

INVITATION TO COMMENT ON DRAFT REGULATIONS TO BE MADE IN TERMS OF THE LEGAL AID SOUTH AFRICA ACT, 2014

1. Currently the policies and procedures for the provision of legal aid are set out in the Legal Aid Guide that is issued by Legal Aid South Africa, in terms of the (now repealed) Legal Aid Act, 1969 (Act 22 of 1969).

2. The Legal Aid South Africa Act, 2014 (Act No. 39 of 2014) (the Act) came into operation with effect from 1 March 2015. Section 26 provides for transitional arrangements and subsection (6) provides that the existing Legal Aid Guide remains in force until it is withdrawn and replaced by regulations and the Legal Aid Manual.

3. Section 23(1) and (2) of the Act provides:

“(1) The Minister must, after receipt of recommendations of the Board, make regulations relating to—

(a) the types of matters, both civil and criminal, in respect of which Legal Aid South Africa—

(i) provides legal aid;

(ii) does not provide legal aid; and

(iii) provides limited legal aid and the circumstances in which it does so;

(b) the requirements or criteria that an applicant must comply with in order to qualify for legal aid, as well as the terms and conditions on which such legal aid is made available to the applicant;

(c) the policy relating to the approval or refusal of legal aid, the termination of legal aid and appeals against such refusal or termination of legal aid; and

(d) any matter which it is necessary or expedient to prescribe for the proper implementation or administration of this Act.

(2) Any regulations made under subsection (1) must, before publication thereof in the Gazette, be tabled in Parliament by the Minister for approval.”.

4. Section 24(1) of the Act provides:

“The Board must compile, amend and approve a Legal Aid Manual and must at least every second year review the Legal Aid Manual relating to—

- (a) the procedures in terms of which applications for legal aid are administered;
- (b) the systems and methods whereby legal aid is delivered;
- (c) the requirements and criteria for the accreditation of private legal practitioners who render legal services to legal aid recipients on the instructions of Legal Aid South Africa and the terms and conditions subject to which such instructions are allocated to accredited legal practitioners, including the fees and disbursements that are payable by Legal Aid South Africa to accredited legal practitioners, taking into consideration the salary scales applicable to the public service; and
- (d) the regulation of any other administrative matter which the Board deems necessary for the effective and efficient functioning of Legal Aid South Africa.”.

5. The current Legal Aid Guide must therefore in terms of the Act be replaced by regulations and a Legal Aid Manual. The draft Regulations are to a great extent the same as the current provisions.

6. Any person wishing to comment on the draft Regulations is invited to submit written comments to the Department of Justice and Constitutional Development on or before 13 January 2017.

Comments should be marked for the attention of Ms W Louw.

(a) if they are forwarded by post, be addressed to -

The Department of Justice and Constitutional Development

Private Bag X81

PRETORIA

0001;

(b) if delivered by hand, be delivered at -

The Department of Justice and Constitutional Development

SALU Building

316 Thabo Sehume Street

PRETORIA;

(c) if they are delivered by e-mail, they can be sent to: WiLouw@justice.gov.za.

**LEGAL AID SOUTH AFRICA ACT, 2014 (ACT No. 39 OF 2014): DRAFT
REGULATIONS**

SCHEDULE

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Definitions

1. In these regulations any word or expression to which a meaning has been assigned in the Act has the meaning so assigned to it and, unless the context otherwise indicates—

“assets” includes any—

- (a) movable or immovable property;
- (b) corporeal or intellectual rights to property; and
- (c) item, property or money that a legal aid applicant has received, or will in the future be entitled to receive, from the estate of any deceased person: Provided that this provision will also apply if—
 - (i) no distribution account for the deceased estate has yet been drawn up;
 - (ii) the legal aid applicant or his or her spouse has not yet taken transfer of, or received delivery of, the item, property or money; or
 - (iii) the item, property or money is held in the name of the estate or in the name of a trust as contemplated in regulation 28(3);

“child” means a person under the age of 18 years;

“Children’s Act” means the Children’s Act, 2005 (Act No. 38 of 2005);

“Hague Convention” means the Hague Convention on the Civil Aspects of International Child Abduction, signed at the Hague on 25 October 1980 and entered into force between the signatories on 1 December 1983;

“household” means family members, spouses, partners, children and parents who live together for at least four nights a week, and who share meals and resources;

“impact legal services” means litigious or non-litigious legal services as provided for in regulation 35;

“Judicare” means a system for delivery of legal aid through the instruction of private legal practitioners to represent legal aid recipients;

“legal aid applicant” means a person applying for legal aid;

“legal aid recipient” means a person receiving legal aid;

“Manual” means the Legal Aid Manual referred to in section 24 of the Act;

“means test” means Legal Aid South Africa’s test to decide whether a legal aid applicant qualifies for legal aid, or not, as provided for in regulation 27;

“merit report” means a report by a legal practitioner which is an assessment of the facts and law pertaining to an applicant’s case to determine prospects of success to determine the provision or continuation of civil legal aid as provided for in regulation 9;

“net monthly income” means income from any source as contemplated in regulation 27;

“Republic” means the Republic of South Africa;

“spouse” means the—

- (a) marriage partner of a person married in terms of the Marriage Act, 1961 (Act No. 25 of 1961);
- (b) marriage partner of a person in a customary marriage as provided for by the Recognition of Customary Marriages Act, 1998 (Act No.120 of 1998); or
- (c) civil union partner of a person in a civil union concluded in terms of the Civil Union Act, 2006 (Act No. 17 of 2006); and

“the Act” means the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014).

General policy

2. (1) Legal Aid South Africa may provide legal aid in a criminal case to any person who qualifies for legal aid in terms of these regulations and who is physically resident in the Republic.

(2) Legal aid is only available to natural persons for advice and for legal representation.

(3) Subject to the provisions of these regulations, Legal Aid South Africa may provide legal aid in a civil matter to—

- (a) a child who is physically resident in the Republic; or
- (b) a person who qualifies for legal aid in terms of these regulations, and who is —
 - (i) physically resident in the Republic; and
 - (ii) a citizen or permanent resident of the Republic.

(4) Legal Aid South Africa may in exceptional circumstances grant legal aid if the issues in a case are justiciable in a court of the Republic, but the legal aid applicant is not physically resident in the Republic.

(5) The requirement that a person must be physically resident in the Republic does not apply to cases pertaining to asylum seekers and the Hague Convention.

(6) The enquiry on whether or not a person is physically resident in the Republic is a factual enquiry and must be conducted by Legal Aid South Africa when the legal aid applicant makes the application for legal aid: Provided that whether or not

the legal aid applicant is legally entitled to be physically resident in the Republic is irrelevant and may not be taken into account.

Criminal matters

3. (1) Subject to the provisions of these regulations, Legal Aid South Africa may grant legal aid to a sentenced or detained person or an accused person in a criminal trial if it is likely that such person would suffer substantial injustice: Provided that substantial injustice might occur if that person cannot afford legal representation and the possibility that he or she might be imprisoned exists.

(2) Subject to the provisions of these regulations, a legal aid applicant who is charged in the High Court of South Africa or a magistrate's court for a regional division may be granted legal aid without any further enquiry into the nature and seriousness of the charge: Provided that such applicant is unable to afford the cost of his or her own legal representation that would sustain the anticipated duration of trial.

(3) Subject to the provisions of these regulations, a legal aid applicant who is charged in the district magistrate's court for the following offences may be granted legal aid, if the district magistrate's court has a statutory increased penal jurisdiction:

- (a) Stock theft;
- (b) any offence referred to in the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992);
- (c) unlawful possession of or unlicensed dealing in firearms or ammunition;
- (d) dealing in liquor without a licence;

- (e) drunken driving;
- (f) driving under the influence of alcohol or drugs;
- (g) overloading of a vehicle as provided for by the National Road Traffic Act, 1996 (Act No. 93 of 1996);
- (h) reckless or negligent driving; and
- (i) any attempt to commit any of the offences in this regulation.

(4) Subject to the provisions of these regulations, a legal aid applicant who is charged in the district magistrate's court for the following common law and statutory offences may be granted legal aid:

- (a) Abduction;
- (b) administering poison or other noxious substances;
- (c) arson;
- (d) assault with intention to cause grievous bodily harm or common assault;
- (e) bigamy;
- (f) bribery;
- (g) compounding;
- (h) culpable homicide;
- (i) defeating or obstructing the ends of justice;
- (j) extortion;
- (k) forgery or uttering;
- (l) fraud;

- (m) housebreaking;
- (n) incest;
- (o) sexual assault;
- (p) kidnapping;
- (q) malicious damage to property;
- (r) murder;
- (s) public violence;
- (t) rape;
- (u) receipt of stolen property;
- (v) robbery;
- (w) sedition;
- (x) theft and shoplifting;
- (y) treason;
- (z) trespass;
- (aa) any sexual offence referred to in sections 12, 13 or 14 of the Criminal Law (Sexual Offences And Related Matters) Amendment Act, 2007 (Act No. 32 of 2007); and
- (bb) any attempt to commit any of the offences in this regulation.

(5) Legal aid may be refused for—

- (a) criminal defamation;

- (b) public indecency; and
- (c) contempt of court:

Provided that Legal Aid South Africa has a general discretion to grant legal aid in these cases where—

- (i) resources permit; and
- (ii) Legal Aid South Africa is convinced that the accused person will experience substantial injustice if not legally represented.

(6) Subject to the provisions of these regulations, a legal aid applicant who is charged in the district magistrate's court for any statutory offence relating to the following matters may be granted legal aid:

- (a) Administration of justice;
- (b) animal and nature conservation;
- (c) children;
- (d) corruption;
- (e) counterfeiting currency;
- (f) dealing in unwrought precious metals or uncut gemstones;
- (g) escaping from custody or obstructing the police;
- (h) persons with mental disabilities;
- (i) squatting;
- (j) vehicle theft;
- (k) witchcraft; and

(f) any attempt to commit an offence referred to in this regulation.

(7) Legal Aid South Africa, in assessing an application by a legal aid applicant who is charged in the district magistrate's court with an offence that is not listed in subregulations (3), (4), (5) or (6), may grant legal aid to the legal aid applicant, after consideration of the following factors:

- (a) the complexity of the case in law and in fact, including the imposing of an appropriate sentence;
- (b) the legal aid applicant's ability to represent himself or herself, and
- (c) the gravity of the case, taking into account the nature of the charge against the accused and the possible consequences to him or her if convicted.

(8) Legal Aid South Africa must be satisfied on a balance of probabilities that there is a good prospect of success before legal aid is granted in the following kinds of cases:

- (a) bail appeals;
- (b) reviews;
- (c) interlocutory applications to a court that is not the trial court;
- (d) condonation applications; and
- (e) applications to lead further evidence.

(9) A legal aid applicant may not receive legal aid for a criminal case if he or she is entitled to legal representation at the expense of the state attorney or a government department.

(10) Subject to the provisions of these regulations, an alleged offender against whom an application in terms of section 30 or 32 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), is brought may receive legal aid for legal representation at such hearing.

(11) Where the alleged offender referred to in subregulation (10) is receiving legal aid for the trial, the legal aid instruction includes legal representation at the hearing referred to in subregulation (10).

(12) Where the alleged offender referred to in subregulation (10) has not yet been charged or is not already receiving legal aid for the trial, he or she must apply for legal aid for the appointment of a legal representative to appear on his or her behalf at the hearing of the application referred to in subregulation (10).

(13) Subject to the provisions of these regulations, a child is entitled to legal representation at a preliminary enquiry contemplated in the Child Justice Act, 2008 (Act No. 75 of 2008).

(14) Subject to the provisions of these regulations, Legal Aid South Africa may not refuse to grant legal aid to a child who is charged for an offence in a child justice court contemplated in the Child Justice Act, 2008.

Witnesses

4. (1) Subject to the provisions of these regulations, a witness who appears before a court and who has been warned by the court to provide incriminating evidence against himself or herself may be granted legal aid.

Extradition

5. Subject to the provisions of these regulations, any person arrested in terms of the Extradition Act, 1962 (Act No. 67 of 1962) may be granted legal aid.

Criminal appeals

6. (1) Subject to the provisions of these regulations, legal aid may be provided for an intended criminal appeal if—

- (a) the convicted person is unable to afford the cost of his or her own legal representation for an application for leave to appeal, a petition for leave to appeal, or for the appeal;
- (b) the convicted person has been sentenced to imprisonment with an unsuspended portion of more than three months, and if given the option of a fine, that fine is unpaid for two weeks after the date of sentence;
- (c) an application for leave to appeal has been made in time or a within a period of less than one year since the date of sentence; or
- (d) the convicted person has not been given the right to an appeal or review by a higher court.

(2) The provision of legal aid to a convicted person contemplated in subregulation (1) is limited to—

- (a) an application for leave to appeal to the trial court that sentenced the convicted person;
- (b) an application for leave to appeal, or a petition for leave to appeal, to a higher court if leave to appeal is refused by the trial court; and
- (c) an appeal, if leave to appeal is granted as contemplated in paragraph (a) or (b), or when the convicted person has an automatic right of appeal.

(3) Legal aid for any other appeal may only be granted if Legal Aid South Africa is of the opinion that there are good prospects of success in further proceeding with an appeal.

(4) If a convicted person applies for legal aid for—

- (a) an application for leave to appeal;
- (b) a petition for leave to appeal; or
- (c) for a condonation application for an appeal that is out of time,

legal aid may be granted for both the application for leave to appeal and the condonation application, or for the appeal itself, subject to the provisions of subregulations (1)(c), (2) and (3).

(5) If a convicted person has received legal aid for the trial he or she does not have to re-apply for legal aid for an appeal, once leave to appeal has been granted.

(6) If a convicted person has not received legal aid for the trial he or she must apply for legal aid for an application or a petition for leave to appeal.

Bail applications

7. Subject to the provisions of these regulations, legal aid may only be granted for one bail application for an accused in a particular case: Provided that Legal Aid South Africa may approve legal aid for a further application if it is satisfied that there are changed circumstances that justify a further bail application.

Court orders

8. An accused who does not qualify for legal aid in terms of these regulations, will not receive legal aid unless this is directed by a court order in terms of section 22 of the Act.

Civil matters

9. (1) Subject to the provisions of these regulations, Legal Aid South Africa may grant legal aid to a litigant in any civil matter if—

- (a) in the opinion of Legal Aid South Africa, the matter has good prospects of success;
- (b) in the opinion of Legal Aid South Africa, the matter has good prospects of enforcement of a court order; and
- (c) Legal Aid South Africa has the necessary resources available,

based on a written merit report, where such report is applicable.

(2) Legal Aid South Africa may, subject to subregulation (1), provide legal aid for the purpose of compiling a merit report, before any steps are taken, except where steps are necessary to prevent prescription, default judgment or lapsing of the litigants' rights.

(3) Subject to the provisions of these regulations, a merit report for a civil matter is not required in respect of the following matters:

- (a) Divorces;
- (b) eviction cases, where assistance can be granted to negotiate with the owner of the property concerned to allow the legal aid recipient to stay on the property for a period of time;
- (c) domestic violence matters to protect the best interests of a child;
- (e) the administration of estates; and
- (f) maintenance.

(4) When legal aid has been granted to a person for a case in a court of the Republic and evidence is to be heard on commission outside of the Republic, Legal Aid South Africa may grant legal aid for attendance by one or more legal practitioners if—

- (a) Legal Aid South Africa has sufficient funds available, and
- (b) Legal Aid South Africa is of the opinion that good reasons exist.

(5) Legal Aid South Africa may not provide legal aid for litigation in any foreign court.

Civil cases for protection of constitutional rights

10. (1) Subject to the provisions of these regulations and availability of resources, legal aid may be provided to progressively implement section 7 of the Constitution.

(2) In deciding whether a person may receive legal aid for a civil case as contemplated in subregulation (1), Legal Aid South Africa must consider the following criteria:

- (a) The seriousness of the implications for the legal aid applicant;
- (b) the complexity of the relevant law and procedure;
- (c) the ability of the legal aid applicant to represent himself or herself effectively without a lawyer;
- (d) the financial means of the legal aid applicant;
- (e) the legal aid applicant's chances of success in the case;
- (f) whether the legal aid applicant has a substantial disadvantage compared to the other party in the case; and
- (g) whether the other requirements of these regulations are met.

Limitation and exclusion of civil legal aid

11. (1) Legal aid may not be granted for a case where, in the opinion of Legal Aid South Africa, there is no substantial and identifiable material benefit to the legal aid applicant: Provided that this regulation does not apply to litigation in an equality

court contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), and to impact legal services.

(2) Legal aid may not be granted for the following types of cases:

- (a) A financial enquiry in terms of section 65 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944);
- (b) an administration order in terms of section 74 of Magistrates' Courts Act, 1944;
- (c) the administration of an estate, subject to the provisions of regulation 23;
- (d) the voluntary surrender or sequestration of an estate;
- (e) the liquidation of a legal person;
- (f) an application for the rehabilitation of an unrehabilitated insolvent;
- (g) an action claiming damages on the grounds of—
 - (i) defamation;
 - (ii) breach of an engagement contract;
 - (iii) infringement of dignity;
 - (iv) infringement of privacy;
 - (v) seduction;
 - (vi) adultery; or
 - (vii) inducing someone to desert or stay away from his or her spouse:

Provided that legal aid may be granted to defend these kinds of actions.

(3) Subject to the provisions of regulation 23(8), legal aid may not be granted for any action that can brought in a small claims court in terms of the Small Claims Courts Act, 1984 (Act No. 61 of 1984): Provided that Legal Aid South Africa may, subject to the provisions of these regulations, grant legal aid for a claim that does not exceed the monetary jurisdiction of the small claims court by more than 50 percent.

(4) Legal aid may not be granted for instituting or defending an action in a burial dispute: Provided that, subject to the provisions of these regulations, legal aid may be granted when a burial dispute can be resolved through alternative dispute resolution.

(5) Legal aid may not be granted for the purpose of giving security: Provided that in matters where the sheriff requires security or an indemnity to effect a writ and where that request is in accordance with the rules of court and can be substantiated by the sheriff, Legal Aid South Africa may provide the necessary indemnity to a sheriff.

(6) Legal aid may not be granted for a claim —

- (a) that has prescribed; or
- (b) is unlikely to be acted on within the time left before prescription; and
- (c) condonation is unlikely to be obtained.

(7) Legal aid may not be granted for any notarial or conveyancing matter.

(8) Subject to the provisions of these regulations, legal aid may be granted for a non-litigious matter, including arbitration or mediation.

(9) Legal aid may not be granted for a civil matter where the legal aid applicant is entitled to legal representation at the expense of the state attorney or a government department.

(10) Legal aid may not be granted for the bringing of a claim against the Road Accident Fund, established by the Road Accident Fund Act, 1996 (Act No. 56 of 1996), or any other personal injury claim, subject to the provisions of regulation 23.

(11) Legal Aid may not be granted for a hearing before an administrative tribunal: Provided that legal aid may be granted, subject to the provisions of these regulations, to review a decision of an administrative tribunal.

(12) A legal aid applicant may only receive legal aid for one civil matter at a time, unless Legal Aid South Africa approves that legal aid may be granted for more than one matter, if it satisfied that—

- (a) there is a good prospect that the cases will succeed; and
- (b) the cost of the cases will be justified by the benefit to the legal aid applicant.

Civil appeals

12. Legal aid may only be granted for a civil appeal, subject to the provisions of these regulations, if Legal Aid South Africa is satisfied that—

- (a) there is a good prospect that the appeal will succeed; and
- (b) the cost of the appeal will be justified by the benefit obtained to the legal aid applicant.

Maintenance, domestic violence and harassment cases

13. (1) In a maintenance case in terms of the Maintenance Act, 1998 (Act No. 99 of 1998), a domestic violence case in terms of the Domestic Violence Act, 1998 (Act No. 116 of 1998), or a matter brought in terms of the Protection from Harassment Act, 2011 (Act No. 17 of 2011), Legal Aid South Africa may, subject to the provisions of these regulations, grant legal aid to a legal aid applicant for an initial consultation to advise him or her on his or her rights, the procedure he or she can follow and his or her prospect of success: Provided that legal aid may be granted to a person over 60 years of age in a domestic violence matter where it is required to protect that person.

(2) Subject to the provisions of these regulations, legal aid may be granted for legal representation in a court hearing for the matters referred to in subregulation (1), if—

- (a) in the opinion of Legal Aid South Africa, the legal aid applicant's claim or defence has a good prospect of success; and
- (b) the opposing party is represented by a legal practitioner or is a legal practitioner.

(3) Legal aid may be granted for legal representation in a maintenance matter if—

- (a) the legal aid applicant has been unable to seek or execute a maintenance order for a period of longer than 12 months, due to a failure by the system; or
- (b) there is an abuse of the court system.

Labour cases

14. (1) Subject to the provisions of these regulations, Legal Aid South Africa may grant legal aid for—

- (a) legal representation in the Labour and Labour Appeal Courts;
- (b) assistance to farm workers in exercising their rights under the Labour Relations Act, 1995 (Act No. 66 of 1995), as provided for in section 8(3) of the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997); and
- (c) assistance to enforce an award by the Commission for Conciliation, Mediation and Arbitration established in terms of the Labour Relations Act, 1995, except where there is no prospect of recovery.

(2) Legal Aid South Africa may not grant legal aid for legal representation at conciliation and arbitration proceedings in the Commission for Conciliation, Mediation and Arbitration or bargaining councils established in terms of the Labour Relations Act, 1995.

Divorce and family law cases

15. (1) If legal aid is granted for the bringing of a divorce action, the action must be instituted in the court for a regional division established in terms of the Magistrates' Courts Act, 1944: Provided that Legal Aid South Africa may grant approval for the institution of the action in another court, after taking the following factors into consideration:

- (a) Cost effectiveness;
- (b) logistical factors, including the legal aid applicant's distance from the court; and

(c) the interests of the legal aid applicant.

(2) Legal Aid South Africa may not grant legal aid for the following matters:

- (a) A divorce appeal;
- (b) a divorce action if Legal Aid South Africa is satisfied that there is no prospect of the legal aid recipient succeeding in his or her action; and
- (c) a divorce action if the legal aid applicant married a foreigner to enable that foreigner to obtain South African citizenship.

(3) Legal aid may only be granted in order to vary or enforce a divorce order if—

- (a) the issue in dispute deals with the care of children or contact with children;
- (b) the application is supported by a report of a social worker or a Family Advocate; and
- (c) the opposing party refuses, fails or neglects to give effect to the terms of the court order or deed of settlement.

(4) Legal aid may be granted to vary or amend a divorce order so as to include an order for the payment of the pension fund interest by the pension fund or to ensure the correct description of the relevant pension fund in the court order.

(5) After the issuing of a divorce summons Legal Aid South Africa may apply to the court for an order that the opposing party may make a contribution towards

the legal aid applicant's costs: Provided that this application must not be brought if the cost of the application will be more than the amount of the contribution.

Legal aid for specialist or expert advice

16. Subject to the provisions of these regulations, Legal Aid South Africa may grant legal aid for the obtaining of a specialist or expert opinion.

Land rights

17. (1) Subject to the provisions of these regulations, Legal Aid South Africa may grant legal aid for cases under the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) if the Land Claims Commissioner —

- (a) makes funds available to Legal Aid South Africa to fund the matter; or
- (b) is the opposing party to the litigation or possible litigation.

(2) Legal aid may not be granted for the claim lodgement and investigation under the Restitution of Land Rights Act, 1994.

Cases relating to the Land Reform (Labour Tenants) Act, 1996, the Extension of Security of Tenure Act, 1997 and Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1988

18. (1) Subject to the provisions of these regulations, legal aid may be granted to persons affected by the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997) and the Prevention of Illegal Occupation and Eviction from Land Act, 1998 (Act No. 19 of 1998):

Provided that the granting of legal aid in terms of this regulation is subject to the making available of funds by the relevant government department.

(2) Subject to the provisions of these regulations, legal aid may be granted to a defendant or respondent who is an occupier as contemplated in the Acts referred to in subregulation (1), if Legal Aid South Africa is satisfied that he, she or his or her family members are threatened with eviction.

(3) In matters referred to in subregulation (1), where litigation has already started, Legal Aid South Africa may grant legal aid for mediation, arbitration or other alternative dispute resolution procedure, if Legal Aid South Africa is satisfied that these methods are likely to—

- (a) eliminate or shorten litigation; or
- (b) reduce the fees and disbursements that would otherwise be payable by Legal Aid South Africa.

Asylum seekers

19. (1) Subject to the provisions of these regulations, legal aid may be granted to a legal aid applicant who seeks asylum in the Republic or who intends to apply for asylum under Chapter 3 or 4 of the Refugees Act, 1998 (Act No. 130 of 1998).

(2) It is not necessary for a legal aid applicant referred to in subregulation (1) to be physically resident in the Republic: Provided that he or she must be physically present in the Republic at the date that he or she applies for legal aid.

Hague Convention cases

20. Subject to the provisions of these regulations, legal aid may be granted for Hague Convention cases: Provided that it is not necessary for the legal aid applicant to be physically resident in the Republic.

Equality court cases

21. Subject to the provisions of these regulations, legal aid may be granted for matters governed by the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000).

Civil matters involving children

22. (1) Subject to the provisions of these regulations, legal aid may be granted to a child who may suffer substantial injustice in a civil case, after consideration of the following factors:

- (a) The seriousness of the implications for the child of the issue and whether the child's constitutional rights or personal rights are at risk;
- (b) the complexity of the relevant law and procedure;
- (c) the financial situation of the child or the child's parents or guardian; and
- (d) the child's chances of success in the case.

(2) Where a child is the respondent or defendant in a civil matter, the merits of the civil matter are irrelevant and a child may be granted legal aid, subject to the provisions of these regulations.

(3) If a child applies for legal aid to bring civil proceedings, Legal Aid South Africa must consider the merits of the case and the child's prospects of success.

(4) The means test is applied when the legal aid applicant is a child, subject to the following provisions:

- (a) If the child is not assisted by his or her parent or guardian, the child's means are taken into account;
- (b) if the child is assisted by his or her parent or guardian, the parent or guardian's means are taken into account; or
- (c) if the child is assisted by his or her parent or guardian, who exceeds the means test and can afford to provide legal representation for the child, yet fails, refuses or neglects to do so, legal aid may be provided to the child: Provided that Legal Aid South Africa may institute proceedings against that parent or guardian to recover the cost of the legal aid.

Other legislation requiring legal representation for children

23. (1) Subject to the provisions of these regulations, legal aid may be granted to a child for legal representation to intervene in divorce, care or maintenance proceedings between the parents of the child if—

- (a) it is necessary to protect the best interests of a child; and
- (b) if substantial injustice would otherwise result.

(2) Subject to the provisions of these regulations, legal aid may be granted to a child for the administration of an estate where it is required to protect the best interests of a child.

(3) Legal aid as contemplated in subregulation (2) may only be granted where the value of the estate does not exceed the amount determined by the Minister responsible for the administration of justice in terms of section 18(3) of the Administration of Estates Act, 1965 (Act No. 66 of 1965), except where there is immovable property in that estate of which the value exceeds the amount determined in terms of section 18(3) but is valued at less than R500 000.

(4) Subject to the provisions of these regulations, legal aid may be granted to a child to institute a —

- (a) claim against the Road Accident Fund, established by the Road Accident Fund Act, 1996 (Act No. 56 of 1996); and
- (b) to institute a personal injury claim.

(5) Subject to the provisions of these regulations, legal aid may be granted to a child in a domestic violence matter where it is required to protect the best interests of that child and if substantial injustice would otherwise result.

(6) Subject to the provisions of these regulations, legal aid may be granted to an unaccompanied foreign child as contemplated in the Refugees Act, 1998, where it is required to protect the best interests of that child and if substantial injustice would otherwise result.

(7) Subject to the provisions of these regulations, legal aid may be granted to a child in a matter brought in terms of the Protection from Harassment Act,

2011, where it is required to protect the best interests of that child and if substantial injustice would otherwise result.

(8) Subject to the provisions of these regulations, legal aid may be granted to a child for a money claim that exceeds the small claims court monetary jurisdiction by more than 50 percent, where it is required to protect the best interests of that child and if substantial injustice would otherwise result.

(9) Subject to the provisions of these regulations, legal aid may be granted to a child if it is required for the appointment of a curator *ad litem* or a curator *bonis*.

Types of Children`s Act matters where legal representation can be ordered in terms of section 55 of the Children`s Act

24. (1) Subject to the provisions of these regulations, legal aid may be granted to a child to obtain legal representation to ensure that a parental responsibilities and rights agreement, as contemplated in section 22 of the Children`s Act, is in the best interests of that child.

(2) Subject to the provisions of these regulations, legal aid may be granted to any person who has an interest in the care, well-being or development of a child to apply to the High Court, a regional court or to the children`s court, as the case may be, for an order granting the legal aid applicant contact with that child or for the care of that child, as contemplated in section 23 of the Children`s Act.

(3) Subject to the provisions of these regulations, legal aid may be granted to any person who has an interest in the care, well-being and development of a child to apply to the High Court for an order granting guardianship of that child to the legal aid applicant, as contemplated in section 24 of the Children's Act.

(4) Subject to the provisions of these regulations, legal aid may be granted to any male person who is not married to the mother of a child, and who is, or claims to be, the biological father of that child, to apply to a court for an order for confirmation of his paternity of that child if the child's mother—

- (a) refuses to consent to an amendment to be effected to the registration of birth of the child;
- (b) is incompetent to give such consent;
- (c) cannot be located; or
- (d) is deceased,

as contemplated in section 26 of the Children's Act.

(5) Subject to the provisions of these regulations, legal aid may be granted to any person to apply to the High Court, a regional court or a children's court, as the case may be, for an order —

- (a) suspending for a period;
- (b) terminating;
- (c) extending; or
- (d) limiting,

any or all of the parental responsibilities and rights which a specific person has in relation to a child, as well as, if appropriate, an application for the assignment of contact and care over that child to the legal aid applicant, as contemplated in sections 23 and 28 of the Children's Act.

(6) Subject to the provisions of these regulations, legal aid may be granted to any person to apply to the court for the adoption of a child, as contemplated in the Children's Act.

(7) Subject to the provisions of these regulations, legal aid may be granted to any child to obtain a legal representative to represent that child in all applications under the Hague Convention, if the requirements of section 55 of the Children's Act are met.

Matters relating to the Mental Health Care Act, 2002

25. (1) Subject to the provisions of these regulations legal aid is available to mental health care users and the means test is applied when the legal aid applicant is a mental health care user as contemplated in section 15 of the Mental Health Care Act, 2002 (Act No. 17 of 2002), subject to the provisions of subregulation (2).

(2) If—

(a) the mental health care user is not assisted by his or her parent, guardian, spouse, life partner or child, the means of the mental health care user must be taken into consideration;

- (b) the mental health care user is assisted by his or her parent or guardian, spouse, life partner or child, the means of that parent, guardian, spouse, life partner or child must be taken into consideration; or
- (c) the mental health care user is assisted by his or her parent, guardian, spouse, life partner or child who exceeds the means test and can afford to provide legal representation for the mental health care user, yet fails, refuses or neglects to do so, legal aid must be provided to that mental health care user: Provided that Legal Aid South Africa may institute proceedings against that parent, guardian, spouse, life partner or child to recover the cost of the legal aid.

Commissions of Inquiry

26. Where funds are made available for legal aid by the establishing authority of a commission as contemplated in the Commissions Act, 1947 (Act No. 8 of 1947), legal aid may be provided, subject to the provisions of these regulations, for legal representation for a person appearing before a commission where that commission has certified that that person has standing before that commission.

Qualifying for legal aid and means test

27. (1) In order to qualify for legal aid in either civil or criminal cases, the legal aid applicant's gross monthly income less tax and net assets must fall within the parameters set by the means test contemplated in subregulations (2), (3), (4), (5) and (6) before legal aid may be granted.

(2) An applicant who applies for legal aid for a criminal case and has a net monthly income, after deduction of income tax, of R5 500 a month, or less, may qualify for legal aid in that criminal case, subject to the provisions of these regulations, irrespective of whether the applicant has a spouse or is a member of a household.

(3) An applicant who applies for legal aid for a civil case and who does not have a spouse or is not a member of a household and has a net monthly income, after deduction of income tax, of R5 500 a month, or less, may qualify for legal aid for that civil matter, subject to the provisions of these regulations.

(4) An applicant who applies for legal aid for a civil case and who has a spouse or the applicant is a member of a household and whose household has a monthly income, after deduction of income tax, of R6 000 a month or less, may qualify for legal aid for that civil matter, subject to the provisions of these regulations.

(5) A legal aid applicant or an applicant who is a member of a household who does not own immovable property and has net movable assets of less than R100 000 in value may qualify for legal aid for a civil or criminal matter, subject to the provisions of these regulations.

(6) A legal aid applicant or an applicant who is a member of a household who owns immovable property and has net immovable assets and movable assets in value of up to R500 000, may qualify for legal aid for a civil or criminal matter, subject to the provisions of these regulations: Provided that the legal aid applicant or the member of a household must physically reside in the immovable property or in at least one of the immovable properties, where there is more than one, unless Legal Aid South Africa decides to the contrary.

Amounts included or excluded for legal aid qualification

28. (1) A grant paid by the South African Social Security Agency is not taken into account in the calculation of income for purposes of the means test.

(2) Spousal maintenance or child support received by a legal aid applicant is taken into account in the calculation of income for purposes of the amounts.

(3) If any asset is owned by a trust, company or other legal personality but is controlled, either directly or indirectly, by the legal aid applicant or his or her spouse, dependent, sibling, parent, descendant or nominee, for the direct or indirect benefit of the legal aid applicant or his or her spouse, dependent, sibling, parent, descendant or nominee, that asset will be deemed to be owned by the legal aid applicant for the purposes of determining whether the legal aid applicant qualifies for legal aid in terms of the means test: Provided that where there are beneficiaries other than the legal aid applicant or his or her spouse, dependent, sibling, parent, descendant or nominee, the applicant is deemed to be the owner of his or her percentage share of that assets.

(4) Where a legal aid applicant applies for legal aid for litigation or possible litigation between him or her and his or her spouse, the legal aid applicant's means test must be assessed as if he or she does not have a spouse.

(5) A legal aid applicant must provide documentary proof and a written disclosure of assets for purposes of the means test, where requested.

(6) A legal aid applicant must provide proof that he or she is a natural person who is indigent as set out in these regulations.

(7) Legal Aid South Africa may conduct a forensic investigation of the financial circumstances of the applicant or recipient before legal aid is granted or after legal aid has been granted by itself or through a service provider.

No right to choose legal practitioner

29. No legal aid applicant has the right to choose the legal practitioner who will be instructed to represent him or her.

Exceeding the means test and discretion

30. (1) Legal Aid South Africa has the discretion to authorize fully subsidized legal aid for any applicant who exceeds the means test by up to R3 000 a month in respect of gross income for all matters and R100 000 in respect of net assets for all matters.

(2) Legal Aid South Africa may consider the application of any person who does not qualify for legal aid in terms of the means test under regulation 27(1) and (2), but who subjectively judged, is indigent and deserves sympathetic consideration on the grounds of exceptional or other circumstances: Provided such application otherwise qualifies for legal aid in terms of regulations 3(1) and 10(1).

Partially subsidized legal aid

31. (1) If a legal aid applicant does not qualify for legal aid in terms of the means test for a criminal matter, Legal Aid South Africa may provide partial legal aid and require from the legal aid applicant to contribute to the cost of the legal aid.

(2) In assessing whether partial legal aid should be provided Legal Aid South Africa must take the following factors into account:

- (a) Whether the applicant will suffer substantial injustice if legal aid is not provided;
- (b) whether the legal aid applicant will be able to afford the cost of his or her own legal representation; and
- (c) whether the applicant can adjust his or her standard of living to be able to afford the cost of his or her own legal representation.

Contributions by legal aid recipient

32. (1) If partial legal aid is provided as contemplated in regulation 31(1), the contribution amounts as set out in the Manual must be paid to Legal Aid South Africa monthly in advance until—

- (a) the cost recovery amount is paid in full;
- (b) cessation of the trial; or
- (c) the accused is convicted and sentenced to direct imprisonment, whereafter no further payment will become due and payable.

(2) If a legal aid recipient's circumstances change subsequent to the granting of partial legal aid as contemplated in regulation 31(1), Legal Aid South Africa may amend the contribution amount.

(3) If the legal aid recipient fails to pay any contribution as determined by the authorising body, legal aid may be terminated.

(4) Where a court in accordance with section 22(1) of the Act orders/directs the provision of legal aid and the legal aid applicant exceeds the parameters of the means test, that court order must provide for a contribution in accordance with this regulation.

Termination of legal aid

33. (1) Legal Aid South Africa may terminate a legal aid recipient's legal aid on account of the conduct of the legal aid recipient, which may include that the legal aid recipient —

- (a) ceases to qualify under the means test;

- (b) fails to appear in court timeously on the appointed day without giving a good reason for not appearing and a warrant for arrest has been issued;
- (c) unreasonably refuses to accept a settlement;
- (d) does not timeously comply with a contribution order as contemplated in regulation 32;
- (e) terminates the mandate of the instructed legal practitioner unreasonably and without good reason; or
- (f) makes it impossible for the instructed legal practitioner to carry out his or her mandate.

(2) If legal aid is terminated by the legal aid recipient or as a result of his or her conduct, Legal Aid South Africa may instruct a further legal practitioner after consideration of the facts of the case.

(3) Legal aid may be terminated where the instructed legal practitioner withdraws or has his or her mandate terminated by Legal Aid South Africa for reasons that may include the following:

- (a) Ethical reasons;
- (b) the legal practitioner ceases to practise;
- (c) the legal practitioner ceases to be a Legal Aid South Africa accredited legal aid practitioner;
- (d) the legal practitioner is unable to continue to act because of ill-health or another cause that makes it impossible to carry out his or her obligations as a practitioner;
or
- (e) the legal practitioner fails to proceed with the matter.

(4) Where a legal practitioner's mandate is terminated as contemplated in subregulation (3), Legal Aid South Africa must appoint another legal practitioner if the legal aid recipient continues to comply with the provisions of these regulations.

(5) Legal Aid South Africa may terminate a legal aid recipient's legal aid for reasons that may include the following:

- (a) A change in policy on the type of matters for which legal aid is available;
- (b) the suspension of legal aid in certain types of matters as a result of a lack of resources; or
- (c) the legal aid recipient gives just cause for the termination of the practitioner's mandate.

(6) Where Legal Aid South Africa terminates a recipient's legal aid because of Legal Aid South Africa's policies or resources, it must ensure that the legal aid recipient does not suffer any prejudice as a result of the termination.

(7) A legal practitioner acting in a civil legal aid case must refuse to proceed if he or she has reason to believe that one or more of the following situations has arisen:

- (a) The applicant's problem is trivial or is without sufficient grounds and is only instituted to cause annoyance;
- (b) the circumstances suggest that no real or substantial benefit will be achieved by the rendering of legal aid;
- (c) the legal costs involved would be out of proportion to the relief that the legal aid applicant wishes to get; or
- (d) considering all the circumstances of the case, legal aid should not have been granted for financial or other reasons.

Refusal of legal aid

34. (1) When an application for legal aid has been refused the legal aid applicant has the right of appeal according to processes as determined in the Manual.

(2) Legal Aid South Africa must inform the legal aid applicant in a criminal matter of his or her right to apply to the court for an order that he or she must be provided with legal representation at State expense and that, before that order is considered, the court will refer the issue for evaluation and report by Legal Aid South Africa under section 22 of the Act.

Impact legal services

35. (1) Legal Aid South Africa may undertake or fund litigation or other legal work which has the potential to positively affect the lives of a larger number of indigent persons other than the person or persons to whom legal services are rendered directly, which matter—

- (a) may establish a legal precedent, jurisprudence or clarify aspects of the law that will be followed in dealing with indigent persons in similar matters;
- (b) may have the potential of resolving a large number of disputes or potential disputes, and obtain wider collective objectives; or
- (c) may improve the lives of a group of persons or a sizeable portion of a group.

(2) In a case contemplated in subregulation (1) legal aid may be granted to a legal entity acting on behalf of a large number of natural persons or in the furtherance of public interest in accordance with section 38 of the Constitution.

(3) If legal aid is refused for the matter as contemplated in subregulation (1), Legal Aid South Africa must inform that legal aid applicant that he or she has the right of appeal.

Medical, travelling and witness costs

36. Legal Aid South Africa does not pay costs related to a legal aid applicant's—

- (a) medical treatment, operations or hospitalisation; or
- (b) travel expenses for attending a medical consultation or examination.

Receipt of monies after legal aid instruction

37. No additional moneys that are not due in terms of these regulations, the Manual or a court order, may be received directly or indirectly by a legal practitioner from the legal aid recipient, or from any other source, after receiving a legal aid instruction for a particular matter.

Payment of financial benefit to Legal Aid South Africa

38. When a litigant who receives legal aid from Legal Aid South Africa obtains a financial benefit as a result of a settlement or judgement at any stage after legal aid was granted, a percentage of the financial benefit is payable to Legal Aid South Africa, as determined in the Manual.

Transitional provision

39. Any legal proceedings which have been instituted before these regulations come into operation must be continued with in terms of these regulations.

Offences

40. Any person who contravenes a provision of these regulations or fails to comply therewith is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year.