johns- Tombo	26 June 2019	27 November 2020
Free State	Bethlehem	3 July 2019	13 November 2020
Mpumalanga	Mbalenhle - HOUSE OF PRAISE, cnr Ngwasheng and Masemola Street, Mbalenhle	18 July 2019	24 November 2020
KwaZulu-Natal	Hammersdale- Mpumalanga Township	29 July 2019	3 November 2020
Limpopo	Matlala Village- Matlala Community Hall/Paypoint Tibanesfontein Ga Matlala	8 August 2019	10 November 2020
Western Cape	Stellenbosch- Eikestad Hall, Longstreet, Cloetesville; VGK Church	13 August 2019	17 November 2020
North West	Phatsima Village- Community Hall	16 August 2019	20 November 2020
Northern Cape	Douglas- Civic Centre Siyancuma Municipality	23 August 2019	-
Gauteng	Pretoria- Mabopane Skills Centre	27 August 2019	6 November 2020

Annexure C: List of Respondents to Discussion Paper 150

No.	**Date of Submission**	**Name and Respondent**
1.	23 November 2020	Terry Harrison
2.	30 November 2020	Legal Practice Council
3.	30 November 2020	General Council of the Bar of South Africa (Johannesburg Society of Advocates; Pretoria Society of Advocates; Society of Advocates of KwaZulu-Natal)
4.	November 2020	Legal Aid South Africa
5.	30 November 2020	The Banking Association of South Africa
6.	30 November 2020	Personal Injury Plaintiff Lawyers Association
7.	30 November 2020	Rules Board for Courts of Law
8.	30 November 2020	Werkmans Attorneys
9.	30 November 2020	Centre for Applied Legal Studies
10.	4 January 2021	Law Society of South Africa[12]

[12] The LSSA was granted extension for submission of comments to the SALRC.

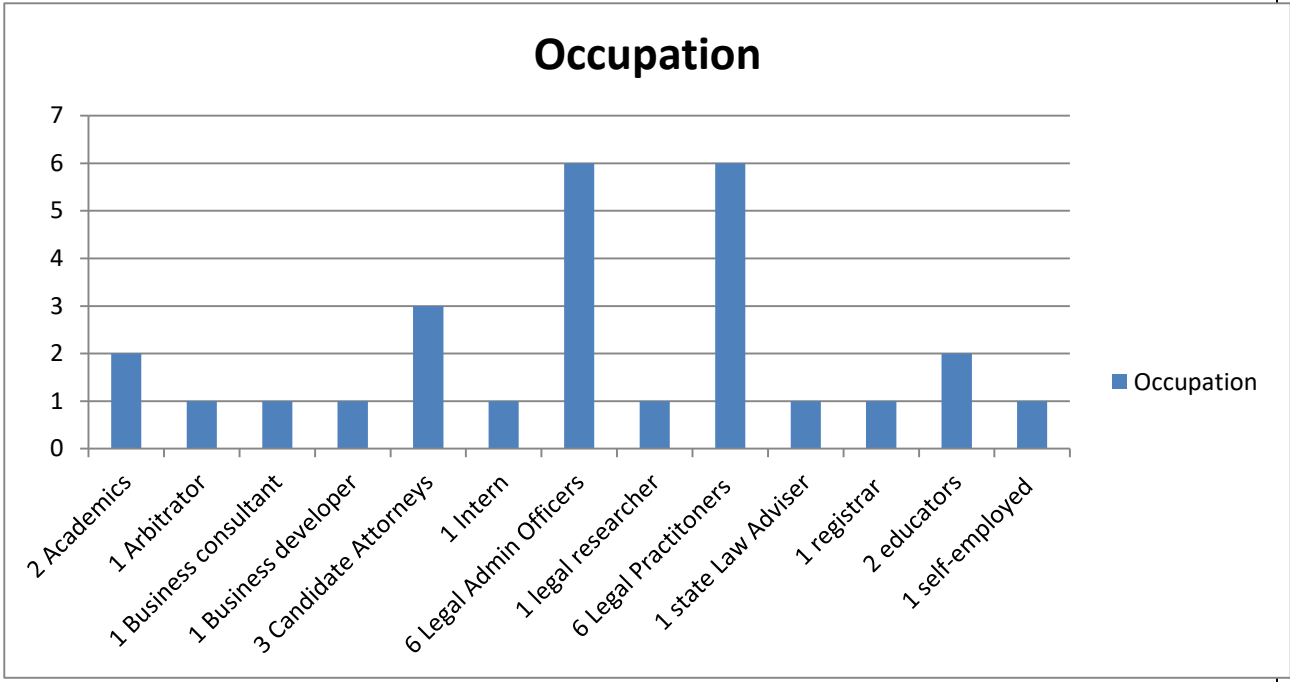
Annexure D: List of Respondents to the Questionnaires

Middle-income Users Online Questionnaire			
	Name		**Name**
1.	Molepo P	6.	Hamilton P
2.	Motumisi CL	7.	Malobola S
3.	Mpofu B	8.	Ramantshane R
4.	Calver D	9.	Brown T
5.	Carter M	10.	Moatshe M
Law Students: University of Western Cape			
1.	Makore A K	9.	DeJager J
2.	Gravenorst A	10.	Steyn I
3.	Uren U	11.	Snyders A
4.	Ningi N	12.	Mncengwa N
5.	Josephus K	13.	Nginingini S
6.	Hughes C	14.	Adams O
7.	Twentiey K	15.	Scullard S
8.	Sonnenberg E		
Law Lecturers and Students: UNISA			
1.	Koza XK	7.	Mokoena T
2.	Teka M	8.	Kamwenda J
3.	Senoamadi S	9.	Ebrahim S
4.	Moshiane A N	10.	Nkoane P
5.	Ndlazi MB	11.	Mohlake K
6.	Mabusela L		

Annexure E: Responses to the Middle-income Users of Legal Services Questionnaire

1. Occupation

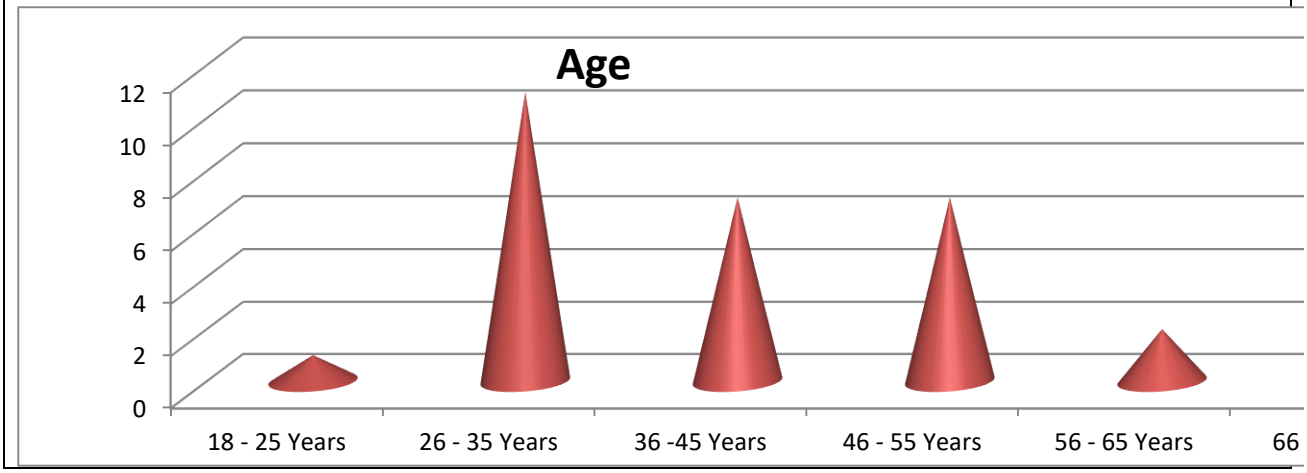
A total of 27 attendees responded to the questionnaire



2. Age

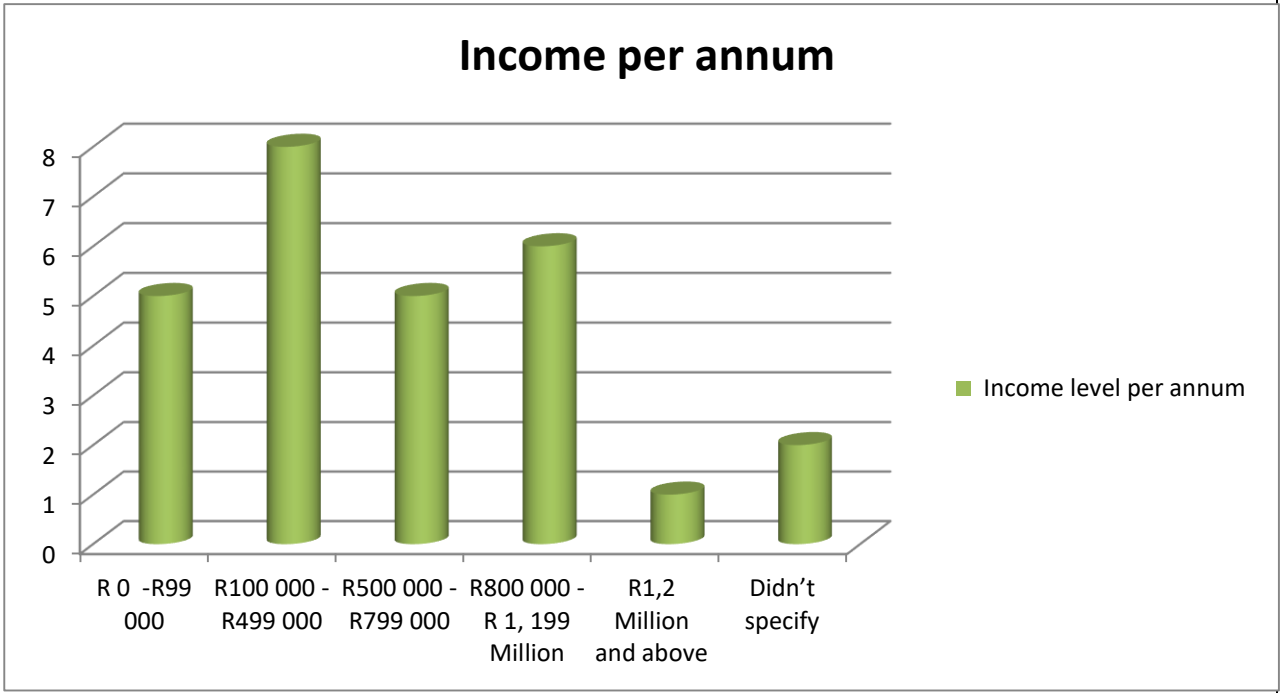
From 27 Participants

Not stated	**1**	**18 – 25**	**1**	**26 – 35**	**11**	**36 – 45**	**7**	**46 - 55**	**5**	**56 - 65**	**2**	**66 upwards**	**0**



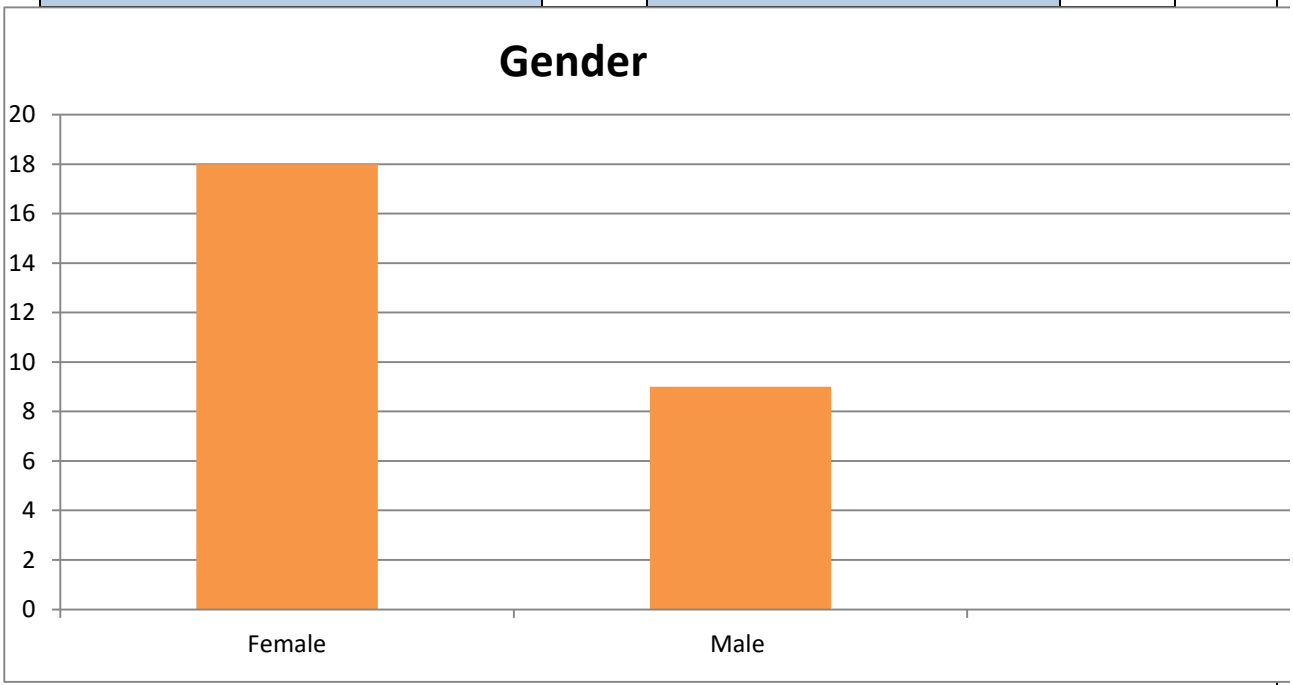
3. Income level *per annum*

R 0 - R 99 000	5	R 100 000 – R 499 000	8	R 500 000 – R 799 000	5	R 800 000 – R 1,199 million	6	R 1.2 million > above	1
Not stated	2								



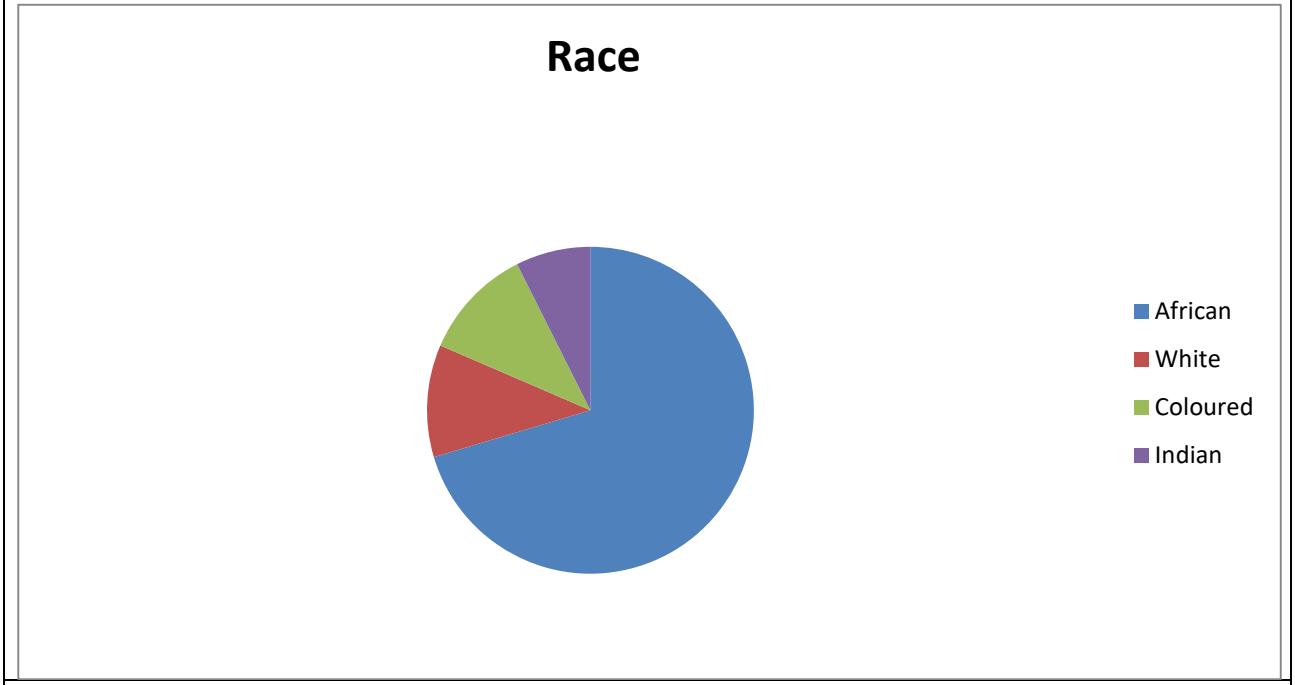
4. Gender

Female	18	Male	9



5. Race

African	19	White	3	Indian	2	Coloured	3	other	



6. Location

- **21 Pretoria**
- **3 Johannesburg**
- **1 Bloemfontein**
- **1 Durban**
- **1 Gauteng (unspecified)**

7. What Alternative Dispute Resolution (i.e., ADR) forum or process do you use when faced with a legal problem?

- **CCMA**
- **Mediation x 14**
- **Mediation and negotiation**
- **Mediation and arbitration**
- **None x 6**
- **Elders and Headmen**
- **Public Protector**

7.1. Did you find ADR cheaper/more expensive as compared to the formal court process?

Cheaper	**19**	**Expensive (arbitration is expensive)**	**4**	**None**	**6**	**Additional Info**	**Lengthy process**	

8. In your opinion, should everyday South Africans be provided with a greater chance to represent themselves in our courts, by increasing the power of certain smaller courts for this purpose, or are legal experts necessary in most legal matters?

Answer	Comment
Yes	• **Informal/ inquisitorial**
Yes x5	• **No further comment**
Yes	• **South Africans should be afforded an opportunity to self-represent from the first instance**
Yes	• **Only if they are well informed of their rights**
No x3	• **They must be represented by legal experts**
Yes x2	• **Litigants must be given a chance**
	• **Entities should be provided more resources** • **Courts must be more accessible to every South Africans** • **Legal aid and law clinics should assist**
Yes	• **Increase jurisdiction of smaller courts for easier cheaper access to courts, however, some matter will need legal expertise**
No	• **Smaller courts will be than people representing themselves so that people take control of their rights**
Yes	• **The public should be given a chance to represent themselves but ensuring that no one is prejudiced, they must be on equal footing.**
Yes /No	• **South Africans should have a choice to represent themselves, however, when persons represent themselves, this will affect the income of legal practitioners**
Yes x 4	• **Only when matters are too complex, they should have legal representation**
Yes	• **Strengthen the lower courts to make justice more accessible**
Yes	• **Small claims court and tribunals**
Yes	• **Needs to provide legal education to south Africans**

9. Have you ever been involved in court proceedings?

9.1 What type of legal matter were you faced with?

Answer		What type of legal matter were you faced with?
Yes		• **Prefer not to state**
Yes		• **Attachment of property** • **Dispute with an employer**
Yes		• **Urgent application**
Yes		• **Criminal/assault x2**
Yes		• **Protection order**
No		• **(not litigious) But had a matter that required legal expertise (administration of the estate)**
Yes x2		• **Labour matter**
Yes		• **Bail application**
Yes		• **Inheritance dispute**
Yes		• **Unfair labour dispute**
Yes		• **Adoption matter**
Yes		• **Civil**
No	**12**	

9.2 How much money did you spend in dealing with the matter?

Comment
• **Prefer not to state**
• **More than R100 000**
• **None x2**
• **R30 000**
• **R500 for consultation and +/- R1700 to settle the matter**
• **R800 for urgent application**
• **R20 000**
• **R5000 for bail**
• **R37000 for inheritance dispute**
• **R25000 labour dispute**
• **self – considering using legal insurance**
• **R90 000 for adoption matter**
• **Lost count of money spent**
• **R250 000 labour dispute (18 months to solve)**

9.3 Did you get the outcome that you had hoped for?

Answer	Comment
Yes x3	
No x3	• **The matter remains unresolved**
Yes	• **Attachment settled out of court**
Yes	• **Include legal education in schools**
Yes	• **Not found guilty**
No x3	
Yes	• **Bail granted**
No	• **Adoption not granted**
No	• **Moved from pillar to post**
No	• **Labour dispute**

9.4 How long did the matter take to get finalised?

Comment
• **2 months**
• **Do not engage engaged legal representatives cannot afford them; does not qualify for legal aid and pro bono**
• **A few weeks**
• **Close to two years**
• **Since 2013 still unresolved (administration of the estate)**
• **24 hours for an urgent application**
• **One day for a protection order**
• **6 Months**
• **1 year for a bail?**
• **6 months estate matter/inheritance**
• **More than a year for a labour dispute**
• **18 months for adoption matter** •
• **4 years later and the matter was struck off (civil)**
• **18 months labour dispute**

12 When faced with a legal matter how do you fund the legal representation?

Comment	
• **Self x12**	
• **Self-paid in instalment**	
• **Law Clinic**	
• **Negotiate payment by way of instalment**	
• **Legal insurance**	
• **Getting a loan**	
• **FNB Law on-call (legal insurance)**	
• **Pro Bono Counsel**	
• **Family assisted with costs**	
• **Made a loan against immovable property**	
• **Loans and savings**	
• **Self except in CCMA matters**	

13 In your opinion are legal fees affordable?

Comment
• **No x 18**
• **No; lawyers charge a lot and costs are not explained**
• **Yes; problem is that legal practitioners exaggerate fees**
• **Yes, if you are a member of legal insurance**
• **Only for the rich x2**

13.1. If legal fees are not affordable then what can be done to promote access to legal services for Middle-income users?

Comment	
• **Mandatory mediation x4**	
• **Allow middle-income to qualify for pro bono and legal aid and pay reduced fees** • **Alternatively, legal representatives should lower their fees**	**x5**
• **Give free legal services**	

• **Mandatory pro bono services by all legal practitioners**
• **Allow legal aid and law clinic to cover**
• **Legal fees should be regulated in line with the public's affordability**
• **More Legal clinics established across the country**
• **Regulate fully the tariffs/fees lawyers charge x2**
• **Access to information, the more middle-income group know of the available services**
• **Publish different lawyers' quotations of legal fees online and clients can choose**
• **Have a means of subsidising the middle**
• **Expand current insurance cover such as UIF and pension fund to automatically cover employees and family disputes**
• **Access to justice through support and training at Magistrate court level and tariff for attorney-and-client**
• **Introduce more legal aid offices, introduce an insurance fund for middle-income and mediation**
• **Mediation**
• **Technological advancement to assist self-representation**
• **Insurance; the government subsidy**

14 In your opinion, does Legal Aid SA adequately address the needs of South African's in terms of broadening access to justice?

Answer	Comment
No	• **Financial means should not be the determining factor**
No x5	• **Does not assist those above the threshold**
Yes x2	• **Provides free legal services**
No x2	• **They should deal with all legal issues**
No x5	
No	• **Legal aid needs to give their all in offering legal services, most clients in criminal matters end up in prison and with civil matters, the client doesn't get the anticipated outcome.**
	• **Legal Aid is one of the biggest law firms that afford indigent people access to courts. However, their requirements for admission as a client are very restrictive and middle-income earners are excluded from assistance in most instances.**
	• **Depends on the bands people use or pay for**
No	• **They have inadequate personnel to cover all the courts in the country.**
No	• **Members of the community do not have confidence in Legal Aid South Africa and think it is aimed at assisting in** • **their conviction, especially in a criminal case.**
No	• **There is still a lot to be done: needs quality of services, more training of the attorneys**

Yes	• **Only for those who fall within the means test**
Yes	• **However, there are funding issues that need to be looked into**
No x2	• **The workload; lack of capacity and accused convicted due to poor representation**
Yes/no	• **Yes, for criminal and no for civil**

Annexure F: Fee parameters for counsel acting on the instruction of the State

No. of years after completing pupillage	Fee parameter	No. of years as silk	Fee parameter
0-1 yrs.	R900p/h; R9000p/d	0-1	R2050p/h; R20500p/d
1-2 yrs.	R950p/h; R9500p/d	1-2 yrs.	R2150p/h; R21500p/d
2-3 yrs.	R1000p/h; R10000p/d	2-3 yrs.	R2250p/h; R22500p/d
3-4 yrs.	R1050p/h; R10500p/d	3-4 yrs.	R2350p/h; R23500p/d
4-5 yrs.	R1100 p/h; R11000p/d	4-5 yrs.	R2450p/h; R24500p/d
5-6 yrs.	R1150p/h; R11500p/d	5-6 yrs.	R2550p/h; R25500p/d
6-7 yrs.	R1200p/h; R12000p/d	6-7 yrs.	R2650p/h; R26500p/d
7-8 yrs.	R1250p/h; R12500p/d	7-8 yrs.	R2750p/h; R27500p/d
8-9 yrs.	R1300p/h; R13000p/d	8-9 yrs.	R2850p/h; R28500p/d
9-10 yrs.	R1350p/h; R13500p/d	9-10 yrs.	R2950p/h; R29500p/d
10-11 yrs.	R1450p/h; R14500p/d	10-11 yrs.	R3050p/h; R30500p/d
11-12 yrs.	R1550p/h; R15500p/d	11-12 yrs.	R3150p/h; R31500p/d
12-13 yrs.	R1650p/h; R16500p/d	12-13 yrs.	R3250p/h; R32500p/d
13-14 yrs.	R1750p/h; R17500p/d	13-14 yrs.	R3350p/h; R33500p/d
14-15 yrs.	R1850p/h; R18500p/d	14-15 yrs.	R3450p/h; R34500p/d
15-16 yrs.	R1950p/h; R19500p/d	15-16 yrs.	R3500p/h; R35000p/d

16-17 yrs.	R2050p/h; R20500p/d	16-17 yrs.	R3550p/h; R35500p/d
17-18 yrs.	R2150p/h; R21500p/d	17-18 yrs.	R3600p/h; R36000p/d
18-19 yrs.	R2250p/h; R22500p/d	18-19 yrs.	R3650p/h; R36500p/d
19-20 yrs.	R2350p/h; R23500p/d	19-20 yrs.	R3700p/h; R37000p/d
20-21 yrs.	R2450p/h; R24500p/d	20 and more	R3750p/h; R37500p/d
21-22 yrs.	R2550p/h; R25500p/d		
22-23 yrs.	R2650p/h; R26500p/d		
23-24 yrs.	R2750p/h; R27500p/d		
24-25 yrs.	R2850p/h; R28500p/d		
25-26 yrs.	R2950p/h; R29500p/d		
26-27 yrs.	R3050p/h; R30500p/d		
27-28 yrs.	R3150p/h; R31500p/d		
28-29 yrs.	R3250p/h; R32500p/d		
29-30 yrs.	R3350p/h; R33500p/d		

Annexure G: Basis for Charges for Court Fees and Lawyers' Fees[13]

Country	Fees arranged between lawyer & client	Fees for cost-shifting purpose: tariffs
Austria	These arrangements can detract from the tariff system, but in practice, the Autonomous Fee Schedule, used as guidance for agreements, tends to use the Act.	Tariff system established by the Lawyers' Fees Act.
Australia	Fees are freely agreed upon between lawyer and client (conditional fee agreements are possible, also including an uplift of up to 25% of base costs. The fees are subject to control by statutory requirements of costs disclosure and by cost assessment.	There is a tariff system in the rules of Federal Court and state courts apart from New South Wales, where cost-shifting amounts are subject to cost-assessment. Fixed fees are item based.
Belgium	Hourly fees, or global fees with caps and success fees are common.	Tariff system, depending on the value of the case.
Bulgaria	The Bar Act and Ordinance stipulate that lawyers' fees can be freely arranged with the client.	No tariff system. Court awards cost to the winning party based on the actual agreed fees, as long as they are reasonable.
Canada	The fee depends on the location of the firm and the seniority of lawyers. Contingency fees are allowed	No tariff system. Loser pays rule applies to lawyers' fees, and the reasonably incurred and proportionate fees will be recovered, subject to the court's discretion.

13 Hodges C, Vogenauer S and Tulibacka M, *The Costs and Funding of Civil Litigation: A Comparative Perspective* 2010 Hart Publishing 114.

China	Normally hourly fees are agreed upon with clients between 3% and 10%. Fee tariffs are established on a local level: for instance, according to the *Shanghai Measure for Charge of Legal Services*, lawyers' fees are dependent on the area of law, urgency, case complexity and location of the law firm. They can be freely agreed upon, and any attempt of Bar Associations to set fee tariffs would be considered anti-competitive.	No tariff system. The court awards reasonable lawyers' fees, except in some patent, trademark or copyright or contract cases.
France	Lawyers are free to agree with clients, on an hourly basis or on a contingency fee (up to 25% of the claim) basis.	No general tariff system. Loser pays rule applies (costs and disbursements are either fixed by a tariff or assessed by the court.
Czech Republic	Agreements establishing a fee below the tariff set out by statute are not allowed. However, above this amount, the lawyers can freely agree on a fee with clients	Tariff system. The Regulation 404/2000 Coll. Prescribes rates for cost-shifting purposes, depending on the value of the case.
Germany	Either a fixed fee or an hourly rate can be applied in contractual arrangements, subject to the requirements of reasonability.	*Rechtsanwaltsvergütungsgesetz* (RVG)- Act on lawyers' Fees of 2004 regulates fees for cost-shifting purposes. Fees depend on the value of the case.
Denmark	Tariff system. Rates for cost-shifting purposes are established by the Administration of Justice Act and are dependent on the value of the case.	
Greece	Minimum fees for lawyers are established by statute.	No tariff system. The loser pays rule applies, although in practice the true costs are rarely awarded.
England and Wales	Hourly fees are most common. Fees depend on the seniority of the lawyer and the location of the law firm. They can be freely agreed with the client. Conditional Fee Agreements are quite common, with the uplift being a percentage of the hourly fee (up to 100%).	No tariff system. The loser pays rule is normally applied in practice, but it is subject to court discretion and the cost assessment rules are very complex. Normally the winner recovers up to 75% of costs.
Hong Kong	Lawyers normally charge on an hourly basis, and it is extremely rare for them to charge fixed or capped fees.	No tariff system. The loser pays rule applies.
Hungary	Freely established by agreement. Normally, hourly fees apply. Fixed fees are also used.	No tariff system. The loser pays rule applies.
Estonia	The fees are not determined by the law and vary greatly. The hourly fees are the most common.	No tariff system. Loser pays rule applies, and the court assesses costs to be awarded to the winner at the end of the proceedings.
Ireland	Freely agreed on hourly fees	No tariff system. How much is actually awarded to the winner is subject to the discretion of the court but in practice the winner would recover between 60 and 80% of the total fees.

Sweden	Lawyers are free to agree their fees with clients. Hourly fees are most common, and fixed fees are quite rare	No tariff system. Court normally awards costs to the winner, and all costs are awarded.
Switzerland	Fees can be freely agreed upon. Hourly fees are most common, although capped fees also occur.	Federal Supreme Court and each canton have their own fee schedule that sets forth what amount the losing party has to pay to the winning party for the latter's attorney's costs.
Japan	Lawyers can freely agree with their clients. Hourly fees are frequent than the initial fixed fee + a success fee on winning the case.	Parties pay their own lawyers' fees, apart from tort law claims where the loser pays rule applies.
Latvia	Lawyers freely agree to their fees with their clients. These can be done on an hourly basis, fixed fees or contingency fees (where no statutory limits are established, but normally the success fee is between 5% and 20%).	No tariff system.
Taiwan	The lawyers can charge: hourly, fixed fees or contingency fees (not in criminal or family cases). Lawyers are free to agree on fees with clients, and both hourly fees and contingency fees are common.	No general tariff system. Each party bears its own lawyers' fees.
USA		Each party pays its own costs unless otherwise directed by the court.
Lithuania	Lawyers can freely agree on the fee with their clients	A regulated cost-shifting system (no tariff as such), established by the Order of the Minister of Justice of 2004.
Netherlands	Lawyers can freely agree on the fee with their clients	Tariff system established by an informal but national standard used by all Dutch courts.
New Zealand	Lawyers can freely agree on fees with clients. Hourly fees are most common, and fixed fees are quite rare	No tariff system established by legislation, but courts started using daily recovery rates depending on the complexity of the case.
Norway	Lawyers are free to agree their fees with clients.	No tariff system. Court normally awards costs to the winner, and all costs are awarded.

Poland	Lawyers are free to agree on fees with their clients.	Tariff established by statute.
Portugal	Lawyers' fees, which can be freely agreed upon with clients, depend on the lawyer's experience and the specific issue at stake.	No tariff system. The winner recovers his lawyers' fees (determined according to equity).
Romania	Lawyers are free to agree on fees with clients on an hourly basis, cap them or agree on a conditional fee, although not as a percentage of damages awarded	The loser pays rule applies, but there is no longer any tariff system.
Russia	Lawyers are free to conclude fee arrangements with clients on an hourly basis or to agree on a fixed fee or a success fee	Loser pays rule applies, although success fees are not enforceable or recoverable.
Scotland	Lawyers agree on fees with their clients according to current market rates. Contingency fees are not allowed, but solicitors may agree to a success fee (maximum 100% of normal fee).	The loser pays rule applies, although it is subject to the court's discretion.
Singapore	Freely agreed on fees, with hourly fees increasingly popular. Contingency fees are unlawful.	Fees are fixed by the court.
Spain	Freely agreed fees: often based on the Bar Council rates; hourly or contingency fees are also popular	Bar Council establishes rates for cost-shifting purposes