South African Law Reform Commission

Report of the

International Conference on

Access to Justice, Legal Costs and Other Interventions

Held on

1–2 November 2018

Garden Court Marine Parade, Durban, South Africa

Hosted by the

South African Law Reform Commission

Supported by

European Union

Department of Justice and Constitutional Development

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INTRODUCTION

1. On 1 -2 November 2018, the South African Law Reform Commission ("SALRC") organised and hosted an international conference titled ***INTERNATIONAL CONFERENCE ON ACCESS TO JUSTICE, LEGAL COSTS AND OTHER INTERVENTIONS***. In hosting the conference, the SALRC was supported by both the Department of Justice and Constitutional Development and the European Union. The aim of the conference was to stimulate the profession into giving their initial insights into the question of access to justice and the impact of high legal costs which impedes access to justice for the majority of the people of South Africa.

2. The venue for the conference was Garden Court Marine Parade Hotel in Durban. The conference was attended by approximately 125 people. Some of the attendees delivered research papers. The conference papers can be accessed on the following SALRC website, namely: http://www.justice.gov.za/salrc/index.htm.

3. The delegates included, *inter alia*, the Minister of Justice and Correctional Services, Adv TM Masutha (MP); Deputy Minister of Justice and Constitutional Development, Mr J Jeffery (MP); Chairperson of the SALRC, Judge Jody Kollapen and members of the SALRC; members of the judiciary; members of the legal profession; delegates from academic institutions, law clinics and juristic entities providing legal services; government officials at all spheres of government; members of foreign legal bodies; and representatives of civil society organisations providing legal services to the people of South Africa.

4. The conference was chaired by Advocate Anthea Platt SC, a commissioner at the SALRC, and facilitated by a diverse number of delegates all of whom added invaluable input into steering the course of the conversation throughout the conference. The SALRC is mandated by section 35(4) and (5) of the Legal Practice Act, No.28 of 2014 to investigate and report back to the Minister of Justice and Correctional Services within two years after commencement of Chapter 2 of the Act on the following-

(a) *The manner in which to address the circumstances giving rise to legal fees that are unattainable for most people;*

(b) *Legislative and other interventions in order to improve access to justice by members of the public;*

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

(d) *The composition of the mechanism contemplated in paragraph (c) and the processes it should follow in determining fees or tariffs;*

(e) *The desirability of giving users of legal services the option of voluntarily agreeing to pay fees for legal services less or in excess of any amount that may be set by the mechanism contemplated in paragraph (c); and*

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

5. Gratitude is expressed, on behalf of the SALRC, to the many delegates who availed themselves from all over the globe in order to participate in this intensive discussion. A discussion that heralded the first step in the upcoming conversations planned throughout the course of the investigation into legal fees.

SESSION 1: WELCOME AND INTRODUCTION; GOALS OF THE CONFERENCE

6. The Chairperson of the SALRC (Judge Jody Kollapen) welcomed delegates to the conference and recognised the various dignitaries who were in attendance. What follows hereunder is an expert from his speech.

> *There is little doubt that the law plays a critical role in any society. It sets rules for engagement, it regulates conflict, it is meant to provide a fair rules-based system to resolve most forms of contestation. At other times it serves to moderate power held by the state or private actors and it is really meant to fulfil the promise that it carries for a better life for all. It is also meant to protect the weak, the vulnerable and the marginalised.*
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> *You would not need reminding that in the sad history of our country, the law certainly in the pre-1994 era, was a grotesque tool in the social destruction of*

our society. Land was taken, people were banished, people were assaulted, detained, had their livelihood and their dignity stripped all in the name of the law. But 1994 promised a new era. It promised an era where the law would be a tool in the social reconstruction of our society, and we perhaps need to go back to establish whether that promise continues to be fulfilled.

In our society, and given the unique nature of the political settlement that was arrived at in the early 1990s, the law in my view assumes an even more significant and central role. Ours was a compromise, flawed in many respects, but the best we could have hoped to achieve at the time we are told. That compromise meant that while political power was transferred peacefully, much of the social and economic design of apartheid continued to remain in place. The supreme law encapsulated in our Constitution was meant to then become the promissory note for a better life serving as the lodestar through which the change for which so many gave their lives would be affected.

Impressive as it is it continues to hold out the promise for social justice, substantive equality for all and an inclusive society committed to respecting the building diversity that characterises us as a nation, and respect for the fundamental human rights that define us as humans. So the law in institutions and personnel continues to play centre stage in our transformation as hardly a significant event occurs in our country without some or other involvement of the law and the courts. Some would say that lawyers play a disproportionate role in that process. But that is a debate for another day.

What remains, however, a reality is that the law continues to be the basis by which we regulate how we function and how we assert the rights that are found in our Bill of Rights. That process, however, does not take place in a vacuum. It occurs within a context where the fault lines of our past, of race, of power and powerlessness, of inequality and disparity, of hope and fear continue to prevail. Sometimes one is tempted to agree with the observation of Professor Richard Falk when he says that while the power of rights is a force that was unimaginable 40 years ago, it is simply no match when it comes to the rights of power. It is against that background that we must then

ask how the law has fared over the past 24 years in effecting the transformation of our society.

And while it is so that we have passed progressive legislation in a number of areas, including the Land Reform, the rights of consumers, the law relating to the supply of credit, access to information and administrative justice, and we must justly take pride in that process. I am sure you will agree with me that the litmus test is how the law has worked in practice, and in particular with those for whom the law was enacted and are able to assert its protection. For that to happen one requires an effective and functioning judiciary and a legal system that provides meaningful access to those who need it. As a sitting judge, I offer no comment on whether we do have an effective and well-functioning judiciary, although anecdotal and other reports suggest that we do. Do we have a legal system that provides meaningful access to those who need it the most? I am not sure if we do. While criminal legal aid is extensive and provides comprehensive cover for those who are at risk, in the civil field the picture is considerably different. From my own recollection in the North Gauteng court where I sit, just by way of example, the majority of cases involving foreclosures and loans and with it the risk of losing one's home and the security that it brings are dealt with on an unopposed basis. And even where a homeowner appears, it is invariably without representation.
What does this say then about our system that a person could lose their home, the anchor in their lives and in their own self-determination, and that it occurs regularly on an undefended basis. Our estimate with the Judge President was that we deal with about between 300 and 400 such cases per week in both the North and South High Court. And if you add all the other divisions, it may well be close to just under a thousand homes that are lost on a weekly basis under circumstances where the right to housing becomes meaningless because someone is not able to access court. And even if there is no defence on the merits to at least place evidence before the court with regard to whether an order to executability should be granted.

Now those kinds of disparities are simply unsustainable where, on the other hand, a homeowner can go to court to assert a right that his or her view of the

sea is obscured by another building. So you have that playing itself out in our legal system. And in a legal system that prides itself on being located within a rules-based society, invariably then it favours those who know the rules and those who can afford to assert the rule.

And so, the question that brings us here today is whether the cost of legal services puts it beyond the reach of the majority. And I think the answer to that must be, yes. In saying so, I am not suggesting that the fees that are charged are excessive, unreasonable or exorbitant. I am simply saying that as a matter of fact, the question of affordability of fees is a real problem with regard to access to justice. And I would like to think that it is a matter that must concern all of us because the law and the protection that it promises then becomes elusive to so many. And it hardly then remains respectable or legitimate as former Justice Brandeis of the United States Supreme Court said and I quote, "If we desire respect for the law, we must first make the law respectable". And in my view respectability of the law does not only relate to the content of the law, but it also relates to questions around its accessibility.
And so, it is against that brief background that the Law Reform Commission has convened this conference, and in particular in respect of the mandate given to it in terms of the Legal Practice Act, Section 35(4) and (5) which encapsulates that mandate. And I am not sure if it is purely a matter of coincidence but section 35(4) and 35(5) of the Act is coming into operation today. It just coincides with the two-year period within which the Commission must conduct its investigation, which starts today. And within two years we must submit a report to the Minister on the manner in which to address the circumstances giving rise to legal fees that are unattainable for most people.

And I think the act concludes that legal fees are unattainable for most people. It does not ask us to examine that issue but rather the circumstances that give rise to that state of affairs.

Secondly, we are required to look at legislative and other interventions in order to improve access to justice by members of the public. Thirdly, we are required to consider the desirability of establishing a mechanism, which will be

responsible for determining fees and tarrifs payable to legal practitioners. And if we think that such a mechanism is necessary and desirable, to apply our mind to the composition of the mechanism that is contemplated and the processes that it should follow in determining fees and tariffs.

And then in addition to that, if we go as far as that, to consider the desirability of giving users of legal services the option to pay less or in excess of any amount that may be set. We also need to look at the whole question of mandatory fee agreements. In doing this we need to be guided by best international practice, the public interests and the interests of the legal profession. So clearly the Commission takes the mandate that it is given in terms of the Legal Practice Act seriously, it has significance as I have indicated not just for the legal sector, but for the very idea of the respectability of the law and broader consequences that invariably go with that I may mention and just to set your mind at ease that the determination of tariffs and fees is not something that we are required to do as the Commission. What we must do in relation to tariffs and fees is to establish whether there is a need for a mechanism that will do this. And if so, what such a mechanism should look like and where it should be housed. But at the same time the investigation we are required to undertake is not just about fees and tariffs, but more importantly to deal with and understand the circumstances that give rise to legal fees that are unattainable for most people, and then having done that, the manner in which those circumstances should be addressed? Of course we are also required to look at other interventions and there are a number that come to mind. The judiciary will be mindful that more effective case management may well result in reduction of legal costs where a matter will only go to trial when it is ready for trial, and significant progress under the leadership of the Chief Justice has been made in that regard.

The Law Reform Commission is also looking at various models of mediation and Judge President Mlambo as well as other judges on some of the committees are also doing that. It is my view that appropriate mediation interventions are much needed simply because, many of those matters that come before us as judges may well be the kind of matters that can be

mediated and mediation can often result in avoiding the need to go into an adversarial trial. I am mindful of pro bono interventions by the profession, by private legal firms. But the reality is that all of those interventions collectively still see us facing a deficit in respect of meaningful access to justice.

And so we welcome you in that spirit even though ultimately, the investigation and report that will be produced will be that of the Commission. We cannot see ourselves producing such a report without really engaging with the profession, with the public, with academia, with those who provide legal services. And as we move forward, we will continue to seek your views. We may differ as we go along, and that is likely that we will, but that is the nature of the democratic spirit that certainly has taken root in our society in the last 24 years. We will have difficult discussions, but they will be necessary discussions, and at the end of the day we hope to bring out a report that can make a contribution in ensuring that we discharge our mandate in terms of the Act. But also that we make a meaningful contribution to ensuring greater access to justice for those who need it the most.

Perhaps as I close I would like to make an appeal to all of you. I am mindful that that all of you come here, or many of you come here, representing a particular constituency and mandated to speak on behalf of that constituency and I have no doubt you will do that. But I also appeal to you as a South African to perhaps be willing to step outside of the boundaries that that constituency places on you and ask yourself the bigger question- whether what we do advances the interests of our people. It may well be that a particular intervention may be seen as a threat to a particular sector of the profession. But if it enhances access to justice and respectability of the law, then surely you must agree with me that it enhances the interests of that sector.

And so I hope we can have that mature, robust and honest discussion about legal fees, about other interventions and about access to justice. Because if truth be told as lawyers, we have a monopoly on the provision of legal services. No one else can provide legal services. As lawyers we should have

an acute and intimate understanding of the law and the social contract that is evident in the Constitution. And I would like to think that as lawyers we carry with us the obligation to serve that noble ideal, and sometimes to step outside the limited and perhaps narrow interests of the profession we find ourselves in and to embrace the broader imperative of the Constitution.

I am hoping that we can engage in that spirit. As we move forward I, on behalf of the Commission, would like to assure you that the process of consultation will continue, just not like this. We think it is important to consult with communities at local level, to consult with the profession even if it is in a dedicated and a structured manner, and that process will continue to unfold.

We have established an advisory committee appointed by the minister and some of the members of the committee are here you today. Again, just to set your mind at ease, the advisory committee is not meant to be a representative body. It is precisely what it says it is, an advisory committee. And so in its structure there was no intention to say this committee has to be completely representative of the profession. We are mindful that the profession's voice and that of the public is important and must be heard. We are committed to hearing it and engaging with it as we move forward in what is an important process. One that we anticipate will be difficult, but one that we hope with integrity, we can all apply our minds to so as to discharge that part of our mandate in the interest of ensuring greater respectability for the law and access to justice, and really to make and to convert the promise of the Constitution into reality. So I wish you a good conference and thank you very much.

SESSION 2: KEY NOTE ADDRESS

7. The Deputy Minister of Justice and Constitutional Development (Mr John Jeffery) next addressed the conference by delivering his key note address. What follows hereunder is an excerpt from his address:

Yesterday chapter 2, with the exception of section 14, of the Legal Practice Act came into operation. Chapter 2 provides for the establishment, powers and functions of the Legal Practice Council. And I understand they had their first meeting yesterday and congratulations to Ms Kathleen Dlepu, who was elected Chair of the Legal Practice Council, and Commissioner the Law Reform Commission, Advocate Anthea Platt SC, for being elected as Deputy Chairperson of the Legal Practice Council.

Today most of the remaining sections pertaining to amongst others definitions, the regulation of legal practitioners, professional conduct and disciplinary bodies, the legal practitioners, fidelity funds in the handling of trust monies also came into effect. The coming into operation of these sections bring about a new era in the legal profession in our country. The first purpose of the Act is to provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values of the constitution and ensures that the rule of law is upheld.

The second is to broaden access to justice by putting in place a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within reach of the public. Now ladies and gentlemen, I doubt if there is anyone here who will dispute that the amount charged for fees when consulting private lawyers and access to the courts is beyond the reach of the vast majority of South Africans.

Yes, we do have Legal Aid South Africa which provides legal representation in criminal matters where substantial Injustice would otherwise resul,; as well as limited access to civil law, assistance limited because of budgetary constraints, but this is only available to individuals who earn less than R5 500 per month after tax or R6 000 in the case of a household. A 2016 review done by LexisNexis into the attorney's profession in South Africa found that 61% of salary partners bill between 1 000 to R3 000 per hour, and that was in 2016. So the amounts, one can assume, have further increased since then.So let us imagine you are a worker earning 7 000 per month after tax. This means that your total monthly wage will give you three

billable hours with a salary partner on the bottom end of the scale. This raises many issues, is this fair? Is this what we mean by access to justice?

Legal costs are a significant barrier in a recent study commissioned by the Department which was undertaken by the Human Sciences Research Council to assess the impact of the decisions of the Apex Courts on the transformation of society. The report states that costs are an essential issue in relation to access to justice in all legal matters. 59% of South African respondents of the South African Social Attitudes Survey, in the most recent survey of the courts in 2014 indicated that they felt lack of funds to pay legal expenses were a significant barrier to accessing justice from the courts.

Although the law societies were empowered by legislation to prescribe the tariff of fees and costs for professional services where no tariff is prescribed by legislation, a number of problems have emerged in the recent past about the legality of the fee guidelines issued by them as well as the contingency fee agreements that do not comply with provisions of the Contingency Fees Act. A number of cases have been brought before the courts in the past couple of years where it was evident that the professional fees and costs charged by certain legal practitioners are in excess of the limits prescribed by the Act. Of note, the famous or perhaps infamous case of De La Guerre (if I pronounced it right) v Ronald Bobroff, which upheld the law relating to the conclusion of contingency fee agreements strictly in terms of the Act. Whilst the issue of the abuse of such agreements in matters relating to RAF claims was settled in the above case, we have now started to note an increase in the number of medical negligence claims, the majority of which are brought on the basis of contingency fee agreements. So that is why Parliament when considering the Legal Practice Bill made provision for the South African Law Reform Commission to investigate and report back to the Minister of Justice within two years after the commencement of Chapter 2 of the Act, which is within two years of yesterday, with recommendations on the manner (and you heard them I think from Judge Kollapen) but just to repeat them, the manner in which to address the circumstances giving rise to legal fees that are unattainable for most people.

Secondly, legislative and other interventions in order to improve access to justice by members of the public. Thirdly, the desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners. Then the desirability of allowing clients to opt out of these provisions and pay the practitioners more or less. And lastly, the obligation by legal practitioners to conclude a mandatory fee arrangement with a client.

And we are pleased that the South African Law Reform Commission did not wait for these sections of the Act to come into effect and it has proactively convened this conference on legal costs and related matters. We accept that the issues from the perspective of legal practitioners are complex. When we look at the legal profession itself, we see a similar scenario as in broader society. At the top end there are practitioners making huge sums of money whilst at the other end there are practitioners who are battling to keep afloat and striving to pay overheads and keep their practices going.

This is also linked to the amounts or fees charged, with the established practitioners charging huge amounts. For example, having to pay a legal practitioner a R120 000 to read a book or R7-million to investigate corruption in a Municipal Metro, whilst those practitioners who are still trying to establish themselves charge a lot less. We need to take note of the fact though that South Africa does not have enough legal practitioners to service the population. particularly, if you look at the comparisons with other countries. Last year countrywide we had 25 283 practising attorneys and 2 915 advocates at the Bar. This gives us a total of just over 28 000 practising legal professionals.

Now that may seem like a lot, but consider the fact that 28 000 legal practitioners have to render services to a country with a population of 55.7-million people. This means that it is just under 2,000 people to one practising legal professional. If we look internationally, we will note that our ratio is much higher than other countries. The New Zealand Law Societies Magazine, Law Talks, says that New Zealand has a ratio of one lawyer to every 372 New Zealanders. The United States ratio is one lawyer for every 256 people. And if we look at our Bricks Partners, Brazil, their ratio is one lawyer for every 316. We are 1 to 1989.

And this might explain why many people in our country do not have adequate access to legal services. However, we cannot have more lawyers in South Africa unless they can have an income. The issue of the high costs so concerned parliament that it put in interim arrangements in the legal Practice Act to assist the public by providing that- until the Law Reform Commission's investigation is complete, fees must be in accordance with tariffs set by the Rules Board for the courts of law, the Rules Board being the statutory authority that makes rules for all court procedures as well as setting tariffs for fees and litigations. This would have entailed the Rules Board setting tariffs for non-litigious work.

Unfortunately, the Rules Board requested that this should only be done once the Law Reform Commission has completed its investigation so that it does not have to second-guess, investigate or deal with similar issues that the Law Reform Commission will deal with. But this was quite clearly not the intention of parliament in inserting Section 35(1) in the bill. It had wanted some form of immediate relief for the public. As the concerns from the Rules Board were only raised recently, the Minister agreed that these sections should not come into effect for the moment, but we cannot have the status quo continuing for a further two years. If need be, we need to engage with the Rules Board further on the issue.
We are nonetheless appreciative of the fact that the Rules Board is addressing the issue of tariffs for advocates who are currently not subjected to tariffs at all. There was, I think, a cap on advocates' tariffs in an Act which was repealed in 1990. And I am not sure why, but since then there has been complete freedom. The Rules Board recently set out for comment draft tariffs which it intends introducing in respect of advocates' fees in terms of uniform Rule 69, that may be claimed under taxation. Once these tariffs are determined, it will assist the public in knowing upfront what fees can be claimed on tax, in litigation.

On the issue of fee estimates some members of the profession have raised concerns saying that estimates are not practical, the Legal Practice Act provides that you need to be given as a client an estimate of how much your case is going to cost you. And the issue of the harm that this was attempting to address was a complaint stemming from members of the public. They will go to an attorney. They

will be asked to pay money. They will pay that money and then a few weeks or months later they will be asked to pay more money and then end up at the end of the matter saying that if they had known how much it would cost, they probably would not have wanted to proceed with the litigation.

Now, once again regarding that section, the concerns were only raised recently, even though the Act was assented to four years ago. Those relevant sections have not been put into effect as yet, but we need to urgently address the concerns and address Parliament subjective to the fact that a client must have some idea of how much litigation will cost them when they approach an attorney.

From the government side we put in other measures in place to make the cost of justice more accessible. The establishment of the Small Claims Courts, with at least one in each magisterial sub district; sorry, in each magisterial district and sub district; in South Africa is a major step forward in terms of enhancing access to justice. And effectively the Small Claims Courts give everyone the opportunity to have disputes resolved up to an amount of R15 000. The Small Claims Courts operate without legal representation. It is a more inquisitorial system. So there is more of a responsibility on the commissioner to assist.
The monetary jurisdiction of Small Claims Courts has increased on a regular basis informed by discussions with relevant role players. Not surprisingly the Law Societies not being in favour of an increase in in jurisdiction because obviously if people take matters to a small claims court, they do not go and see an attorney. There are presently 422 Small Claims Courts Countrywide and 30 additional places of sitting, but the aim is to resolve civil disputes in a quick and affordable manner. We have also as the Department of Justice and Constitutional Development embarked on a project to introduce mediation at the courts to assist people to settle their disputes in a way which is more user friendly and cost effective than litigation.

The purpose of this new initiative was to make justice more accessible in the civil and family courts as part of the larger Civil Justice Reform Project. The implementation of mediation rules has brought fundamental reforms to the Civil Justice System. Court Annexed Mediation provides a less intimidating process in which parties can explore a range of options and have control of the discussion and

of the decision in their case. It also provides an opportunity for disputing parties to express their views without fear that their legal rights will be compromised or their relationships jeopardised by dispute resolution.

The mediators are guided by a strict code of ethics which includes confidentiality both in respect of the parties and the mediation. The early settlement of civil disputes presents the potential of averting huge legal costs in instances where legal proceedings had not commenced, or significant reduction of costs where the mediated settlement was achieved during the instituted court proceedings. We do, I think, have to evaluate that programme. There is not the uptake on it, in the Magistrate's Courts particularly, that we had expected. Another vehicle to assist communities in the attainment and protection of their human rights is community advice offices. These offices are small non-profit organisations that offer free legal and human rights information advice and services. In addition to the rights-based information, community advice offices educate communities on how and where to access services offered by government departments and agencies. Today community advice centres provide services that contribute to social justice and facilitate access to government services for the poor and marginalised.

Community based paralegals, working within these offices provide support and frontline assistance to many who do not have the means to access other forms of justice or legal services. Over the years community advice offices have provided much-needed services to millions of poor and marginalised South Africans. And we are pleased that the Law Reform Commission has included a session on community-based legal services in the programme. As government, we are very mindful of the need to provide for statutory regulation of paralegals as well as tackling the issue of sustainable funding for community advice offices.

But I think in terms of discussing these issues we need to recognise that there are two broad competing interests at play, the desire of the profession to make a reasonable income and the need for South Africans to have access to justice. I would however though caution that it in its consultations, the South African Law Reform Commission does not prioritise the profession over the public because it is almost like asking turkeys to be the authoritative voice on what should be on the

table for Christmas dinner, while ignoring the impact of the decision on geese, chickens and pigs.

One can understand that many legal practitioners will not be enthusiastic about their ability to make money being restricted in any way. For example, we know the professional bodies have opposed measures such as the limitations on the use of attorneys and advocates in the CCMA and the road accident fund. Attorneys also objected to provisions for paralegals in the Legal Practice Act or the legal Practice Bill. And the matter was then referred to the Legal Practice Council to, within two years after the commencement of chapter 2 (so two years from yesterday) investigate and make recommendations to the Minister on the statutory recognition of paralegals taking into account best international practices, the public interest and the interest of the legal profession, with a view to legislative and other inventions in order to improve access to the legal profession and access to justice generally.

In some instances, attorneys in small towns were not keen on the establishment of Small Claims Courts in that town fearing that it would deprive them of their bread and butter income. But let me also add with regard to paralegals, that in spite of what is in the Act, our Department is working on legislation for paralegals who work on a voluntary basis in community-based offices. This narrowed focus is a result of research finding that although paralegals fall into many categories, it is the ones in the community advice offices that need the most urgent attention.

The new bill should provide a regulatory body that would inter alia deal with matters such as regulation, discipline, the registration of community advice offices and community based paralegals, the requirement to offer to operate a community advice office and finally, requirements to practice as a community-based paralegal including the necessary qualifications. So in closing, we are hoping that the impact of the Legal Practice Act will be two fold, to help the profession by making it more efficient and transformed, and also to help the public to be able to access quality and affordable legal services. Government continues developing and implementing policies that bring about improved access to justice and making people aware of their rights.

As much as our Constitution has been lauded across the globe as being a highly progressive and transformative one, a progressive constitution alone will not realise rights if people living within our country either are not made aware of their rights, or do not have the means to access their rights. These are all issues which need to be addressed at this conference. These are not simple matters but matters that will require to be debated and deliberated on at length.

In the novel Lorna Doone, the issue of the meaning of curia vult adversari is raised. The author RD Blackburn writes, 'curia vult adversari, as the lawyers say, means let us have another glass and then we can think about it.' So whether we discuss these issues in our sessions over the next few days or whether we find other avenues to debate it, these are all matters that are crucial to access to justice. And therefore, we must find solutions. Thank you.

8. Some of the delegates posed questions to the different speakers who made presentations at the conference. Some of these questions and the answers are contained in this report hereafter.

9. Dr Dave Holness

Question: His concern was that although all the speakers had raised the value of community-based paralegals (CBPs) and there has been an undertaking by government to fast-track the question of CBP's, they were not included under the Legal Practice Act. Now they know that there is a process for this to be considered, but he is just concerned as to the time frame given that various factors are at play here.

Answer: The Act provides the requirement that the Legal Practice Council needs to, within two years, make recommendations to the Minister. He thinks that the problem has been from DOJCD's side. The DOJCD passed the Legal Practice Act, it requires a Legal Practice Council to be established and provincial councils too. It really wants to see that happen and take place and that has taken longer than expected. One of the issues with paralegals is that they need to be regulated. How is that going to be done and more importantly who is going to pay for it? The issue

of qualifications is a complex one because you can require certain academic qualifications, but you might find in many community advice offices that you have got an older person who does not have any qualifications, but they are a very good paralegal. You do not want to kick them out but you need to be able to have a system in which you can recognise them. Conversely, some other person might not have any qualifications, skills or experience and should not be giving advice to the community. This he feels is the overall problem that has to be grappled with.

10. Mr Asif Essa

Question: He wanted the Deputy Minister to understand from the legal profession's point of view that when one asks them at the outset: 'How much will this matter cost me?' the response will be: 'How long is a piece of string?' This he illustrated by way of an example in 2 separate divorce matters where, a lawyer could have a file of less than 6 inches thick in one matter and then have 10 lever arch files worth of documents in another divorce matter. The concern regarding the matter with ten lever arch files is that this matter may have got out of hand. But it is also true that it may have been very difficult right at the outset to give an accurate fee assessment, because a lawyer would never know which interlocutory applications would be necessary, as well as how long litigating the whole matter would take.

Answer: This issue of giving a quotation which was provided for in the Act was taken from New Zealand. The DOJCD did not hear anything from Law Societies or anyone about the fact that implementing this provision is a problem until right at the end and it is partially his frustration often with the profession that problems are always raised not solutions. It may be that the quotations should be for stages of work. For instance, lawyers should accurately tell you it will cost this amount to issue summons. But lawyers cannot expect somebody who does not know much about the law to give instructions for the matter to proceed without giving them any clue of what they are paying for. That he believes is the problem.

SESSION 3: SETTING THE SCENE

11. Facilitated by Advocate JB Skosana, Deputy Director General of Court Services at the Department of Justice and Constitutional Development, Session 3, *Setting the Scene,*

included the following presenters: Judge Dunstan Mlambo (Judge President of the South Gauteng High Court of South Africa) and Judge Motsamai Makume (Judge of the South Gauteng High Court of South Africa). Advocate Elizabeth Boloyi-Mere from Advocates for Transformation had previously submitted a paper to be presented at the conference, however, due to an unexpected death in her family, she could not attend the conference.

12. Judge President Mlambo's presentation was titled: "***LEGAL COSTS AND FEES IN SOUTH AFRICA- THE CURRENT POSITION."*** He touched on a number of factors that he believes contribute to high legal fees in this country. He raised the issue of case management in our courts by questioning whether judges are managing the matters before them in court suitably enough to broaden access to justice. He further wondered whether the struggles experienced by everyday South Africans who engage the services of paralegals, Legal Aid South Africa and other legal practitioners had ever been fully considered. His **suggestions** regarding the topic of high legal fees impeding access to justice were the following:

That there needs to be more efficient monitoring of awards and payments to clients who obtain monetary awards against the state. That the number of legal empowerment community centred engagements around the country needed to be established in order to find out how informed the public was about the different aspects of access to justice. That the skills that can be provided by the huge numbers of unemployed law graduates in the country needed to be identified and utilised.

13. Question posed to Judge President Mlambo:
Ms Nolukhanyiso Gcilitshana
Question: How does providing certainty regarding an attorney's legal fees assist an indigent person in a very rural area with no access to an attorney within reachable distance (who relies of paralegals and other NGO's)?

Answer: He wonders how many South African's knew that Legal Aid South Africa has a legal advice line, which they can access, and which is toll-free? So even if they were sitting in the furthest corner of South Africa, and studies do show that almost everyone has a cell phone, they have access to a toll-free line where they can ask for advice. If it is

a matter that requires more consideration, more effort is put into accessing them and dealing with their matter.

Another matter that he has discussed when he goes to open satellite offices of Legal Aid South Africa in far flung areas is the concept of more Bi-Legal clinics, more Legal Aid Clinics where periodically lawyers go to far flung areas and have the cooperation with the local traditional leaders who tell their people when the lawyers will be there to help them with their legal problems. It saves people transport money. This is all an example of what he calls low hanging fruit that have to be maximised to make sure that people have access.

14. Judge Makume's paper is titled: "***IS ACCESS TO JUSTICE DEPENDENT ON ONE'S ABILITY TO AFFORD LEGAL FEES?"*** He argued that section 34 of the Constitution guarantees everyone the right to have **any** dispute that can be resolved by the application of the law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. He further argued that section 35 of the Constitution makes provision for the fair trial rights of criminally accused persons, including far reaching rights to legal representation. He however pointed out that section 34 of the Constitution does not make provision for access to courts at state expense which results in indigent and marginalised persons lacking the means to access the said courts. He then went on to **suggest** a number of tools that the profession and the state could utilise in order to ensure the realisation of this right, namely:

- Whether a client should be involved in the negotiation of an advocate's fee, being that she will ultimately be responsible for settling it?
- How the provision of *pro bono* work by legal practitioners should be enforced and regulated?
- Whether the regular application of section 300 of the Criminal Procedure Act would assist complainants in 'obtaining speedier and more cost effective and holistic justice?
- What the consequences to legal practitioners should be where they choose to institute a matter in the high court which rightly belongs in the magistrate court?
- Whether Rule 37 of the Uniform Rules of Courts is being used efficiently enough by parties to limit and resolve issues before trial?

15. Question posed to Judge Makume:
Ms Nolukhanyiso Gcilitshana
Question: How does providing certainty regarding an attorney's legal fees assist an indigent person in a very rural area with no access to an attorney within reachable distance (who relies of paralegals and other NGO's)?

Answer: Judge Makume added onto what judge president Mambo had said in response to this question. Judge Makume suggested the following as regards advice to people in the rural areas: he remembers that many years ago, when he was still in the Law Society, Transnet used to fund a 'Legal Train' which moved from Musina , Mafikeng and possibly to Bloemfontein. It was funded by the private sector and should be brought in together with the paralegal system today. That train used to stop for two days in Mokopane and then for two days in Polokwane and it was all manned by legal practitioners who gave their time. Such services should be reintroduced in order to reach people in far flung areas perhaps by way of *probono* work.

16. Advocate Elizabeth Baloyi-Mere's paper is titled: "***Transformation in relation to improving access to justice by members of the public."*** Unfortunately advocate Baloyi-Mere had a tragedy in her family and could not participate in the conference on the day. She had however submitted an abstract ahead of the conference.

SESSION 4: ECONOMIC COMPARATIVE ANALYSIS

17. This session ran parallel to session 5, which was hosted in a separate venue. Session 4 was facilitated by Ms Rochelle Francis, the Deputy Chairperson of the Advisory Committee on Project 142. Session 4, *Economic Comparative Analysis,* was presented by the following delegates: Professor Jonathan Klaaren (Professor at the University of the Witwatersrand, Faculty of Commerce, Law and Management) and Professor Maurits Barendrecht (Research Director at the Hague Institute for Innovation of Law).

18. Professor Jonathan Klaaren's paper is titled: "**TOWARDS AFFORDABLE LEGAL SERVICES: LEGAL COSTS IN SOUTH AFRICA AND A COMPARISON WITH OTHER PROFESSIONAL SECTORS."** This paper points out that different members of society

experience different challenges when it comes to accessing justice. He identifies the fact that these challenges differ according to one's socioeconomic, racial, sex, age, religious and cultural groupings. Klaaren suggests that it might be feasible to develop a method in terms of which legal services are offered on a sliding scale depending on the affordability of the client. Consequently, he proposes the division of the county's population into three bands i.e. the poor, missing middle and the rich. Once a person is assigned to a particular band, they can then be directed to the appropriate supplier of legal services available to them. He states that identifying the three different types of consumers of legal services will assist in developing a method that will help the legal sector make comparisons with other sectors.

19. Question posed to Professor Jonathan Klaaren:
Professor Karthigasen Govender
Question: Is there any impact by the growth of technology on fees? How can we use technology to reduce legal costs? Specifically does it play a role in the adversarial process?

Answer: He thinks that technology will definitely impact fees. We haven't quite seen the transformation of Legal Education yet as we will see. One thing to think about with the three part analysis is how to some extent one idea could be looking at addressing technological changes in the missing middle, but then actually have a cascading effect by providing different models for the delivery of civil legal assistance for the poor. That is an example where technology may be actually of real assistance in both bands, both of which are forms of lower bands

20. Judge Kollapen
Question: He asked whether we have any data that suggests that poor people are in greater need of legal services primarily because their lack of information, their lack of knowledge and their lack of the ability to bargain equally at the outset? And to empowering people, will that have the effect of perhaps decreasing the demand for legal services?

Answer: In terms of credence goods and bargaining equally and the consequences thereof, he thinks that they have data to support the data that comes about in the Courts.

They have data that comes about from anecdotes, they have data that comes about from life experience. He thinks it would be fair to say they don't have all the numerical data that would be within statistical significance, to drive home all of those points, but that doesn't mean that they don't already know that legal services are the special kinds of goods where the importance of non-equal parties bargaining is an important factor.

21. Advocate Greg Harpur SC

Question: He felt that the panel had raised an interesting paradigm being the operation of legal services within the free market system. This he has two variables generally speaking- one being income and the other being expenses. Assuming a cap on income without any corresponding cap on expenses, what are the long term probable consequences: On the lawyers increasing or diminishing in numbers? On accessing justice through lawyers?

Answer: He stated that Frank Steven was the source that he depended on for Lawyers, Markets and Regulations. Steven says that when you spin out the different models under different parameters there are several different possibilities. One is that, when new interventions come into the market, there can be unintended consequences. One of these consequences can actually be that non-quality Lawyers masquerade as great lawyers because of the particular configuration of the market. They can advertise services for a much lower price. When lemons squeeze out the market they take up more and more space. That is why these dynamics need to be looked at, and economists want to see more data than just a cap on income or expenses.

22. In his paper, **"COSTS AS A BARRIER TO JUSTICE: EMPIRICAL FINDING,"** Professor Barendrecht advances the argument for the use of alternative dispute resolution mechanisms in the place of formal justice mechanisms. The legal sector should be more transparent about the different options available to consumers so that they can exercise a choice. Having more money should not mean that one automatically has to spend more to get the same legal problems solved. In advancing the argument for the alternative dispute resolution mechanism he states that this mechanism costs less and often leads to a speedier resolution of the dispute. He includes numerous findings garnered from surveys, done across a number of countries, into the legal fees and access to justice question wherein over 70 000 people participated. He proposes that "attention should

perhaps shift towards the value proposition on offer. Do courts, lawyers and formal justice mechanisms really deliver what people need?"

23. Professor Barendrecht also answered Professor Govender's question;
Professor Karthigasen Govender
Question: Is there any impact by the growth of technology on fees? How can we use technology to reduce legal costs? Specifically does it play a role in the adversarial process?

Answer: He feels that in providing contracts, wills etc. there is much innovation going on to automate that. Having people write a good contract together can be partly automated and guided but it will still need to involve legal advice, at least to give people the assurance that they are on the right track and to check for risks. He says that the same is developing in adversarial processes around the world. One lets people who are in a conflict go through a number of questions and let the computer match the answers and then define what the parties should work on to conclude an agreement or conflict. If they don't conclude an agreement on a certain issue, that issue can be mediated or decided by a Judge. The Judge is then asked to substitute a fair decision for what the parties cannot agree to themselves. These models are possible, they are working. But they change the rules for the Judge of course for Lawyers.

Lawyers are also starting to invest in IT platforms; they are taking the lead in developing search platforms and making them scalable. The questions that need answers are the following:

- How can you scale your services to individual people a thousand times?
- What technology will you use?
- What kind of investments would you need and if lawyers would be allowed and start working in that direction? Maybe if lawyers can take part in this innovation and even be in front of it, they will be less likely to oppose change.

SESSION 5: COMPARATIVE FOREIGN JURISDICTIONS AND THEIR SYSTEM OF LEGAL COSTS

24. Session 5 ran parallel to session 4. Session 5 was facilitated by Ms Yvonne Dausab, the Chairperson of the Namibian Law Reform and Development Commission. Session 5, *Comparative Foreign Jurisdictions and their System of Legal Costs,* was presented by the following delegates: Mr Joash Dache (Secretary and CEO of the Kenya Law Reform Commission), Ms Frances Katooko (Principal Legal Officer of the Uganda Law Reform Commission) and Mr Patrick Hundermark (Chief Legal Executive of Legal Aid South Africa).

25. Mr Joash Dache's presentation and paper is titled: "**INACCESSIBILITY OF JUSTICE FOR MARGINALIZED AND VULNERABLE KENYANS."** Mr Dache made the following observations under the session 3 question and answer session.

26. In Kenya they have scaled fees and legal practitioners cannot charge beyond these fees. They have a system where the Law Society makes proposals to the Chief Justice to issue a remuneration order specifying the amount of fees to be charged by advocates. This system has led to a lot of argument about the fact that the scale fees are actually restricting competition. Scale fees have also had the unintended consequence that- under the pressure of charging very low fees in order to come in lower than the next practitioner- advocates cannot survive on the income they are deriving from their practices and have now resorted to pillaging their trust accounts in order to survive. This, he felt he needed to warn South Africa about as we embarked on our own legal fee investigations.

27. In his presentation he suggested that society should enhance and inculcate a culture of compliance with the law and the implementation of the Constitution so as to reduce the prevalence of injustice in society. He further stated that a recent Constitutional Court decision in Kenya ruled that costs should not be awarded against a party that was unsuccessful where they legislated in the public interest.

28. A number of questions were posed to Mr Joash Dache:
Mr Sbu Gule

Question: His question pertained to non-litigious matters, particularly Business Law where one is dealing with commercial transactions. He wanted to know whether there is a distinction that is drawn between work done for individuals, and work done in respect of commercial transactions. If so, what is the guideline if any in terms of the fees that are charged in respect of the non-litigious commercial work?

Answer: He answered by saying that they did indeed have costs for non-litigious commercial work in Kenya. That their Advocates Remuneration Order makes provision for this sort of work and stipulates exactly how much should be charged for such work.

29. Mr Raj Daya

Question: He asked whether legal professionals are obligated to render *pro bono* services in Kenya and if so, how it works.

Answer: He answered by saying that indeed they are, but that the quality of *pro bono* representation was poor. Lawyers did it mostly as a means of boosting their professional development points at the end of each year.

30. Ms Francis Katooko presented a paper which she titled: **"LEGAL COSTS- UGANDA PERSPECTIVE."** In the instance of Uganda she too informed the delegates that they have a set of rules which identify the scales which are used to tax legal fees. These rules are governed by the Advocates Acts. She then moved on to identify problems with these scaled fees. One of the problems identified was that these rules do not contain a provision on the instruction fees of advocates, and so this *lacuna* is exploited liberally by advocates there. Another issue with the rules is that most people in the country are completely oblivious to their existence and so cannot use them to negotiate or enforce their rights in any case.

31. Ms Katooko also answered a number of questions:

Mr Sbu Gule

Question: His question pertained to non-litigious matters, particularly Business Law where one is dealing with commercial transactions. He wanted to know whether there is a distinction that is drawn between work done for individuals, and work done in respect of commercial transactions. If so, what is the guideline if any in terms of the fees that are charged in respect of the non-litigious commercial work?

Answer: Her answer was similar to her neighbour from Kenya, Mr Dache. Uganda also has scales of fees that are applicable to non-litigious commercial work. This scale is used to determine a fee amount for the registration of companies, trademarks, and instructions for perusing documents etc.

32. Mr Raj Daya

Question: He asked whether legal professionals are obligated to render *pro bono* services in Uganda and if so, how it works.

Answer: She stated that they do have *pro bono* services in Uganda as well as legal aid. That the Uganda Law Society requires all lawyers to perform some hours for the purposes of legal aid and *pro bono* services. Lawyers are awarded points every time they perform such, which points are used as a basis for renewing their practicing certificates. If the lawyer does not achieve a specific number of points, then the lawyer will have challenges renewing their practice certificate.

33. Mr Patrick Hundermark presented a paper titled **"ACCESS TO JUSTICE AND LEGAL COSTS."** He notes that the German model, albeit a different model from our own in that it is more inquisitorial in nature, was the first model to set scales of fees and to set out how to use them. He is cognisant of the fact that one size cannot fit all in our legal dispensation and one has to examine both litigious and non-litigious fees as well as identifying the different types of persons needing access to different legal services. He looks at our costly and complicated legal system and challenges us to consider the following questions: How do we lessen the impact that is suffered where a legal dispute is drawn out over a long period of time? How better can settlement disputes be encouraged? Should there be incentives offered for the settling of matters e.g. a rebate in fees? Where possible, can electronic service of court processes be made more acceptable in order to eliminate the added cost of paying sheriffs fees? Finally, he recommends that judges in South Africa take a more robust approach in managing the cases before them.

SESSION 6: SOCIO-ECONOMIC FACTORS IMPEDING ACCESS TO JUSTICE

34. Mr Irwin Lawrence, who is the Vice-Chairperson of the South African Law Reform Commission, facilitated session 6 of the conference. Session 6, "*Socio-Economic factors impeding access to Justice,"* was presented by 5 delegates; namely: Dr Willem Gravett (Senior lecturer at the University of Pretoria and Project 142 Advisory Committee Member),Ms Janice Tooley (Janice Tooely Attorneys) who made a joint presentation with Mr Mametlwe Sebei (Lawyers for Human Rights, Advocate Busisiwe Mkhwebane (the Public Protector of South Africa) and lastly Advocate Inez Bezuidenhout (Director of the University of the Free State Law Clinic).

35. Dr Willem Gravett presented a paper which he titled, **"LIST OF SOME LEGAL AND SOCIO-ECONOMIC FACTORS IMPACTING ON LEGAL COSTS."** He divided his paper into two sections, with the first half listing some of the legal factors and the second half listing some of the socio-economic factors. All-in-all he identified and listed 47 such factors. Most of them have been identified by presenters elsewhere in this report. However, some are worth mentioning, such as: unethical billing practices, lack of statutory tariff for non-litigious matters as well as for advocates' fees, fear of having to pay opponent's costs, detailed assessment, reservation of work for legal practitioners, priority afforded to matter, the need to support minors with regards to legal costs, costs of translators and interpreters and access to justice for people with disabilities.

36. Ms Tooley and Mr Sebei delivered a paper on **"ACCESS TO ENVIRONMENTAL JUSTICE."** In their paper they identified a number of problems plaguing the framework of environmental justice, which legal framework is constantly changing. These problems have led to affected communities feeling that their concerns are ignored, which have in turn led to the protests witnessed of late throughout the country.

37. Some of the problems identified by them are: Firstly, environmental matters are couched in highly technical legal and industry specific jargon, which language results in the effective exclusion of affected community members during the consultative process stage. Secondly, government has failed to guarantee the affected communities access to information during the consultative part of the process. Thirdly, not enough is being done to timeously identify a situation where a mine is failing to act in accordance with its duty to

keep the community abreast of the various issues that will affect them. Lastly, it has become difficult for government to insure the independence of the Environmental Assessment Practitioner (hereinafter the EAP) when the said EAP is appointed by the development specialists themselves.

38. The presenters suggested a number of solutions to these problems; namely: that public participation times should be extended in order to allow for greater community involvement; that legislation should be amended to direct mines to consult with affected communities or workers when a transfer of the ownership of the mine is underway; that the entire manner in which EAPs are appointed and operate should be relooked at so as to ensure their independence, and lastly, that a more simplified process of reviewing the decisions of the EAP or the Ministry by affected communities is introduced.

39. The following question was asked of Ms Tooley and Mr Sebei;
Mr Rooshdeen Rudolph
Question: He asked what in their view would be the best way of establishing non-litigious tariffs in their field of practice- which is very costly.

Answer: They answered that the types of matters that they generally take on as Human Rights NGO's can drag out for years, are indeed very costly and that many times the matter does not make it to court even after years of work. They therefore recommend that, in order to make this type of legal work sustainable, the applicants for mining and development projects should fund the legal and technical support that the communities need.

40. Advocate Busisiwe Mkhwebane delivered a paper entitled **"THE ROLE OF THE PUBLIC PROTECTOR TO PROVIDE ACCESS TO ADMINISTRATIVE JUSTICE WITHIN THE BROADER JUSTICE SYSTEM."** In her paper she enumerated the various ways in which the Public Protector assists poor and marginalised members of our society, thereby assisting in broadening access to justice in this country. In fact, she estimated that around 70% of the matters referred to the Public Protector are "bread and butter" matters involving slow turnaround times of service delivery, home affairs identity book and birth registration matters etc.

41. She therefore finds it unfortunate that the Constitutional Court decision finding that the remedial action of the Public Protector is binding, has led to the unintended result that a lot of her decisions are being taken on administrative review- which has in turn led to an enormous strain on the Public Protector's budget for public representation.

42. She bemoans the fact that Chapter 9 Institutions have unfortunately been excluded from section 35 of the Legal Practice Act although they too are impacted by the question of high legal fees. Perhaps this is an opportunity to introduce a "legislative intervention" as is required by the LPA.

43. Advocate Mkhwebane answered the following question:
Professor Karthigasen Govender
Question: He asked what steps the public protector has made to give effect to the clarified mandate of the constitutional court in providing the public with an opportunity to approach her office in the place of a court for a binding order.
Answer: She answered that since the constitutional court judgment applications for judicial review of their reports have increased. Firstly, their reports now include the judgment of the constitutional court by stating that anyone who is not happy with a report can take their office on review, failing which their decision is binding. Secondly, after issuing a report they then follow up in order to ensure the implementation of the report even when a review application is pending. Lastly, they now have introduced Public Protector rules which have been gazetted. These rules outline what is expected from organs of State which are being investigated.

44. Advocate Bezuidenhout's paper is titled **"REVISITING ARGUMENTS FOR THE IMPLEMENTATON OF STUDENT PRACTICE RULES."** In her paper and presentation Advocate Bezuidenhout argued for the possibility of reviving the now mostly neglected practice of street law at universities. She posed the question: "Can quality tertiary legal education operate as a mode of delivery for access to justice or do faculties of law merely assist in the development of a foundationally qualified pool of legal practitioners who will in future endeavour this Constitutional goal?" She suggested that, aside from the law students themselves, there is a large pool of unemployed law graduates who could be utilised for this very purpose, given the right supervision. She also conceded that this

project would face a number of challenges, which is exactly why it would have to be properly regulated, monitored and supported.

45. Advocate Bezuidenhout answered a number of questions:
Deputy Minister John Jeffery
Question: He asked questions pertaining to community service at tertiary institutions. He asked how effective supervision would be ensured. He also asked what would be done about the fact that not all universities are well enough resourced to provide community service for the public.

Answer: She answered that our law curriculum is not standardised so all law clinics are not equally equipped or equally funded or equally prepared to undertake this type of community service. Her idea is that law students will have to be certified to be professional enough to fulfil community service, and that this certification will have to come from the Dean of the Faculty of Law. The certificate can then also be withdrawn at any time so as to assure the quality of the service provided.

46. Ms Mimi Mamke
Question: She asked what the position would be when the students performing community service made a serious blunder taking into consideration that they do not have professional indemnity insurance. She wanted to know what recourse members of the public would have when that happens.

Answer: Regarding indemnity she answered by saying that she saw no reason why provision could not be made for students in the same way that provision is made for candidate legal practitioners. She felt that students were less likely to 'mess up' because of the level of supervision that they would have.

SESSION 7: TRANSFORMATIVE COSTING

47. Session 7 was facilitated by Mr Krish Govender who is a member of the Legal Practice Council. Session 7, "*Transformative Costing*," was the final session of the first day of the conference. The four delegates presenting during this session were Mr Ben Groot from Ben Groot Attorneys, Mr Ettienne Barnard, co-Chairperson of the Law Society of South

Africa, Advocate Greg Harpur SC from the General Council of the Bar of South Africa and Mr Ignaz Fuesgen, managing director of KOHMAP Consulting.

48. Mr Groot presented a paper titled: **"FIXED FEES AS A WAY TO ENHANCE ACCESS TO JUSTICE."** In this paper he states that he believes the traditional methods of billing to be problematic.

49. He believes that hourly billing fails to evaluate the value or quality of work done, but merely assesses the volume of work done. This method of billing rewards the inefficient and fails to incentivise either efficiency or added value. But perhaps the biggest problem with this method is that there is absolutely no risk ascribed to the legal practitioner as the client irrationally bears all of the risk during the litigation process.

50. As to the second traditional method of contingency fees a different set of problems is presented. In this scenario the attorney carries all the risk even where she has no control over clients who sabotage their own case or substitute her for new legal representation during the course of the litigation process.

51. He defines fixed fees as those fees entailing: "a billing arrangement where most of the fees have been fixed prior to the attorney being engaged, with normally only unforeseen items being billed on an hourly billing basis." In extolling the virtues of this method he states that it encourages attorneys to work more efficiently in order to increase the profit margin whilst, at the same time, giving the client a much clearer indication of the proposed litigation costs at the inception of the matter. He states that he believes in the method so much that he has in fact implemented it- with great success- at his own law firm.

52. Mr Ben Groot answered the following questions:
Mr Asif Issa
Question: He pointed out that what the problem with the fixed fees proposition is that the hourly rate needs to be quantified in any case in order to establish the fixed fee..

Answer: He agreed that one had to base a fixed fee on something and that it is not a perfect system to base it on an hourly fee, but then at least one has something that is

objective to use as a starting point. Having something to base out fees on is better for our clients than merely expecting them to guess.

Question: How do we fix a fee at the beginning of a matter where we have no idea how long a matter will take and what unplanned events will occur throughout?
Answer: He agrees that there are some challenges with the fixed fee approach, but that if one takes the matter on a step based approach with one's client for every step as it arises the client will be much more informed and therefore feel more secure. It is not a fixed fee for the process as a whole. It is a fixed fee per step.

53. Mr Barnard titled his paper: **"THE DESIRABILITY OF TARIFFS IN CRIMINAL AND OTHER MATTERS: HOW SHOULD TARIFFS IN LITIGIOUS AND NON-LITIGIOUS MATTERS BE DETERMINED- THE REFERRAL SYSTEM."** Mr Barnard states in his paper that, "it is difficult to determine a tariff for all legal practitioners. The break-even point is different for different practices and hence different prices are required…" in order for a practice to be sustainable and to make a profit or grow. He lists some of the factors, which are outside of the control of the profession, but which influence the costs of running a practice. These include the ineffective operation of government departments, offices and courts, the need to consult expert witnesses who charge as they wish and poor case management in the courts to name but a few.

54. He does not believe that the intention of the LPA was to protect wealthy clients in society at the expense of legal practitioners and as such, he goes on to suggest that if large corporates or wealthy clients were to be free from the requirement of price control, these fees would subsidise the cost of providing legal services to the middle and lower economically able clients. However, he is alive to the fact that should this last proposition pass, it could result in a huge gap in the income of lawyers representing wealthy clients and those representing ordinary people, a gap which would sadly be supported by legislation.
55. He warns that setting a universal tariff for legal fees is contentious in that price fixing is unlawful in this country as it is regarded as anti-competitive behaviour by the Competition Act 89 of 1998. Because of all of these difficulties he comes to the conclusion that it might be better to provide guidelines where tariffs are concerned as this will assist in striking a balance between access to justice and the sustainability of law firms.

56. Advocate Harpur SC presented a paper titled, **"THE CURRENT COSTS REGIME AS IT PERTAINS TO ADVOCATES: WHAT SHOULD THE MECHANISM BE IN DETERMINING FAIR AND REASONABLE FEES PAYABLE TO ADVOCATES?"**

57. As he sees it, in as far as "referral advocates" are concerned- the LPA already adequately outlines a means of establishing advocates fees. Any further attempts to prescribe direct tariffs would be anticompetitive and raise the question "as to whether adherence to a tariff by referral advocates would constitute a prohibited horizontal and vertical practice under the Competition Act 89 of 1998 on the basis that it has the effect of substantially preventing or lessening competition in a market without any technological, efficiency or other pro-competitive gain resulting from it?"

58. He highlighted the fact that the setting of a tariff for referral advocates would be unfair where they did not enjoy the protection and benefits which accrued to other legal practitioners by virtue of their ability to work either under a contract of employment or the ability to share in the profits accruing to a partnership with other legal practitioners. Referral advocates practice for their own account and bear all of the risks of their practice alone, thus imposing a tariff on them whilst failing to control these other realities of practice will undoubtedly result in the demise of these professionals. This of course raises the question, "if the legal profession is to be subject to a tariff, is the tariff also to be applied to other professions, or other trades, or other occupations? If not then the rights embodied in sections 9 (equality), 10 (human dignity), 22 (freedom of trade, occupation and profession) are invoked.

59. In any case the LPA calls on the SALRC to establish whether a mechanism is desirable. He strongly feels that it is in fact not desirable at all. He wonders on what basis the purpose of the LPA (i.e. increasing access to justice) is served by affording wealthy clients, with enormous bargaining power themselves, the benefit of a maximum tariff at the expense of the legal practitioner.

60. The following questions were posed to Advocate Harpur:
Judge Kollapen

Question: He asked what suggestions the panel would advance for inclusion in the report that the Commission had to make to the Minister pertaining to the unaffordable cost of legal services and access to justice for the masses of the poor people of our country.

Answer: He replied that one cannot adopt a 'one-size-fits-all' approach in these matters. He demonstrated this by stating that the way to help the poor would be to look at consumer legislation where it deals with thresholds, but that this approach would hardly be necessary for the rich or for big corporations.

Question: He also observed that the broadness with which the requirement for charging a fee has been framed (i.e. reasonableness) almost ensures that it would be difficult not to justify the fee. He therefore wanted to know whether there had been any change in the way that fees are being charged since the implementation of the code or whether it had simply continued to be 'business as usual.
Answer: None of the panellists answered this question.

61. Mr Ignaz Fuesgen presented a paper titled: **"THE EVOLUTION OF LEGAL SERVICES-LEGAL COSTS IN THE BIGGER PICTURE OF TODAYS REALITIES."** He believes that the legal sector is lagging behind on the question of legal fees. That the debate on legal fees needs to move away from the input-driven perspective (i.e. how much work did the legal practitioner put into a particular matter) towards an output –focused view (i.e. whether the outcome of the legal practitioners' efforts have yielded a positive outcome for the client). He suggests this because input does not matter to the client, only output (or delivery of the service) does.

62. He further warns that the introduction of tariffs is only the beginning step in driving the profession to be better competitive with the growing number of other players in the legal sector- who are not regulated and do not fall under the operation of the LPA.

63. Mr Fuesgen answered the following question:
Mr Assif Essa
Question: He pointed out that, by Mr Fuesgen's own admission, time spent is not the ***sole*** consideration for fee determination. This implies that one still needs to determine quantification of an hourly rate. How does one deal with an hourly rate in this scenario?

Answer: He answered by saying that one has to consult extensively with one's clients in order to reach a mutually acceptable arrangement. One must compile as much data as one can in order to eventually get to a place where one can exclude the application of an hourly rate completely.

SESSION 8: CONTINGENCY FEES AND ABSENCE OF MANDATORY FEE AGREEMENTS

64. Facilitated by Advocate Johan de Waal SC, a Commissioner at the South African Law Reform Commission, Session 8, *Contingency Fees and Absence of Mandatory Fee Agreements,* included the following presenters: Mr Odwa Nweba (Stellenbosch University Law Clinic), Mr Anthony Millar (Director at Norman Berger and Partner Incorporated) and Professor Fawzia Cassim (Associate Professor at UNISA and Project 142 Advisory Committee Member).

65. Mr Nweba presented his paper, which he titled, **"USE OF CONTINGENY FEES AGREEMENTS: ARE WE JUSTIFIED IN GAMBLING WITH OUR CLIENTS CASES."** Mr Nweba started out by listing the requirements of the form and content of a valid contingency fee agreement, as stipulated by the Contingency Fees Act 66 of 1997. They are that the agreement must be in writing; signed by both parties; the proceedings that the agreement is dealing with must be stated in the agreement; the client must be advised about other avenues of finance; the client must be advised about the success fee and what party and party costs are; the purpose of the agreement must be explained to the client and lastly, it must also be explained to the client that he has 14 days from the date of signing the agreement to withdraw from such an agreement. He feels that we need to have more regulation and monitoring of these CFAs because they are so prone to abuse.

66. Mr Odwa Nweba presented both a paper and a PowerPoint presentation at the conference.

67. Mr Anthony Millar presented a paper which he titled, **"CONTINGENCY FEES: THE CONTIGENCY FEES ACT AND CASE LAW."** He states that the contingency fee arrangement contained in section 2 (1)(b) of the act, as well as the arrangement widely known as that of 'common law contingency fees' are both problematic arrangements.

68. Common law contingency fees "totally disregarded the provisions of the Act and the limitations imposed by it. They were predicated upon a fixed percentage of the amount recovered, usually somewhere between 25 and 45 percent- such percentages are irrespective of and unrelated to the amount of work actually done. They routinely also contained a provision which allowed the legal practitioner to keep in addition to the fixed percentage of the capital, also the party and party costs paid by the defendant on success. This all resulted in no regard being had for the value of the actual work done and proper itemized accounts or Bills of Costs." Consequently, common law contingency fees were found to be unlawful in the full court judgment of De La Guerre v Ronald Bobroff and Others.

69. He goes on to state that the Act was supposed to be for genuinely contentious cases. But it is only almost being used in the "soft target" cases where "low hanging fruit" are prevalent e.g. Road Accident Fund claims, government departments etc. Section 2(1)(b) in his opinion should be abolished completely. Only section 2(1)(a) should remain. He believes that the former has "commoditized the rights of our people" and that this commoditisation of our rights is fundamentally wrong. Section 2(1)(a) is, in his opinion, enough to "open the keys to the court for meritorious cases and for professionals to do their work. And the only thing that is required of them is to give their honest opinion up front. The attorney must be reasonably certain that he will succeed with this case and if he is he will receive his payment- that's all. That will be the privilege."

70. Mr Millar feels strongly that as lawyers we exist to serve clients. That we do not exist to line our pockets in order to afford ourselves a standard of living beyond what our contribution to society is.

71. Mr Millar answered the following questions:

    Mr Assif Essa

    Comment: He pointed out that a big issue involving contingency fee agreements is that of when the contingency fee should be signed. He stated that many unethical lawyers have been hedging their bets at the expense of their clients and signing the document moments before handing up a draft order. He suggests that the Act be more direct on this issue.

Judge Kollapen

Question: He asked Mr Millar whether he was suggesting that section 2(1)(b) of the Contingency Fees Act be scrapped altogether.

Answer: He responded by stating that he feels very strongly that there is no need for section 2(1)(b) because section 2(1)(a) is sufficient for opening up the keys to the court for meritorious cases and for professionals to do their work. He feels that the only thing required of lawyers is that they give their honest opinion about the matter up front and only represent matters that they feel have a reasonable chance of success, after which they will receive their payment. He concluded that, lawyers exist to serve their clients and not to line their pockets and be afforded a standard of living beyond their contribution to society.

Dr Dave Holness

Question: He stated that law clinics are precluded from entering into contingency fee agreements and that this leads to an unacceptable monopoly of these agreements by attorneys. He suggested that these agreements should be extended to law clinics in order address the question of funding and better sustainability of law clinics.

Answer: He stated that currently there is a statutory prohibition against anyone other than an attorney from entering into a contingency fee agreement, and for good cause. However, he stated that he agrees with Dr Holness' suggestion as long as law clinics are required to take out professional indemnity insurance too.

72. Professor Fawzia Cassim presented her paper titled, **"CONTNGENCY FEES: INTERNATIONAL PERSPECTIVES."** She made a brief comparison of the following jurisdictions:

73. The United States of America, the United Kingdom, Australia, Canada, India and Brazil. In the USA each state has adopted its own contingency fees charging methods. The amount recoverable upon a successful outcome is on average 33%. "Most jurisdictions prohibit the use of contingent fees in criminal cases or certain family law cases."

74. In the UK (England and Wales), conditional fee agreements are used by lawyers where there is a 70% chance of winning on the merits. If they win, the lawyer is entitled to his normal fee on hourly billing coupled with a success fee which is capped at 25% of the

reward. The percentage of the success fee is no more than 100% of the normal fee. Conditional Fee Agreements are not allowed in criminal and family law matters.

75. In Scotland it is lawful to agree that the lawyer receives payment only if the case is won. Parties may agree to a percentage increase of the lawyer's fee if the action is successful. The Jackson reforms introduced contingency fees to English civil litigation in April of 2013. They are known as DBAs or Damage Based Agreements and lawyers are entitled to a percentage of the winnings, with a cap of 50% thereof. These are not allowed in family and criminal law matters.

76. In Australia there is no fee agreement to fix the lawyer's payment as a percentage of the court's award to the client. Contingency Fee Agreements are allowed in some Canadian provinces. They are prohibited in criminal and family law matters. The test for a valid Contingency Fee Agreement in Canada is whether the said agreement is reasonable.

77. India has prohibited lawyers from charging contingency fees. In Brazil contingency fees are allowed and are fixed by a judge on behalf of the successful attorney. However, the Brazilian Bar Association is against contingency fees. Professor Fawzia Cassim presented both a paper and a PowerPoint presentation at the conference.

SESSION 9: NON-LITIGIOUS LEGAL COSTS AND VARIOUS CATEGORIES OF LEGAL SERVICES

78. Session 9 was facilitated by Mr Raj Daya, Secretary of the Rules Board for Courts of Law and Project 142 Advisory Committee Members. Session 9, "*Non-Litigious Legal Costs and Various Categories of Legal Services*," was presented by Mr Brent Williams, CEO of Cliffe Dekker Hofmeyr Attorneys, Mr Sbu Gule, former CEO of Norton Rose Fulbright Attorneys, and Mr Asif Essa, President of KZN Law Society.

79. Mr Williams and Mr Gule presented a joint ***paper*** titled: **"TREATMENT OF NON-LITIGIOUS FEES OF LEGAL PRACTITIONERS: NON-LITIGIOUS CORPORATE AND BUSINESS LEGAL SERVICES."** In terms of the paper that they submitted these big law firms agree with the suggestion that all law firms need to be subjected to the same rules

when they are involved in the rendering of legal services to the indigent citizen and to the ordinary citizen. They also agree that law firms should also render non-litigious legal services on a *pro bono* and *pro amico* basis from time to time. What they take issue with is the suggestion that: "non-litigious corporate and business legal services ought to be subjected to fee (price) regulation, other than the requirement for transparency and that a written agreement be concluded with the relevant client."

80. Mr Williams stated that what concerns them is that there is no differentiation between the clients serviced by the profession and the different service providers servicing the profession. He agrees that hourly rates are problematic and that pricing the law through an hourly rate does not benefit clients. It encourages inefficiency and all sorts of other bad behaviour. He, however, disagrees with the notion put up by Mr Miller in the previous question and answer session where he stated that one should not distinguish between the tiers of clients that one services. "First National Bank and an indigent injured rural worker are in two different categories," he says. "That is, they have different sets of resources and different power to negotiate what they want from their legal service providers and what they are willing to pay for. Their clients have enormous power to negotiate fees. One must ask the question: Is the LPA intended to protect the FNB's of the world?"

81. Mr Williams feels that if they were only to confine the mechanism of regulating price to a tariff rate (for example, an hourly rate or a fixed fee) and then tell their legal practitioners that this is the only way that they can charge their clients, it would place the profession at a disadvantage. It would mean that they would have to compete with other alternative legal services providers- who are non-lawyers (like auditors and bankers) and who operate in this country at the moment- but be expected to do so on an unequal footing as they would be constricted by these tariffs where their opponents would have no such constraints. Lawyers would simply be unable to compete.

82. In conclusion, they believe that there needs to be a recognition that there are different kinds of clients and that there are different categories of non-litigious legal services and different kinds of legal service providers. And as such he believes that there should be a tiered approach when dealing with different clients and their applicable fees as it cannot be a one size fits all approach.

83. Mr Gule believes that the main concern with regard to fees is the question of indigent people and the missing middle. Thus we cannot have the approach of 'one size fits all.' Their firms deal with multinational and big business clients for the most part. In order to provide services to these clients highly skilled people are needed because international clients are used to New York and London skills level. For the longest time in Africa when these clients came here they used outside international firms because they felt that South African firms lacked the level of expertise necessary to negotiate on the continent. Thus, firms had to invest heavily in up-skilling their employees. These things do not come cheap and firms are subject to market forces.

84. After the 2008 economic crunch most of these clients, because of the high legal fees, decided to employ in house lawyers and to increase their bargaining power with regards to legal fees. They do the following to achieve this objective:
They call for tenders and bids so that firms can be on their panels (but once you are on that panel you are still not guaranteed work from that client). They then solicit requests for pricing in terms of which you will render a service for a particular transaction and if you fall outside of what they consider to be reasonable you will simply not be awarded that tender.

85. This is the massive bargaining power that these clients hold. Most law firms are under enormous pressure as a result of these bargaining practices. These clients clearly need no protection from the LPA or anyone else.

86. Therefore he feels that the unfortunate and unintended consequences of regulation would be that the overhead costs would exceed the revenue and so these firms would ultimately be forced out of business or have to retrench a large number of their employees. Law firms would lose out to other multidisciplinary practices like auditing firms and accounting firms etc. that provide legal services too. Law firms could also find themselves outside of the regulatory environment as many international law firms presently do operate outside of the purview of the Attorneys Act and will not operate within the purview of LPA, because you do not have to be an admitted attorney in order to be in the position to do the kind of commercial work that they do.

Judge Makume

Question: Judge Makume wanted to know what had happened to the debate about multidisciplinary practices in South Africa.

Answer: Mr Gule responded that accounting firms are increasingly getting into the space that law firms are playing in. That they are doing a lot of 'consulting work' and in this fashion are increasingly doing the work that was previously only in the sphere of lawyers. That they are even taking over small law firms. Therefore, if law firms are regulated but not these firms they will not be able to compete. Internationally, the big accounting firms have acquired law licences as well to compete in these spaces. He stated that the saying goes that these firms have taken their lunch, and now they are coming for their dinner as well.

Judge Makume
Question: He noted that Mr Gule spoke at length about the top 6 or the top 5, but where does that place Buthelezi Attorneys and Masango Attorneys somewhere in Alberton on these issues? Do the big firms have them in mind or have they forgotten that they also exist?

Answer: Mr Gule responded that on the issue of the small firms, there are quite a number of smaller law firms that are playing in the same field as the big law firms and it is desirable of the big ones to help in offering access to these spaces. However, he had to mention that doing the type of work that they do requires a lot of skill and training (3-5 years or so). He went on to say that the problem is that there are too many lawyers concentrated in some areas of the law and not enough in other, more lucrative areas. That there aren't enough black lawyers involved in business law.

Mr Anthony Millar
Question: He stated that the question of a tariff of fees was first raised in 1960; his partner was practicing at that time and has said that even then the big firms specifically objected to a tariff. Consequently, the result was that the tariff that does exist is now applied by the taxing master and only for litigious matters. The issue, as he sees it, is whether we going to have a legal system and regulation that is for all or only one that deals with the third estate? If the big firms want to be a part of the entire society they need to recognise that there cannot be a distinction.

Answer: Mr Gule responded that they don't actually see a difference between large, medium and the small law firms when it comes to the rendering of services to the ordinary and indigent client. And that trying to create the impression that the larger law firms want to be exceptionalised is the wrong impression. That they are saying that they ought to be subject to the same regulation that other law firms are subject to in order to facilitate access to justice for indigent and ordinary citizens. That the only thing they are pointing out is that there are some clients (which just happen to be the types of clients that they service) that don't need this kind of regulation. They are sufficiently powerful and resourced and do not suffer the same market imperfections that occur amongst poorer, less sophisticated clients.

Mr Irwin Lawrence
Question: He asked whether they think that reducing the hourly rate of the big 5 is going to impact at all on the issue of access to justice considering the types of clients that these firms have.

Answer: Mr Gule responded that he does not believe that capping this amount would at all increase access to justice considering their clients.
Answer: Mr Williams responded by saying that he believes that if they excluded large law firms by saying that beyond a certain category of clients, or above a certain threshold of the value of the matter, these rates or regulations do not apply to those matters- then large law firms will not be impacted because their clients are not really ordinary citizens.

87. Mr Essa presented his paper titled, **"LEGAL PRACTITOINERS AND NON-LITIGIOUS LEGAL FEES."** He begins by pointing out that many of the services that have historically been provided by legal practitioners, such as labour law matters, drafting of wills etc. are no longer reserved solely for legal practitioners. Nonetheless, the 'legal profession has recognised the category of consumers that cannot afford legal services and implemented various interventions to facilitate access to justice for the indigent people of South Africa.' Examples of these interventions are: *pro bono* work, *pro amico* work, participating in the Legal Aid South African Judicare system, serving as commissioners in Small Claims Court etc. It is now compulsory for every attorney to provide at least 24 hour of *pro bono* legal

services per year. He also believes in a tiered approach to different clients when it comes to legal fees.

88. Mr Essa believes that a threshold should be established in order to determine which clients are to be serviced and at which level, including the missing middle class. He believes that consumers falling under the threshold will be able to benefit from these interventions and those who do not can negotiate their fee. In conclusion, he believes that legal services should be made available to every indigent person and then a guideline or a band of fees should be considered for purposes of dealing with the middle classes. The rich can negotiate on their own and need no protection.

Mr Raymond Venkatsami
Question: He asked how they should address the question of poor people who cannot pay. He believed that this question was not being addressed here.

Answer: Mr Essa responded that the legal aid desk at the courts, *pro bono* work and contingency fees are already helping with this question. The legal fraternity will render services absolutely free of charge when the occasion arises.

SESSION 10: STATE LEGAL SERVICES

89. Session 10 was also facilitated by Mr Raj Daya. Mr Rodney Isaacs, the Acting Chief Litigation Officer from the Department of Justice and Constitutional Development, addressed this session.

90. Mr Isaacs states that the Department of Justice has the responsibility to make sure that the profession is transformed. He believes that the State Attorney in particular needs to develop a fair, equitable, transparent and competitive costing system when briefing counsel, otherwise the result will always be repetitive briefing. Apparently, the rate of payment to counsel, over a period of four years was a total of +- R3.4 billion for legal fees and yet they still have counsel complaining that they have not been briefed. “So something is off.” His suggestion is to turn over more matters to mediation, or to brief more counsel at a lower fee and “have us all survive equally.”

SESSION 11: *PRO BONO* COMMUNITY LEGAL SERVICES

91. Session 11, *Pro Bono Community Legal Services,* was facilitated by Ms Nontuthuzelo Memka, a Director at Memka Attorneys. The presenters in this session were Dr David Holness, director at the University of KwaZulu-Natal Law Clinic, Ms Joanne Harding from Social Change Assistance Trust and Ms Alison Tilley a co-ordinator at Judges Matter presented a joined paper together. The other presenter was Mr Seth Mnguni, Chairperson of the Association for Community-Based Advice Offices. No questions were posed during this session as the conference had to wrap up due to the fact that time was running out and delegates had flights to catch etc.

92. Dr David Holness presented a paper entitled, **"IMPROVING ACCESS TO JUSTICE IN SOUTH AFRICA IN CIVIL MATTERS AND THROUGH EXISTING COMMUNITY-BASED PARALEGALS AND SOME CONSIDERATIONS AS TO POSSIBLE LAW GRADUATE POST-STUDY COMMUNITY SERVICE."** He defines what he refers to as Community Based Paralegals (hereinafter CBPs) as: "Paralegals may be law graduates who have no licence to practice as advocates or attorneys, or ordinary lay-people with less (and sometimes even no) formal legal qualifications but who have been trained in giving legal advice, administrative issues and legal education skills." He states that they play a major role in screening and resolving matters during the initial stages of legal problems. If they cannot resolve the dispute they refer it to other legal practitioners. Their work encompasses more than legal work as it includes: "giving legal advice, linking local people with legal practitioners, taking client statements and following up on existing cases, referring people to health and welfare agencies, facilitating problem solving with relevant authorities through negotiation and mediation, building networks with other CBP'S and NGO'S, training local people about their legal rights and the remedies available to them, teaching local people to train others, publicising local legal events and problems and lobbying for improvements in the justice system."

93. At present there is no legislation formalising this sector. Because the sector is unregulated, CBPs generally rely on donor funding for any type of remuneration. As a result of this the sector is in financial straits and finds it more and more difficult to improve access to justice for the most vulnerable members of our society.

94. As to the current status of Law Graduate Community Service (LGCS hereinafter), it is not yet in force in this country. In fact it has yet to be conceptualised fully. The challenge of how and where and to whom such community service would be rolled out seems to be the biggest challenge in this regard.

95. Ms Harding and Ms Tilley presented a joint paper titled, **"PARALEGALS AND ACCESS TO JUSTICE: A DREAM DEFERRED."** They state that there have been a number of attempts throughout the years to develop the formal recognition of paralegals and that they have failed thus far. They give a detailed history of this process throughout parliament since 2013 in their paper.

96. Ms Harding states that most of the challenges experienced by the sector are due to lack of funding, which she hopes will improve once paralegals are formally recognised. The biggest employer of paralegals is Legal Aid South Africa and it is funded by the Department of Justice. Ms Harding makes the following recommendations:

- A CAO (or Community Advice Office) needs about R250 000 per year to run itself effectively.
- We need about 300 CAOs.
- CAOs see on average +- 1 500 cases per year.
- This would amount to a cost of +- R166 per case.
- This would cost the state around R75 000 000 per year.
- The cost of monitoring the AO would be around 20 -30%.
- With a total cost of R97 000 000.
- Serving 375 000 people.
- If AOs were funded properly they would be able to service more people.
- In addition to all this the sector also needs help funding paralegal education which can amount to +-R20 000 per year per student. This is simply too much for most people. It's not cost effective.

97. Ms Tilley states that at the present moment there is draft legislation proposing the structure and recognition of the sector. She feels that the draft legislation fails to deal with a number of issues pertinent to the sector though and would have to be thoroughly discussed in order to allay everyone's concerns.

98. Mr Seth Mnguni delivered a paper titled, **"DEALING WITH COSTS OF ACCESS TO JUSTICE, LEGAL COSTS AND OTHER INTERVENTIONS THROUGH COMMUNITY ADVICE OFFICES."** He stated that everything that he had wanted to cover had already been covered by previous speakers. He did add however, that having worked with communities through Community Advice Offices (hereinafter CAOs) for a number of decades, he firmly believes that CAOs offered the best alternative structure to the formal justice system, in that they facilitate access to justice to vast numbers of the poor and marginalised in the far flung areas of South Africa- people who have nowhere else to go to solve their problems.

99. Professor David McQuoid-Mason delivered a paper titled, **"HOW TO ACHIEVE ACCESS TO JUSTICE FOR ALL IN SOUTH AFRICA: SOME SUGGESTIONS FOR THE WAY FORWARD."** The professor pointed out that throughout the entire conference there had been a defining silence on the traditional courts led by chiefs and headman. He stated that the majority of South Africans in fact depend on traditional courts to solve their problems. Perhaps it would be apt to look at ways in which paralegals or law graduates could be placed at these courts in order to advise the presiding officers of their Constitutional obligations during these trials. He feels that presiding officers need to look at implementing section 300 of the Criminal Procedure Act more often and that paralegals and law graduates ought to be allowed to represent accused people in bail hearings at the very least. He further highlighted the fact that of the 4500 law students that graduate annually in this country, less than half of them enter the profession. He sees these people as an incredible source of untapped potential that we could use for our current purposes- but only if we think creatively.

SESSION 12: WAY FORWARD

100. Judge Jody Kollapen, Judge of the North Gauteng High Court and the Chairperson of the South African Law Commission, made his final address at the conference. He communicated the plan for this project moving forward. He thanked the delegates for attending the conference and for starting this conversation in such a robust, dignified and wonderful spirit even though the issues discussed were difficult ones. He stated that unless the problem was addressed it would be difficult to find a solution. He noted with

gratitude that throughout the duration of the conference members of this profession had come out in their numbers and offered their willingness to assist the Commission with its investigation.

SESSION 13: CLOSING REMARKS

101. This was the address given by the Minister of Justice and Constitutional Development. This address was in actual fact given straight after session 10 in order to accommodate the Minister's schedule on the day. What follows hereunder is an excerpt from the minister's speech:

I am deeply concerned that almost 25 years into our democracy this profession is still struggling to transform itself and to bring itself in line with the new democratic dispensation. I heard that some of the professional bodies that are to be subsumed into the new professional arrangements actually predate the establishment of the union and continue, to this day, virtually with the same kind of identity- hopefully only in name. I am alluding to 1910 because, as much as we can talk about 1994 as the most notable milestone in our history, 1910 also represents an equally important milestone in our history.

In 1910, after the Anglo Boer war, the now former colonial powers of the day made a new state out of the former Boer republics and Natal. And there lay an unprecedented opportunity, at the birth of a new state to create an inclusive society and an inclusive nation of the kind we strove for when we again had another opportunity to re-establish the state in 1994. It is unfortunate that at that occasion, by virtue of the South African Act of 1909, a new white state was born to the exclusion of 90% of the population at the time. The population at the time was +/ 6 000 000, and so only 10% of this number was served by the state.

I believe that an unprecedented opportunity presented itself then, to create a new state of only 6 000 000 people, which would have been less of a mammoth task than it was almost a century later of having to create an inclusive state that would ensure that the 90% that was initially left out now had to be included. And to make it even more difficult, reverse systematic exclusion, exploitation and oppression

meted out over that period of time- that ensured that the majority in this country were completely excluded from accessing, using and creating wealth out of the land or on the land as early as after the establishment of the Union in 1913, and a series of laws along that journey that lasted nearly a century. And as if that is not enough, through a series of other measures calculated to architect this exclusively white state by marginalising black people, women and others.

Instruments such as the Colour Bar Act that created a glass ceiling to the upward mobility of those who were marginalised. The Group Areas Act ensured that black people were relegated to the periphery of the social and economic life of this country. The Separate Amenities Act in terms of which only a few delegates here would have been allowed even into this conference hall because facilities such as this one would not have permitted black people to be near it. The beaches outside were exclusively available to people only of the white race. The Influx Control Act that made sure that black people were relegated to black reserves save for making sure that their cheap labour was available to service the economic and social needs of the minority and the list goes on. And, as this profession, were indicted to reflect on whether we have made enough contribution just in our context to reverse the legacy of that atrocious and unenviable past that our Constitution enjoins us to do.

So, I felt maybe this is the scene I want to set so that when we start to engage around some of these issues we jolt ourselves out of our comfort zones and reflect a little deeper as to what are other issues at hand.

As the state we have started a process of reviewing the role of the state in this arena, in particular in relation to state litigation. We believe that it needs to be overhauled and replaced by a new dispensation that deals comprehensively with the provision of legal services through the state, including litigation services – with the key objective being, amongst others, to use the muscle of the state to play a constructive role in the current state of affairs by ensuring that state legal work is used to achieve transformation.

This is to ensure that the state itself is an active player by serving as an incubator of high end skills where young black women graduates are given an opportunity to

acquire various skill sets in many fields of law, because we believe that the state is an active player virtually in every area of specialization in legal practice. The state as regulator plays a direct and active role in virtually every area of human endeavour, and of course specifically in the area of litigation and legal services generally and when I refer to the state I refer to the state as a whole, from national all the way to local government departments (over 800 entities at all three spheres of Government).

All that constitutes state muscle and should be channelled and utilized more efficiently to ensure that we broaden a pool of skills sets in the profession in this country and become more competitive globally given the globalised nature of our world today. That we ensure that we grow high end skills and as we do so we ensure inclusivity that would bring about efficiency and effectiveness in state litigation and generally in the provision of high quality legal services within government.

We believe that, first of all the state must clean itself up. Clean up its act. We are tired of Default Judgments and Contempt of Court Orders that result from poor administration of litigation within the state. Whether arising from lack of diligence on the part to the office of the State Attorney, as the primary litigator on behalf of the state, or lack of co-operation by line-function departments and entities that result, for example in instructions not being issued on good time, if at all, or bad instructions for that matter being issued – resulting in turn with the often talked about poor performance of the state in the courts.

But more importantly we need to cleanse the state of corruption. They say it takes two to tango and it is apparent to us that you cannot talk of corruption within the state without alluding to the concomitant role that the private sector, including private practitioners having their role in it. It is for that reason that not so long ago our President issued a proclamation for a nationwide investigation into the dealings within the office of the State Attorney as it interfaces with the profession through the issuing of briefs for state litigation, including conduct of certain officials in client departments and elsewhere – other professionals who play a role in litigation, by or against the state etcetera. And I must say that so far we have begun to see humble,

modest and yet very valuable successes early on in our effort to implement this project, and like I said this is but one leg of putting right at least at the level of the state – the provision of legal services. The other part is to finalise a new policy framework that will obviously necessitate legislative reforms that will help us realise the kind of transformative objectives alluded to earlier.

I just thought that before I proceed I needed to highlight this point and maybe, at this juncture, also seize the moment to acknowledge and thank the leadership of the Legal Practice Forum that has just folded and just given over its baton to the new incoming Legal Practice Council and wish the new body all the best as it takes the baton forward. I am confident that all of us as professional bodies, as individual practitioners and other institutions in this field will give our all in support of the ideals that should be achieved through this new Legal Practice Act.

Let me also thank the Law Reform Commission under the able baton of Justice Kollapen for initiating this very important project of stimulating dialogue on a subject they are now entrusted the responsibility to investigate into, namely the issue of ensuring full access to legal services especially for those who remain disadvantaged because of the prohibitive cost that legal services in our country has escalated into. To find ways for all our people and all institutions and other entities who use legal services to get a fair deal – for me it is not just about the cost it is also about the quality of the service that we render. It is about accountability. It is about fairness and I think that those values need to be upheld in a new dispensation as we review the manner in which we provide access to court through the rendering of quality and affordable legal services in our country.

Now as the Deputy Minister in his address yesterday would have said, the Johannesburg Court in an application brought by the Johannesburg Bar Counsel ordered Kajee Ebrahim a practicing advocate at the Johannesburg Bar until a few days ago to submit his bank records, invoices and statements for work done on behalf of the State Attorney. There are those who are aware that this case falls within the concern of an on-going investigation into the affairs of the State Attorney by the Special Investigating Unit (the SIU) as part of a growing list of cases where our courts have pronounced on the conduct of legal practitioners relating to their

conduct in the charging of fees. In this instance for the provision of state legal services.

Similar cases include the Bobroff cases amongst others. These cases bear on the ethical conduct of legal practitioners and are the domain of the newly elected Legal Practice Council to address. The investigation by the Commission is about identifying the factors which contribute to unaffordable legal fees and the manner in which this should be addressed and I must at this juncture also acknowledge the progress over the years that has been made by Legal Aid under the challenging circumstances of resource constrain, which continue to worsen as we go through austerity, for having achieved clean audit now at least 17 years in succession since it embarked on a transformation project of itself. I believe that it has succeeded in making access to justice a reality for many of our citizens through its various packages of various legal services that it renders.

A well trained broadly representative, accessible and evenly distributed legal profession is one of the seven key result areas appending Justice Vision 2000, which sought to transform the justice system effectively and to ensure that every person has fair and equal access to justice. The theme of this international conference sought to elicit views and comments on access to justice and the impact of high legal costs which impedes access for the majority of citizens in our country. Engaging the services of a legal practitioner in court is simply beyond the reach of many people. The enactment and coming into operation of the Legal Practice Act, with the overall objective of transforming the legal profession, brings with it much promise. Going forward the major challenge of facilitating access to justice and high costs needs a collective wisdom and action and I look forward to yourselves acting in that spirit of patriotism to find solutions, not to suit our own context alone (of course we have to represent our interest) but which looks at the national interest at the same time.

Section 35(4) and (5) of the Act sets out the parameters of the investigation to be undertaken by the South African Law Reform Commission. The papers presented here over the past two days reflected on this mandate and the deliberations, at this conference, will form part of the investigative processes. The Legal Practice Act

heralds an important beginning to what is a new dispensation for legal practitioners. I would like to encourage all practitioners to make input into the process of addressing the contentious aspect of legal fees.

The aspects of high legal costs is not a phenomenon attributable to our jurisdiction only. We have seen international jurisdictions, like the United Kingdom and Australia, introduce sweeping reforms. The Jackson Reforms introduced in the United Kingdom, for example saw the overhaul of the legal costs relating to civil litigation with emphasis placed on controlling costs and promoting access to justice. The recently launched justice project in Australia by the Law Council of Australia involved research conducted over a period of over two years and looked at a comprehensive review into the state of access to justice in Australia for people experiencing significant disadvantage. The final report made a number of recommendations and is considered to be a significant review of the legal system which should be fair, just and accessible to the people, responsive to their needs and properly resourced.

I must also address an argument that has been put forward by some practitioners that this is an issue for those practitioners who are dealing with ordinary people. That theirs is a market which can afford high end skills at a cost, because of the nature of the clients they service, and that they should not be affected in any way by these discussions. I would like to contest that paradigm. Very often, let us remember that most businesses simply transmit their overhead costs over to consumers. So at the end of the day it is usually the consumer, whether it is for services rendered by a private entity or a state entity, who ultimately has to pay a fair tariff for the services rendered by the business. Built into that cost structure would be the high cost of litigation. But the other consideration, if we have to be brutally honest with ourselves, is that very often ordinary people find themselves having to enforce their rights against the powerful and mighty, who have deep pockets to fight them in the courts using high powered lawyers who are well motivated because of being well paid, therefore are in a position to put in all manner of resources into defending their client's cases against ordinary people who may not well be in the same position. You are in a kind of David and Goliath situation, if you like.

I must also address the issue of certain bias that continues to resist transformation. I often single out the Cape Bar and the Western Cape as a province generally. The latest nominations for silk, for example, if my memory serves me well, of the approximately 17 nominees all were male, all were white- or something close to it- repeating itself on more than one occasion. And I ask myself, with the many very capable educational institutions in that province that have been churning out year in, year out young black and female graduates: Where do they end up? Why is the legal profession failing in its duty to these young people? Why are we, a quarter of a century on since the ushering in of our democracy, our constitutional democracy, still at the very same place where we were when 1994 happened? And I have heard all the blame being levelled at the state and the State Attorney in particular for failing to give work to black practitioners.

How responsive are the professional bodies, the various bar councils in playing their part by tagging along those that had been excluded and bringing them into the fold? I believe that these conversations must be balanced and must not be lopsided. And in any case what about the private firms? Who do they give their work to? So, let us have a proper, honest and comprehensive conversation.

The drafters of Section 35(5) were alive to the need for comparative studies and the balance to be struck in weighing up the interest of the legal profession in any recommendation to be made. However, the core of the problem identified in section 35(4) is the recognition which appears not to be in dispute that the cost of legal services is beyond the affordability of the majority of South Africans. It is this group that the investigation must remain focussed on. Left unattended our Constitution, which is as celebrated as one of the most progressive in the world, especially its Bill of Rights, will be rendered meaningless. The interest of any particular grouping within the legal sector, important as I accept it to be, can never negate the collective public interest and responsibility we share in giving effect to the imperatives of our Constitution.

Over the past two days of deliberations you have touched upon the importance of paralegals in enabling access to justice. You have taken note of the need for regulation in this regard. We have also taken note of the importance of Small

Claims Courts in providing access to justice. However, both Judges President Mlambo and Makume spoke of abuse of court process in many instances which results in exorbitant legal costs to litigants. The Acting Chief Litigation Officer also spoke of the atrocious amounts expended by the state in defending itself against litigation, dare I say some of which I find frivolous. This is surely not in the national interest – we must be focussed on the importance of delivering essential services such as education and health and not shrink our limited resources as a result of the budget for legal fees that we need to set aside to support contingency liability of the state.

I therefore want to reiterate a call that was made at this conference for legal practitioners to be driven by a duty to serve rather than an exclusive pursuit for profit, and I am not calling upon all of us to suddenly abandon our professions and become priests or church ministers or rabbi's or imams. We do not have to be holier than thou to do the right thing. Rome, as they say, was not built in a day. There is no magic wand governing the process of transformation. Such a transformation endeavour must herald a new dawn for millions of the marginalised to fair and equitable access to justice. This conference is the first step in the investigative process of the South African Law Reform Commission which will pave the way for an interactive and participatory process.

I look forward to pledges from the profession to reach out to poor communities, through community service in whatever form and to institutionalise it. Put aside some of your time, if you are not rewarded on this earth I can assure you some of your sins may well be forgiven at the doorstep of heaven.

I express the hope that the report that the Commission will ultimately produce will take us forward in ensuring that the barriers to meaningful access to legal services are identified and addressed and that it will offer hope to millions of South Africans who are excluded from access to legal services.

As we come to the end of this conference, I would like to thank you all for your attendance and the meaningful participation and contributions you made. I must also thank the South African Law Reform Commission for hosting the Conference

and all who contributed to it, through resources and in kind and through the many hours they put in to making this Conference a success. I thank you very much.

Ms Alison Tilley
Question: She wanted to know what the minister's thinking was on how paralegals would be funded.

Answer: The Minister responded by saying that It is a pity that this issue is being looked at during a period of biting austerity throughout government. That government is trying to rationalise its resources to ensure that vital frontline legal services do not implode. That it therefore speaks for itself that it is not going to be an easy road even as they try to open up new avenues for service delivery and access to justice such as ensuring that paralegals receive the recognition and support that they need. That every rand counts.

Mr Mashudu Kutama
Question: He suggested that the Minister amend the State Attorney's Act to allow the state attorney to outsource litigation to brief attorneys as attorneys of record who appear in every matter for the state since the state attorney is complaining about lack of capacity.

Answer: The Minister responded by saying that outsourcing should mean that the state is able to make a saving, not to suffer a loss. That if the state can provide a service by itself more efficiently and more cost effectively, where is the rationality in outsourcing and justification to the tax payer that the state should outsource that service? Thus outsourcing must come with efficiency, greater effectiveness and cost effectiveness.

VOTE OF THANKS

102. Advocate Anthea Platt SC thanked all the delegates for their attendance as well as for their contributions. She then adjourned the conference.