LAW SOCIETY
OF SOUTH AFRICA

SUBMISSIONS BY THE LAW SOCIETY OF SOUTH AFRICA ON DISCUSSION PAPER 150 REGARDING THE INVESTIGATION INTO LEGAL FEES – PROJECT 142

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INTRODUCTION

The Law Society of South Africa (LSSA) has considered Discussion Paper 150 titled "Investigation into Legal Fees including Access to Justice" published by the South African Law Reform Commission (SALRC) for comment. Following extensive consultation via its various professional affairs committees, its constituent members (being the Black Lawyers Association, the National Association of Democratic Lawyers and provincial Attorneys' Associations) and members of the legal profession, and thorough consideration of the SALRC and other stakeholders' comments, we hereby submit our comments.

We acknowledge the mammoth task that the SALRC has undertaken, which culminated in a comprehensive discussion paper. While there are some recommendations that we support, there are others that are of concern, notably those regarding a tariff with limited targeting.

The issue of a tariff with limited targeting (Options 1 and 2) is dealt with in Chapter 1 of this submission. Our responses to the individual recommendations are contained in Chapters 2 to 8.

The LSSA is well aware of the need for greater access to justice by members of the public and that legal services are allegedly unaffordable. However, we believe that access to justice can be achieved through less invasive means than implementing a tariff (with or without limited targeting) in respect of attorney-and-client fees. We have no problem with the Legal Practice Council (LPC) issuing guidelines (Option 3, discussed in Chapter 7).

In terms of Section 35(5)(c) of the Legal Practice Act (LPA), the Commission must take into consideration the interests of the legal profession when undertaking its investigation. There is a conspicuous absence of practicing attorneys on the Commission's Advisory Committee. We believe that, without an acute understanding of the realities of and expenditure associated with operating a law practice, the interests of the legal profession, and in particular small legal firms, could not have been sufficiently dealt with by the Commission.

There appears to be little research into a complex legal system, the requirements of legal practitioners and firms, the difficulties experienced by candidate legal practitioners, the costs of equipment, copies, research tools, costs of office rental, etc.

Further, while a great deal of attention has been given to the cost of legal services, insufficient attention has been given to identifying the actual economic root cause of the cost of legal services.

The allegation that legal services are regarded as unaffordable compels the state to seek ways to reduce these costs, but imposing fee limitations on legal practitioners is not the way to go in solving what is quite evidently a market efficiency problem, not an abuse of dominance problem.

Treating a fundamental market efficiency problem as a private sector abuse of dominance problem by imposing fee controls on legal practitioners is an approach that will ultimately lead to long term erosion of competitiveness and quality of legal services in South Africa.

No professional service fee caps should be considered without also considering professional service liability caps. Legal practitioners do serious work. If a professional can be held liable for significant sums of money for professional negligence, that liability risk has to be fairly priced into the professional service. Coupled to that, are the increased professional expenses of legal practitioners (subscription fees, professional indemnity insurance cover, professional interest membership fees, continuous professional development, top-up insurance and auditors' fees).

It takes many years of study and apprenticeship to enter the legal professional, because law is a large and complex field of study and the consequences of providing a poor legal service to a client can be devastating for the client on the receiving end of the poor service.

Very little work remains reserved for attorneys. Many tax practitioners and other law firms are opening private companies that do not fall under the regulatory control of the LPC. The legal profession is already highly regulated and if it is over-regulated, it will eventually lose more practitioners to that sector. For the most part the same kind of work can be done without the risk.

The recommendations of the Commission, if implemented, will have serious and far-reaching consequences for the legal profession and the public and we believe that, particularly recommendations 5.1, 5.4, 6.11 to 6.13 and 6.15, will lead to job losses within the profession, and this will result in a major loss of professional skills needed to assist members of the public. It will conceivably lead to large scale unemployment, affecting paralegals, secretaries, messengers, legal practitioners, candidate legal practitioners and IT employees. South Africa is already suffering high levels of unemployment.

We believe that access to legal services will be enhanced if regard is had to the following aspects:

(i) promoting and ensuring an increased supply of legal practitioners, so as to promote price competition within this market for the benefit of the consumers of these services;

(ii) ensuring that organs of the state operate efficiently and effectively; and

(iii) ensuring that Legal Aid South Africa and its Judicare system is enhanced substantively, as suggested below.

As alluded to above, the Commission's recommendations will not lead to an increase of legal practitioners, but rather the opposite. The way to increase the supply of legal practitioners is to provide greater financial support to prospective law students and university law faculties so that more deserving candidates can enter the profession. This will result in a more price-competitive legal market and greater market service penetration through natural market forces.

A legal practitioner who charges a fee that is higher than the competition, without providing any commensurate advantage, loses clients. Not so with the state, who is able to provide its services with very little regard for the consequences of inefficiency.

The Commission accepted in its discussion paper that "It is the responsibility of Government at all spheres and levels to ensure that Organs of State operate effectively and efficiently at all times times and that services are delivered to the people of South Africa as per the mandate of the Organs of State concerned."[1]

The LSSA had regard to the public response to Issue Paper 36, as summarised in Chapter 9. Many of the responses relate to systemic problems, which require a holistic approach. Without government playing its part in improving service delivery, access to justice will not be achieved.

Save for a few concerns mentioned in the relevant chapters, we welcome the interventions proposed by the Commission to make the system more effective and efficient.

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1 SALRC Discussion Paper 150 "Investigation into Legal Fees including Access to Justice", p139.

As stated in our previous submission, access to justice should not be conflated with access to legal services. We support the proposals by the Commission in Chapter 3 to strengthen community advice centres and paralegal services, promote the use of alternative dispute resolution mechanisms, promote public awareness of alternative fora for ADR mechanisms, such as tribunals, ombuds and Chapter Nine institutions and rendering of community service by post-study law graduates.

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We reiterate that providing access to justice to citizens is primarily the duty of the state, which cannot be delegated to the legal profession.

The reason for the existence of Legal Aid South Africa is to ensure access to justice at state expense by providing legal advice and representation to those who cannot afford it. Legal Aid South Africa plays a pivotal role in promoting access to justice (as it should), and it should be properly resourced and the means test substantially increased. The pool of Judicare practitioners should also be extended.

Legal practitioners are willing to play their part to ensure that citizens are afforded access to legal services. They already serve the community by doing pro bono and pro amico work, work free of charge or at a reduced rate (including Judicare), entering into contingency fees agreements and giving their time to preside over Small Claims Courts. The LPA also now imposes an obligation on legal practitioners to render community service.

In conclusion, while the LSSA is not in favour of fixed tariffs for attorney-and-client fees, it supports an attorney-and-client fee *guideline* for litigious and non-litigious matters issued by the LPC. This is also consistent with best international practice and other professions.

CHAPTER 1: TARIFFS WITH LIMITED TARGETING (OPTIONS 1 AND 2)

1.1 THE SOUTH AFRICAN LAW COMMISSION'S PROPOSED MECHANISM (OPTIONS 1 AND 2): LIMITED TARGETING

One of the mechanisms recommended by the SALRC is summarised as *Tariff with limited targeting*, which proposes that attorney-and-client fees be pegged at the same level and determined on the same tariff as party-party costs in litigious matters in the Magistrates' Courts in respect of users of legal services in the lower- and middle-income bands (Option 1), alternatively with a maximum surcharge of 20% (Option 2).

1.2 THE COMMISSION'S MOTIVATION IN SUPPORT OF LIMITED TARGETING

The SALRC's motivation in support of this proposed mechanism is captured as follows:

"[T]here are credible arguments in favour of this option. First, this proposal is limited to a certain category of users of legal services, and second, only to certain fora (district and regional / Magistrates' Courts), where it is not in dispute that legal fees will be lower compared to other fora. Third, the fact that a successful litigant in all respects is still required to pay legal (attorney-and-client) fees despite his/her/ or its success in the matter seems unreasonable to many potential users that legal fees are payable regardless of the outcome of the case. Fourth, considering that courts only grant costs on the attorney-and-client scale in exceptional circumstances, these factors taken as a whole may serve as a deterrent to anyone contemplating litigation, notwithstanding the advice a user may obtain to the effect that the prospects of winning the case are high. This cannot be in the interest of justice that someone who has an imminently winnable case is deterred from going to court or other fora by the prospect, even in the event of success, of having to pay attorney-and-client fees."[2]

The above will, according to the SALRC "bring about a significant reduction in legal fees payable by users of legal services in the lower- and middle-income categories in litigious matters, taking

[2] SALRC Discussion Paper 150 "Investigation into Legal Fees including Access to Justice", p331.

into account that party-and-party costs constitute in the region of about 30% to 60% of the attorney-and-client fees."[3]

1.3 THE LSSA'S POSITION ON THE PROPOSED LIMITED TARGETING

The LSSA is of the view that there are fundamental flaws within the proposed *Tariff with limited targeting* and the Commission's motivation in support thereof. More importantly, the LSSA is of the view that the proposed *Tariff with limited targeting* falls short of the South African Constitution.

Below are some of the reasons that the LSSA does not support the proposed *Tariff with limited targeting*:

1.3.1 The proposal does not represent a reasonable fee for services rendered by legal practitioners and will, at best, represent a portion of the attorney-and-client fees. It is imperative that the distinction between the party-and-party tariff and attorney-and-client fees be maintained, for the following reasons:

1.3.1.1 The party-and-party tariff generally does not cover all the costs incurred by a litigant, but only the *essential costs*.

1.3.1.2 The relationship between a legal practitioner and his / her client is a complex issue, with a myriad of possibilities. There are different types of clients, including those who insist on unnecessary consultations, phone calls, etc., and those who would need assurance and do not mind paying for the legal practitioner's time to get that. These clients should be accommodated. The recovery role is explained to clients at the outset and they make an informed choice.

1.3.1.3 A legal practitioner is legally obliged to perform certain tasks even before he / she starts the business relationship with the client. i.e., due diligence in terms of a risk management compliance programme. These cost are not recoverable in terms of the party-and-party tariff.

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[3] SALRC Discussion Paper 150 "Investigation into Legal Fees including Access to Justice", p 334.

1.3.1.4 The Commission, in its argument in favour of Options 1 and 2, states that the granting of costs orders by courts on attorney-and-client scale happens in exceptional circumstances. We do not believe that this is a credible argument. The court should have the discretion to award punitive cost orders when dissatisfied with the conduct of a litigant. The Constitutional Court acknowledged the importance of this sanction in *Public Protector v South African Reserve Bank*[4] and among others stated "… there are costs that are meant to be penal in character and are therefore supposed to be ordered only when necessary to inflict some financial pain to deter wholly unacceptable behaviour and instil respect for the court and its processes… They, for instance, come in the form of costs on an attorney-and-client scale".

1.3.2 It will result in a decisive shift from the principle recognised by the Constitutional Court that skilled professional work deserves reasonable remuneration. (Refer to paragraph 1.4.2.1 below). Professional service providers (legal and otherwise) are ordinarily entitled to reasonable remuneration for services rendered.

1.3.3 The threshold in the form suggested by the Commission is fraught with difficulties.

1.3.3.1 A threshold will merely entrench the disparities between the wealthy and the poor.

1.3.3.2 The threshold is based on the income / turnover of users of legal services. It will be very difficult to determine in which category a client falls and those whose total income / turnover exceed the maximum threshold might abuse the criteria. Further, there may be aspects, such as informal employment, assets, inheritances etc. that render a person capable of paying standard attorney-and-client fees.

1.3.3.3 Legal practitioners who provide legal services to the specified categories of users of legal services in lower courts will be unable to charge a reasonable fee for legal services rendered and will be disproportionately affected.

4 *Public Protector v South African Reserve Bank* [2019] ZACC 29 par 36.

1.3.4 The proposed tariff will, if implemented, significantly reduce access to legal services, as it will negatively impact on the sustainability of legal practitioners who are focusing on providing legal services to middle-income earners.

1.3.5 The majority of legal practitioners are sole proprietors or operate within small firms and practice in the rural areas. These firms, who serve mostly the poor and middle-income persons, will in particular be negatively affected. Many of them are already struggling to make ends meet, because they are unable to compete with larger firms in the metropolitan areas. Should the Commission's recommendation be implemented, it is highly likely that these firms will be forced to close their doors, as it will no longer be economically viable to practice, thus diminishing the number of available practitioners. This will have an adverse effect on access to legal services for the poor and middle-income persons and restrict access to justice in outlying areas where there is a dire need for such services.

1.3.6 Options 1 and 2 will lead to hardship and injustice for those legal practitioners who will be forced to charge fees at Magistrates' Courts tariff (or just slightly above), as well as for members of the public. In many instances, legal practitioners will have no alternative but to refuse to supply services to a member of the public whose income falls below the threshold.

1.3.7 Legal practitioners who render services to users of legal services above the anticipated threshold will be able to charge a reasonable fee as determined under Option 3 and will remain unaffected by the proposed tariff for the middle-income users.

We concur with the Johannesburg Attorneys Association that "This proposal disproportionately affects those attorneys who offer services to middle-income earners in South Africa. If the intention is to promote access to justice by denying some a benefit in order to benefit a greater number of people – then the benefit ought not to be foisted upon only one portion of the profession and should be borne by all members of it equally."[5]

1.3.8 A reasonable fee charged by a legal practitioner is in line with the constitutional values and does not offend public policy, nor is it unenforceable. There is no convincing argument to limit the constitutional rights of legal practitioners.

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5 Johannesburg Attorneys Association submission to the SALRC, p4.

1.3.9 A significant number of legal practitioners will be denied the ability to charge reasonable fees for rendering legal services, which is likely to make the practice of law so undesirable, difficult or unprofitable that the choice to enter into it is in fact limited.

1.3.10 It will detract from the independence of the legal profession as it will grant authority to the Minister of Justice and Correctional Service and the Rules Board for Courts of Law to effectively determine fees (that do not represent a reasonable fee for services rendered) for many legal practitioners. (Refer to paragraph 1.8 below).

1.3.11 The recommendations regarding Options 1 and 2, if implemented, will not pass constitutional muster as it is not rational and justifiable in an open and democratic society based on freedom and equality.

1.3.12 There is no suitable international equivalent (i.e. no best international practices) of the proposed *Tariff with limited targeting* (which will deny legal practitioners the right to charge reasonable fees for legal services rendered). (Refer to paragraph 1.9 below).

1.3.13 Less intrusive means are available to enhance access to justice in South Africa.

1.4 THE TWO FEE STRUCTURES

Essentially, the proposed *Tariff with limited targeting* will result in the introduction of two fee structures for legal practitioners (Recommendation 6.15), i.e.:

Fee structure one: A tariff (Options 1 or 2) for the protected category of users; and

Fee structure two: A reasonable fee as determined by the LPC (Option 3).

1.4.1 Fee structure one: a tariff for the protected category of users

1.4.1.1 This fee structure is based upon party-and-party tariff as currently being determined by the Rules Board for Courts of Law (the Rules Board).

Option 1 will result in attorney-and-client fees being equated with the party-and-party tariff of the Magistrates' Courts. Option 2 proposes a maximum surcharge of 20% on the party-and-party tariff, to be approved by the Minister.

Undoubtedly, the tariff envisaged under Options 1 and 2 represents a reduction of the reasonable fee to be determined under Option 3. If not, there is no reason to introduce either Options 1 or 2.

1.4.1.2 In providing a definition for party-and-party costs, the Commission concedes that party-and-party costs *are generally not all the costs incurred by the litigant* but include all the costs provided for in the tariffs of court. The SALRC specifically states that "party-and-party costs constitute in the region of about 30% to 60% of the attorney-and-client fees."[6]

1.4.1.3 In the matter of *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* [7] the Constitutional Court summarised the general principle behind taxing of party-and party costs:

"Here the inherent anomaly of assessing party and party costs should be borne in mind. <u>One is not primarily determining what are proper fees for counsel to charge their client for the work they did</u>. That is mainly an attorney and client issue and when dealing with a party and party situation it is only the first step. When taxing a party and party bill of costs the object of the exercise is to ascertain <u>how much the other side should contribute to the reasonable fees the winning party has paid or has to pay</u> on her or his side. Or, to put it differently, <u>how much of the client's disbursement in respect of her or his own counsel's fees would it be fair to make recoverable from the other side</u>?" (our underlining).

The Constitutional Court confirmed that, when dealing with party-and-party tariffs, 'the ultimate test is not whether the rate charged and/or the time spent is

6 SALRC Discussion Paper 150, "Investigation into Legal Fees including Access to Justice", p334.

7 *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (SA) 64 (CC) at 85C-E para 47.

reasonable but <u>whether the resultant amount is fair to award on a party and party basis</u>.' (our underlining).

1.4.1.4 It is evident from the above that:

i. The proposed *Tariff with limited targeting* is based upon the party-and-party tariff, which only represents *a contribution towards the reasonable fees* the winning party has paid or has to pay;

ii. The party-and-party costs are generally not all the costs incurred by the litigant, but include all the costs provided for in the tariffs of court;

iii. The party-and-party tariff does not represent a reasonable fee;

iv. The proposed *Tariff with limited targeting* will not represent a reasonable fee; and

v. Party-and-party costs constitute in the region of about 30% to 60% of the attorney-and-client fees.

1.4.1.5 The proposed *Tariff with limited targeting* effectively deviates from the standard of a 'reasonable fee' and introduces a different and reduced fee structure for many legal practitioners.

1.4.1.6 The Commission erroneously regards the concept of a successful litigant paying legal fees in addition to party-and-party tariffs, regardless of the outcome of the case, as 'unreasonable'.

On the contrary, the Constitutional Court has pointed out that "a successful party gets costs as an indemnification for its expense in having been forced to litigate, and that a moderating balance must be struck to afford the innocent party

adequate indemnification within reasonable bounds. All circumstances must be taken into account, and an overall balance struck." [8]

The party-and-party tariff is aimed at introducing a measure of reasonableness.

1.4.1.7 The SALRC's argument that the factors listed by itself may serve as a deterrent against litigation for someone who has an *imminently winnable case* is, at best, contentious. A person who has an 'imminently winnable case' would be encouraged to litigate knowing that he or she will be able to recover some of the costs in contribution to their expenditure to litigate.

1.4.1.8 Essentially, the legal practitioners who provide legal services to the specified categories of users of legal services in lower courts will be unable to charge a reasonable fee for legal services rendered.

1.4.2 Fee structure two: a reasonable fee

1.4.2.1 The LSSA has, in its initial submission, emphasised that the Constitutional Court, in the matter of *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another*[9] laid down 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." (our underlining).

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8 *Ibid.*

9 *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* (CCT 76/12) [2012] ZACC 17.

The above statement came about because of a review of the taxation of counsel's fees in *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*[10]. The complaint was that counsel's fees were excessive.

Before confirming that skilled professional work deserves reasonable remuneration, the Constitution Court specifically stated that "It is the concept of what it is reasonable for counsel to charge that this judgment hopes to influence."

1.4.2.2 In *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another*[11] the Constitutional Court reiterated that in an attorney-and-client bill, *the reasonableness of the fee* is the predominant criterion.

1.4.2.3 This is consistent with Section 5(b) of the Legal Practice Act which provides that one of the objects of the Legal Practice Council is 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.*

1.4.2.4 The reasonable fee option is also consistent with the LSSA's comments on Issue Paper 36:

"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."

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10 *Residents' Association and Another v Harrison and Another [2010] ZACC 19.*

11 *President of the Republic of South Africa & Others v Gauteng Lions Rugby Union & Another* 2002 (SA) 64 (CC) at para 47.

Disturbingly, the Commission, through its proposed *Tariff with limited targeting,* recommends a decisive shift from the recognised principle that skilled professional work deserves reasonable remuneration.

This is contrary to a principle recognised by the Constitutional Court, void of international best practice and will seriously jeopardise access to justice in South Africa and the independence of the legal profession.

1.5 THE TWO FEE STRUCTURES: DISPROPORTIONALITY

It is conceivable that these two fee structures would, for the most part, be mutually exclusive for many legal practitioners. Put differently, some legal practitioners may, due to the nature of their practices, focus on a particular category of users and accordingly be restricted to the tariff proposed under Options 1 or 2.

The implication of having two different fee structures will be that:

1.5.1 Those legal practitioners representing a certain category of users of legal services within certain fora will not be able to charge a reasonable fee, while those who represent users of legal services falling outside of the specified categories and fora, will be able to charge a reasonable fee.

1.5.2 Regrettably, legal practitioners who are focused on primarily rendering services to lower- and middle-income earners will be on an unequal footing with other legal practitioners.

1.5.3 The legal practitioners who are at the coalface of rendering legal services to lower- and middle-income earners (i.e. providing access to justice) will have to do so whilst being forced to charge a fee of about 30% to 60% of what would ordinarily be considered as reasonable.

1.6 FEE STRUCTURE ONE (OPTIONS 1 AND 2) AND THE FREEDOM TO CONTRACT

1.6.1 In dealing with the issue of contractual freedom, the Commission refers to the Constitutional

Court judgment of *Barkhuizen v Napier*[12] where the court stated that: "All law, including common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control."

The SALRC acknowledges that: "…the proposed mechanism [must] recognise and protect contractual freedom; independence of the legal profession and the right to choose trade, occupation or profession freely. However, there are a number of other factors that must be taken into consideration and balanced against each other, such as the need to broaden access to justice so as to ensure that legal services rendered are within the reach of the citizenry; and the state's obligation to respect, promote and fulfil the rights in the Bill of Rights as contemplated in the Constitution."[13]

1.6.2 The *Barkhuizen* judgment also commented that: "The proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights."[14]

Also:

"Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the Constitution proclaims, 'is a cornerstone' of that democracy; 'it enshrines the rights of all the people in our country and affirms the democratic [founding] values of human dignity, equality and freedom'."[15]

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12 *Barkhuizen v Napier [2007*] (5) SA 323 CC par 15.
13 SALRC Discussion Paper 150, "Investigation into Legal Fees including Access to Justice", p398.
14 *Barkhuizen v Napier [2007*] (5) SA 323 CC par 30.
15 *Idem,* par 28.

1.6.3 A more recent Constitutional Court judgment, *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[16] confirmed the following trite principles:

1.6.3.1 Freedom of contract is a constitutional value that aligns with the principle that contracts freely and seriously entered into should be judicially enforced;

1.6.3.2 Public policy was a cogent rationale for refusing to enforce contractual terms;

1.6.3.3 Good faith, fairness and reasonableness are not self-standing grounds for a refusal to enforce otherwise valid contracts;

1.6.3.4 A term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable; and

1.6.3.5 A careful balancing exercise is required to determine whether a contractual term, or its enforcement, would be contrary to public policy.

1.6.4 In *AB v Pridwin Preparatory School*[17], the Supreme Court of Appeal observed that:

"…contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of

16 *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020).

17 *AB v Pridwin Preparatory School*[17] [2018] ZASCA 150.

our society. Indeed, our constitutional project will be imperilled if courts denude the principle of pacta sunt servanda."

The minority judgment offered the following examples of where legislation has introduced restrictions on freedom to contract with the aim of introducing fairness into contracts, including:

1.6.4.1 The Consumer Protection Act, which provides for the non-enforcement of contracts that are unfair, unjust or unreasonable; and

1.6.4.2 Legislation aimed at protecting "vulnerable groups", such as workers, tenants, consumers and those evicted from urban dwellings and people who live in rural areas, on farms and on undeveloped land, i.e. the Extension of Security of Tenure Act 62 of 1997, the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 and the Rental Housing Act 50 of 1999.

1.6.5 To support its proposed limitation of freedom of contract, which is a constitutional value, the SALRC lists the following factors to be considered:

1.6.5.1 The need to *broaden access to justice* so as to ensure that legal services rendered are within the reach of the citizenry (Section 3(b)(i) of the LPA);[18] and

1.6.5.2 The *state's obligation to respect, promote and fulfil the rights in the Bill of Rights* as contemplated in the Constitution.[19]

Regrettably, the SALRC offers no convincing argument to suggest that a reasonable fee charged by a legal practitioner is harmful to the values enshrined in our Constitution, is contrary to public policy and is, therefore, unenforceable. This is all the more so given that the Constitutional Court has already confirmed that skilled professional work deserves reasonable remuneration. Further, the state's obligation to promote access to justice has

[18] SALRC Discussion Paper 150, "Investigation into Legal Fees including Access to Justice", p376.
[19] *Ibid,* p398.

been insufficiently explored by the Commission. Much more needs to be done regarding Legal Aid South Africa (including its Judicare system) and other forms of legal aid.

1.6.6 In its initial submission the LSSA remarked that:

"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."

In its discussion document, the Commission affirms "access to justice is a multidimensional concept that is broadly concerned with the ability of the people to obtain just resolutions to justiciable problems through impartial formal and informal institutions and with appropriate legal support. Legal services constitute but one of the mechanisms for the resolution of justiciable problems and disputes. As correctly pointed out by the LSSA, the responsibility to ensure access to justice for all is primarily that of the State, and not necessarily the legal profession."[20]

1.6.7 The LSSA maintains that it is primarily the state's duty, and not the legal profession's, to ensure access to justice for all. Failure by the state to ensure access to justice for all is not a self-standing ground for denying legal practitioners the ability to charge reasonable fees for legal services.

1.7 FEE STRUCTURE ONE (OPTIONS 1 AND 2) AND THE RIGHT TO CHOOSE AND PRACTICE A PROFESSION FREELY

1.7.1 Section 22 of the Constitution provides that: "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

20 *Ibid,* p139.

1.7.2 In the matter of *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others*[21], the Constitutional Court confirmed that Section 22 comprises two elements, i.e.:

- The right to choose a trade, occupation or profession freely, and
- The practice of a trade, occupation or profession may be regulated by law.

According to the Constitutional Court, both the *choice* of trade and the *practice* are protected by Section 22. Any limitations imposed on the either the choice or the practice should invite constitutional scrutiny.

The Constitutional Court stated that:

"If a legislative provision would, if analysed objectively, have a negative impact on choice of trade, occupation or profession, it must be tested in terms of the criterion of reasonableness in Section 36(1).

If, however, the provision only regulates the practice of that trade and does not affect negatively the choice of trade, occupation or profession, the provision will pass constitutional muster so long as it passes the rationality test and does not violate any other rights in the Bill of Rights." (our underlining).

And

"a law prohibiting certain persons from entering into a specific trade, or providing that certain persons may no longer continue to practise that trade, would limit the choice element of section 22".

Arguably, the proposed limited targeting does not represent such an express prohibition.

1.7.3 The Constitutional Court also remarked that:

21 *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* [2017] ZACC 26.

"[O]ne may also conceive of legislative provisions that, while not explicitly ruling out a group of persons from choosing a particular trade, does so in effect, by making the practice of that trade or profession so undesirable, difficult or unprofitable that the choice to enter into it is in fact limited." (our underlining).

It is evident that a significant number of legal practitioners will be denied the ability to charge reasonable fees for rendering legal services. We believe that such denial will make the practice of the legal profession so undesirable, difficult or unprofitable that the choice to enter into it is in fact limited.

The LSSA agrees with the Johannesburg Attorneys Association[22] that "The introduction of a fee tariff at this point in time might force many hundreds or thousands more to leave the industry, and/or into liquidation/business rescue, because it will further impede their ability to produce an income stream. In fact, it is likely that the attorneys who will be hit by the proposed tariff are already barely surviving and the implementation of the tariff will almost certainly result in their elimination."

1.7.4 If tested against the criterion of reasonableness in Section 36(1), as alluded to by the Constitutional Court, it means that the proposed *Tariff with limited targeting* must be justifiable in an open and democratic society based on freedom and equality and that there must be a rational connection between means and ends, otherwise the measure is arbitrary, and arbitrariness is incompatible with an open and democratic society.

The LSSA contends that there is no rational connection between the means and the ends. The Commission's recommendations as regards Options 1 and 2 to ensure access to justice are, in our view, arbitrary and not rational and justifiable in an open and democratic society based on freedom and equality.

1.7.5 The Commission does not take into account or does not sufficiently consider that operating a legal practice is subject to normal market conditions. South Africa is a free market economy wherein members of the profession are striving for excellence in the interest of the

[22] Johannesburg Attorneys Association submission to the SALRC, p3.

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 freely.

1.8 FEE STRUCTURE ONE (OPTIONS 1 AND 2) AND THE INDEPENDENCE OF THE LEGAL PROFESSION

The LSSA believes that the proposed *Tariff with limited targeting* detracts from the independence of the legal profession.

1.8.1 Justice Chaskalson on "The future of the profession" at the 2012 annual general meeting of the Cape Law Society stated that it was "in the public interest that the culture of the legal profession should be rooted in its independence, and that lawyers should not be subject to outside influences, nor be concerned that if they take on a case for a particular client they will incur the hostility of the government or other powerful institutions".

He emphasised, as reported in *De Rebus*[23], that "The duties owed to clients to act without fear or favour, to the court to act honourably, and generally to observe high professional standards, are important parts of the profession's responsibility to the public".

1.8.2 The International Bar Association's Standards for Independence of the Legal Profession adopted in 1990, provides that an independent legal profession is an essential guarantee for the promotion and protection of human rights and the establishment and maintenance of the rule of law.

1.8.3 The SALRC's proposed *Tariff with limited targeting* will have the effect of:

1.8.3.1 Shifting the burden of ensuring access to justice from the state to the legal profession;

23 *De Rebus*, February 2013.

1.8.3.2 Impinging on the LPC's mandate under Section 5(b) of the LPA 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;

1.8.3.3 Granting authority to the Minister of Justice and Correctional Service and the Rules Board for Courts of Law to effectively determine fees (that do not represent a reasonable fee for services rendered) for many legal practitioners.

1.8.4 The SARLC's mandate is focused on "investigating a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners". There is no reason why a mechanism cannot be implemented under the auspices of the LPC, which has the legal mandate to ensure that fees charged by legal practitioners for legal services rendered are reasonable.

1.9 BEST INTERNATIONAL PRACTICES

In investigating a mechanism that will be responsible for determining fees and tariffs payable to legal practitioners, Section 35(5)(a) of the LPA enjoins the SALRC to take into consideration best international practices.

Not one example of a tariff with limited targeting, where legal practitioners are denied the right to charge reasonable fees, appears in the Commission's analysis of other jurisdictions. Below are further examples on how legal fees are dealt with internationally. It will be noted that fees charged by legal practitioners are generally regulated through guidelines to ensure reasonableness without overreach.

1.9.1 Kenya: Lawyers' fees are regulated under the Advocates (Remuneration) (Amendment) Order, 2014 (as amended from time to time) which, for the most part, prescribes the range of *minimum* fees to be charged for certain work. Lawyers are seemingly not allowed to charge below such minimum fee. There appears to be *no maximum limit* on the amount of fees that may be charged, but unjustifiably high fees that are not commensurate with the professional services rendered constitute professional misconduct.

1.9.2 Nigeria: The Rules of Professional Conduct for Legal Practitioners 2007 provide that lawyers are entitled to be paid adequate remuneration for their services to the client. The professional fees charged by lawyers must be reasonable and commensurate with the services rendered, and accordingly, the lawyer shall not charge fees which are excessive or so low as to amount to undercutting: Provided that a reduced fee or no fee at all may be charged on the ground of the special relationship or indigence of a client. There are no fixed tariffs.

1.9.3 Ghana: There are no fixed tariffs, but guidelines. The essence of the guidelines shall be negotiation and agreed upon between the lawyer and the client within the range prescribed by the guidelines. In negotiating a fee, a lawyer must adhere to the guidelines and avoid charges that either overestimate or undervalue the service rendered. Legal aid cases and the poverty of the client may require a less charge or even none at all.

1.9.4 European countries: According to the World Bank[24], in most jurisdictions, lawyers are free to negotiate their fees through agreements with their clients. Free negotiation of lawyers' fees, as opposed to regulation, is associated with lower litigation costs as compared with a regime of regulated fees (by the law or the bar). The World Bank states:

"Most countries have basic principles regarding the fee structure and require that the fees are adequate and proportionate depending on the value and complexity of the case. This is also reinforced in the core principles of the CCBE Code of Conduct for European Lawyers, which stipulate that the fee charged to clients should be fair and reasonable. Hourly rates are most commonly applied, although the parties can also agree on a fixed amount. In line with CCBE Code of Conduct for European Lawyers, agreements on fees based on quota litis (where the client agrees to pay a share of the results upon the conclusion of the matter) are not allowed, with the exception of Spain and Albania. However, some countries allow agreements where the fee is charged in proportion to the value of the dispute in accordance with the officially approved fee scale.

[24] The World Bank conducted comparative research of the regulation of lawyers within Albania, Austria, Bulgaria, Croatia, Czech Republic, England and Wales, Lithuania, the Netherlands, Serbia, and Spain.

In the absence of an agreement between the lawyer and the client, the parties can refer to the fee scales or tariffs, which are either regulated by law, like in Albania, Austria and Croatia, or by the bar association, as is the case in Bulgaria. In Bulgaria, the amounts set out in the Ordinance of the Supreme Bar Council serve as a minimum level for the fees and lawyers may not charge amounts that are below those set by the Ordinance. The amount of the lawyers' fees in Bulgaria depends on components such as the material interest of the case, the complexity of the case, the lawyer's efforts and the time necessary for preparation and solving the case. In Albania, if the fees have not been included in the agreement between the lawyer and the client, the law provides for some basic tariffs. Serbia is the only country among those compared that has a fee scale which provides a floor and a ceiling for lawyers' fees."

It appears that international best practice is aligned with the principle that skilled professional work deserves reasonable remuneration. To the extent that countries may have introduced maximum tariffs, it cannot necessarily be assumed that such tariffs are not reasonable – in the manner as proposed by the SALRC.

In short, the SALRC's proposed *Tariff with limited targeting* has no international best practice equivalent, and will ultimately negatively impact on access to justice.

1.10 REGULATION OF FEES WITHIN OTHER PROFESSIONS

It is difficult to understand the rationale for the regulation of the legal profession to the extent proposed by the Commission, if one considers the extent to which other industries charged with offering services to the public are regulated. For example, if one considers the health care profession, the regulation of medical practitioners in the private sector are subject to scant regulation when one considers that such practitioners are at liberty to charge fees in excess of the medical aid rate.

To permit the abovementioned practice within the health care profession, which industry offers citizens access to one of the most fundamental and basic rights, whilst prescribing the fees that legal practitioners could charge for services rendered, would amount to an arbitrary and unjustifiable practice.

Below are examples of the fee structures within other professions:

1.10.1 Health care profession:

The fees charged by medical practitioners and dentists in South Africa are consistent with the principle that skilled professional work deserves reasonable remuneration.

Section 53(1) of the Health Professions Act, 56 of 1974, provides that "Every person registered under this Act (in this section referred to as the practitioner) shall, unless the circumstances render it impossible for him or her to do so, before rendering any professional services inform the person to whom the services are to be rendered or any person responsible for the maintenance of such person, of the fee which he or she intends to charge for such services

(a) when so requested by the person concerned; or
(b) when such fee exceeds that usually charged for such services,

and shall in a case to which paragraph (b) relates, also inform the person concerned of the usual fee."

Section 53(3)(d) of the Act empowers the professional board to determine and publish Tariff *Guidelines*.

Section 6(c) of the National Health Act, 61 of 2003, provides that a health care provider must inform the user of the cost implications for treatment or procedure to be undertaken.

The South African Medical Association does not prescribe the rates that medical practitioners may charge. In terms of its Code of Conduct for Doctors, doctors must, when determining professional fees, consider the financial position of the patient and discuss the financial implications of treatment options.

1.10.2 Built environment:

In terms of Section 4 of the Council for the Built Environment Act, 43 of 2000, the professional bodies of the six professions falling under the Act (architecture, engineering, landscape architects, project and construction management, property valuation and quantity surveying) are required to publish *guidelines* for fees.

As far as we are aware, no not all the professional bodies have yet published guidelines, although some, such as the South African Council for the Architectural Profession, have.

It should however be noted that these are guidelines only and do not prescribe maximum or minimum mandatory fees.

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

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

The LSSA agrees that laws should be drafted in plain and straightforward language.

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

(a) The court rules and practice directives should be made uniform across all courts;

(b) They should be more straightforward in wording;

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

(d) An electronic platform should be introduced to enable litigants and their legal representatives to file documents at court without the need for physical attendance at court. E-filing may also be utilised to submit applications such as unopposed, non-contentious interlocutory applications and applications to compel discovery, for consideration by a Magistrate or Judge without the necessity of an appearance at court. According to the Chief Justice, Mogoeng Mogoeng, the main challenges faced by the courts are that they handle hard copies throughout the court processes. These include dockets, case files and judgements. On 23 November 2018, the Chief Justice announced plans to pilot an e-Filing system which, if successful, will be rolled out to all the courts. The e-Filing system will enable law firms and litigants to file documents to the court electronically over the internet. The objective is to improve efficiency and the quality of service rendered to the public.

2.2.1 The LSSA agrees that the court rules and practice directives should be harmonised across all courts, that they should be straightforward in wording and that plain language should be used.

2.2.2 The LSSA is of the view that the adoption of an electronic platform to enable litigants and their legal representatives to file documents at court without the need for physical attendance at court is ideal. However, the recommendation is premised on a utopian society, rather than the realities in the country. We believe that, at this stage, complete digitisation is not attainable and that it will be counter-productive for government to develop a policy if no resources are available to implement the policy.

The courts are not properly equipped, including with updated hardware, software, spyware etc. to deal with the technological problems that may arise. The vast majority of cases are in the Magistrates' Courts, which often do not have a proper infrastructure.

It is further uncertain how unrepresented parties, who do not always have the technological means and knowledge, will be accommodated.

For these reasons, we suggest the following:

- Aid centres should be set up at courts to assist members of the public;
- Training should be provided to court support staff and skilled staff should be appointed to deal with matters electronically;
- The digitisation system should initially be run concurrently with a manual system; and
- There should be a proper lead-in period.

Mention is made of the Office of the Chief Justice (OCJ) E-Filing Court Modernisation Project. We believe that this project is *limited in its scope and that it takes no or little account of the lower courts*. It also appears to place an unnecessary administrative burden onto judges. It is not known how much comparative study was done but Brazil, at least, seems to have a successful system that could be emulated quite easily. It did not concern itself with procedural rules, but rather built a management system that runs matters and only exceptions need to be dealt with. It has integrated its sheriffs as well and uses digital certificates very effectively to verify participants. It set up aid centres at its courts to help those not yet digitally enabled, thus avoiding exclusion.

In general, there has to be a coherent digital document management and filing program applicable in all courts. It should also be workshopped with the legal profession and all involved need to be properly trained.

2.2.3 In addition to the digitisation of the courts, there are many *processes and procedures that can be streamlined*. Family law matters is a case in point, where the procedure can be streamlined by, amongst other, short circuiting the summons with financial disclosure plea and the time period within which family law matters are required to be heard. This will be a far more streamlined, quicker and cost-effective procedure. There is an urgent need for reform. Family law matters are just too expensive, too cumbersome and there is no quick access to justice.

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

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

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

2.3.1 The LSSA supports this recommendation as far as the strengthening of the lower courts is concerned.

2.3.2 In addition, more judicial officers should be appointed, not only in the lower courts, but also in the High Court in those areas where there is a need to do so and, where there are sufficient judicial officers, steps should be taken to optimise their efficiency. Vacancies that exist, should be filled. Matters can often not proceed on the date of set down, because of the unavailability of a judge or a magistrate.

2.3.3 It is suggested that the establishment of *dedicated specialized courts*, such as for motor vehicle accident and family law matters, be considered. The LSSA is alive to the fact that the establishment of dedicated courts may be hamstrung by fiscal constraints, but submit that this is an avenue worth exploring. It is noted that the majority of cases in the Gauteng

Division of the High Court are RAF matters. If these matters could be heard in a dedicated court, supported by a robust case management system, this will not only relieve the pressure on the other courts, but will also ensure an expeditious and efficient resolution to these matters.

Alternatively, a number of dedicated judges can be assigned by the various Judges President to deal with these matters on a rotational basis, thus allowing the other judges to deal with the general roll. This system is being used in the KwaZulu-Natal Division of the High Court, where judges are assigned to deal with criminal law matters for a particular term. Similarly, a running roll could be considered in all matters, including criminal law matters.

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

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

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

We do not support the recommendation of limiting the number of pages in respect of affidavits and heads of argument, given that annexures to an affidavit may run into many pages. There are also cases that warrant voluminous heads of argument. Further, each legal practitioner has his / her own style of drafting.

We also do not agree that the heads of courts should determine what a reasonable number of pages will be. This should be dealt with in the case management procedure. An effective case management system will ensure that unnecessary information is eliminated. The judicial officer will identify issues that are common cause and direct the parties to provide either heads of argument or further affidavits. The number of pages can be regulated and parties who file prolix documents penalised.

One of the issues that frustrates efficient case management is the inadequate number of judicial officers to carry the roll in some of the smaller areas. The Department of Justice and Constitutional

Development should ensure that enough judicial officers are appointed in all jurisdictions. Where there are sufficient judicial officers, steps should be taken to optimise their efficiency. Where necessary, vacancies must be filled.

We agree with the recommendation that training should be provided to legal practitioners on the preparation of heads of argument.

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

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

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

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

2.5.1 The LSSA supports the recommendations relating to complete discovery and a robust court timetable.

2.5.2 As regards ADR, we agree that access to justice does not mean access to courts. Justice can be made available through appropriate dispute resolution mechanisms. ADR needs to be cost effective and the mechanisms put in place must not be such that they can be hijacked by service providers trying to make money.

However, *mandatory* ADR may result in a delay in the relief sought by the parties when a party frustrates the progression of the matter to court. We agree with the Commission[25] that parties may simply go through the motions in order to progress to court, leading to delays and increased legal fees. Mandatory ADR becomes even more problematic where parties are unrepresented.

[25] SALRC Discussion Paper 150 "Investigation into Legal Fees including Access to Justice", p179.

We have no problem with a provision making it mandatory to *consider* ADR, but the discretion to utilize ADR should remain with the parties.

We acknowledge that ADR can be efficacious in certain matters, such as family law matters, and in these matters, it can be made compulsory. In Austria and New Zealand, one cannot go to court in family matters, without attending at least three sessions before a mediator. The mediator reports to court and if a party is successful in court without actually going through mediation first, they will be deprived of their costs.

We understand that a project is underway to draft a bill on *family law matters*, where *compulsory mediation* at various stages of litigation, during and before a trial date is be allocated, is being considered and we support this move in principle.

The LSSA wishes to point out that, although the Rules Board for Courts of Law has introduced new rules that require parties to *first consider mediation* proceedings before proceeding too far with litigation (i.e. the amendments to Rule 41A that took effect on 9 March 2020), it seems most likely that *no significant study has yet been done on the impact of this significant new rule.* All too often litigants fail to do the meaningful communication work amongst themselves that is needed for them to resolve their disputes and legal practitioners and the litigation processes are invoked in lieu of constructive dialogue. Forcing the parties to consider mediation, *with potential adverse cost orders as a consequence of failing to do so,* promote the potential for constructive dialogue between litigants.

It is presumed that the mediation rule change was made on the basis that it may have a significant impact on the cost of resolving disputes and this impact should be considered in a meaningful way. Studies should be conducted to actually assess the cost impact of this March 2020 rule change, before ploughing ahead with fee regulation proposals.

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

The LSSA supports this recommendation. Although there are judicial case management systems in place at some Magistrates' Courts, they are not managed and used very effectively.

The reasons for this might include a lack of training for magistrates and an insufficient number of magistrates to deal with this. The Department should be encouraged to appoint more magistrates, especially in remote areas where they are overwhelmed. Vacancies should be filled. Where there are a sufficient number of magistrates, they should be encouraged to make use of the judicial case management systems.

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

This recommendation is supported.

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

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

(b) Court rules need to be amended in order to make provision for digital court legal process.

Refer to response to Recommendation 2.2 above.

2.9 ***Recommendation 2.9:*** *The Commission concurs with the respondents' recommendation that the Rules of Court should be amended in order to enhance e-discovery. Rule 53 should be amended to make e-discovery compulsory. Rule 35(12) should also be amended to explicitly require 'material relevance'. This will lower the costs of litigation and help improve the administration of justice. Furthermore, the Commission takes note of the Task Team established by the Rules Board with the mandate of investigating the e-development of the rules for court and include the topic of e-discovery. According to the respondent, the Task Team will have the benefit of evaluating rules in foreign jurisdictions and the commentaries and criticisms of those rules, as well as the impact of those rules on the costs and complexity of the process.*

South Africa is unfortunately lagging far behind other leading jurisdictions when it comes to making use of electronic discovery of electronic documents as a practical and available means of curtailing some of the most significant costs incurred in the litigation process. Although the Rules Board has been considering this possibility for several years now, and amended the provisions of Rule 35 of the Uniform Rules as recently as 30 October 2020 (GG 43856, RG 11190, GoN 1157) with regard to rules relating to the discovery and production of documents, the published rule change has again overlooked the benefits of enabling litigants to request electronic copies of electronic documents discovered by the other party and still prescribes the archaic procedure of making discovered documents available for inspection at a time and date at a particular office of the discovering party.

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

Refer to the LSSA's views regarding the issue of fees in Chapters 1, 6 and 7.

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

The LSSA concurs that the LPC is best placed to address improper and unethical billing practices.

2.12 ***Recommendation 2.12:*** *In order to reduce legal fees, it is recommended that referral fees must not be recoverable from the client in all legal matters. The LPC must prohibit all forms of payment and receipt of referral fees by all legal practitioners, that is, candidate attorneys, attorneys, referral and non-referral advocates, and juristic entities alike, by making this an act of misconduct in the Code of Conduct provided for in section 36 of the LPA.*

These kinds of arrangements between attorneys serve to channel work to specialist attorneys, which increases access to justice and improved quality of service. This type of arrangement can potentially be extended to advocates with trust accounts who refer matters to other specialist

practising legal practitioners. If the intention is to ensure that the referral fees are not recoverable from the client, we agree. Referral fees should not be permitted to the extent that they amount to an increase of normal fees.

Paragraph 18.10 of the Code of Conduct sufficiently deals with the issue of referral fees by attorneys to third parties (non-legal practitioners).[26]

We suggest that it be left to the LPC, as regulator, to deal with the matter in an appropriate manner.

2.13 ***Recommendation 2.13:*** *The Commission recommends that the whole of Rule 67 of the Uniform Rules, which still makes provision for the payment of court fees to institute or defend legal proceedings, should be repealed. The Commission recommends that interventions to reduce sheriffs' fees, as well as alternative means to deliver and execute court orders, should be explored by the Rules Board.*

2.13.1 The LSSA agrees that Rule 67 should be repealed. Section 78 of the Magistrates' Courts Act, which makes provision for security of costs in respect of appeals, should also be repealed, as the R1 000 is an insignificant and unnecessary gatekeeper to access to justice.

2.13.2 We commend the recommendation that the Rules Board should explore alternative means to deliver and execute court orders. Sheriffs' fees are often a hindrance to access to justice and beyond the means of many litigants. In certain areas, sheriffs require a cash deposit upfront, particularly when receiving instructions from a newly established law firm.

In principle, the LSSA is in favour of alternative means to deliver and execute court orders, save for exceptional circumstances, such as where a person's prime place of residence is involved.

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[26] Paragraph 18.10 of the Code of Conduct provides that an attorney shall "not buy instructions in matters from a third party and may not, directly or indirectly, pay or reward a third party, or give any other consideration for the referral of clients other than an allowance on fees to an attorney for the referral of work".

The issue of unrepresented parties, who sometimes have no access to electronic means of communication, requires special consideration.

The LSSA will be making recommendations to the Rules Board regarding the reduction of sheriffs' fees and alternative means of delivery and executing court orders.

2.14 ***Recommendation 2.14:*** *In line with the Competition Commission's decision that advertising should be allowed subject to the general advertising law of South Africa, it is clear that there is no longer a place for any restrictions on advertising and marketing for legal professional services in the law of South Africa. These rules must be reviewed with a view to improvement and modernisation in accordance with best international practices of permitting ethical and not misleading advertisements.*

The LSSA agrees that the rules relating to advertising and marketing should be reviewed. We however believe that it is in the interest of the public and the profession that there should be some restrictions, including in respect of touting or soliciting of work. Rule 18.22 of the Code of Conduct provides that:

"An attorney will be regarded as being guilty of touting for professional work if he or she either personally or through the agency of another, procures or seeks to procure, or solicits for, professional work in an improper or unprofessional manner or by unfair or unethical means, all of which for purposes of this rule will include, but not be limited to:

18.22.1 the payment of money, or the offering of any financial reward or other inducement of any kind whatsoever, directly or indirectly, to any person in return for the referral of professional work; or

18.22.2 directly or indirectly participating in an arrangement or scheme of operation resulting in, or calculated to result in, the attorney's securing professional work solicited by a third party."

In the matter of *Law Society of the Cape of Good Hope v Berrange*[27] Desai J. stated that "The scheme implemented by the respondent was a way of touting for business and displays a high

[27] *Law Society of the Cape of Good Hope v Berrange* (3475/04) [2005] ZAWCHC 41; 2005 (5) SA 160 (C) [2006] 1 All SA 290 (C) (9 June 2005).

level of disloyalty to other members of the profession. The practice of touting by legal practitioners is a serious contravention "which should be eradicated" (see Cirota & Another v Law Society, Transvaal 1979 (1) SA 172 (A) at 192A-D)."

In certain circumstances the buying of work can amount to a corrupt practice, in contravention of anti-corruption legislation.

The payment of money, or the offering of any financial reward to third parties within this context no doubt increases the cost of legal services and, consequently, impedes on access to justice.

2.15 ***Recommendation 2.15****: Section 34(9) of the LPA mandates the LPC to conduct an investigation and make recommendations to the Minister on the creation of other forms of legal practice, including limited liability and multi-disciplinary practices. It is recommended that this matter be dealt with by the LPC in terms of its mandate provided for in the LPA.*

The LSSA supports the recommendation that this issue should be left to the LPC to deal with in terms of its mandate.

2.16 ***Recommendation 2.16:*** *The Commission concurs with the respondents' view that the introduction of section 34(2)(a)(ii) of the LPA regarding receipt by an advocate of a request (briefing) directly from a member of the public or from a justice centre for a legal service will enhance access to justice by members of the public. On the question whether the various societies of advocates be allowed to determine where their members may hold chambers / offices, it is recommended that the LPC is the relevant body to make a determination in this matter.*

The LSSA agrees that the LPC should determine where members may hold chambers / offices.

2.17 ***Recommendation 2.17:*** *To the extent that a junior counsel's fee is determined as a percentage of a senior counsel or silk's fee (for example, one third, or two thirds or 50% of senior counsel of a silk's fee), the system negatively influences the setting of a junior advocate's fee and gives rise to unattainable legal fees. It is not clear why a junior counsel should be entitled to a higher fee when briefed along with senior counsel or silk than would ordinarily be the case when he/she is not briefed along with senior counsel. This (general) rule cannot constitute a blanket rule, especially in cases where the junior is relatively inexperienced. It is also not clear why the client should be*

liable for the increased fees. Against this background, it is recommended that when a junior counsel is briefed along with senior counsel, there is no rational justification for pegging the junior counsel's fees against those of senior counsel. The junior counsel's fees must be determined in terms of the tariff applicable to junior counsel.

We agree with the Commission's recommendation. It is a highly unsatisfactory state of affairs that junior counsel's fee is determined as a percentage of senior counsel's fee. It is just and equitable that junior counsel should only charge for the work that he / she has actually done and at the normal rate applicable to junior counsel. We in any event believe that remuneration should be service-based and not practitioner-based.

2.18 ***Recommendation 2:18***: *It is recommended that the requirement that an attorney must be present when a matter is argued must be abolished, provided that the client is satisfied that someone else will be present in court to instruct counsel when the need arise.*

Although the Code of Conduct provides some leeway[28], the fact remains that it is the attorney who briefs the referral advocate, and not the client.

In *Johannesburg Society of Advocates and Another v Seth Azwihangwisi Nthai and Others*[29] the court refers with approval to the matters of *In re: Rome*[30] and *Rösemann v General Council of the Bar of South Africa*[31] as regards the distinction between the referral advocates' and the attorneys' professions.

In *Rösemann*, the court had the following to say:

"… An advocate in general takes work only through the instructions of an attorney. The rule is not a pointless formality or an obstacle to efficient professional practice, nor is it a protective trade

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28 Paragraph 18,16 of the Code of Conduct reads as follows: "18. An attorney shall – 18.16 be in attendance, *or immediately accessible,* during a consultation with counsel or an attorney acting as counsel, or at court during the hearing of a matter (other than an unopposed application) in which he or she is the attorney of record, in person or through a partner or employee, being an attorney or a candidate attorney."

29 *Johannesburg Society of Advocates and Another v Seth Azwihangwisi Nthai and Others* (879/2020 and 880/2019) [2020] ZASCA 171 (15 December 2020).

30 *In re: Rome* 1991 (3) SA 291 (A).

31 *Rösemann v General Council of the Bar of South Africa* (364/2002) [2003] ZASCA 96; [2003] 4 All SA 211 (SCA) (26 September 2003).

practice designed to benefit the advocacy. The rule requires that an attorney initiates the contact between an advocate and his client, negotiates about and receives fees from the client (on his own behalf and that of the advocate), instructs the advocate specifically in relation to each matter affecting the client's interest (other than the way in which the advocate is to carry out his professional duties), oversees each step advised or taken by the advocate, keeps the client informed, is present as far as reasonably possible during interaction between the client and the advocate, may advise the client to take or not take counsel's advice, administers legal proceedings and controls and directs settlement negotiations in communication with his client. An advocate, by contrast, generally does not take instructions directly from his client, does not report directly or account to the client, does not handle the money (or cheques) of his client or of the opposite party, acts only in terms of instructions given to him by the attorney in relation to matters which fall within the accepted skills and practices of his profession and, therefore, does not sign, serve or file documents, notices or pleadings on behalf of his client or receive such from the opposing party or his legal representative unless there is a Rule of Court or established rule of practice to that effect (which is the case with certain High Court pleadings but finds no equivalent in magistrates' court practice). The advocate does not communicate directly with any other person, save opposing legal representatives, on his client's behalf (unless briefed to make representations), does not perform those professional or administrative functions which are carried out by an attorney in or from his office, does not engage in negotiating liability for or the amount of security for costs or contributions towards costs or terms of settlement except with his opposing legal representative and then only subject to the approval of his instructing attorney…"

It is clear from the above that the nature of the attorneys' profession warrants, dictates and requires that, in instances where referral counsel appears, the attorney should be attending, either in person, or through another attorney or candidate attorney in the firm.

2.19 ***Recommendation 2.19:*** *The Commission concurs with the respondent's recommendation that the general acceptance and use of Information Technology (digital legal services) in the provision of legal services will result in the reduction of legal fees. The providers and consumers of legal services will all benefit from automation in the sense that legal services will be provided to more clients in a short period of time, in a more effective, efficient and productive manner.*

The LSSA agrees with these views. However, refer to our response to Recommendation 2.2.

2.20 ***Recommendation 2.20:*** *The Commission concurs with the respondents' view that transport, accommodation, and other indirect costs of litigation have a negative impact on access to justice. The following measures are recommended:*

(a) Presiding officers must ensure that when a court date is set, matters enrolled in the court roll do in fact proceed;

(b) Legal practitioners should embrace technology so as to limit the need for a client to travel to the bare minimum;

(c) Consideration should be given for parties who want to present argument only and not evidence, to do so via video conferencing;

(d) The system of rotational sitting of the court as currently utilised by the Land Claims Court, Labour Court and certain Regional and High Courts should be promoted.

The LSSA agrees with these recommendations. The rotational sitting of Labour Courts is very successful.

2.21 ***Recommendation 2.21****: The Commission concurs with the respondents' view that there appears to be lack of support for vulnerable groups (youth, people with disabilities, and women) with regard to legal costs. South Africa is grappling with a pandemic of violence against women and children and people with disabilities. There is also a stark increase in hate crimes against members of the LGBTQI+ community. The following measures are recommended:*

(a) The community advice office sector actively pursues programmes and projects that are specifically looking at ensuring access to justice for vulnerable groups. Consideration should be given by the DOJCD and other relevant stakeholders towards enhancing their financial and other operational resources to do so; and

(b) Consideration should be given to extending the mandate of Legal Aid South Africa (in the Legal Aid South Africa Act, 39 of 2014 or the Regulations issued in terms of the Act) to include provision of legal aid to vulnerable groups like the youth, people with disabilities and women.

The LSSA agrees with these recommendations.

There is a notion that it is legal practitioners' duty to provide access to justice. This is not so. It is the duty of the state and cannot be delegated to the profession. The reason that there are

institutions like Legal Aid South Africa is to ensure that indigent and other vulnerable persons have access to justice.

The LSSA submits that Legal Aid South Africa should be properly resourced, and its areas of operation should be extended beyond what is recommended by the SALRC (i.e. the youth, people with disabilities, and women). Although Regulation 9(1) empowers Legal Aid South Africa to provide legal aid in civil matters, this is linked to the availability of sufficient resources. Given the state's Constitutional obligation to afford citizens access to justice, it is imperative that the fiscus should prioritise Legal Aid's financial resources.

The means test should be *substantially increased*. It is noted that the means test currently employed by the Legal Aid Board only offers the most indigent citizens access to justice.

Through the Judicare system, legal practitioners in private practice can contribute enormously to the provision of legal services to the indigent. We believe that many legal practitioners are willing to accept instructions from Legal Aid South Africa, at reasonable fees, and we suggest that the pool of Judicare practitioners be extended.

2.22 ***Recommendation 2.22:*** *The Commission concurs with the respondents' views that lack of general education negatively impact access to justice. Unnecessary litigation can be avoided if people are properly aware of their legal rights. The following interventions are recommended:*

(a) A basic legal understanding should be a mandatory part of the school curriculum, for example, as part of the Life Orientation programme;

(b) Greater effort at public awareness should be made by relevant government departments or by the Government Communication and Information System.

The LSSA agrees with the proposed interventions.

2.23 ***Recommendation 2.23:*** The Commission concurs with the respondents' views that there is a lack *of knowledge about laws and legal rights amongst the general public. The following interventions are recommended:*

(a) Legal Aid SA; community advice centres (CAOSA) and paralegal services should be empowered to focus on educating the communities that they serve;

(b) *Awareness campaigns regarding legal services which are accessible to indigent persons should be conducted; posters or other easily accessible materials should be freely available; and the available avenues for exercising rights through institutions or processes which facilitate access to justice should be broadcast widely.*

(c) *DOJCD should publish a guide on how and where access to free legal advice can be obtained. The guide should include not only Legal-Aid SA, but all NGOs and NPOs as well.*

The LSSA agrees with these interventions. It is important to consider what preventative measures can be taken, i.e. what to do before one lands in trouble. Education and awareness programmes are necessary. Flyers could be made available at all courts, detailing the existence and services by these institutions. The newly appointed Legal Services Ombud can also play an informative role to the public in this regard.

2.24 ***Recommendation 2.24****: On the subject of corruption perpetrated by members of the legal profession, both the National Prosecuting Authority and the LPC have a duty to act against allegations of corruption and to ensure that negative findings against law practices and legal practitioners are met with fitting sanctions.*

The LSSA concurs.

2.25 **Questions raised by the SALRC:**

(1) *With the electronic communication available, why is there still a need for a correspondent attorney?*

Until there is a sophisticated electronic system available, there will be need for a correspondent attorney.

There are certain functions that only a correspondent attorney can perform, such as the issuing, indexing and paginating of documents, etc. At the Supreme Court of Appeal and the Constitutional Court, where records need to be bound in a specific manner, a correspondent can perform that duty at a fraction of the cost to the client. Since case management meetings deal with procedural matters, it may be inappropriate for the instructing attorney to attend these meetings, at an astronomical cost to the client.

Furthermore, the courts' practice directives are not uniform and these are known only to the correspondent operating in that territory.

The courts have consistently held that an attorney may engage a correspondent who practices as the seat of the court, where this is justified. In *Wimbush and Another v Erintrade (Pty) Ltd t/a RT Chemicals*[32] the court referred to the matter of *Schoeman v Schoeman*[33], where it was stated that "Much would depend on the circumstances of the case and a realistic and common sense approach should be adopted." Also refer to *Sonnenberg v Moima*[34].

In the unreported matter of *Development Bank of South Africa & Others v National Director of Public Prosecutions*[35] the court indicated that the applicant had a correspondent attorney who could have attended court, instead of the instructing attorney travelling to court, which endorses the point that correspondent attorneys serve a vital role in curtailing costs.

It is also often more cost effective to utilise the services of a correspondent attorney in non-litigious matters, where the seat of office is in a specific area, e.g. the Master's Offices and the Deeds Offices.

We submit that it will be imprudent to dismiss the issue of correspondent attorneys.

(2) *The SALRC invites comment and input on the question whether the kilometres rule for service of court process and other documents by sheriff should be abolished and that delivery of all court process and documents be done electronically.*

As stated in paragraph 13.2 above, save for exceptional circumstances (such as unrepresented parties and where a place of residence is involved), the LSSA in principle supports delivery of documents by electronic means, to be supported by an affidavit.

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32 *Wimbush and Another v Erintrade (Pty) Ltd t/a RT Chemicals* 548/13) [2013] ZAKZPHC 39 (11 June 2013).

33 *Schoeman v Schoeman* 1990 (2) SA 37 (E).

34 *Sonnenburg v Moima* 1987 (1) SA 571 (T)).

35 *Development Bank of South Africa & Others v National Director of Public Prosecutions, case nr. 9629/14* (KZP).

(3) *The SALRC invites comment and input on the question whether the requirement that the attorney must be present needs to be abolished. This requirement cripples the Office of the State Attorney in particular, where days and days are spent in court, resulting in little or no time for correspondence in the office to be answered.*

Please refer to the LSSA's comment in respect of Recommendation 2.18 above.

We believe that reference to the Office of the State Attorney is unfortunately misplaced. The State Attorney carries the mandate of the state, consulted with the client and instructs counsel. The advocate may never have consulted with the client.

Further, all litigants are equal before the law and it is inequitable to implement legislation to suit the needs of a specific litigant.

CHAPTER 3: ACCESSS TO LEGAL SERVICES BY USERS IN THE LOWER AND MIDDLE INCOME BANDS

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

The LSSA agrees with this recommendation. "Access to justice means effective access to the law requiring not only legal advice and representation in court, but also information an education of the law, law reform and a willingness to be able to identify the unmet needs of the poor. Access to justice requires 'policies which deploy every possible means toward attaining their goal, including reform of substantive law, procedure, education, information and legal services".[36]

3.2 ***Recommendation 3.2:*** *The SALRC recommends that section 29(2) of the LPA be amended by the substitution for subparagraphs (b) and (e) of the following subparagraphs (b) and (e); and the addition of the following subparagraphs*:

Community service

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

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

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

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

(cA) <u>service at the community advice office</u>;

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

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

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

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[36] Skinnider E. "The Responsibility of States to Provide Legal Aid", The International Centre for Criminal Law Reform and Criminal Justice Policy: Paper prepared for the Legal Aid Conference Beijing, China March 1999, p5. Available at http:// www.icclr.law.ubc.ca/ publications/reports/beijing.pdf (accessed on 14 December 2020).

It is submitted that the above mentioned proposed amendment of the LPA will enable the Minister to make regulations, and the LPC to make rules, regulating community service and pro bono legal services on the same model as provided for under rule 25 of the attorneys' profession.

3.2.1 It should be noted that, although it is already provided for in the Legal Practice Act (Section 29(2)(a)), the LSSA finds it problematic that service in the state may be regarded as community service. It is not the legal profession's obligation to provide free legal services to the state. The said subsection does not facilitate access to justice, but is aimed at providing free services that the taxpayers' money is already paying for. Community service should primarily be for the benefit of indigent members of society.

The decision of what should constitute community service, however, should be left to the LPC, as regulator of the legal profession.

3.2.2 The LSSA supports the extension of community-based work to all Chapter 9 institutions and community advice offices. This is in line with the purported spirit of community service.

3.2.3 We support the insertion of subsection (dA). This is in line with our recommendation that pro bono services should fall within the ambit of community service. Pro bono obligations should also benefit citizens falling within the middle-income bracket.

3.3 ***Recommendation 3.3:*** *It is recommended that the LPC should consider the viability of introducing community service to be rendered by post-study law graduates as a means to broaden access to justice to the majority of the people of South Africa including appearance in court subject to supervision. Section 29(1) of LPA the provides that the "The Minister must, after consultation with the Council, prescribe the requirements for community service from a date to be determined by the Minister."*

As the Commission correctly pointed out, at this stage it is unclear how law graduate community service will be funded and regulated.[37] Post-study graduates do not fall under the regulatory control

[37] SALRC Discussion Paper 150 "Investigation into Legal Fees including Access to Justice", p173.

of the LPC and it should be incumbent upon the state to develop a mechanism in terms of which law graduates can do community service and be funded by the state.

3.4 ***Recommendation 3.4:*** *The Commission concurs with the respondents' views that there is generally a lack of awareness of alternative fora for ADR mechanisms such as judicial/quasi-judicial tribunals, administrative appeal tribunals, the various public and private ombuds, and Chapter Nine institutions such as the Commission for Gender Equality, the South African Human Rights Commission, and the Public Protector, among others, that could be utilised to a greater extent and strengthened in order to broaden access to justice for the majority of the people of South Africa. More resources should be deployed in promoting public awareness of the existence of institutions such as the National Consumer Regulator and Chapter Nine institutions as this will educate the public and enhance overall access to justice.*

The LSSA agrees with this recommendation. The Legal Services Ombud can also play a valuable informative role in this regard

3.5 ***Recommendation 3.5:*** It *is recommended that the use of ADR mechanisms, including the use by organs of state of pre-litigation administrative processes with a view to encourage early settlement of disputes without the need to go to court be promoted.*

The LSSA supports this recommendation.

3.6 ***Recommendation 3.6:*** *It is recommended that the monetary jurisdiction of the Small Claims Courts should be reviewed and increased to R40 000.00. Thereafter, it should be reviewed once every two years in order to keep up with inflation.*

The LSSA agrees with this recommendation.

3.7 ***Recommendation 3.7:*** *It is recommended that the LPC should collaborate with the LEI industry in order to address the key regulatory weaknesses that impact on the provision of premium products geared towards providing access to justice and legal services for the legal services market as a whole. This is will ensure that the protection provided to consumers of legal services under the LPA is extended to LEI policyholders.*

The legal expenses insurance industry does not fall under the regulatory control of the LPC. It is imprudent for the LPC to collaborate with organisations that they cannot in any way regulate, on the basis as recommended by the Commission. Our position is that legal services rendered by the LEI industry should not be in contravention of Section 33 of the LPA and that anyone rendering legal services as envisaged in this section should be a legal practitioner, subject to the authority of the LPC.

CHAPTER 4: MANDATORY FEE ARRANGEMENTS

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

4.1.1 Inasmuch as the LSSA in principle supports entering into a mandatory fee arrangement with the client when the client secures the legal practitioner's services, such agreement should only entail the basis upon which the fees are charged, e.g. itemised rates and other aspects of the fees to be charged. It should *not* entail an estimate of the envisaged total costs.

Section 35 places no obligation on referral advocates to enter into mandatory fee arrangements when their services are secured. Although paragraphs 26.2 and 26.3 of the Code of Conduct provides for some form of fee arrangement, this is not obligatory.[38] This unfairly discriminates against attorneys and Section 34(2)(b) advocates. A mandatory fee arrangement will also prevent disputes of fact about the quantum of fees and agreed terms of payment.

4.1.2 We caution against written costs estimates. In its letter to the Minister of Justice and Correctional Services, quoted extensively by the Commission in its discussion document[39], the LSSA raised several problems with regard to written cost estimates. These issues remain of concern. We reiterate our view that the provisions of subsection 35(7) are unrealistic and unreasonable. It will be virtually impossible to provide the client with a cost estimate upfront, particularly in respect of litigation matters. The legal practitioner is not aware how the case is going to develop, how many interlocutory applications may be required, how many documents there will be, how many consultations will be required, how long the case will take, how many postponements there will be, etc. This is particularly so in a system fraught with challenges.

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38 Section 26.2 of the Code of Conduct provides that "Counsel shall upon accepting a brief, at the time of acceptance, stipulate to the instructing attorney the fee that will be charged for the service or the daily or hourly rate that shall be applied to computing a fee". Section 26.2 reads that "Counsel shall, in respect of every brief, expressly agree with the instructing attorney the fee to be charged, unless there is a tacit understanding between counsel and the instructing attorney about the fees or the rate of fees usually charged by counsel for the particular kind of work mandated by the brief" (our underlining).

39 SALRC Discussion Paper 150 "Investigation into Legal Fees including Access to Justice", p215.

It will be particularly difficult for a legal practitioner to set out the disbursements that will be needed in litigation. As an example, the client's medical condition, recovery, pre-existing conditions, development in medical science, new areas of specialization, other factors, and experts (whose fees are determined by market forces) determine the need for further experts in the litigation process. It is an impossible task for a legal practitioner to identify and suggest to a client an outline of the possible expenses, or actual expenses that may be incurred, at the first consultation.

A legal practitioner who intends to comply properly with the requirements of cost estimates as set out in Section 35(7), will in all probability need to provide so much information to the client that it will result in information overload. This is particularly so having regard to the question of when the estimated costs should start and until which stage of litigation should it continue. For example, should only the costs of the current process, e.g. summons be estimated, or should all aspects of the process be covered, and if so, where does the process stop? At judgment, or execution or appeal? If it stops at appeal, at which level (e.g. appeal to the High Court or Supreme Court of Appeal or Constitutional Court)? The cost estimate section is too wide and unworkable. The problems inherent to it is a further motivation why the LPC should be encouraged to set fee guidelines and deal with the other relevant aspects.

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

The consequences of failing to provide a mandatory fee arrangement (misconduct, in addition to Section 35(11) of the LPA) are unnecessarily harsh. Smaller firms that do not have a large infrastructure, are particularly at risk of falling foul of these provisions.

CHAPTER 5: CONTINGENCY FEE AGREEMENTS

5.1 ***Recommendation 5.1:*** *The Commission recommends that section 2(1) of the Contingency Fees Act be amended by the substitution for subsection 2(1) of the following subsection 2(1):*

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

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

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

This recommendation is not supported, for the following reasons:

5.1.1 The inclusion of the phrase adds an unnecessary complexity which will impose a superfluous burden upon the legal practitioner, whilst not adding any meaningful control mechanism.

5.1.2 It will be virtually impossible to monitor and enforce a requirement of this nature as the institution responsible to do so will have to take into consideration the factors present at the time of taking instructions and not in hindsight.

5.1.3 As far as personal injury matters are concerned, the explanation given in the Commission's commentary is unreasonable and does not follow. [40] There are various risks at the time of concluding the agreement. Risk not only pertains to liability, but also to the credibility of the client; the nature and extent of the injuries; whether the injuries translate into a financial loss and to what extent, if any; rehabilitation of the client; accommodations at work; and the

[40] SALRC Discussion Paper 150 "Investigation into Legal Fees including Access to Justice", p241 – 244.

nature and extent of the quantum. The test is a subjective one that needs to be made at the time of taking instructions, rather than looking back once a matter has been finalised.

The costs incurred in investigating personal injury claims are dependent on medical and other experts, which are necessary to prove a case in court. Failing to investigate the full extent of the injuries (medically) opens the legal practitioner up for a case of negligence. The clients benefit from a full array of experts in order to define the nature and extent of such injuries and by implication to rule out injuries and sequelae. In this context, it is impossible for a legal practitioner to assess the risk, unless medical and other expert evaluations are conducted.

Should the client not be medically impaired or the legal practitioner not be able to prove the case in court (i.e. there may be various other reasons), it is the legal practitioner that absorbs the risk and costs of litigation.

Therefore, to consider the risks after the matter has been successfully finalised, will be a skewed perspective of the realities of practice. The risk that a legal practitioner incurs to assist members of the public at the time of accepting the instruction will not be accurate if analysed retrospectively. This will unfairly prejudice the legal practitioner. The commentary over-simplifies the test.

5.1.4 Claimants are often indigent and would otherwise not have access to justice to remedy the wrong that they have suffered, either at the hands of medical practitioners, the state, drivers of motor vehicle accidents, etc. The introduction of this additional test will discourage practitioners from taking on cases with less risk involved, thus denying those claimants access to justice.

5.1.5 The SALRC's focus of attention is the fee that legal practitioners are entitled to, rather than access to justice. In the latter context, any amendments should highlight methods of improving access to justice. The commentary takes into account the protection of the state, rather than the victim (client).

5.1.6 Accordingly, we believe that the implementation of this recommendation will be counterproductive and have adverse effect on access to justice. Furthermore, the

introduction of this phrase adds an additional and redundant layer which was not anticipated by the drafters of the legislation and it offers no remedy for the suggested abuse or claimed conflict of interest.

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

This recommendation is not supported.

5.2.1 It is submitted that the Contingency Fees Act (CFA) sufficiently provides for protection of the client, as well as remedies that a client may consider. In addition, the case law that developed clearly shows that contingency fees agreements are in any event closely scrutinised by the courts.

5.2.2 Whilst the courts have inherent powers to supervise contingency fees agreements and in *Masango and Another v Road Accident Fund and Others*[41], it was indeed stated that contingency fees agreements "will be supervised strictly by the courts to ensure that the rights of the clients in litigation are protected and not compromised", it is of concern that the Commission's recommendation seems to suggest that the courts should interfere with the percentage in terms of the agreement, when the fee is based on the taxed or agreed bill of costs.

5.2.3 The courts have no knowledge, at the time that a settlement agreement is made an order of court, of how much work went into the matter, the time spent and what fees should be charged. As such, they cannot make a value judgment.

5.2.4 We are concerned that this suggestion will simply frustrate the process and result in legal practitioners not assisting members of the public by utilising contingency fee agreements as opposed to attorney-and-own client agreements.

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41 *Masango and Another v Road Accident Fund and Others* (2012/21359) [2016] ZAGPJHC 227; 2016 (6) SA 508 (GJ) (31 August 2016), at [3].

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

This recommendation is noted. The normal legislative process will follow.

It is however peculiar that the recommendation is placed under the heading of contingency fees agreements. The Road Accident Fund Act has been promulgated to protect the public from injury or death sustained by the negligent driving of a motor vehicle on South African roads. It is our submission that the focus should be placed at the prevention of motor vehicle accidents, by effective policing, a stricter approach to issuing motor vehicle licences and other preventative measures. It appears as if there is a suggestion that the Act needs to be amended, rather than focusing on the prevention of the actual problem (accidents) which in turn gives rise to claims.

5.4 ***Recommendation 5.4:*** *The following is recommended:*

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

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

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

(c) that section 4(1) of the Act be amended as follows:

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

(d) that 5(1) of the Contingency Fees Act be amended as follows:

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

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

5.4.1 The LSSA has no problem with paragraphs (a), (d) and (e) as these amendments are in accordance with the establishment of the LPC.

5.4.2 The proposed amendment of Section 1 of the Act is opposed. The Commission states that the 25% cap does require clarity. [42] We wish to point out that, with reference to the use of advocates and correspondents, the Contingency Fees Act, as clarified by the courts, anticipates two scenarios:

5.4.2.1 Where the attorney and advocate enter into a contingency fee agreement with the client:

The courts have already held that, where counsel is acting on contingency and charging higher than normal fees, then all the fees collectively will be subject to the 25% restriction.

[42] SALRC Discussion Paper 150 "Investigation into Legal Fees including Access to Justice", p254.

The Commission's proposed definition of "success fee" is based on the assumption that it is the norm that both the attorney and the advocate enter into a contingency fee agreement with the client. This rarely happens in practice.

Section 3(2) of the Contingency Fees Act provides that:

"A contingency fees agreement shall be signed by the client concerned or, if the client is a juristic person, by its duly authorised representative, and the attorney representing such client and, where applicable, shall be countersigned by the advocate concerned, who shall thereby become a party to the agreement. (emphasis added).

This means that an advocate is not obligated to become a party to a contingency fees agreement and in deciding not to become be a party, his/ her fees would fall outside of the ambit of such contingency fees agreement.

The same applies to correspondent attorneys.

5.4.2.2 In the event of the attorney entering into a contingency fees agreement with the client:

Where an advocate has *not* entered into the contingency fees agreement and only charges his/her *normal fee*, the advocate's account will be considered a disbursement. It is not a "success fee" and cannot be part of the restriction.

The definition of the word "fee" is confined to the fee as described in the Contingency Fees Act, being the fee that the legal practitioner is entitled to.

It does not pertain to the disbursement involved in the litigation, be it the advocate or correspondent attorney's fees. The correspondent attorney and advocate's fees are in the normal course disbursements which are recovered on the party-and-party scale, if successful. In the absence of a contingency fees agreement from advocates, they are not a party to the agreement.

Accordingly, disbursements which are payable, and which are recovered from the opposing party (on success), cannot possibly be considered as the attorney's fee.

The recommendation, which in effect lumps the attorney's fees and disbursements together, is thus unreasonable. *Disbursements advanced (e.g. correspondent attorneys' and advocates' accounts) are covered by the legal practitioner on behalf of the client in the event of the case been unsuccessful*. It is illogical to consider these disbursements as part of a legal practitioner's fee.

The *legal practitioner gains no material interest or benefit from these disbursements*. The recommendation suggests that the legal practitioner is not entitled to recover same, and that these disbursements must be included in his/her 25% fee (inclusive of VAT). It will be inequitable if the fee that the attorney is entitled to, after having run a matter, at risk, and funding it, for two or more years, is calculated less the disbursements.

The claimants receive a contribution towards these disbursements on success. The recommendation, if implemented, will have the effect that a legal practitioner will absorb these costs on behalf of the client, despite these disbursements being recoverable from the other party. *It cannot be expected that the legal practitioner should be prejudiced, whilst the client benefits doubly from the recovery*.

In Magistrates' Courts matters, the disbursement of the advocates' accounts may outweigh the 25% fee that the legal practitioner is entitled to in terms of the Act.

It is appropriate to refer to Section 3(3)(b)(i) of the Contingency Fees Act, which provides that, before the agreement is entered into, the client was advised of "the manner in which any amendments *or other agreements ancillary to the Contingency Fees Agreement* will be dealt with" (our emphasis). The agreement with counsel is an ancillary agreement, the implications of which will be explained to the client. Furthermore, the cost order will ordinarily make provision for the recovery of counsel's fees on the applicable scale from the losing party.

The reality is that members of the public cannot afford the disbursements required in litigation, and should these recommendations be implemented, legal practitioners may desist from providing a service in terms of the Contingency Fees Act.

5.4.3 The proposed amendment in paragraph (c) is in accordance with the newly established LPC.

We wish to point out that this provision is for the approval of an agreement between the attorney and his/her client. We note with concern the trend that certain state entities are trying to impede this aspect, in order to delay payment.

The agreement between an attorney and his/her client should never be at the disposal and/or used for the benefit of his/her opponent. It is certainly not for the purposes of any organisation to try and delay payment or to gather data. Third parties should generally not be privy to the agreement, as it is for the courts or the LPC to confirm that the agreement complies with the legislation.

5.5 ***Recommendation 5.5:*** *On the question whether a mechanism should be created specifically to deal with allegations of excessive fees being charged in contingency fees litigation in order to ensure that those fees remain reasonable in the light of the circumstances of a case, in other words, whether there should be a body focusing specifically on preventing the abuse of contingency fee arrangements, the Commission recommends that the LPC, as the regulator for the legal profession, is the appropriate Mechanism to deal with allegations of excessive fees in terms of section 5(b) of the LPA. In its submission to the Commission, the LPC points out that: "The Act already has a mechanism to adjudicate disputes not only about the terms in a contingency fees agreement but also any fees chargeable in terms thereof. The Legal Practice Council adopted the Contingency Fee Tribunals established in terms of section 5 of the Act by the former Law Societies and these functions. Furthermore, additional tribunals will be established for each of the nine provinces."*

The LSSA agrees with this recommendation, but wish to highlight that legal practitioners should not be subjected to lengthy processes to obtain confirmation of fees that they are entitled to. Legal practitioners working on contingency require speedier approval of their fees, as they in essence fund litigation.

5.6. **GENERAL REMARKS ON CONTINGENCY FEES**

5.6.1 It is submitted that Section 35(7) should not apply to matters governed by contingency fees agreements. The CFA deals comprehensively with aspects that need to be contained in a contingency fees agreement. Section 3 prescribes the form and content of contingency fees agreements and Section 3.3 provides that the amounts payable or the method of calculating the amount payable, and how disbursements will be dealt with, must be stated. There is provision for a 14-day cooling off period. Section 5.1 provides that the client can review the terms of the agreement or the fees via the professional controlling body. We believe that the CFA provides a full body of control and that it is onerous, impractical and unjustifiable to disjoint the CFA by cross-referencing Section 35(7) of the LPA.

5.6.2 The impact of the proposed amendments to the Contingency Fees Act, if approved, on existing valid contingency fee agreements should be considered. A clause will have to be added to protect the validity of the current agreements.

5.6.3 Although the Commission touched on the issue of debt collections[43], no recommendation has been made in this regard. It is suggested that this issue be considered by the SALRC in due course.

43 *Ibid*, 233.

CHAPTER 6: MECHANISMS FOR PARTY-AND-PARTY COSTS

6.1 ***Recommendation 6.1***: *The Commission is of the view that the Rules Board, as presently constituted institutionally in terms of section 3 of the Rules Board for Courts of Law Act 107 of 1985, read with section 5(1) of the Act, is the appropriate existing mechanism for determining legal fees and tariffs payable to legal practitioners and juristic entities in litigious matters.*

The Rules Board, as presently constituted, is the appropriate existing mechanism to determine recovery *party-and-party* tariffs in *litigious matters*. We submit that, in respect of non-litigious matters, the LPC is the appropriate body to determine the mechanism.

We note the Commission's comment that "Section 35(1) of the LPA signals the intention of the Legislature to extend the mandate of the Rules Board to include the determination of tariffs in non-litigious matters."[44] We submit that it is clear from the wording of the section that this is intended as an *interim measure*. Section 35(1) states that "*Until the investigation contemplated in subsection (4) has been completed and the recommendations contained therein have been implemented* by the Minister, fees in respect of litigious and non-litigious legal services … must be in accordance with the tariffs made by the Rules Board for Courts of Law …" (our emphasis).

6.2 ***Recommendation 6.2:*** *It is stated above that in the RSA, the award of costs, unless expressly stated otherwise, is in the discretion of the presiding judicial officer and that costs generally follow the event. It is recommended that courts should consider applying the proportionality test in addition to that of reasonableness when awarding costs on party and party scale and attorney and client scale. The aim of the proportionality test is to maintain a sensible correlation between costs, on the one hand, and the value of the case, its complexity and significance on the other hand.*

We do not believe that it is prudent to be prescriptive on how presiding judicial officers should exercise their discretion. Presiding judicial officers should have an unfettered discretion in awarding costs. Nothing prevents a judicial officer from applying the proportionality test in appropriate circumstances.

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44 SALRC Discussion Paper 150 "Investigation into Legal Fees including Access to Justice", p282.

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

To the extent that this recommendation applies to *litigious matters*, we agree. The assessment of fees in respect of non-litigious matters should remain with the LPC.

We also agree that more taxing masters need to be appointed and trained. In many jurisdictions it is very difficult to obtain taxation dates, which impedes access to justice. Furthermore, should the Commission's recommendations of extending the party-and-party tariff as a basis of attorney-and-client fees be accepted, this will become more critical.

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

Although the LSSA has no problem in principle with the LPC developing guidelines in respect of initial consultations, there are instances where essential attendances are disallowed on taxation on the basis that they are pre-litigation costs, including "premature" briefing of counsel. In some instances, these essential attendances do not strictly further the litigation process. Even though pre-litigation costs are dealt with in case law (see in particular *Randall vs Baisley*[45]), this issue could be addressed by amendments to the party-and-party tariff, so that at least reasonable consultations, research, investigations and correspondence are included. It will also be important to clarify at what stage the litigation process starts.

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

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[45] *Randall vs Baisley 1992(3) SA 448 E.*

(a) *That the rules relating to expert evidence require revamping so as to improve the advice rendered to court and to ensure that the costs are curtailed.*

(b) *Fees charged by experts should be regulated by the relevant professional bodies. The fees should be reasonable and relate to work done by the expert and not repetition of what had been done by others.*

(c) *Expert reports must be truthful, impartial and only relate to the area of expertise for which the expert is qualified.*

(d) *The LPC should inform all relevant professional bodies of the need for guidelines to be determined with regard to the fees that may be charged. The guidelines should be published for purposes of transparency and that disciplinary action will be taken where experts charge unreasonable and disproportionate fees.*

We agree with these recommendations. There are potential risks and liabilities associated with acting as an expert witness, but the relevant professional body will no doubt take this into consideration when determining the fees.

6.6 ***Recommendation 6.6:*** *It is recommended that an investigation be conducted by the DOJCD into the feasibility of establishing an administrative body that will be responsible for prescribing minimum norms and standards and code of conduct for legal costs consultants without a right of appearance in court. Legal costs consultants are not expressly included in the code of conduct that must be developed by the LPC in terms of section 36(1) of the LPA. The code of conduct is applicable to all legal practitioners, candidate legal practitioners and juristic entities. Allowing costs consultants to present and oppose bills of costs is conducive to the settling of bills, thereby facilitating access to justice, as more matters may be set down and finalised at any given time. It also provides users of legal services with more product choices and competitive prices which is an important tenet of a free market system.*

We have no problem with an investigation into the feasibility of establishing an administrative body. However, we are not in favour of allowing cost consultants without right of appearance to present and oppose bills of costs. If one attends a taxation, one exercises a function as an officer of the court. Further, it is ultimately the legal practitioner's responsibility to ensure that the bill of costs is accurate.

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

The LSSA agrees that the recoverable tariffs in respect of advocates' and attorneys' fees should be reviewed.

When adjusting the tariff, it should be taken into consideration that the intention of the LPA was to level the playing field between attorneys and advocates. Legal practitioners should be entitled to charge the same rate, subject to the same criteria.

We therefore support the Commission's recommendation that the review must be informed by the *service-based principle* (rather than the practitioner-based principle). Attorneys and advocates should be treated equally, based on the services they render, regardless of which branch of the profession they come from.

From a costs point of view, the Magistrates' Courts party-and-party tariff is extremely technical and difficult to use. We suggest a simplified tariff, such as the High Court one, but with slightly lower rates.

A further reason why attorney-and-client fees cannot be determined on the basis of the Magistrates' Courts party-and-party tariff is that it does not cover all the items.

6.8 ***Recommendation 6.8:*** *Although there is no provision in the Rules Board for the Courts of Law Act barring the Rules Board from making rules regulating the practice and procedure in connection with litigation in criminal matters in the Magistrates' Courts, High Court and SCA, however, cost orders are generally not granted against either the State or the accused party in litigious criminal*

matters. It is recommended that service-based attorney-and-client Fee Guidelines be developed by the LPC in all branches of the law including criminal matters.

The LSSA agrees that the LPC should develop guidelines in respect of criminal matters. These guidelines should be service-based as opposed to practitioner-based, to bring parity between attorneys' and advocates' fees. The guidelines should be used as a benchmark, and not be regarded as a fixed tariff.

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

The LSSA does not believe that this recommendation will achieve the desired results. This will only create an extra burden on presiding officers, who are already overburdened. The recommendation, if implemented will present challenges for the state. The Commission is silent on the question of what will happen if the presiding officer fails to inform complainants accordingly.

In addition, if this is made compulsory and the presiding officer did not comply, this in itself suggests an irregularity in the proceedings, which will have a ripple effect on the number of appeals or reviews that may be forthcoming.

There may also be an increase of appeals against the quantum that the presiding officer has determined.

In view of the above, the LSSA does not support the recommendation. The public should rather be educated on their rights to apply for these awards.

6.10 ***Recommendation 6.10:*** *It is recommended that the DOJCD should consider amending section 191(3) and (4) of the Criminal Procedure Act, 1977 (Act 51 of 1977) to include a provision that will*

provide for a bi-annual review or an automatic annual adjustment of allowances payable to witnesses attending criminal proceedings in line with inflation as per the consumer price index.

We support an *automatic annual adjustment*, linked to the consumer price index, coupled with the right of any stakeholder to call for a comprehensive review from time to time. This will deal with market forces and inflation and prevent delays which might be inherent in a bi-annual process.

6.11 ***Recommendation 6.11:*** *The Commission recommends that it is desirable that the existing mechanism for determining recoverable (party- and- party) legal fees and tariffs in litigious matters in the Magistrates' Courts be extended by default, without the opt-out option as provided for in section 35(3) of the LPA, for use as basis for determining attorney and client fees payable to legal practitioners by users of legal services whose total income / turnover per annum does not exceed the maximum threshold determined by the Minister by Notice in the Gazette, subject to the following modifications:*

(i) that the party and party tariffs must be reviewed annually and updated once every two years so as to keep up with inflation;

(ii) that the party and party tariffs in respect of attorneys' and counsels' fees must be reviewed in relation to each other and in respect of the various hierarchies of court so as to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Court level right up to the Supreme Court of Appeal and Constitutional Court. A tariff for counsels' fees is required to guide taxing masters in the taxation of counsels' fees and to establish uniformity in the taxation of counsels' fees with those of attorneys with the right of appearance in the High Court;

(iii) that the party-and-party tariffs should also make provision for the recovery of section 34(2)(b) counsel's fees who have the right to receive a brief directly from a member of the public.

We find it perplexing that the issue of attorney-and-client fees are dealt with under the heading "Mechanisms for party and party costs". The objectives of the two are not the same and it is imperative that the distinction be maintained, for the reasons set out in Chapter 1.

The LSSA's views on the proposed attorney-and-client *Tariff with limited targeting* are comprehensively dealt with in Chapter 1 and will not be repeated here.

It however needs to be reiterated that the LSSA is not in favour of fixed tariffs in respect of attorney-and-client fees, whether or not they be linked to a threshold.

We further believe that there is no justifiable correlation between the Commission's research and the outcomes as postulated, and no synergy and logic in the reasoning in arriving at a conclusion that goes against the grain of the research.

Should the Commission's recommendations of a threshold nevertheless be accepted, we suggest that this can be catered for in fee guidelines issued by the LPC.

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

(i) additional surcharge of not more than 20%, or such percentage as may be approved by the Minister, on the tariff amount to be determined at taxation by the registrar or clerk;

(ii) that the party and party tariffs must be reviewed annually and updated once every two years so as to keep up with inflation;

(iii) that the party and party tariffs in respect of attorneys' and counsels' fees must be reviewed in relation to each other and in respect of the various hierarchies of court so as to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Court level right up to the Supreme Court of Appeal and Constitutional Court. A tariff for counsels' fees is required to guide taxing masters in the taxation of counsels' fees and to establish uniformity in the taxation of counsels' fees with those of attorneys with the right of appearance in the High Court;

(iv) that the party-and-party tariffs should also make provision for the recovery of section 34(2)(b) counsel's fees who have the right to receive a brief directly from a member of the public.

The LSSA's objections to Recommendation 6.11 apply equally to Recommendation 6.12. A 20% surcharge may not do justice in relation to the amount of work an attorney has to do. Further, the

percentage of the proposed surcharge appears to be arbitrary and bears no relation to the actual determined cost of practice and/or of representing a client in a matter.

6.13 ***Recommendation 6.13:*** *It is recommended that for the sake of certainty, party-and-party tariffs should regulate attorney-and-client fees in respect of users of legal services in the lower and middle-income bands in litigious matters as a permanent arrangement.*

The LSSA does not support this recommendation, for the reasons stated above and in Chapter 1.

6.14 ***Recommendation 6.14:*** *It is recommended that the mechanism (Rules Board) must adopt a consultative process of all the stakeholders involved prior to determining fees and tariffs. The following stakeholders and role players, among others, must be consulted:*

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

The LSSA notes the list of recommended stakeholders and role players. It has a concern regarding members of the judiciary being consulted. This will constitute a conflict of interest as they are expected to adjudicate on these matters when they come before them.

We also note that a long list of proposed stakeholders must be consulted. However, the LSSA, as recognised and unified representative body of attorneys and candidate attorneys, are excluded. The LSSA's constituent members are the Black Lawyers Association, the National Association of Democratic Lawyers and provincial Attorneys' Associations in all of the 9 provinces of South Africa. It represents the attorneys' profession and has included in its mission, the object to safeguard the

rule of law via the efficient and fair administration of justice. As such, we believe that the LSSA is an important stakeholder in any issue affecting the attorneys' profession and the administration of justice.

The LSSA is nevertheless of the view that legislation should not prescribe to either the Rules Board or the LPC which stakeholders or role players must be consulted in executing their mandates. These bodies should have the discretion to consult with other bodies, including regulatory and representative bodies of other professions, which can also provide valuable input. Further input can, in their discretion, be obtained by the Rules Board and the LPC from a wider group when executing their mandates.

6.15 ***Recommendation 6.15:*** *The Commission recommends that it is not desirable that users of legal services whose total income / turnover per annum does not exceed the maximum threshold to be prescribed by the Minister by notice in the Gazette, be given the option of voluntarily agreeing to pay fees for legal services in excess of any amount that may be set by the mechanism (tariffs prescribed by the Rules Board) in the Magistrates' (district and regional) Court on the following grounds:*

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

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

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

The one-sided approach[46] that only the users of legal services be given the opt-out option, limits a legal practitioner's capacity to negotiate and flies in the face of the Constitution, which guarantees citizens freedom to contract and the right to choose a profession freely.

[46] See section 35(3) of the LPA which only offers the users of legal services to opt out at their 'own initiative'. "Despite any other law to the contrary, nothing in this section precludes any user of litigious or non-litigious legal services, on his or her own initiative, from agreeing with a legal practitioner in writing, to pay fees for the services in question in excess of or below any tariffs determined as contemplated in this section."

Also refer to our submissions in Chapter 1 and 7. Legal practitioners have a constitutional right to initiate negotiations of their fees and this should be recognized, subject to the rider of reasonableness (which can be enforced by the LPC or taxing masters, depending on whether matters are non-litigious or litigious).

6.16 ***Recommendation 6.16:*** *However, the Commission recommends that it is desirable that all other users of legal services, including users of litigious legal services in the HC; SCA and Constitutional Court and non-litigious legal services whose total income / turnover per annum does not exceed the maximum threshold to be prescribed by the Minister by notice in the Gazette, be given the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism (service-based attorney-and-client Fee Guidelines to be developed by the LPC). Parties who opt to pay in excess of the fee determined by the mechanism will have to reduce their agreement into writing and provide reasons for doing so. Since it is the responsibility of the LPC to promote access to justice, to promote and protect public interest, it follows that the implementation of the limited tariff as determined by the mechanism will be overseen by the LPC as part of the complaints handling mechanism.*

The LSSA is of the view that, should the Commission's Recommendations 6.11 or 6.12 be accepted, the opt-out option should be available to all users of litigious legal services, irrespective of their total income / turnover per annum or of the court in question.

6.17 **Questions for comment:**

The Commission invites comment and input on the question whether either option 3 (party and party tariff in the Magistrates' Courts to operate as default position for use as a basis to determine attorney and client fees for users in the lower- and middle-income bands a determined by the Minister without the opt out option)

Or

Option 4 (same as option 3, but subject to up to 20% surcharge to be determined by the Minister) should be recommended as an interim arrangement pending development of service-based attorney and client fee guidelines by the LPC and further review by the SALRC;

Or

Whether either of these options should be recommended as a permanent arrangement.

The LSSA believes that neither the option of the party-and-party tariff in the Magistrates' Courts to operate as a default position, nor the option of the party-and-party tariff with a surcharge is acceptable (whether as a temporary or permanent arrangement) for the reasons stated above.

CHAPTER 7: MECHANISMS FOR ATTORNEY AND CLIENT FEES

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

The LSSA agrees that a universal and compulsory tariff is undesirable, because of the reasons mentioned in the Discussion Paper and the LSSA's previous submission.

7.2 ***Recommendation 7.2:*** *The Commission is of the view that the LPC, as the regulatory body for the legal profession in the Republic, is the appropriate body to develop service based attorney and client Fee Guidelines for determining legal fees in respect of all branches of the law. Section 18(1)(ii) of the LPA empowers the LPC to establish a committee comprising of members of the LPC and any other suitable persons except employees of the LPC, to assist the LPC in the exercise of its powers and performance of its functions. Section 18(2)(a) –(b) of the LPA empowers the LPC to determine the powers and functions of a committee, and to appoint a member of a committee as chairperson of such committee. It is recommended that the LPC must establish a Committee to be responsible for determining attorney and client fee guidelines. The Committee should comprise of fit and proper persons drawn from the following sectors of society:*

(a) Legal profession;

(b) Judiciary;

(c) Government; and

(d) Civil society.

The detail about the composition of the Committee and the number of members who may constitute such a Committee are all matters to be decided by the LPC.

7.2.1 The LSSA is in principle in favour of the LPC developing *service-based fee guidelines* in respect of *all branches of the law* (Option 3).

7.2.1.1 A clear distinction needs to be made between tariffs, which are prescriptive, and guidelines, which serve as a benchmark.

The LSSA opines that a more flexible dispensation, where there is the least amount of restrictions on practitioners, is the only workable solution, for attorney-and-client fees in respect of *litigious matters*. A guideline, which will serve as a benchmark, will address the concerns we have with Options 1 and 2, since parties will be able to negotiate, within reason.

This is also in line with the international position. The Commission refers to the University of Oxford's study of costs and funding litigation that found that in most jurisdictions lawyers' fees are negotiable.[47] No distinction is made between litigious and non-litigious work in this regard.

In respect of non-litigious matters guidelines will facilitate expediency and provide certainty for the client, as well as the legal practitioner.

As stated in our previous submission, the conveyancing fees guidelines have worked very well in practice. Conveyancing fees also work on a cost-shifting principle, in that the seller normally appoints the conveyancer, but the purchaser pays the costs.

7.2.1.2 To address the problem of access to legal services for the "missing middle", these guidelines can provide for limited targeting, *without being prescriptive*.

7.2.1.3 We believe that these guidelines should be *service-based*, as opposed to practitioner-based. As clarified in the Commission's discussion paper service-based tariffs provides "a narrative of the services to be rendered and the cost thereof, *regardless of which practitioner will provide* the service in question …"[48] This will ameliorate the difficulties regarding the disparity between the fees of advocates and attorneys.

7.2.1.4 We agree that the Commission's view that '… there is no need for another mechanism to be established when an existing mechanism can be adapted for

47 SALRC Discussion Paper 150, "Investigation into Legal Fees including Access to Justice", p 361.
48 SALRC Discussion Paper 150, "Investigation into Legal Fees including Access to Justice", p xxii, p386.

this purpose'.[49] The LPC, as the regulatory body and comprising legal practitioners and non-legal practitioners, is the best placed to determine these guidelines and to ensure that any deviation from these guidelines is reasonable.

7.2.2 As regards the proposed composition of the LPC Committee to determine the guidelines, we agree with the Commission that this should be left to the LPC to decide. However, our preliminary views are:

7.2.2.1 Although we are alive to the fact that, from a competition law perspective, the Committee should not only comprise of competitors (legal practitioners), there should be a fair representation of practising attorneys (at least 50%), for the same reasons advanced by the General Council of the Bar[50].

7.2.2.2 The Judiciary should not form part of the Committee. Their involvement in developing guidelines will constitute a conflict of interest, as they are supposed to adjudicate on these matters when they come before them.

7.2.3 The Commission proposed that Section 95 of the LPA be amended by inserting a paragraph reading: "fees and tariffs payable to legal practitioners and juristic entities in respect of litigious and non-litigious legal services …".

The LSSA supports this proposed legislative intervention with the proviso that this refers to attorney-and-client fees.

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

49 *Ibid,* p 390.
50 *Ibid,* p388.

from the fee guidelines in justifiable circumstances. This includes the development of fee Guidelines in non-litigious matters that are reserved for legal practitioners.

We agree with this recommendation. The LPC should have the discretion on which factors to take into account when developing the guidelines.

It is proposed that the following factors should be taken into account:

- the amount and importance of the work done;
- the complexity of the matter or the difficulty or novelty of the work or the questions raised;
- the skill, labour, specialised knowledge and responsibility on the part of the legal practitioner;
- the number and importance of the documents prepared or perused, without necessarily having regard to length;
- the place where and circumstances in which the services or any part thereof were rendered;
- the time expended by the member;
- where money or property is involved, its amount or value;
- the importance of the matter to the client;
- the quality of the work done;
- the experience or seniority of the legal practitioner;
- whether the fees and disbursements have been incurred or increased through over-caution, negligence or mistake on the part of the legal practitioner.

7.4 ***R*ecommendation *7.4****: It is recommended that the mechanism (LPC) must adopt a consultative process of all the stakeholders involved prior to determining fees and tariffs. The following stakeholders and role players, among others, must be consulted:*

- *the Rules Board;*
- *consumers of legal services;*
- *members of the legal profession;*
- *members of the judiciary;*
- *representatives of civil society organisations;*
- *the Minister, or his/ her representative;*
- *the Competition Commission;*
- *Legal Aid SA;*
- *Law clinics;*

- *Juristic entities;*
- *NEDLAC; and*
- *Human Sciences Research Council.*

Although we agree that the LPC should engage in thorough deliberations, the list of stakeholders and role players is problematic. We note that, whilst provision is made for representatives of civil society organisations, no mention is made of bodies representing legal practitioners, such as the LSSA. We assume that the reference to "juristic entity" means a juristic entity as contemplated in the LPA. Our concern regarding the inclusion of members of the judiciary (recommendation 7.2) is also applicable in this regard.

We suggest that, rather than being too prescriptive, it be left to the LPC to determine the various stakeholders and role players, provided that there is wide consultation.

As stated under recommendation 6.14, the LSSA is of the view that legislation should not prescribe to either the Rules Board or the LPC which stakeholders must be consulted in executing their mandates. These bodies should have the discretion to consult with other bodies, including regulatory and representative bodies of other professions which can also provide valuable input. Further input can, in their discretion, be obtained by the Rules Board and the LPC from a wider group when executing their mandates. The LSSA has a national footprint and is a unified national representative of the attorneys' profession in South Africa, representing various stakeholders.

7.5 ***Recommendation 7.5:*** *The Commission recommends that, with respect to service based attorney-and-client fee guidelines, it is desirable that users of legal services be given the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism (LPC).*

A guideline is fundamentally a benchmark or recommendation, from which one can deviate in appropriate circumstances (as also accepted by the Commission).[51] Therefore, it should be possible for *both* the user and the provider of legal services to negotiate a fee (opt-out). As stated in our previous submission, an agreement can only be reached if all parties involved can negotiate.

51 SALRC Discussion Paper 150 "Investigation into Legal Fees including Access to Justice", p 401.

We reiterate our opposition to the one-sided approach that only the user of legal services be given an opt-out option. It is very unlikely that a client will offer to pay fees in excess of the amount that may be determined. Legal practitioners, particularly those who provide service to people within the lower- and middle-income bands, will be obliged to refuse to provide services to those clients, or work at uneconomic rates.

We believe that the LPC is the institution created to provide sufficient protection for the users of legal services (including those below the threshold), who can refer the matter to the LPC, should they believe that they have been overcharged. Members of the public are becoming increasingly aware of their legal rights and, with further awareness campaigns, these matters will very likely be referred to the LPC.

Further, in terms of Section 46 of the LPA, one of the objects of the Legal Services Ombud is "to protect and promote the public interest in relation to the rendering of legal services as contemplated within this Act". In other jurisdictions, the Legal Services Ombud has clearly added value by educating the public and making the public further aware of their rights regarding legal representation and costs.[52]

Also refer to our comments under Recommendation 6.11 and 6.15.

7.6 ***Recommendation 7.6*****:** *It is recommended that the LPC, as the regulator for the legal profession, is the appropriate mechanism to deal with allegations of excessive legal fee in terms of section 5(b) of the LPA. The LPC has adopted the Contingency Fee Tribunals established in terms of section 5 of the Act by the former Law Societies and their functions. Additional tribunals will be established by the LPC for each of the nine provinces of the Republic. Furthermore, it is recommended that section 6 of the Contingency Fees Act, which provides for rules to be made in order to give effect to the provisions of the Act, be amended as proposed in Chapter 6 of this Discussion Paper.*

We agree that the LPC is the appropriate body to deal with allegations of excessive fees.

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52 Hussain et.al Case Management in Our Courts: A New Direction (Chapter 7 re the Legal Services Ombud) at 112 & 113.

The LPC has made rules in terms of Section 6 of the Contingency Fees Act. These rules appear in Government Gazette 42739, dated 4 October 2019.

7.7 **Questions for comment:**

The Commission invites comment and input on the following two Options in relation to the proposed operation of the opt-out provision contained in section 35(5) of the LPA:

Option 1

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

Option 2

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

The LSSA is not in favour of either of these two options.

As already stated in Chapter 6, we do not support the notion of a threshold or that the recovery tariff (with or without the surcharge) be utilized to determine attorney-and-client fees (Recommendations 6.11 and 6.12). We propose that the LPC should issue fee guidelines for litigious and non-litigious matters in respect of users of all income bands and that opt-out should be possible in all instances.

As regards the concern that an opt-out option could undermine mechanisms to protect the lower- and middle-income users[53], the fact that the agreement is in writing, with the reasons for opting out, should not prevent the LPC from conducting a fees enquiry and making the appropriate order. In terms of the Code of Conduct, the onus rests on the legal practitioner to justify the reasonableness of fees charged.

53 SALRC Discussion Paper 150 "Investigation into Legal Fees including Access to Justice", p 399.

CHAPTER 8: LEGAL SERVICES FOR THE UPPER INCOME BAND NATURAL PERSONS AND JURISTIC ENTITIES

Recommendation 8.1*: The Commission concurs with the respondents' views that corporate clients in the upper income band as well as high net worth individuals should be excluded from the protection of the mechanism for determining legal fees and tariffs as contemplated under section 35(4) of the LPA. Much as this matter does not require any regulatory intervention, however, it is imperative that all users of legal services ensure that they are not challenged by excessive fees and that the LPC is available to everyone for assistance. Paying exorbitant fees does not enhance a culture of consciousness with regard to legal fees. The purpose of the Act is to curtail excessive costs, irrespective of whether a user is able to afford them or not.*

We repeat that the LSSA is not in favour of the Commission's recommendations regarding a threshold. While those firms that render legal services to the upper income bracket will not be affected, this will negatively impact on small and medium sized law firms, the majority of which service users falling within the middle- and lower-income brackets. This might diminish access to justice for the poor and middle-income persons, for the reasons advanced in Chapter 6.

While the threshold initially seemed attractive for other reasons (such as cross subsidization etc.), the LSSA has had regard to valuable input regarding the fact that litigants should as far as possible be equally empowered by representation. It could be unjust where one party (below the threshold) litigates against another party (beyond the threshold) and different tariffs apply. This is all the more reason for preferring guidelines as opposed to fixed tariffs.