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**MEDIA STATEMENT BY SOUTH AFRICAN LAW REFORM COMMISSION CONCERNING  
RELEASE OF DISCUSSION PAPER 154 – PROJECT 141: MEDICO-LEGAL CLAIMS**

The South African Law Reform Commission (SALRC) have released Discussion Paper 154 on Project 141: Medico-legal Claims for general information and public comment.

The SALRC was established by the South African Law Reform Commission Act 19 of 1973. It is an advisory body whose object is the development, improvement, modernisation and reform of the law of South Africa on a continuous basis.

The investigation into medico-legal claims was included in the SALRC's programme of investigations subsequent to requests received from the Department of Health and the Minister of Justice and Correctional Services. The requests flowed from challenges faced by the public health sector due to the escalation in claims for damages based on medical negligence and the increasing financial implications thereof for the fiscus, as well as issues raised in various court cases dealing with claims based on medical negligence against the state. No legislation currently exists in South Africa to specifically address legal claims in the medical field.

Discussion Paper 154 is the second document published by the SALRC during the course of this investigation. It follows on *Issue Paper 33 – Project 141: Medico-legal Claims* published on 17 July 2017. **Discussion Paper 154 contains the SALRC's preliminary research results and puts forward proposals on possible solutions. The proposals are detailed in Chapter 9 of Discussion Paper 154. The SALRC seeks comments on these proposals in particular.**

The proposals put forward by the SALRC in Chapter 9 of the discussion paper focus mainly on measures to alleviate the financial burden of medico-legal claims against the state on the fiscus, and to provide for alternative procedures for the speedy resolution of medical negligence claims. A brief synopsis of the most important proposals appears below.

It is proposed that –

- 1) national expert teams be established to oversee and assist the provinces to address identified problems and implement proposed solutions;
- 2) the quality of public health care be improved by implementing the solutions and corrective measures put forward in existing Public Protector reports; South African Human Rights Commission (SAHRC) Reports , Auditor-General audit reports, Office of Health Standards Compliance (OHSC) reports, the Presidential Health Summit 2018 Compact and other existing government-initiated reports, plans and studies;
- 3) existing guidelines on record-keeping and patient safety incident reporting and learning be reviewed, implemented and monitored;
- 4) mediation be introduced as a first step to deal with disputes – mediation is voluntary, but parties must attempt mediation before instituting court proceedings;
- 5) a certificate of merit affidavit by an accredited and suitably qualified medical practitioner form part of the papers when action is instituted for damages based on medical negligence to avoid frivolous, meritless, fraudulent or abandoned claims;
- 6) a plaintiff is barred from proceeding with a claim after a period of inaction after issuing summons, with the possibility of having the period extended by the court on good cause shown;
- 7) a no-fault compensation system is not a viable solution to South Africa's medico-legal claims crisis, since it would lead to an enormous increase in the number of claims;
- 8) South Africa adopt an administrative compensation system, based on the Welsh redress system, for smaller medical negligence claims;
- 9) South Africa introduce a pre-action protocol similar to the United Kingdom's protocol for clinical disputes for larger medical negligence claims;
- 10) civil procedures be amended to improve pre-trial procedures, as well as court case flow and management to expedite and simplify the finalisation of claims;
- 11) the parties to litigation use joint expert witnesses, and when necessary a panel of three joint expert witnesses from the discipline concerned, for technical medical evidence;
- 12) the Superior Courts Act 10 of 2013 and the Uniform Rules of Court be amended to provide for the appointment of specialist assessors to assist judges in complex medical negligence matters;
- 13) compensation be awarded in the form of a structured settlement – with part of the compensation paid in a lump sum, part of the compensation paid as periodic payments, and part of the compensation provided as payments "in kind" by means of the delivery of services – allowing a combination of these methods and determining the ratio of one aspect in comparison to another aspect by considering the circumstances of each particular case;

- 14) future health care services be provided in state hospitals as far as possible;
- 15) periodic payments in the nature of an annuity be awarded for future maintenance, loss of earnings and the portion of future medical care, treatment, rehabilitation and therapy that the state cannot provide;
- 16) the underlying principle for the calculation of future loss of income be changed to a structured method based on the average national income or the average income of the area where the claimant lives;
- 17) it may be necessary to cap any damages other than special damages – such as constitutional damages and general damages (non-pecuniary damages);
- 18) it should be possible to adjust periodic payments in exceptional circumstances.

There are certain prerequisites critical to the proposals put forward in Discussion Paper 154:

- 1) National strategy for dealing with medico-legal claims that must be adhered to by all the provinces.
- 2) Strategy for handling medico-legal claims in the Office of the State Attorney that dovetails with the national strategy.
- 3) Dedicated medico-legal unit in each province made up of suitably experienced medical and legal professionals.
- 4) Proper system of record keeping supported by a state-owned information technology system used throughout the country.
- 5) Reporting system supported by the same system and technology to enable data sharing and a centralised data base.
- 6) Compulsory budgeting for medico-legal litigation and compensation by provinces in accordance with normal budgeting practices.
- 7) Alternative dispute resolution team in each province.
- 8) Introduction and application of patient safety measures in all provinces.
- 9) Establishment of a dedicated national monitoring body to ensure that applicable legislation, national guidelines and the corrective measures proposed in audit reports, OHSC reports, SAHRC reports and other government-initiated reports and documents are implemented and applied.
- 10) Review the training of nurses to reconsider the curriculum, practical training, quality of training and so forth.
- 11) Amend the Contingency Fees Act, 1997 to provide for a sliding scale for the determination of contingency fees in relation to the size of a compensation award.
- 12) Introduce a “Good Samaritan” law exempting a medical practitioner acting in an emergency situation from negligence claims as long as certain conditions are complied with.

**The closing date for comment is 31 January 2022. All comments and submissions must be sent for the attention of Ms Ronel van Zyl to the following address:**

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Discussion Paper 154 is available on the SALRC website at:  
[www.justice.gov.za/salrc/dpapers.htm](http://www.justice.gov.za/salrc/dpapers.htm).

Printed copies of Discussion Paper 154 can be obtained free of charge from the SALRC on request. Kindly contact Mr Jacob Kabini at [JaKabini@justice.gov.za](mailto:JaKabini@justice.gov.za) or (012) 622 6346.

Contact for enquiries in respect of media statement: Ms Ronel van Zyl.

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**ISSUED BY THE SECRETARY, S A LAW REFORM COMMISSION, CENTURION**

**DATE: 12 November 2021**