LAW SOCIETY
OF SOUTH AFRICA

# SUBMISSIONS
# BY THE LAW SOCIETY OF SOUTH AFRICA
# ON ISSUE PAPER 36 REGARDING THE INVESTIGATION INTO LEGAL FEES – PROJECT 142

## INTRODUCTION

The Law Society of South Africa (LSSA) constitutes the collective voice of the approximately 30 000 attorneys within the Republic. It brings together the Black Lawyers Association, the National Association of Democratic Lawyers and provincial attorneys' associations, in representing the attorneys' profession.

The LSSA was conceptualized in 1996 and formally constituted in 1998. Therefore, the LSSA has participated in the negotiations in respect of the Legal Practice Act (LPA) since the beginning and has made contributions to each serious attempt of making this Act effective. The LSSA's approach is one of constructive engagement, wherein it embraces the progressive aspects of the Act and makes its opposition clear on those aspects that it considers to be regressive and neither in the public nor the profession's interest.

The LSSA is acutely aware and supportive of the need to ensure greater access to justice and access to legal services, particularly by persons who are poor and vulnerable, in order to give effect to the founding values and rights enshrined in the Constitution. These are the principles on which a transformed legal profession rest.

On 1 November 2018, when the LPA became operational, the LSSA's amended constitution also came into operation. In terms of its constitution, the LSSA's fundamental aims and objectives include to:

- promote on a national basis the common interest of members of the profession and the welfare of the profession, having regard at all times to the broader interest of the public whom the profession serves, and to endeavour to reconcile, where they may conflict, the interests of the profession and the public;
- safeguard and maintain the independence and integrity of the profession;
- promote legal aid and the accessibility of all to the law, the courts and any board, tribunal or similar institution;
- uphold, safeguard and advance the rule of law, the administration of justice, the Constitution and the laws of the Republic of South Africa; and
- strive towards the achievement of a system of law that is fair, just, equitable, certain and free from unfair discrimination.

# PART I

## 1. THE SOUTH AFRICAN LAW REFORM COMMISSION'S MANDATE

The South African Law Reform Commission's (SALRC) mandate is contained in Section 35(4) and (5) of the LPA, which provides that it must, within two years after the commencement of Chapter 2 of the LPA, investigate and report back to the Minister of Justice and Correctional Services (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 the members of the public;
c) the desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners;
d) the composition of the mechanism contemplated in paragraph (c) and the processes it should follow in determining fees or tariffs;
e) the desirability of giving users of legal services the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism contemplated in paragraph (c); and

f) the obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services.

In conducting the investigation referred to in subsection 35(4), the SALRC must 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).

## 2. COMMENT ON THE SALRC MANDATE

Section 9 of the Constitution of the Republic of South Africa provides:

*"Everyone is equal before the law and has the right to equal protection and benefit of the law".*

The fundamental responsibility to uphold Section 9 of the Constitution rests on the State and not on the private sector. It goes without saying that the system of justice maintained by the State needs to underpin and deliver this right. In civil litigation, the principle is applied in interpreting the law, but does not guarantee a litigant legal representation.

Access to legal services to those who cannot afford a legal practitioner is a human rights issue in relation to criminal prosecutions, but not in a patent dispute or corporate takeover bid. In between these two poles is a wide range of "circumstances" that may or may not demand addressing.

Thus the "circumstances" to be addressed in relation to legal fees will vary considerably, having regard to the nature of the services required and require to be identified and examined separately.

A system of state-funded legal representation in criminal matters already exists, which should be maintained and improved. The private profession can (and does) supplement this service. Further collaboration needs to be implemented (and maintained) between the organised profession and the State in order to expand the contribution already made by the profession to addressing this need.

The rights of children enunciated in Section 28 of the Constitution is another clear human rights issue that demands protection, as do the rights of women, in particular, to freedom and security of

person and to bodily and psychological integrity. Although this remains the primary responsibility of the State, there are various non-profit organisations that act as watchdogs for those rights. The organised profession continues to make a significant contribution to protecting those rights by way of *pro bono* services from members and/or in collaboration in test cases as part of their corporate responsibility program. The main cost factor in many of these cases relates to counsel's fees as well as to expert reports. Negotiations should be put in hand by the organised profession to access those services on a *pro bono* basis in appropriate cases.

Many of the rights enshrined in the Bill of Rights are upheld by way of civil litigation via the Contingency Fees Act, 1997, such as occupational health issues, environmental pollution, the right to adequate housing, the right of freedom and security of person. Here the private sector plays a large roll.

Other areas of concern are more administrative, such as administration of small estates and consumer issues and could be effectively addressed by expansion of the footprint of university law clinics as well as by the use of trained paralegals.

Further suggestions and remarks are contained in paragraph 3.4 below.

The LSSA is committed to being part of the solution and requires more time to fully identify and explore further aspects of legal fees and related circumstances in order to provide input. The LSSA is of the opinion that access to justice by members of the public can be achieved without further legislative interventions. Any legislation, rule or regulation which detracts from the independence of the profession or inhibits the right of a practitioner to freedom of contract is neither desirable nor lawful.

One of the aspects that the SALRC has to take into consideration in its investigation is the interest of the legal profession. Inasmuch that it is one of the objects of the LPA to broaden access to justice, we submit that the interest of the public is integral to that of the profession and *vice versa*.

## 3. ACCESS TO JUSTICE / ACCESS TO LEGAL SERVICES

### 3.1 The legal context

**Constitution of the Republic of South Africa**: Although the Constitution makes no express reference to the concept of 'access to justice', Section 34 thereof provides that 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. The rights recognised under the Constitution would be inadequate in the absence of Section 34[1].

**The Legal Practice Act**: The preamble of the LPA states that "*Access to legal services is not a reality for most South Africans.*" The LPA offers a number of instances on how access to justice can be broadened. Under sub-section 3(b), the LPA offers at least three possibilities, including by:

a) putting in place a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry;
b) measures to provide for the rendering of community service by candidate legal practitioners and practising legal practitioners; and
c) measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic.

The objects of the Legal Practice Council (LPC) are, amongst other, 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 LPC may also make recommendations to the Minister regarding legislative and other interventions to improve access to the profession and access to justice broadly and the Minister must thereupon

[1] Further examples of related rights are contained under sub-section 35 (2) which provides that: "*Everyone who is detained, including every sentenced prisoner, has the right- (a) to be informed promptly of the reason for being detained; (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly; to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly*." Further, sub-section 35 (3) provides that: "*Every accused person has a right to a fair trial, which includes the right- (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence; (c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay; (e) to be present when being tried; (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly*".

table that report in Parliament. The LPC may also provide financial support to non-profit organizations and institutions promoting access to justice for poor people.

The concept of a mechanism to determine fees chargeable by legal practitioners for legal services is introduced with the purpose of broadening access to justice, a concept which is not defined in the LPA.

### 3.2 How is access to justice defined?

The Organization for Economic Co-operation and Development (OECD), in its report entitled 'Legal Needs Surveys and Access to Justice'[2], states that "*Efforts to construct measures of access to justice must start from the understanding that access to justice is a multidimensional concept*." It has been suggested that the legal dimension of the concept of access to justice developed as an element of the fundamental principle that all people should enjoy equality before the law[3].

The OECD suggests that access to justice is broadly concerned with the ability of people to obtain just resolution of justiciable problems and enforce their rights, in compliance with human rights standards, if necessary, through impartial formal or informal institutions of justice and with appropriate legal support[4].

The LSSA agrees with the OECD's sentiment that "*In functional terms, this does not mean that use of legal services is necessary to ensure access to justice, only that appropriate services are available for those who are unable to achieve otherwise appropriate solutions to justiciable problems*."[5]

Access to justice relates primarily to legal needs that are not appropriately met. The OECD suggests that: "*A better and nuanced understanding of access to civil justice is crucial for developing more effective policies, models and financing*."

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2 Available at: https://www.oecd.org/governance/legal-needs-surveys-and-access-to-justice-g2g9a36c-en.htm. Published on May 31, 2019.

3 Access to justice in the South African social security system: Towards a conceptual approach, Mathias Nyenti, available at: http://www.saflii.org/za/journals/DEJURE/2013/44.html.

4 Legal Needs Surveys and Access to Justice, Published on May 31, 2019.

5 Available at: https://www.oecd.org/governance/legal-needs-surveys-and-access-to-justice-g2g9a36c-en.html. Published on May 31, 2019.

A multidimensional challenge requires a multidimensional solution. The OECD correctly states that: "*Access to justice extends beyond formal process to informal dispute resolution and, ultimately, to social justice and the distribution of welfare, resources and opportunity*." The OECD further avers that the definition of access to justice incorporates at least seven distinct dimensions:

- The substance of law
- The availability of formal or informal institutions to secure justice
- The quality of formal or informal institutions of justice
- The availability of legal assistance
- The quality of legal assistance
- The quality of outcomes
- Legal capability

In its report[6], released on 3 December 2014, the Australian government's Productivity Commission correctly concluded that there is no single solution to the issue of access to justice, and that a multi-faceted approach should be taken. It stated that *"… the notion of a civil justice 'system' is misleading. Parties can resolve their disputes in many ways, including through courts, tribunals and ombudsmen*".

A recent survey entitled: "Global Insights on Access to Justice: General Population Poll in 101 Countries Findings"[7] states that "*Most people do not turn to lawyers and courts. Less than a third (29%) of people who experience a legal problem sought any form of advice to help them better understand or resolve their problem, and those who did seek assistance preferred to turn to family members or friends. Even fewer (17%) took their problem to an authority or third party to mediate or adjudicate their problem, with most preferring to negotiate directly with the other party*." The survey further reveals that *"While results vary by country, this study nonetheless reveals that justice problems are ubiquitous. Approximately half (49%) of people surveyed experienced a legal problem in the last two*

6 https://www.pc.gov.au/inquiries/completed/access-justice/report. The scope of the investigation was to "*examine the current costs of accessing justice services and securing legal representation, and the impact of these costs on access to, and quality of justice*."

7 Produced by the World Justice Project and available at: https://worldjusticeproject.org/our-work/publications/special-reports/global-insights-access-justice-2019.

*years. While the prevalence and severity of problems varies by country, the most common problems relate to consumer issues, housing and money, and debt.*"

### 3.3 Access to justice and legal need

Although it is primarily the State's duty, and not the legal profession's, to ensure access to justice for all, the legal profession will do its part to contribute to this objective. Access to justice should not be conflated with access to legal services. The OECD offers the following key insights flowing from its survey on global legal needs:

a) Justiciable problems are ubiquitous across the globe, but are not randomly distributed across populations;
b) Legal problems are associated with particular social groups or stages of life;
c) Clear associations exist between disadvantage and justiciable problem experience;
d) The formal judicial system is marginal to the experience of justice;
e) When acting to resolve justiciable problems, people seek help from a wide range of sources, both formal and informal; and
f) Only a minority of people facing justiciable problems obtain assistance from a lawyer.

Legal services are but one of the mechanisms for the resolution of legal needs and according to the OECD, access to justice implies a wide range of government agencies and civil society organisations.

### 3.4 Access to justice in the South African context

The LSSA and the legal profession are committed to access to justice and legal services in the various spheres of its activities. These are the principles on which a transformed legal profession rest. The LSSA and its constituent members have participated in a number of projects aimed at broadening access to justice.

The late Dr A. M. Omar, as a former Minister of Justice, launched Justice Vision 2000 in September 1997. The document was the product of a long process of consultation amongst role players in the administration of justice sector. In 1994 the first Legal Forum on Crime

was held, and in the intermediary period there were two other legal forums, one on Legal Education and another on Access to Justice.

The LPC is now attending to a Charter to ensure the provision of legal services in an environment that is conducive to effective access to justice.

Recently, the LSSA successfully challenged the former President of South Africa where the Constitutional Court[8] emphasised the wide ambit of access to justice by stating "*The advancement of human rights and freedoms, the rule of law and a democratic government that is accountable are some of the foundational values of our democratic order. Our duty as a nation or the State is to protect and promote these values and the citizens' right of access to the Tribunal through state machinery. Our President lacks the authority to negotiate and sign away our fundamental and treaty right of access to justice and to potentially prejudice citizens of other SADC countries in that manner. To the extent that he purported to do so, his conduct is unconstitutional*."

Legal practitioners already serve the community in various ways. They give time to *pro bono* cases, or work free of charge or at reduced rates. They do *amico work*, provide services free of charge by law clinics, enter into fee agreements contingent upon success (contingency fee agreements) and preside over Small Claims Courts. These are all demonstrations of the profession's commitment to provide access to legal services and increasing access to the legal profession.[9] These interventions have been pursued, whilst taking into account the high levels of poverty and inequality. For example, the SALRC has in the past expressed the view that the Contingency Fees Act of 1997 is geared towards facilitating access to justice by allowing legal practitioners to bring their fees more into line with the needs of their clients.

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8 Law Society of South Africa and Others v President of the Republic of South Africa and Others (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018).

9 In similar vein, the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004) has been adopted by both the African Commission on Human and People's Rights and the UN Economic and Social Council. It constitutes a regional and international standard on legal aid. The UN Principles and Guidelines (2012) draws on many of the approaches and issues included in Lilongwe Declaration and was developed once ECOSOC, after recognizing Lilongwe, mandated the UN to develop international principles and guidelines on legal aid for criminal justice systems. It provides for a special role for lawyers: Lawyers have a duty to promote access to justice. Lawyers should provide legal aid on a *pro bono* basis. The organised bar should co-operate with governments and CSOs to ensure effective and equal access to legal services. The Judiciary should more pro-actively ensure that defendants have legal aid and unrepresented indigent accused are able to put their case.

It is of particular importance to distinguish very clearly between large and small law firms, as well as to show their role in advancing the very important principle of access to justice.

The so-called large law firms (more than 50 legal practitioners) constitute less than 10% of the law firms in the country. The smaller law firms constitute the bulk of law firms in South Africa – in excess of 75%. This is important for access to justice.

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

On the other hand, most big law firms, which take matters on that are quite different to those that small firms accept, have dedicated departments that assist many indigent persons and undertake public interest litigation.

***Pro bono* services**: One of the most direct ways in which legal practitioners extend access to justice to those most in need of it, is to take on cases on a *pro bono* basis. Before the advent of the LPA, it was compulsory for all attorneys to provide at least 24 hours per year of *pro bono* work and many have performed in excess of the expected hours. The advocates' profession had similar arrangements, albeit not mandatory. The LPA does not specifically provide for *pro bono* services, but the LPC has taken a policy decision that *pro bono* should be regulated. It called on legal practitioners to provide *pro bono* while the position is being regularized and the *pro bono* offices at the Provincial Councils remain operational.

Assuming that there are 30 000 legal practitioners, the vast majority of whom are not exempted from mandatory *pro bono* service, this translates to some 720 000 hours of free work per year.

Also refer to the comments in paragraph 8: *Pro bono as a mechanism for improving access to justice*.

**Small Claims Courts**: The Small Claims Court Act, No. 61 of 1984 (SCCA) was implemented in the context where there was a crying need for such a court. In *Chrish v*

*Commissioner- Small Claims Court- Butterworth and Others (774/2005) [2007] ZAECHC 114)* it was stated that "*in a South African small claims court many of the litigants will be poor, ill-educated and unsophisticated people*." The 2017/8 Annual Report for the Department of Justice and Constitutional Development indicates that for the 2017/18 financial year, 6 new Small Claims Courts were established, bringing the total number to 411. The report further states that *"Small Claims Courts offer members of the public a quicker and easier way of resolving disputes that involve amounts limited to R15 000* (now R20 000) *and they can do so without the need for a legal representative."* A total of 98 additional Commissioners were appointed during 2017/18 to preside in the courts. In addition, 148 new Advisory Board members were appointed to assist with the functioning of the courts. Many attorneys are serving as Commissioners at Small Claims Courts.

**Access to justice projects**: Legal practitioners also participate in several projects undertaken in collaboration with the professional bodies and stakeholders aimed at broadening access to justice, including:

a) The National Wills Week, where free wills are drafted for persons who have no wills, has become an institutionalized annual event.
b) The Access to Justice Week, implemented by the Department of Justice and Constitutional Development.
c) Previously, the LSSA initiated workshops in South African prisons for inmates, especially remand detainees, called Remand Detainees Project. The aim was to educate detainees on the plea bargaining system and the advantages thereof. The intention is to resuscitate this project.
d) The First Interview Scheme, which was a project where legal advice/consultation offered during the first half hour was done free of charge. The scheme worked on a rotational basis - members of the public were referred by the provincial Law Societies to a specialist attorney based in the town in which the client works or resides. The first free half hour consultation did not constitute *pro bono* work and participation was voluntary.
e) Co-operation with university law clinics.
f) The LSSA publishes information brochures and audio-visual material to raise awareness about relevant processes and consumers' rights. Information brochures include 'Your Labour Law Rights'; 'How to Access the Small Claims Court';

'Admission of Guilt Fines'; 'Applying for Temporary or Permanent Residence Visa'; 'Buying or Selling a House'; 'Deceased Estates'; 'The Consumer Protection Act', etc.

**Legal Aid South Africa**: It is important to acknowledge the role played by Legal Aid South Africa in regard to access to legal services. Currently there is almost universal access to lawyers in criminal matters, notwithstanding the budgetary challenges faced by Legal Aid South Africa. Access to justice can be vastly increased by enhancing Legal Aid South Africa. They should be properly funded to ensure that they can execute their mandate without undue challenges. The types of matters that they deal with should be extended. The means test should also be increased. This is said specifically because it is the responsibility of the State to ensure access to justice. A larger portion of the fiscus should be allocated towards funding Legal Aid South Africa.

### 3.5 Further interventions that could be devised to address the challenges in South Africa:

The LSSA believes that access to justice can be achieved in the following manner:

- Firstly, the provision of legal aid for the indigent. We have already suggested that the means test for Legal Aid South Africa and the *pro bono* means test should be increased.
- Secondly, access to justice for the "missing middle" can be enhanced by a discount for persons earning between identified income amounts, e.g. R12 500 to R25 000.
- Thirdly, as is the case in the National Credit Act and the Consumer Protection Act, the government and large corporates are not protected by the consumer legislation. They have bargaining power and hence have thresholds beyond which they are not protected in terms of such legislation. The same should apply to consumers of legal services. Therefore, Section 35 should not apply to matters where the client is an artificial person (the state, a trust, club or corporate body) or a natural person whose asset value or annual turnover exceeds an amount to be determined by the Minister from time to time.
- Non-South African citizens should also be excluded from the provisions of Section 35.

Many of the interventions proposed by the Australian Productivity Commission could also to good effect be implemented in the South African context, including:

- Providing legal education and legal information to the public (including self-help kits);
- Providing sufficient government funding for legal aid;
- Enhancing advice centers to provide free legal advice in minor matters;
- Encouraging the use of informal dispute resolution mechanisms and the use of ombudsmen and complaint bodies;
- Simplifying court processes to reduce costs and delays;
- Encouraging courts to manage their caseloads properly;
- Encouraging the use of technology to improve courts' performance; and
- Encouraging the use of paralegals and fast-tracking legislation regulating paralegals.

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.

The system can be simplified by reducing red tape and time wasting procedures. State entities should operate efficiently and swiftly (courts, Deeds Offices, Masters' Offices, access to state records for searches, etc.). All public records should be digitised for offsite access. Care should however be taken not to compromise fundamental legal principles and rights for economic reasons.

Efficient case management systems will expedite the narrowing of issues and provide for adverse cost orders every step of the way against the party in default. Such system should also provide for early access to adjudication of identified issues on which there can be no agreement or settlement. In some matters, despite the best will in the world, there is no alternative but adjudication.

A community service model to ensure that quality legal service is provided to the poor needs to be developed. Creative ways in which to increase the scope of legal service providers

should be considered, such as enlisting university students to assist with writing statements in police stations as part of community service.

The public should be educated to ensure that people have knowledge of their legal rights (the possibility of introducing legal rights education from high school level should be considered).

## 4. LEGAL FEES

The issue of fees has correctly been a subject of extensive discussions. One of the aspects that the SALRC has to take into consideration in its investigation is the interest of the legal profession. This would include aspects such as the commercial realities of the legal practitioner's practice. Legal services are rendered at considerable expense, which includes the costs of research, staff and other overheads. These are all necessary items required to provide sufficient access to justice. Coupled to that, are the increased responsibilities as a result of the LPA, including professional levies, legal practitioner fidelity indemnity fees, continuous professional development, professional interest membership fees, top-up insurance and auditors' fees.

Inasmuch that it is one of the objects of the LPA to broaden access to justice, we submit that the interest of the public is integral to that of the profession and *vice versa*. The promotion of the interest of the legal profession will promote a profession that has integrity, subscribing to the highest standard of service delivery and ethics. All of these are not only beneficial to the legal profession, but will promote the public interest.

It should also be taken into consideration that, in many instances, the legal practitioner's fee is but a fraction of the legal costs. For instance, in conveyancing matters the main costs pertaining to a property transaction involving a transfer of land relate to tax in the form of either transfer duty or value added tax, as well as municipal rates and taxes, agent's commission and so forth, while the conveyancer's fees represents a small percentage of the total costs (in many instances below 1% of the purchase price).

## 4.1 Legal practitioner and own client fee versus recovery of fees

Attorney-and-own-client fees are the fees and costs due to the legal practitioner by the client for the disbursements and services rendered by that practitioner to the client. Party-and-party fees are fees awarded by a court to a successful litigant to be recovered from the unsuccessful litigant(s), which will only represent a portion of the successful litigant's attorney-and-own-client fees.

The distinction between these two aspects are important in that the recovery of legal fees in litigation by a successful party is to a large extent regulated by statutory tariffs. The attorney-and-own-client fee is however to a large extent dependant upon the agreement between the legal practitioner and the client.

This distinction enhances access to justice in the sense that the successful party at least recovers a portion of the legal fees paid. This is however only so if the party-and-party (recovery) tariff is kept in line with the consumer price index.

As regards attorney-and-own-client fees, clients make a choice right at the outset to instruct a specific attorney. The recovery role is explained to them by the legal practitioner, for them to make an informed choice.

## 4.2 Litigious and non-litigious costs

The distinction between litigious and non-litigious costs is material, because the basis of the two types of legal work differ in essence. Therefore, for the sake of precedent, it is important that the distinction does not fall away, because it will have important implications for the public and legal practitioners.

The LSSA has no difficulty with the current structure regarding litigious tariffs, since these are recovery tariffs. However, it will be impracticable to apply a fixed tariff to non-litigious work such as commercial law matters (e.g. mergers and acquisitions), environmental law matters (e.g. environmental impact assessments and due-diligence investigations) and intellectual property law matters (e.g. patents and designs), as this will not be a case of comparing apples with apples. Whilst litigious work follows legal options within a procedural

framework, the variables in respect of non-litigious work are vast. In addition, non-litigious work covers a wide variety of disciplines.

### 4.3 Fixed tariffs

The LSSA believes that there can be no universal tariff for all legal practitioners, for the following reasons:

4.3.1 The nature of law firms, their geographical spread and the socio-economic factors in a specific area have a direct impact on their fee structure. Each area has its own costs of living and overheads. Salaries and rentals have reached different levels. Therefore, it will be unsuitable to apply a uniform tariff across all socio-economic areas. This will result in some practices running at a loss and clients in poorer areas still not being able to afford legal practitioners' fees.

4.3.2 Fee structures are primarily based on the clients that a particular law firm assists. Large law firms generally service corporate clients, where the exposure of the legal practitioner is substantial. High tariffs are therefore not disproportionate to the complexity of the work.

4.3.3 Some fields of law are more complicated than others and highly technical, requiring specialized knowledge and skills. Examples of these are in the areas of intellectual property law, conveyancing and notarial work, which require a legal practitioner to pass an examination in addition to the admission examination. Should fixed tariffs be implemented, they would have to be sector-specific, which would be untenable, taking into consideration all the disciplines that would have to be covered.

4.3.4 The question arises as to what criteria would be used to determine a single tariff for all matters, taking into consideration the vast field that would have to be covered. Criteria such as importance, complexity, expertise all have their own challenges. Importance has degrees of relativity, as all matters dealt with by legal practitioners are important to the clients they serve and require proper professional care and attention. As for seniority and experience, a relatively junior

practitioner may not have general experience across the board, but he or she may have acquired, because of the nature of the work he or she has been doing, considerable experience in a limited field. The volume of work and time spent are also arbitrary criteria, as an inexperienced practitioner may or may not take longer than an experienced one to perform a particular task.

4.3.5 There should be equality of application. If tariffs are implemented, legal practitioners will be limited in their fees. The question therefore arises whether persons who do not fall within the definition of "legal practitioner" in the LPA will be bound by the tariff. If not, this would be iniquitous and will result in an unequal application of the law as those such as banks, accountants, financial advisors, immigration "lawyers", letting agents, business brokers and the like, falling outside the definition of "legal practitioner", will be free to charge what they like for non-litigious work that is not reserved for legal practitioners. There is an inherent unfairness in that.

4.3.6 South Africa is a free market economy wherein members of the profession are striving for excellence in the interest of the public. Introducing a mechanism that results in the capping of fees for legal services, may encourage many legal practitioners to leave the profession to set up businesses outside of the parameters of the LPA, leading to a loss of expertise and experience in the profession and lack of proper regulation of such service providers. In addition, there is a constitutional right of practitioners to practice their profession. Further, there is the principle of freedom of contract, which should apply. Implicit in this should be the legal practitioner's right to refuse to accept an instruction.

4.3.7 While legal practitioners have an enduring interest to ensure access to justice, their capacity to earn a living should not be limited. There is need to balance unreasonable expectations on the one side and sound practice management and fair reward on the other.

4.3.8 Rather than fixed tariffs, the LPC as the regulator of the legal profession, should have systems in place to ensure that there are effective mechanisms available to members of the public who may believe that they have been treated

unprofessionally or have entered into an unenforceable fees agreement and/or have been over-charged or over-reached. Systems are already in place to deal with such complaints. Litigation conducted in terms of the Contingency Fees Act, 1997, is closely supervised by the High Court, which is the ultimate adjudicator in any dispute over legal costs. The LPC is in the process of finalising Rules to be promulgated to further regulate litigation conducted in terms of the Contingency Fee Act, 1997.

4.3.9 It is submitted that sufficient mechanisms already exist and are being developed by the LPC.

4.3.10 Although we understand that Section 35(1) has been suspended, it is clear with regard to the interim measures to be adopted pending the investigations contemplated in Section 35(4), that a tariff is contemplated. This deserves a brief discussion. The suspended sub-section 35(1) refers to the following: *"… fees in respect of litigious and non-litigious legal services rendered by legal practitioners, 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 Courts of Law …"* It will thus be necessary to amend the LPA if a guideline is to be prescribed rather than a tariff as an interim measure. Bearing in mind that the SALRC has only two years to make recommendations it seems counter-productive for the Rules Board to have to make formal tariffs which may, in the end, not be supported by investigations undertaken by the SALRC. What will happen to all the "contracts" entered into during that period, many of which will endure for more than two years? Will they be adjusted to take into account the new legislation/regulations? Several tariffs already exist in terms of the Rules of Court and various pieces of legislation. It is necessary to have a balance between the interest of client and the legal practitioner and to this end, fee guidelines could serve a useful purpose. It is proposed that the LPC introduces a suitable mechanism to assess non-litigious legal services. The point has been made that there is no one-size-fits-all tariff that can be devised. Nor is it possible or practical (particularly in litigation) for a globular figure to be "estimated".

### 4.4 Fee guidelines – A mechanism for determining fees

An important issue to be considered by the SALRC is the desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners. The LSSA is of the view that *Fee Guidelines*, in all areas of law, will offer a desirable mechanism to determine fees and tariffs payable to legal practitioners by their clients. We suggest that it will be appropriate and equitable to issue fee guidelines based on certain factors, which would allow the parties to deviate from such guideline in justifiable circumstances. A fee guideline is a protective measure and acts as a yardstick to determine a reasonable fee. In application, the fee guidelines could be adjusted according to the criteria set out in Section 35(2) of the LPA.

The LPC will be in the best position to issue these guidelines, taking into account the above criteria, as well as the geographical spread of firms and socio-economic factors in the specific area. The LPC possesses sufficient expertise and practical experience to design fair, just and equitable fee guidelines. As regards the perception that '*the legal profession sits as judge and jury in its own members' affairs*' (page 2 of Issue Paper) we recognise that such perception could have been valid before the advent of the LPA. However, the LPC is a purely regulatory body whose composition 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. Accordingly, it is well comprised to look after the interests of the public. This is also consistent with the legal mandate of the LPC, being 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.

Further, in order to avoid competition issues, it would be appropriate for the LPC to be the body to prepare fee guidelines.

Sector-specific guidelines could be considered in certain instances. As an example, in the case of conveyancing matters, the consumer public benefit greatly from guidelines, because they give both the public and conveyancers an idea of the costs involved in conveyancing transactions. They also fulfil an important function as the purchaser pays the conveyancer's fees, whilst the seller usually appoints the conveyancer.

Members of the public should also be educated about their right to negotiate fees or "shop around".

The LSSA is for the reasons set out in paragraph 4.3 opposed to fixed tariffs and in favour of fee guidelines.

### 4.5 Fee assessments and combating overreaching

The public must be protected from over-charging. Checks and balances need to be 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 by a number of court judgments. The relevant disciplinary action is taken, even to the level of applications to the High Court for striking.

We submit that the LPC is best placed to determine the reasonableness of fees through its assessment committees. The assessment committees will have sight of the specific file, making it possible for them to determine the matter vis-à-vis the matter at hand. All the relevant factors, including geographic and socio-economic factors can be taken into consideration.

Paragraph 10 of the Code of Conduct published pursuant to the LPA, provides the following:

"*10.1 Any disputes about the quantum or rate of fees charged by a legal practitioner or about work done by and value received from a legal practitioner in relation to non-litigious matters shall be subjected to a fees enquiry to be conducted by an authorized sub-structure of the Council.*

*10.2 An onus shall rest on the legal practitioner to justify the reasonableness of fees charged and that the work charged for was done and was reasonably necessary to be done, or was done at the request of the client or of the instructing attorney, as the case may be."*

The quantification of legal fees should always take into consideration not only the guidelines, but also:

- The amount and importance of the work;
- The difficulty, complexity and novelty of the services rendered;
- Skill, labour and specialised knowledge;
- Responsibility involved;
- The number and importance of documentation perused or drafted;
- The circumstances in which services were rendered;
- Place where services where delivered;
- Time spent by a practitioner;
- The amount of money and property value;
- The importance of the matter to the client;
- Quality of the work done by the practitioner;
- Possible over-caution, negligence or mistakes on the part of the legal practitioner;
- The seniority and experience of the practitioner.

A client who is dissatisfied with the outcome of an assessment, can refer the matter to the Ombud.

### 4.6 Reasonable remuneration vs overreach

The Constitutional Court, in the matter of *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another (CCT 76/12) [2012] ZACC 17*, summarized, in our view, the guiding principles pertaining to fees for legal services when it stated:

"*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 goes beyond what the market can bear. Many counsel who appear before us are accomplished and hard-working. Many take cases pro bono, and some in addition make allowance for indigent clients in setting their fees. We 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.*"

A few important principles emanating from the above paragraph:

a. Skilled professional work deserves reasonable remuneration;
b. Many clients are willing to pay market rates to secure the best services;
c. The legal profession owes a duty of diffidence in charging fees that goes beyond what the market can bear; and
d. Courts have the inherent jurisdiction to fix fees in circumstances of overreach.

The Court also summarized the key challenge in relation to the above principles: "*It is the concept of what it is reasonable for counsel (the legal practitioner) to charge that this judgment hopes to influence*."[10]

The LSSA and its constituent members do not condone any abuse of people or legal processes, including overcharging clients. However, the LSSA is of the view that skilled legal practitioners deserve reasonable remuneration, but must under no circumstances overreach.

As stated in *Masango and Another v Road Accident Fund and Others* (2012/21359) [2016] ZAGPJHC 227: "*An attorney renders professional services and therefore charges professional fees for such services rendered. An attorney cannot charge for anything other than the services he or she has actually rendered."*

The Court stressed that, in dealing with unreasonable and unlawful fees that *'the professional controlling bodies* [Legal Practice Council] *must in the interest of the good image of their respective professions take steps to weed out such practices, and if*

[10] This is, for example consistent with the Rules of Professional Conduct for lawyers in Canada, which provides: "*Reasonable Fees and Disbursements 3.6-1 A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion. 3.6-1.1 A lawyer shall not charge a client interest on an overdue account save as permitted by the Solicitors Act or as otherwise permitted by law. A number of factors have been offered for consideration to determine what is fair and reasonable, including: [1] What is a fair and reasonable fee will depend upon such factors as (a) the time and effort required and spent, (b) the difficulty of the matter and the importance of the matter to the client, (c) whether special skill or service has been required and provided, (c.1) the amount involved or the value of the subject-matter, (d) the results obtained, (e) fees authorized by statute or regulation, (f) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency, (g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment, (h) any relevant agreement between the lawyer and the client, (i) the experience and ability of the lawyer, (j) any estimate or range of fees given by the lawyer, and (k) the client's prior consent to the fee*." https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/chapter-3.

*necessary punish the offending conduct, whenever they are found to exist.'* To this extent, the LPC has the exclusive mandate to regulate legal practitioners. This is confirmed in Section 3 of the LPA, which captures, amongst other, the following purposes:

a) Section 3(c) – 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 any accountable, efficient and independent legal profession;
b) Section 3(f) – to provide a fair, effective and transparent procedure for the resolution of complaints against legal practitioners and candidate legal practitioners; and
c) Section 3(g) – to create a framework for the development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners.

## 5. FEE AGREEMENT AND WRITTEN COST ESTIMATE

The LSSA believes that the principles of freedom of contract underscore the need to allow the parties to enter into agreements. Section 35(3) provides that "*Despite any other law to the contrary, nothing in this section precludes any user of litigious of non-litigious legal services, on his or her own initiative, from agreeing with a legal practitioner in writing, to pay fees for the services in question in excess of or below any tariff determined as contemplated in this section."*

The meaning of this saving provision is subject to debate, in particular the phrase *"….on his or her own initiative"*

Thesaurus synonyms for this phrase are "deliberately, freely, spontaneously, willingly and/or intentionally".

The interpretation of this clause, although perfectly compatible with the wording, renders the clause meaningless for the very reasons advanced. This section should be reworked so as to clearly spell out its meaning to clearly allow for the freedom of contract.

The point has been made that there is no one-size-fits-all tariff that can be devised. Nor is it possible or practical (particularly in litigation) for a globular figure to be "estimated".

The LSSA has the following serious concerns with the provisions regarding the fee agreement and cost estimate:

i. When closely interpreting Section 35(3), it appears that only the USER, in other words the client, can negotiate an increased or decreased fee. In terms of this subsection, it must be on the *client's own initiative* and cannot be proposed by the legal practitioner. This is impractical and unfair. How can it be expected that a lay person must on their own accord negotiate fees? An agreement can only be reached if the two parties involved can *both* negotiate. Furthermore, as this section currently reads, the legal practitioner will not be allowed to offer to act at a lower tariff, or even on a *pro bono* basis.

   It is highly unlikely that corporates such as banks will offer to pay higher fees. The trend is quite the opposite.

ii. From Section 35(3) and 35(4)(f), it is clear that all legal practitioners will have to enter into a written mandate with each client.

   Furthermore, Section 35(7) determines that when an attorney or a Section 34(2)(b) advocate first receives instructions, they must provide the client with a cost estimate in writing. The section is prescriptive as to what information shall be contained in the cost estimate and if the practitioner fails to comply, not only is the client not required to pay until the LPC has made a determination as to the amounts to be paid (Section 35(11)), but the practitioner is also guilty of *misconduct* (Section 35(10)).

   While the underlying idea of a fee agreement linked to a cost estimate is a good one, the way in which these sub-sections are framed presents some problems. Firstly, the duty is on the attorney to provide the cost estimate and the referral advocate is left out of it. Secondly, no two matters are alike and the circumstances in a matter can change. Interlocutory applications, experts, etc, which were not envisaged at the start of the matter, could be required. The same holds true for non-litigious work, where the work does not always follow a specific process. In term of the subsection, the estimate needs to include disbursements, and this could also change as the matter develops. A global cost estimate is impractical and unreasonable, and it will be unprofessional to handle individual and unique matters on this basis. The question is where the litigation process starts and where does it end. For

example, does it end at judgment or execution or taxation or appeal and, if at appeal, at which stage of the appeal? To the High Court, Supreme Court of Appeal or Constitutional Court?

Also, charging an all-inclusive fee will for example lead to overcharging in a matter where only six hours were spent and undercharging in a matter where fifty hours were spent. This will create a situation where specific care and attention is not given to each individual matter. A time basis for a meaningful estimate is the only fair platform for the practitioner and client.

iii. In terms of Section 35(7), one of the aspects to be contained in the cost estimate is *"(c) an outline of the work to be done in respect of each stage of the litigation process, where applicable*". Again, it is impossible to give an outline of the work, as every matter differs. At best, it can be agreed that interim accounts will be rendered to the client on the agreed tariff in order to keep the client up to date of the fees and expenses in the matter.

Most importantly, in South Africa, unlike in jurisdictions where budgets for trials are required, matters are not always being heard on dates allocated to them. In the context of South Africa, it will be an impossible task for a legal practitioner to prepare a budget, unless there is a guarantee that the matter will proceed on the date allocated to it.

The only way in which a legal practitioner can practically implement the all of the above is by entering into a written agreement or mandate that sets out the practitioner's hourly rate and then meet at intervals, e.g. 6 months, to discuss the finances with the client.

*iv.* Should this provision remain, a new subsection should be inserted, reading: "*A legal practitioner and client may agree that the cost estimate given will only be for a particular stage or task in the process or services to be provided and that other estimates will follow with regard to other services."*

*v.* Section 35(8) provides for a verbal explanation to the client, in addition to the written cost estimate, failing whereof the client may refuse to pay (fees and disbursements) until the LPC has made a determination. There is a danger that this section can be utilised as a delaying tactic by clients to pay their bills. Furthermore, it might not be possible to obtain the client's written acceptance before proceeding with the matter (e.g. in bail applications). It is unclear

whether the cost estimate and explanation must be given to recurrent clients *in each and every case,* no matter who the client is and how sophisticated they are. The sub-section should be amended so that the cost estimate and explanation should not be given recurrently.

vi. The consequences of not complying with these subsections appear to be unduly severe, including the potential of being found guilty of misconduct, which is a very serious offence.

Section 35(8), as read with Section 35(11), is unworkable and could prove disastrous for practitioners. It provides the client with a convenient device to delay paying whilst the practitioner is obliged to account to the client for money recovered. By the time that the LPC adjudicates on what may very soon become one of many "complaints" the money may have been spent, leaving the practitioner with no recourse to recover fees and disbursements. At the very least, the section should provide that the total award be held in trust pending adjudication of the complaint.

vii. Sub-section 35(11) creates further problems in matters where deposits were paid to the legal practitioner and already debited as fees. It should thus either be deleted or substantially amended.

## 6. THE STATE AND LEGAL FEES

The Minister may, in terms of Section 35(6), determine maximum tariffs payable to practitioners who are instructed by the State. This can create a disincentive to do work for the State. The regulations appear to be an attempt to reduce the financial burden on the State. If remedies such as taxation and assessment are applied correctly, the State will not be overcharged. It is nevertheless essential for the State to negotiate fees with its own service providers. This is a contractual issue between the State and its service providers.

Further, we submit that this provision might breach the equality clause in the Bill of Rights, in that it gives protection only to the State and not smaller organisations or members of the public. It could create an inequity regarding other legal service providers not providing to the State. This is not in terms of the law of general application and thus cannot be justifiable. The State should be treated as any other client.

## 7. THE COMPETITION PERSPECTIVE

In a market based economy, the laws of supply and demand should set the price. The question is whether public policy requires that Government regulates maximum prices (or price "caps"). This ordinarily happens only in the case of monopolies, where normal competitive forces are unable to drive down prices to a competitive level. Legal services cannot be regarded as monopolistic. It is therefore not a traditional area which requires Government intervention. In considering whether the public policy on increasing access to justice requires maximum price regulation, the variety of factors set out in paragraph 4.3 above should be considered. In addition, the following should be taken into account:

a. From an economic perspective, price cap regulation is not generally desirable unless the suppliers of goods or services make a positive profit. If not, the suppliers will refuse to produce (or produce less or at lower quality) or simply leave the market. In the case of legal services, we have indicated elsewhere in this submission that the effect of price caps of non-litigation services may lead to attorneys simply leaving the profession and rendering their services as non-regulated legal consultants. Alternatively, they may not invest the necessary time and skill in the execution of legal tasks if they are not adequately rewarded. This would clearly be disadvantageous to consumers of legal services. The difficulty therefore is to determine what a "positive profit" is, that would prevent this from occurring. Legal services are not commoditized products – they are immensely complex depending on the nature of the legal problems encountered which require legal advice. There are a wide array of specialities (e.g. tax, intellectual property, mergers and acquisitions, professional negligence, competition law, etc.), educational requirements (e.g. patent agents, conveyancers), practice forms (one person; medium sized; large commercial; niche specialised, etc.) and practice locations (e.g. rural areas, smaller towns, cities, etc.). Accordingly, it would be well-nigh impossible to determine a "one size fits all" price cap that ensures reasonable profitability.

b. The body setting price caps is unlikely to have enough information to set the caps optimally, given all the variables mentioned above. In addition, in an inflationary environment where costs increase regularly, the price caps would have to be adjusted continuously. But

because the determination of the price caps is so complicated, this will take a long time, with the result that the intended regulation would not have the desired outcome at the desired point in time or at all. As indicated above, if the price is set too low, certain attorneys/advocates will go out of business or depart the profession (which will reduce competition in the market to the detriment of the consuming public and access to justice). On the other hand, if the price caps are set too high, all legal practitioners would tend to charge at the maximum price, which would undermine the objective of the Government intervention.

c. Finally, the cost of the price cap regulation and who should carry it would have to be considered. Since the exercise is so complex and requires in depth expertise and detailed economic and accounting analyses on an ongoing basis, the regulatory burden would be high. A vast, highly qualified staff complement would have to be appointed for this task. This has proven to be the case in other industry regulators which fix maximum prices (such as NERSA, DOE and ICASA). The cost of this would presumably be passed on to legal practitioners, who in turn would pass this on to their clients. This would have the opposite effect of increasing access to justice.

d. The above factors have in the past led to Competition regulators eschewing price regulation or, at the very least, reserving it for the most deserving cases like enduring state sanctioned monopolies.

e. Fee guidelines, as advocated in paragraph 4.4 above, would overcome some of these problems.

## 8. *PRO BONO* AS A MECHANISM FOR IMPROVING ACCESS TO JUSTICE

The LSSA and its constituent bodies have engaged extensively on the issue of the form and content of *pro bono* services under the LPA. More recently, this comprised a stakeholder meeting[11], attended by members of the organised legal profession, private legal professionals and other interested parties. A task team was set up by the stakeholders to prepare a concept document on community service and pro bono, which was presented at five provincial consultative

[11] The National Stakeholder Engagement to inform Provincial Dialogues on Pro Bono / Community Service held on 18 March at the Protea Hotel OR Tambo Airport, Kempton Park.

dialogues held during 2017[12]. A report on Section 29 of the LPA – "Community Service and Pro Bono", was subsequently produced[13].

### 8.1 *Pro bono* legal services in South Africa

The provision of *pro bono* legal services should not be confused with *low bono* and contingency fee agreements. *Pro bono* legal services have always been regarded as legal services provided *free of charge and without payme*nt to those who cannot afford legal services.

In this regard, there are similarities and differences with the variety of mechanisms by which legal services are provided to indigent people on a no-fee paying basis like:

- *pro deo* (the system originally provided free defence to accused facing capital penalty offences. Over time practitioners were paid by the state and the system was absorbed into the legal aid system);
- *pro amico* (acting for friends or family for free); and
- *in forma pauperis* (the procedure in the High Court by which a litigant can apply for representation on a no fee basis.)

In more recent times, practitioners acting on a *pro deo* basis did receive a fee, albeit that this was often a reduced fee.

*Pro amico* and *in forma pauperis* mechanisms provide for the provision of legal services by practitioners free of charge and without payment.

### 8.2. Low bono legal services

*Low bono*, i.e. legal services offered at discounted rates, may well be a solution to broadening access to justice, especially for those who earn above the thresholds of the

[12] A series of consultative workshops was facilitated at Pietermaritzburg, Bloemfontein, Johannesburg, Cape Town, and East London from 11 to 19 October 2018.

[13] A Report on Section 29 of the Legal Practice Act 28 of 2014 – Community Service & Pro Bono. https://www.lssa.org.za/upload/files/General/Nadel%20Report%20on%20pro%20bono%20services%20%20pro%20bono.pdf

applicable means test. See e.g. the options noted on the website of the Washington State Bar Association in this regard[14].There could be creative solutions to broadening access to justice.

### 8.3 The means test

One of the crucial questions facing the provision of legal services is the fact that many South Africans find themselves in dire circumstances. The *pro bono* means test has not changed in recent years. There is thus very little difference between this threshold and that used by Legal Aid South Africa.

The current means test for Legal Aid South Africa was recently increased to take account of the fact that over time the threshold had not kept up with inflation. By way of illustration, a person's qualifying monthly earnings, after tax, must not exceed R7 400. However, the increase was far from adequate to allow for an appropriate increase in access to justice as contemplated in the LPA[15].

The LSSA believes that the *pro bono* means test should be increased to R10 000 and that Legal Aid South Africa's means test should be increased to R15 000. Legal Aid South Africa has a mandate from the South African Constitution to help the poor get tax-funded legal assistance.

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14: "Low bono service providers find many creative ways to provide their services, and the list of possibilities continues to grow as practitioners try out new models of service delivery. Some examples of low bono services include:

- Using flexible pricing models, including sliding-fee scales, flat fees, payment plans, third-party payments, even crowd funding;
- Unbundling services
- Increasing the efficiency of delivering common services, such as adopting back office technologies and appropriately delegating tasks
- Commoditizing certain services, including online service delivery, automated intake, publication of legal guides, self-help kiosks, and document automation for common documents
- Mindfully and creatively using clients' limited legal budgets, such as when crafting discovery requests
- Adopting a methodology of client counselling and litigation in which practitioners seek early and affordable resolutions when appropriate, even when it would be more profitable to engage in protracted conflict."

http://www.wsba.org/legal-community/sections/low-bono-section

15 A recent article summarised the increases as follows: "A person's qualifying monthly earnings, after tax, must not exceed R7,400, a 35% increase from the previous limit. For a member of a household, the household's monthly income, after tax, must not exceed R8,000, a 34% increase. If the applicant does not own immovable property, the value of their movable assets must not exceed R128,000, a 28% increase. If the applicant is a member of a household and owns immovable property, the value of their immovable and movable assets must not exceed R640,000, a 23% increase." https://www.groundup.org.za/article/more-people-now-qualify-legal-aid/

# PART II

## 1. CHAPTER 1: INTRODUCTION

**General comment**: We have answered the specific questions to the best of our ability, but in certain instances, more research is required. Some questions can only be effectively answered through quantitative research.

**What are the factors that might impede access to justice?**

Consideration should be given to all factors that impede on access to justice, including but not limited to banking and insurance, market influences, ancillary services, the costs of operating a legal practice and complying with regulation and the costs of providing legal services and other potential mechanisms to improve access to justice, which should, at the first instance, be the responsibility of the state.

The Global Insights on *Access to Justice: General Population Poll in 101 Countries Findings*[16] states that: "*People face a variety of obstacles to meeting their justice needs, beginning with their ability to recognize their problems as having a legal remedy. Indeed, fewer than 1 in 3 people (29%) understood their problem to be legal in nature as opposed to "bad luck" or a community matter. As mentioned above, less than a third of those surveyed obtained advice from a person or organization that could help them better understand or resolve their problem, and 1 in 6 (16%) reported that it was difficult or nearly impossible to find the money required to resolve their problem. About the same proportion (17%) reported that their justice problem persists but they have given up any action to try to resolve it further, with another 39% reporting that their problem is still ongoing."*

The legal profession is not the primary service provider in the access to justice delivery mechanism. Legal services are rendered within a free market economy and legal fees are accordingly subject to inflation, which anticipates regular adjustment of fees.

[16] Produced by the World Justice Project and available at https://worldjusticeproject.org/our-work/publications/special-reports/global-insights-access-justice-2019

All private professional fees are expensive, from architectural services to software development and everything in between. The costs disbursed to qualify as a professional and thereafter to operate and maintain an office in order to provide effective and efficient legal services to a large extent dictate the rates that have to be charged to continue to supply the services.

Some of the factors that impede access to justice are:

**The socio-economic context**: According to Stats SA, more than one out of every two South Africans were poor in 2015, with an unemployment rate of 27.2%. South Africa's National Development Plan recognises that South Africa remains a highly unequal society where too many people live in poverty and *'to eliminate poverty and reduce inequality, the economy must grow faster and in ways that benefit all South Africans'*. The Living Conditions Survey (LCS), which is part of Stats SA's household survey programme and provides detailed information on households' living circumstances, as well as their income and expenditure patterns provides that approximately half (49,2%) of the adult population were living below the upper-bound poverty line (UBPL).

**Corruption**: Corruption Watch[17] states that "*Corruption affects us all. It threatens sustainable economic development, ethical values and justice; it destabilises our society and endangers the rule of law. It undermines the institutions and values of our democracy. But because public policies and public resources are largely beneficial to poor people, it is they who suffer the harmful effects of corruption most grievously. To be dependent on the government for housing, healthcare, education, security and welfare, makes the poor most vulnerable to corruption since it stalls service delivery. Delays in infrastructure development, poor building quality and layers of additional costs are all consequences of corruption. Many acts of corruption deprive our citizens of their constitutional and their human rights*." A study by the Council for the Advancement of the South African Constitution[18] (CASAC) points out that: "*Corruption is therefore an antithesis to democracy*

[17] https://www.corruptionwatch.org.za/learn-about-corruption/what-is-corruption/we-are-all-affected/

[18] http://www.casac.org.za/wp-content/uploads/2011/09/IMPACT-OF-CORRUPTION1.pdfCASAC further status that: Corruption is costly, not only for the general public but mainly for the poor as resources are diverted away from them. Service delivery and related policy is distorted if allocation and prioritisation are determined by bribes. It means a few benefits at the expense of many which reinforces existing socioeconomic inequality and makes the poor even more vulnerable. Structural inequality leads to many being denied access to education, to information, and therefore to knowledge about their rights that could enable them to challenge abuse of power. Thus, it has been argued that: "The roots of corruption lie in the unequal distribution of resources in a society. Corruption thrives on economic inequality. Economic inequality provides a fertile breeding ground for corruption – and, in turn, it leads to further inequalities." CASAC also draws a link between corruption and access to rights: 'All South Africans have the right to "access to adequate housing. Adequate housing is measured in terms of certain core factors including legal security of tenure, the availability

*and the rule of law. Corruption diverts resources that are needed to improve the lives of citizens to enrich a few, at great cost to many. Corruption prevents the state from fulfilling its constitutional obligations, erodes the legitimacy of our democratic government and subverts the rule of law. It gnaws away at the ethical fabric of our society, and stifles economic growth. It has a powerful negative effect on foreign investment by destroying investor confidence. This in itself leads to a loss of confidence in public institutions which can undermine the rule of law, security of property,* ***respect for contracts****, civil order and safety and ultimately, even the legitimacy of the state itself. Legitimate state activities may be undermined by this lack of public confidence*."

**Complex legal environment**: The draft National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (2016 – 2021), states that *"During the first 20 years of democracy more than 1200 laws and amendments aimed at dismantling apartheid and eradicating all forms of discrimination were approved by parliament."* The presence of a vibrant legal profession is critical to make these laws a reality to all South Africans.

**Complex civil justice system:** The civil justice system is too complicated and this also hinders access to justice. The complexities in the system need to be reduced, particularly in magistrates' courts matters.

**Delay in delivery**: Delay in delivery due to the clogging up of the court roles. This applies across the board to the rich and the poor litigant, but is to a large extent being addressed by the case management systems.

**The breakdown in State organisations** is a major factor: for example the Masters' Offices, the Deeds Offices and some courts.

**Other factors**: Other factors that can contribute toward the costs of legal services, especially in the context of litigation include:

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of services, materials, facilities and infrastructure, affordability, accessibility and location."71 The Constitution acknowledges that the right cannot be achieved instantaneously, but government must demonstrate that it has worked as effectively as possible to achieve this right.72 Corruption is a serious impediment to realising this right. Construction tenders have been awarded to unqualified or inadequately qualified constructors, which leads to poor workmanship. Numerous media reports have shown that houses built by the government for poor citizens are in a bad condition, with cracked walls, loose bricks and leaking roofs.'

i. Costs related to the appointment of interpreters;
ii. Costs of transcription;
iii. Fees of expert witnesses. The task of the SALRC to make recommendations to the Minister regarding legislative and other interventions to improve access to justice includes the task to address the legal costs incurred by the use of expert witnesses. This aspect should be substantially investigated, reported and recommendations made.
iv. Failure to utilise technological innovations, such as electronic filing of documents.
v. Unnecessary postponements, which are outside of the control of the legal practitioners.
vi. Inconsistent practices relating to case management.

## 2. CHAPTER 2: FACTORS AND CIRCUMSTANCES GIVING RISE TO LEGAL FEES THAT ARE UNATTAINABLE FOR MOST PEOPLE

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

   Yes, unavoidably so because specialised fields require specialised services.

2. *How complex are the rules of procedure?*

   The Rules governing procedures in the High Court are generally complex, hence skilled legal practitioners are ordinarily appointed to represent parties. In the Magistrates' Courts, there is room for improvement. Judicial case management can assist in expediting matters and reducing costs pursuant to compliance with the relevant procedural requirements. The Magistrates' Courts are creatures of statute and accordingly have no discretion to act beyond legislation.

   *Does the complexity of the rules of procedure contribute to unaffordable legal fees or hamper access to justice?*

   Yes.

*If so, in what way?*

Legal practitioners are skilled and are remunerated for their skilled services.

*What changes to the rules of procedure could be implemented to render legal fees more affordable and/or increase access to justice?*

The simplification and harmonisation of Rules pertaining to different Courts will contribute towards access to justice.

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

No, recent developments in legislation have expanded the Constitutional Court's mandate beyond just constitutional matters. The Constitutional Court has recently in the matter of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* permitted, in the public interest, an *amicus curiae* to take a matter on appeal to the Court when the main litigants did not do so.

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

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. Poor persons should be able to access reliable, effective and competent legal aid in relation to lower court matters. University law clinics should have increased participation.

In claims sounding in money, the Contingency Fees Act, 1997 can and does provide access to the courts for plaintiffs. Defendants will have a bigger challenge, but it is still open to them to negotiate a no-win-no-fee contract in terms of the Contingency Fees Act. Whilst there may be no monetary recovery, a successful defence will result in a saving.

Insurance schemes provide some access to legal services in the lower courts. Examples are material damages claims for car accidents, labour disputes, maintenance disputes and criminal defences.

Magistrates' Courts should more effectively manage cases so that matters deserving of more than one day, are allocated more days. Conducting litigation piecemeal over an extended period of time is not cost effective.

Students can assist parties to draft and formulate their claims and counter-claims in the Small Claims Courts.

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

Yes, the remuneration methods used by legal practitioners do facilitate access to justice, for example, contingency fee agreements and agreements to cater for payment in the form of instalments. Remedies are available in the event of legal practitioners over-reaching. For the criteria which should be taken into consideration when an assessment of an account or determination of fees by a cost committee is made, refer to paragraph 4.5 above.

The LPC should have mechanisms in place to assess legal fees. Also, South African courts have exercised inherent jurisdiction to fix fees in circumstances of overreach.

The fact that it costs to litigate also serves to put matters in perspective and acts as a deterrent to litigants prosecuting claims that are not commercially viable or do not involve a fundamental matter of principle.

6. *Do unethical billing practices exist in our law and, if so, to what extent?*

Yes, unethical practices do exist in any sphere. As stated earlier, the LPC is responsible for the regulation of legal practitioners under the LPA and this includes dealing with such unethical practices.

*Other than hourly billing, what methods of remuneration could lead to legal fees generally becoming more affordable? In what ways could the practice of hourly billing be modified to discourage unethical billing practices?*

An itemised list of attendances with menu type prices could determine fixed fees unrelated to how much time is being spent on the legal service.

Also refer to the discussion under Part I.

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

Yes. There is always lack of certainty with advocates' fees and that is what the LPA aims to correct. Clients should know what they are expected to pay.

We do however not believe that tariffs are necessary. Guidelines would suffice.

In terms of Section 35(7), the attorney is to inform the client about the likelihood of engaging an advocate, as well as an explanation of the different fees that can be charged by advocates. This is an extremely difficult task in the absence of guidelines.

Fee guidelines will allow market forces to prevail.

The courts too easily award the costs of two counsel. 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 obtained 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 guidelines creates an even bigger problem when an attorney is to explain to a client the necessity to appoint a referral senior counsel, because that senior counsel will require a junior to assist them. The leaves the client with fees for three lawyers.

In certain instances, it is necessary to build a legal team for proper representation, and in such instances three legal practitioners could be easily justified. This should however not be the norm.

The question can also be raised as to whether a day fee enhances access to justice. Legal practitioners should charge for work that they are doing. Where the matter is concluded very early on day, the legal practitioner can go back to offices or chambers and do other work. The client should not be paying for such instances. The use of a day fees opens the billing system up 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.

The Section 34(2)(b) advocates are a new creation in terms of the LPA. The public will be engaging directly with them. This underscores the need for proper guidelines to assist members of the public to know what those advocates would be charging.

In terms of Section 35(7)(d) it would seem that a Section 34(2)(b) (non-referral advocate) may instruct a referral advocate. This seems to be counter-productive to the reason why the Section 34(2)(b) advocate was created. The direct access advocate, inasmuch as it was intended to minimize cost, may in fact become something else.

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

Paragraph 18.10 of the Code of Conduct applicable to attorneys prohibits referral at a fee by non-attorney third parties. Transgression of this have 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.

In order to curtail costs, referral fees should never be recoverable from the client. Specialist firms will offer a percentage of their own attorney-and-client fees as a referral fee to

colleagues. This has no impact on the bottom line for the client and serves to channel specialised work to specialists.

9. *How does the cost-shifting rule operate in practice?*

This rule operates in civil and not criminal litigation. The Constitutional Court discourages costs orders being made in matters of public interest. A point in case is the matter of *General Council of the Bar of South Africa v. Jiba & Others*[19].

As a general rule in our courts, the costs follow the successful party, even though costs are a discretion of the presiding officer.

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 itself can be an inhibitor to access to justice.

The current trend in decisions made at taxations by taxing masters emphasises the injustice in this for the successful party. Uniform Rule 70 refers to an "indemnity" from costs to the successful party. 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.

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

This may potentially be so.

[19] The Constitutional Court stated that paragraph 63: "The principle that costs follow the result is not applicable to proceedings like the present because these proceedings are initiated in the interests of the general public and the court which has an inherent power to control and discipline practitioners. The GCB's role in instituting these proceedings is to enable the court to exercise its disciplinary powers.[54] These proceedings are not ordinary civil proceedings in which there is a winning and a losing side. As far back as 1931 our courts recognised the inappropriateness of the principle that costs follow the result in proceedings such as the present." Also, at paragraph 68; "Although the appeal on the merits has failed, the GCB should not be ordered to pay costs. The principle that the GCB may not be ordered to pay costs unless special circumstances warranting an adverse costs order exist applied here. Even though the GCB has succeeded in having the costs order made against it overturned, it is fair not to order the respondents to pay its costs. The correct order is, no order as to costs."

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 offer.

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

The South African Contingency Fees Act provides for both the conditional fee agreement and a success fee agreement. In the first instance, the Act provides for an agreement where a successful practitioner may charge his/her normal fee if the matter is won. The Act however has a further type of agreement, where a party may charge an additional success fee. In terms of the Act, neither of these fees may be based on a percentage of the claim. In the matter of *Masango v RAF* Judge Mojapelo specifically pointed out that a legal practitioner may not charge a percentage of the capital. The Act provides for a 25% cap on whatever the fees are.

In the debt collectors' industry, the latter approach poses a problem where commercial entities insist on instruction attorneys by offering a percentage of the capital recovered in debt collections. This should be looked at by the SALRC as it enhances cost certainty and justifies an exception. 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.

The Contingency Fees Agreement Act should be amended to allow for a percentage in the case of debt collections. Legal practitioners have been calling for a substantial review of the Contingency Fees Agreement Act and Regulations in order to address many uncertainties and challenges that exist. A total review of the contingency fees system would probably be in the interest of the public as well.

12. *How do pre-litigation costs apply in practice?*

Pre-litigation costs are a significant problem in cost recovery. The principle is that these are attorney and client expenses and thus not recoverable from the losing party. However, there

is a very fine line between attendances that are essential or form part of a cause of action, such as 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. Many essential attendances are attacked and disallowed as "pre-litigation", including "premature" briefing of counsel.

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 at a later stage in the process are allowed as party and party costs.

Pre-litigation costs should be governed by the same principles as applicable to litigation costs. Pre-litigation costs should at least include reasonable consultations, research, investigations and correspondence (letters of demand and settlement negotiations).

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

The cost of producing factual evidence varies, but is usually significantly less than the costs associated with obtaining expert reports and evidence.

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.

In the case of lay witnesses, a reduction in costs might be achieved if the parties are obliged to swop 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.

A credible panel needs to be appointed from which such experts can be drawn, failing which there will have to be an expedited mechanism to deal with disputes relative to the selection of the expert.

The cost of factual and expert evidence will inevitably impact on access to justice. Where parties agree to a single expert, this will reduce costs. 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.

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

No.

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

There is an increased risk of a higher cost order and time implications. Also, an increased number of experts have increased cost implications. Class action procedures facilitate actions arising from the same cause affecting multiple plaintiffs. This process has been developed in recent cases. Where a plaintiff has to sue several defendants to preserve rights where there is no certainty as to who is liable, this does give rise to significant additional costs which 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 be eliminated. The courts should be applying the case management rules in working out their local practice directives in this regard.

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

Yes, since more extensive research may be required. However, this may potentially save costs by shortening proceedings.

Appropriate cases a specific legal point or issue can be separated and dealt with as a preliminary issue in terms of the Rules. This will materially curtail costs, especially if the point disposes of the case.

If the point taken is bad in law, it can have the opposite effect in delaying the matter and increasing costs.

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

Cost of discovery can be decreased by the use of e-discovery. Discovery is one of the most important steps in litigation. In the case of *MV Urgup v Western Bulk Carriers,* the High Court described the discovery process as a "*devastating tool*" ranking with cross examination as "*one of the mightiest engines for the exposure of truth ever to have been devised*".[20]

The main objective of discovery is to identify information that is relevant to the issues in dispute and to exclude privileged information.

18. *If sufficient use is made of e-discovery, what positive impact, if any, does it have on access to justice?*

No.

*Alternatively, what are the reasons for practitioners making sub-optimal use of e-discovery? In what ways can the courts and the Legal Practice Council contribute to encouraging practitioners to make optimal use of e-discovery?*

Paper based discovery is one of the major culprits in driving up litigation expenses. All too often, one party produces a lengthy discovery schedule which is met with a standard request from the other party for access to the discovered documents. The current discovery rules then only permit the receiving party to inspect the documents and to make a copy or

[20] The MV Urgup: Owners of the MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd 1999 (3) SA 500 (C) at 513G.

transcript thereof. In almost every such matter, the receiving party is 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 rand per individual page.

The LSSA is of the view that the Rules of Court should be amended to enhance e-discovery. This will lower the costs of litigation and help improve the administration of justice. We have made a submission to the Rules Board for Courts of Law in this regard and are aware that this matter is being dealt with.

The LSSA is developing a Best Practice 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.

There is a cost factor in facilitating access to technology, which in turn impacts on the cost of litigation. As access to networks in rural areas may pose challenges, e-discovery should be phased in progressively. This might mean that an old and new system should run concurrently for a period of time.

19. *How is the so-called 'shotgun approach' to litigation to be discouraged? Should there be some kind of legislative intervention with the manner in which costs are awarded in the High Court? Alternatively, should judges merely be required to assess the question of costs more comprehensively – that is, not merely to default to the principle that the winner should be reimbursed (at least some of) his or her costs, but that the question of whether the litigation was conducted in a cost-conscious manner should also be considered?*

Legislative intervention is undesirable. 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. This includes the of use punitive cost orders.

20. *What steps can the courts and the Legal Practice Council take to encourage the timely settlement of litigated matters? What is the effect of late settlement?*

Although this is primarily up to the parties, it does present challenges to get the various institutions, e.g. the Road Accident Fund, the Department of Health, etc. to settle matters timely. Late settlement leads to congestion of the court rolls and an increase in litigation costs.

21. *In what ways can the courts and the Legal Practice Council encourage litigants to make greater use of ADR mechanisms to resolve their disputes? Why is there insufficient use of ADR mechanisms?*

ADR mechanisms also have cost implications. Court-annexed mediation is not yet fully in operation and not necessarily cost-saving. Also, the current fee structure for mediators or court-annexed mediation may impact on the availability of experienced mediators. Whilst parties do not pay for the presiding officer in litigation, payment will have to be made for the presiding officer in ADR matters.

Although ADR has its place in dispute resolution, it negatively affects the jurisprudential development of the South African legal system. ADR processes do no follow a precedent-base system whereas litigation creates precedent and settles the law. It also provides certainty pertaining to the law.

22. *Should sanctions be introduced in the Court Rules in order to dissuade legal practitioners from instituting matters in the Higher Courts where the lower courts have jurisdiction over those matters?*

Sanctions already exist in the form of adverse cost orders in deserving matters.

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. This is a carryover of historically low awards. The courts have upheld the right of a plaintiff in matters such as this to proceed in the High Court.

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

Generally, yes. However, the courts can be more discerning in matters where two counsel have been appointed.

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

Case management is being introduced and perfected as an ongoing mechanism. Not all courts have implemented practice directives pursuant to the case management systems introduced during July 2019.

25. *Why is there a lack of effective and efficient use of court resources and information technology?*

This is a work in progress. 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.

26. *What is the impact of detailed assessment?*

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.

Fee guidelines and party-and-party tariffs should be simplified with a uniform format between the various courts. As to the assessment process, it can potentially be simplified with the grouping together of items on the bill of costs. However, that makes it more difficult for parties to challenge particular items on the bill of costs. For the latter reason, the current format could be retained. This enhances transparency.

27. *Is the lack of briefing of advocates by the public having an adverse impact on access to justice?*

The LPA has introduced the concept of an advocate who can practice with a Fidelity Fund certificate and accordingly receives instructions directly from members of the public. 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 they can rely on the readily available skills of advocates.

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

No, for the reasons stated above.

28. *To what extent, if any, do current restrictions on advertising, marketing, and touting hamper legal practitioners in providing affordable legal services to the public?*

*Should the GCB and the societies be allowed to prohibit their members from advertising legal services at a certain rate or for a specific overall fee? Arguably, advocates do not really compete with each other because they do not advertise; thus the public – and they themselves – are unable to compare their rates.*

We disagree that advocates do not really compete with each other. 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.

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

Work reservation protects the consumer public. The abandoning of reservation of certain work for legal practitioners would have serious implications for South Africa's legal system. Legal work is of professional nature and should be reserved. The Gauteng High Court, in the matter of *Proxi Smart Services (Pty) Ltd v Law Society of South Africa (74313/16) [2018] ZAGPPHC 333* recently remarked that: "*The highest standard of professionalism and honesty are fundamental to conveyancing transactions which involve large sums of money*

*represented by undertakings exchanged on trust. The public derives comfort from the fact that attorneys and conveyancers are regulated by statutory law societies, the Fund and a Code of Conduct that prescribes high ethical standards which they must adhere to ensure that the public is protected."*

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

The LPC is best placed to consider this aspect. Paragraphs 25.7 and 25.8 of of the Code of Conduct published pursuant to the LPA provides the following:

*"25.7 Counsel shall ordinarily consult with instructing attorneys, clients and witnesses at counsel's chambers.*
*25.8 In circumstances which reasonably indicate that consultations cannot conveniently be held at the chambers of counsel, counsel may exercise a discretion to consult at some other place appropriate to the circumstances, which places include the home of counsel or the offices of the instructing attorney or the offices of the client, provided that counsel in so doing guards against compromising counsel's independent status, which circumstances may include …"*

31. *To what extent, if any, does the silk system influence junior counsel in setting their fees?*

The junior counsel will not charge more than the senior.

*How does the silk system impact on access to justice?*

The silk system drastically increases the costs of legal services and therefore does not enhance access to justice. 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.

It is very unlikely that persons who cannot afford to litigate will engage a silk. There are many junior counsel available and no litigant is compelled to brief a silk.

As with other professions, the access to justice is basic in nature. Once the *pro bono* system is properly implemented, even access to very senior practitioners will be enhanced.

32. *Given that they are prioritised over other matters, are the fees charged by legal practitioners for urgent matters justified?*

Yes, given that they are prioritised over other matters. A legal practitioner who takes on an urgent matter, must leave all else and focus fully on the urgent matter. This has implications for the other legal matters and the personal life of that practitioner. The sacrifice is compensated through a reward.

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

Yes.

34. *To what extent is the average South African able to pay legal fees?*

Much needs to be done to enhance access to justice for the average South African.

The concern is about the "missing middle" is not unique to South Africa. The issue of the "missing middle" is a global problem. The Australian Productivity Commission[21] estimated 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. Contingency fees agreements are often the only way in which those people are able to access the courts.

However, also refer to the discussion in Part 1.

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

This negatively impacts on access to justice.

[21] https://www.pc.gov.au/inquiries/completed/access-justice/report.

One can take the Supreme Court of Appeal 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. These costs can be creatively addressed by a change of the system in one of two ways; firstly, either the parties who need to present argument only and not evidence could be allowed to do so via video-conferencing; or secondly, there could be a rotational sitting of the courts. An example is the practice within the Land Claims and Labour Courts and certain regional and high courts.

36. *Is there lack of support for vulnerable groups (minors, people with disabilities, and women) with regard to legal costs?*

No, the problem is much wider. The LSSA proposes that the budget for Legal Aid South Africa be increased significantly with regard to vulnerable groups.

37. *Is there lack of funding from the national fiscus for legal services?*

Yes, see discussion under Part I.

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

Yes, wealthier litigants can afford larger legal teams and more protracted litigation.

39. *What is the impact of the cost of translators and interpreters on access to justice?*

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. There is also the risk of important legal points getting lost in translation. The English language policy introduced by the Chief Justice will also impact on this, but it is doubtful whether there can be any better policy in the South African context.

This increases the costs of legal services. Translators and interpreters are funded by the government.

Small Claims Courts, which takes place after hours, pose problems for interpreters who may have to travel long distances after hours.

40. *What is the impact of the lack of general education on access to justice?*

This negatively impacts on access to justice. Education on the legal system must start an at early stage at schools.

41. *Is there a lack of knowledge about laws and legal rights? If so, how can this be rectified?*

Yes. Through increased awareness and education an at early stage at schools.

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

Yes, there is a lack awareness. Chapter Nine institutions should increase their awareness amongst communities in South Africa, including other institutions geared towards protecting the rights of citizens.

43. *Does language act as a barrier to access to justice?*

Yes, but it should not act as a barrier if there are adequate government-funded interpreters and translators available.

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

This issue is dealt with in Part I.

45. *Is it desirable to establish a mechanism that will be responsible for determining fees and tariffs payable to a legal practitioner, juristic entity, law clinic, or Legal Aid South Africa in respect of litigious and non-litigious legal services?*

As motivated under Part I, the LSSA is of the view that the determination of fees and tariffs payable to legal practitioners in private practice, including juristic entities, is not desirable.

The LSSA is in favour of fee guidelines.

As regards law clinics and Legal Aid South Africa, these institutions should offer free legal services to the indigent. 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.

46. *Are legal fees charged by non-profit organisations justifiable and within the reach of the constituency they are meant to serve and, if so, why?*

As far as we know, NGOs do not charge their constituents anything. All services are free. If they recover costs these go toward their operating and other expenses.

47. *Does legal expense insurance promote access to justice? If so, how?*

Yes, it does in many instances. Refer to discussion under Part I.

48. *Should taxation be the responsibility of the taxing master, or should the presiding officer provide greater guidance in the judgement to the taxing master as to costs?*

Taxations should remain the responsibility of the taxing master. However, currently there are long waiting periods for dates to tax more taxing masters need to be appointed and trained.

*Are the OCJ & DOJCD putting in place appropriate resources to tax bills of costs? Should taxation be the responsibility of the taxing master or that of the judicial officer?*

Yes.

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

Honest cost consultants would not contribute to unaffordable legal services. Ultimately, the legal practitioner should accept 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.

Legal costs consultants are not the litigators in the matter and therefore they do not have personal knowledge of all the attendances. To regulate them will give unnecessary standing to them in the taxation process.

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

See answer above.

51. *Do sections 57 and 58 of the Magistrates' Courts Act 32 of 1944 give rise to unaffordable legal services and therefore hamper access to justice?*

The sections themselves do not hamper access to justice and were well intended.

Abuses in practice (by mostly non-lawyer collectors) have necessitated the courts to step in. This increased judicial oversight could potentially increase the costs of legal services related to these sections.

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

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 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 being specifically trained.

53. *Should contingency fee arrangements be prohibited in medico-legal claims and, if so, how?*

No. Such claimants are often indigent and would otherwise not have access to justice to remedy the wrong that they have suffered.

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

Yes. Most victims do not have the financial means to access the services of specialised legal practitioners otherwise.

55. *Should the jurisdiction of the small claims court be increased in order to encourage self-representation? If so, what should the jurisdiction of the small claims court be?*

Yes. We are not in a position to suggest an amount, as we do not have statistics of the percentage of "small" quantum claims which may be clogging up the system in lower courts (if that is the case). However, the more cases that can be dealt with via Small Claims Courts, the better. At the very least, the current jurisdictional limit should be linked to consumer price index increases.

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

The LSSA is not in a position to comment on this, but must caution against any processes which would not be allowed in terms of the Constitution.

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

Yes. The LSSA has previously commented on the Traditional Courts Bill that Section 9(3)(a) denies a party to the proceedings before a traditional court the right of legal representation. Lawyers are not allowed to participate in proceedings, even in respect of criminal cases, thereby infringing on a person's right to legal representation. 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 marginalized and the indigent, the constitutional right to a fair trial.

## 3. CHAPTER 3: DESIRABILITY OF ESTABLISHING A MECHANISM RESPONSIBLE FOR DETERMINING LEGAL FEES AND TARIFFS

1. *Should section 35(3) be amended in order to qualify the wide exemption it provides to legal practitioners and clients to pay fees in excess of any tariff that may be determined by the mechanism?*

   As stated in Part I, the LSSA is in favour of fee guidelines and not a fixed tariff.

2. *Is the present mechanism for determining fees and tariffs in respect of litigious and non-litigious legal services desirable, appropriate, and/or effective? If not, what alternative mechanism may be recommended?*

   The distinction between litigious and non-litigious matters should not fall away. The present mechanism of the Rules Board regulating recovery tariffs is acceptable. However, it is important that these tariffs be kept up to date. An outdated tariff is in itself an inhibition to access to justice. The tariffs can possibly be simplified.

   As regards fees payable by one's own client, the Code of Conduct for the legal profession provides for a reasonable fee. Although we believe that the checks and balances that are in place to assess the reasonableness of fees are sufficient, fee guidelines will enhance the process.

3. *Would the mechanism for determining fees and tariffs be undermined if legal practitioners could simply opt out by agreeing with clients in writing to do so? In other words, would it be*

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

Clients have a choice to "shop around". Market forces should prevail. The mechanism might be undermined where legal practitioners always put to client a view that the work is expensive. Hence our submission for fee guidelines which opens up the opportunity for freedom to contract within certain limits (which enhance the certainty and could be used by assessment committees to protect the public.).

4. *Would it inhibit competition if practitioners were in principle required to charge no less (unless the user voluntarily offered to pay less) than the determined fee, as appears to be envisaged in sections 35(3) and 35(4)(e)? In other words, is there any case to be made out for a mechanism that determines minimum (as opposed to maximum) fees and tariffs?*

Yes, it will inhibit competition. However, minimums have the potential to create standards compliance with which will help the public, the profession in general, and young lawyers in particular.

5. Should the mechanism envisaged by section 35(4)(c) be a body or bodies of practitioners to which a person may complain if he or she has been charged more than a reasonable rate or tariff?

Yes. The LPC, being the regulatory body of the legal profession, is best placed to deal with these complaints as there will have to be consequence management.

6. *Alternatively, should the mechanism be a body or bodies that determine rates and services in respect of each type of legal service to be provided? If so, how should the latter be done? (a) By placing a cap with reference to the seniority of the legal practitioner on the hourly rate? (b) By placing a cap on the overall amount that may be charged for a particular type of legal service, having regard to the nature and quantum of the claim? If so, how should it be done? or (c) Any other alternative suggestion.*

No. The range of legal services are so vast that this will be an impossible task. As stated in Part I, the LSSA is not in favour of a cap on fees. In respect of some types of legal services, sector specific guidelines (to be provided by the LPC), could be the answer.

7. *What about the process that should be followed in determining the fees or tariffs? This will depend on whether the mechanism is a body or bodies that decide complaints against unreasonable fees (overreaching), or whether it is a body or bodies that determine the fees and tariffs. If the latter, and if caps are to be determined with reference to specific kinds of legal services (rather than merely a cap on the hourly rate), then it would perhaps be appropriate for a pilot project to be carried out in order to ascertain the reasonableness of the caps for the various kinds of services. What is your view about this proposal?*

To cap specific kinds of legal services is not desirable, since matters do not follow a predictable pattern. An example of tariffs for a specific kind or legal services is Uniform Rule 43, where the tariffs were so out of sync with the practical realities of such applications, that the LSSA recommended that the ordinary tariff should apply. Further, there exists case law[22] that dictates guidelines as to what should be regarded as reasonable.

8. *To whom, and what, should the tariff apply? The proposed tariff assumes a universal application, but is this correct?*

There should be fee guidelines and not tariffs. Even those fee guidelines may be linked to levels of income in order to ensure access to justice by all classes of citizens in the country. The concept of the "missing middle' is to be seriously understood within the South African context.

If tariffs are to be introduced, it should be linked to a threshold. They should only apply to consumers who are not wealthy enough to afford legal services, but not poor enough to be eligible for legal aid.

Contingency Fee agreements should not be linked to any threshold. There are sufficient controls on fees in terms of the CFA.

[22] *Coetzee v Taxing Master, South Gauteng High Court and Another* (2010/14197) [2012] ZAGPJHC 175; 2013 (1) SA 74 (GSJ) (19 September 2012.

9. *Would adherence to a tariff by referral advocates constitute a prohibited horizontal and vertical practice under the Competition Act 89 of 1998, on the basis that it has the effect of substantially preventing or lessening competition in a market without any technological, efficiency, or other pro-competitive gain resulting from it?*

   If fee guidelines are in place, then the members of the public will know in advance what costs implications there could be for enlisting the services of such advocates. The guidelines should be sanctioned by a statutory mechanism which overrides the Competitions Act.

10. *Are there any areas of law that must be exempted from the jurisdiction of the mechanism to regulate fees and tariffs; and, if so, what are they and on what basis?*

    No. All areas should be covered by guidelines (as opposed to prescribed tariffs.).

11. *Are there any categories of persons that must be exempted from the jurisdiction of the mechanism to regulate fees and tariffs; and, if so, who should those persons be?*

    Refer to answer to question 8 above and discussion under Part I.

12. *Who will appoint the persons in charge of or responsible for the mechanism?*

    The regulatory body for legal practitioners, being the Legal Practice Council.

13. *Should there be uniform/universal and all-inclusive tariffs for all legal matters, be they litigious or non-litigious? Or, put differently, should there be uniform tariffs for attorneys and advocates in respect of party-and-party costs and attorney-and-client costs?*

    No. A uniform tariff is not desirable. The fee guidelines will be adequate in this regard, as they will cover both types of practitioners.

14. *Which parties or institutions should be involved in the determination of the tariff? Should it be:*
    *(a) The Legal Practice Council,*

*(b) The Rules Board,*

*(c) The Minister,*

*(d) Civil society organisations, or*

*(e) Representatives of the above-mentioned institutions?*

The Legal Practice Council through its Provincial Councils and in consultation with the legal profession.

15. *Should legal matters be classified, like in the United Kingdom, into small claims, fast-track, and multi-track claims based upon the type and value of the matter? Specifically, should low-value small claims, family matters, personal injury claims, and nuisance matters go to the lower court?*

Although fast-tracking might be effective, one would need to be very circumspect as regards the categorization of types of claims. Whilst complex family related matters and personal injury claims need to be dealt with expeditiously, it is crucial that the parties be able to present their positions properly in court, irrespective of the value of the claim.

There is no silver bullet. Some "small" matters are extremely complex and may involve significant human rights issues which deserve ventilation in a High Court. Specialist Courts should be considered to deal with Family Law, Personal Injury, Business/Insolvency and so on. If specialised, these courts should be more efficient.

Also, the natural progression of personal injury matters makes it a risk to subject them to the "lower court". More often than not, the claims develop in large quantum settlements.

The current recently implemented case management system will solve the backlogs in courts and reduce costs.

16. *Should the mechanism be flexible enough to enable legal practitioners and clients alike independently to negotiate fees for professional services and provide broad monetary parameters within which the negotiation of fees may take place?*

Yes. Refer to Part I. The LSSA recommends fee guidelines instead of fixed tariffs.

17. *Should the mechanism use a combination of fee models such as fixed costs, hourly / daily rates, capped or uncapped fees; and, if so, in what type of legal matters?*

The LSSA is not in favour of fixed tariffs. However, in respect of collection matters, there is a serious problem of overcharging debtors without any legal protection.

The former Law Society of the Northern Provinces had, in its rules, prescribed a guideline in respect of reasonable charges for collection matters.[23] A similar approach could be followed to address this concern.

## 4. CHAPTER 4: LITIGIOUS AND NON-LITIGIOUS WORK

1. *Are there sound reasons for not having statutory tariffs in non-litigious civil matters? What impact would statutory tariffs have on the current system? What are the advantages of having statutory tariffs in non-litigious civil matters?*

Yes. Statutory tariffs will have a negative impact on the current system. Fees are determined taking into consideration various factors, including the geographical spread of law firms and socio-economic factors. A fixed tariff will lead to some practices running at a loss and being forced out of the market.

2. *Is there a lack of statutory tariffs for litigious civil matters? If so, should statutory tariffs be introduced in all litigious civil matters?*

There must be a clear distinction between the recovery tariffs as set out in Rule 70 and the attorney-and-own client fees charged by practitioners. Therefore, in relation to the former, the answer is 'no' to the first question. The answer to the second question is also 'no', with

[23] Rule 81: *"… a member to whom any claim of whatever nature is handed for collection may in addition to any professional fees … charge reasonable attorney and client charges: For the guidance of members the following attorney and client charges have been prescribed by the council as being reasonable … but this shall not be construed as prohibiting a member from departing from the prescribed charges, either upwards or downwards, in appropriate circumstances…"*

a rider that the LSSA would recommend fee guidelines for attorney-and-own-client fees for litigious matters.

3. *Can the tariffs used by Legal Aid SA and the State Attorney's Office in criminal and civil matters be used as benchmark for tariffs in general? Would poor and indigent people have more access to justice if these tariffs were used for benchmarking purposes?*

No. Refer to the answer to question 1. Practitioners working for these mentioned institutions earn salaries. They can obviously not be compared to private practitioners and all the expenses as well as indirect costs involved, which factors, inter alia, also contributed to determine feasibility.

4. *How can the provision of section 300 of the Criminal Procedure Act 51 of 1977 be employed in order to reduce legal costs for parties?*

Although the exception rather than the rule, compensation awards is a suitable means of providing restorative justice. The public should be educated on their right to apply for these awards. This section is applied when the State, on behalf of a complainant, requests compensation, e.g. where an accused has stolen from another. It does not assist an accused to reduce his or her legal fees. It might reduce costs of the aggrieved party in recovering from the loss suffered.

5. *Does Legal Aid SA's area of operation need to be extended?*

Yes. Legal Aid South Africa should also be properly funded and the means test need to be increased. This is particularly important in rural areas where there is only limited representation (if at all) by private practitioners.

6. *Why are there no tariffs in non-litigious criminal matters? Should there be tariffs in non-litigious criminal matters? What impact would the introduction of tariffs have on the current system?*

It is undesirable to have tariffs in non-litigious criminal matters, for the same reasons as in respect of civil matters. Also the numerous possible non-litigation criminal matters which may arise cannot be codified, since no numerus clausus of possible exceptions exists.

Practitioners doing criminal work can agree on a set, negotiated fee or payment basis to do a case with a client to make the fee more affordable for those clients who have legitimate financial constraints.

7. *Why are there no tariffs in litigious criminal matters? Should there be tariffs in litigious criminal matters? What impact would this have on the current system?*

Refer to Part I and the answer to question 6.

## 5. CHAPTER 5: ATTORNEY-AND-CLIENTS COSTS AND CONTRACTUAL FREEDOM

1. *Is it desirable to give users of legal services the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism?*

Yes. Anything else may give rise to anti-competitive practices. Parties should retain the right to negotiate. There are other ways of redressing unfair contracts or over-reaching.

2. *Should every legal practitioner who deals directly with a client be obliged to conclude a fee arrangement with that client prior to the commencement of the provision of legal services? If so, what should that agreement deal with?*

If there is no fee agreement, the practitioner is often limited to the tariff of the court in which the litigation takes place in respect of attorney-and-client charges. 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. The practitioner, more so than the client, is exposed should there not be a formal fees agreement in place. Also refer to the discussion in Part I.

3. *What would the consequences be if the parties failed to conclude a mandatory fee arrangement? Would it be appropriate as a sanction to deprive a legal practitioner of his or her right to demand payment for any service rendered if they failed to conclude such an agreement?*

See comment on question 2 above. It is not appropriate to deprive a legal practitioner of the right to charge for work done.

4. *Do you think that the provisions of section 35(7) of the LPA are reasonable and workable in practice?*

No. It is almost impossible to comply with the requirements, having regard to the contingencies and eventualities, for instance in personal injury (medical negligence) matters.

In litigation it is impossible to "guess" upfront what course the case will follow. A matter which might appear straight forward can end up having to go to trial and thereafter on appeal, perhaps to more than one court (full bench, Supreme Court of Appeal and Constitutional Court). This is particularly so when litigating against the State.

Fees agreements should record the rate charged for stipulated attendances (such as perusals and drafting) as well as an hourly rate in respect of time based charges.

At best, the attorney could give a reasonable estimate of his or her fees so as to allow the client to make a determination on whether or not to engage the practitioner.

5. *Does the requirement in subsection 35(7)(a) that attorneys estimate disbursements require knowledge that the attorney might not possess at the outset of the matter? Or are attorneys, because of their experience, able to provide such an estimate?*

Yes. Circumstances in a case may change. Refer to 4 above and Part I.

6. *In terms of subsection 35(7)(d), an attorney or a section 34(2)(b) advocate needs to explain the different fees that can be charged by different advocates. Is this provision unduly*

*onerous? Does it require information that is outside the control or domain of the attorney? Or are attorneys and advocates able to ascertain this information relatively easily?*

Advocates are usually briefed only after trial dates are allocated. If briefed before, their costs might not be recoverable from the other side upon success. A trial date could be allocated three or more years from the taking of the initial instruction. It is impossible to guess what counsel will be charging at that stage. Even in matters where advocates could have dealt with the matter during pleading stages, it will not be possible to ascertain the fees for advocates, particularly without fee guidelines.

*Does it require information that is outside the control or domain of the attorney?*

Yes. If the section is to operate, there should be some obligation on advocates to provide the information required in Section 35(7)(d).

7. *Will the enforcement of the written cost estimate notice in respect of all matters be counter-productive, or will it assist in the goal of enhancing access to justice by making legal fees more affordable?*

Generally, it will assist in the goal of enhancing access to justice. It will help disclose to the client what fees are to be charged within the fee guidelines. However, it might drive up costs in that the current requirements of the estimation process is labour intensive. It might also lead to unscrupulous candidates purposely underestimating and then later hiding behind the fact that it was merely an estimation.

Each "discipline" will determine if it will promote access. Personal injury matters done on a contingency fee basis will cater for indigent victims in any event.

8. *To what extent should legal practitioners who assist the public on a contingency fee basis apply section 35 of the LPA?*

Section 35 is unworkable as far as contingency fees matters are concerned and they should be excluded from its operation entirely. There are sufficient checks and balances in the Contingency Fees Act (CFA) in relation to unethical fees.

Adding Section 35 to the requirements, will increase the risk of practitioners being confronted by clients claiming that the contingency fees agreement is null and void, due to non-compliance with the LPA. In other words, if the CFA applies to an agreement, it should be used as the only reference in determining the validity of the agreement.

9. *Should the applicable legislation be amended, if necessary, to ensure that the 25% cap includes every expenditure incurred as part of the contingency litigation, including experts, counsel, and so on?*

No. 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. All legal practitioners should be included in the 25% cap if a success fee is charged.

If the 75% rule is applied, the excess expenses etc. will be of no consequence as the attorney / advocate will have to adjust their fees to comply.[24]

10. *Should a mechanism be created specifically to deal with allegations of excessive fees being charged in contingency litigation in order to ensure that those fees remain reasonable in the light of the circumstances of a case? In other words, should there be a body focusing specifically on preventing the abuse of contingency fee arrangements?*

The courts have assumed an oversight role in relation to contingency fee agreements and their application in all matters where court orders are obtained, particularly in personal injury matters. The LPC provides a regulating function in relation to legal practitioners. The fee assessment committees and disciplinary committees provide assistance to aggrieved clients in the first instance.

The Act allows for a fee or a provision in an agreement to be set aside by the current regulator. Section 5(2) authorizes this:

[24] https://www.derebus.org.za/decoding-s-21a-and-b-of-the-contingency-fees-act/#.XSW1ig7383c.email

*"(2) Such professional controlling body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his, her or its opinion the provision or fees are unreasonable or unjust."*

11. *Are we justified in retaining the Contingency Fees Act 66 of 1997 and our contingency fee regime?*

Yes, if updated and applied in a uniform and correct manner. The CFA provides access to justice for the aggrieved party and an incentive to the legal practitioner to be rewarded for taking on a case "on risk". It is the "poor man's keys to the court house".

12. *Are the monetary limits of 25% set too high? If so, give reasons and/or proposed limits.*

No. Because a success fee is limited to a "normal" fee x2. The 25% cap is nothing more than a cap. It is not a method of determining a fee. Thus, upon success the legal practitioners are entitled to charge their normal fee plus 100% (the total being the "success" fee) which success fee (inclusive of VAT as per the only case on the subject) may not exceed 25% of the capital. If it does, the balance must be written off.

Thus, if a matter is successful without much work done, double the normal fee will probably be far less than 25% of the capital.

13. *Do the principles enshrined in the contingency fee regime favour or promote access to justice, or contribute to frivolous litigation against the State?*

It most definitely promotes access to justice. Many cases which would not have seen the light of day if the plaintiff had to pay, have been brought on contingency leading to compensation for countless indigent and impoverished individuals. It presents a way in which society takes care of those unfortunate (the injured) members in its midst.

It is seriously doubted that frivolous litigation against the State produces any compensation.

14. *Is the Contingency Fee Act being abused by both legal practitioners and litigants, and, if so, to what extent? What can be done to protect the public, especially the indigent, in matters where a contingency fee agreement is applicable?*

There was considerable misinformation about the application of the CFA in the past. However, this has been clarified and misconceptions dispelled by several judgements. It is unlikely that litigants wanting to abuse the system will be able to persuade a practitioner to take on a case that is patently no good. Most defendants do not countenance "nuisance-value" settlements in matters with no merits.

The Rules provided for in Section 6 of the CFA are in the process of formulation, which will further improve regulation of matters conducted in terms of the CFA.

15. *Do contingency fee agreements increase access to justice and promote efficiency and the early resolution of disputes?*

Yes. However, practice has shown that early settlement is sometimes hampered by the dilatory tactics of governing institutions such as the Road Accident Fund in road accident personal injury matters.

16. *Do contingency fee agreements adequately address the fees/remuneration of advocates and the costs of engaging the services of experts/third parties?*

Yes, if concluded as prescribed in the CFA and regulations.

17. *Should advocates' fees be borne by the instructing attorneys or separately by clients?*

Counsel's fees should be borne by the client, even if the fees are paid during the conduct of the matter by the attorney.

18. *What is the impact of sections 35(4), 35(7) and 92 of the LPA on contingency fees?*

It is to some extent a duplication of the CFA and will create more uncertainty – only the requirements of the CFA should apply.

As previously stated, Section 35 is unworkable as far as Contingency Fees Act matters go. They should be excluded from its operation entirely. There are sufficient checks and balances in the CFA in relation to unethical fees. Further, rules will be promulgated which will further regulate fees and the conduct of matters.

19. *What impact do contingency fees have on the institution of class actions?*

It is presumed that most, if not all class actions (especially those involving sick or injured workers), are conducted on contingency. The Court in the recent dust cases settled the CFA agreements entered into between the legal practitioners and the claimants. In class actions, the Court can also dictate the nature of the fees to be charged. The CFA assists that those class action cases can get to Court.

20. *Does section 92 of the LPA promote access to justice, or does it have the potential to prejudice litigants?*

Yes, *pro bono* promotes access to justice and no, ceding costs does not prejudice litigants.

21. *Would there be any danger in the proposed section 92 of the LPA, which provides that, in circumstances where a legal practitioner, law clinic, or practice appears on behalf of a party, and will only claim payment of that which he, she, or it can recover from the other side, the cost order made in favour of the client is deemed to accrue to the legal practitioner, law clinic, or practice?*

No. The litigant cannot expect to recover costs and disbursements in a matter that has been conducted for him or her for free.

22. *Should the courts be encouraged to impose appropriate monetary limits on contingency fees, and differ from the agreement reached by the parties, in the exercise of their discretion and in the interest of justice?*

No. The Courts can only play an oversight and interpretation role. The CFA sets out the caps and the Courts should not create the contract between attorney and client.

The CFA , itself, provides a limit on the fees that can be charged. A successful practitioner can only charge up to double his or her normal fee, which is determined in relation to attendances and time spent in the conduct of the matter charged at his or her "normal" rate, which is stipulated in the fees agreement at the outset. The further protection for the public is that, whatever the normal and success fee is, it may not exceed 25%. The client can challenge whether the rate is reasonable or not and also contest when the total fees amount to more than 25%. Further, a Court could in this regard upon inspection of the fees agreement make a ruling that the rate is excessive and must be reduced. Apart from this, the fees will only be finally determined when the "normal" fee is determined, either by way of an agreed amount or by way of an attorney-and-client bill of costs and taxation.

23. *Should courts play a more interventionist role in setting caps for contingency fees?*

No. To enhance certainty of law, the CFA should address the issue, sanctions and remedies. The Act empowers the courts and they already inspect the affidavits and can, and do (if required), inspect the CFA agreement itself.

24. *Is there an overlap between the LPA and the Contingency Fee Act, and, if so, to what extent?*

Yes. The CFA regulates contingency fees agreements. However, it uses the legal practitioner regulating mechanism (formerly the law societies and bars and currently the LPC) to assess, manage and discipline practitioners where required. To this extent, they should co-exist. The CFA and regulations should be reviewed and updated where reference is still made to the previous regulators. See for example http://www.justice.gov.za/legislation/regulations/r2006/CONTINGENCY%20FEES%20ACTfin.pdf and the definition of 'professional controlling body' updated (it still refers to 'members' while the LPC is a regulator and not a member organization as the former law societies were).

## 6. CHAPTER 6: LEGISLATIVE AND OTHER INTERVENTIONS TO IMPROVE ACCESS TO JUSTICE BY MEMBERS OF THE PUBLIC

1. *Will different methods to settle disputes enhance access to justice?*

   Yes.

2. *Would a more inquisitorial approach, as opposed to an adversarial approach, be practicable in current circumstances, and would it lead to greater access to justice?*

   No. In our system the courts do not enter the arena and act as impartial independent adjudicators.

   Our Small Claims Courts follow an inquisitorial model. However, those are for smaller and uncomplicated matters. Complicated matters may be referred to the Magistrates' Courts by the Commissioners. The inquisitorial approach will burden the other courts with investigation and research duties. Our system of justice is not geared to have "examining" magistrates or inquisitorial tribunals.

3. *Should pro bono legal services be regulated in South Africa? If so, how?*

   *Pro bono* services should be recognised, specifically under section 29 of the Legal Practice Act. One of the most direct ways in which legal practitioners can extend access to justice to those that are most in need of it, is to take on cases on a *pro bono* basis. Not only should *pro bono* be included as a form of community service, community service should be weighted on the basis that the majority of community service activities required of legal practitioners should be devoted to *pro bono* case work and direct legal assistance to people unable to afford private legal fees.

   As already stated, the LPA does not specifically provide for pro bono services, but the LPC has taken a policy decision that *pro bono* should be regulated. It called on legal practitioners to provide *pro bono* while the position is being regularized and the *pro bono* offices at the Provincial Councils remain operational.

4. *Should CBPs be formally recognised in South Africa? If so - how? How do you view the role of CAOs and CBPs?*

Yes. They provide access to justice to those who cannot afford it. The role of CPBs and CAOs should be complementary to that of the legal profession. They should be able to provide basic legal and human rights advice, free of charge. However, it is of the utmost importance that they be regulated so that the public is not at risk.

*4(b). Should there be a law graduate community service (LGCS) programme in South Africa? If so, how and why?*

Yes. This should also be regulated. Law graduates can play a similar role to the community advice offices in order to give the public general information about basic rights and referring them for legal advice to qualified practitioners or legal aid etc.

*5. What can legal practitioners do to reduce unaffordable legal costs?*

The issue was addressed in Part I.

*6. What role should constitutional institutions and ombudsmen play to broaden access to justice for the majority of the people of South Africa?*

Disputes do not always have to be resolved through courts. Constitutional institutions and ombudsmen can play a role in broadening access to justice. These kinds of institutions should publicise their services in order for the public to use their offices to resolve their disputes. The role for example, of the Legal Services Ombud can also be to educate the public on issues such as fees by way of advertising and brochures.

*7. Should a general appeal or review tribunal be established in terms of section 10(2)(a)(iii) of the Promotion of Access to Administrative Justice Act 3 of 2000 in order to deal with appeals and reviews of administrative decisions against organs of State? If so, why?*

Reviews should remain within the jurisdiction of the courts and not appointed tribunals.

8. *Should legal services be unbundled in order to enable SRLs to better manage their cases? If so, how?*

No. “Unbundling” will not necessarily achieve the objective of assisting SRLs to manage their own cases. It may open the door to unscrupulous and unskilled service providers to render legal services in an unregulated manner.