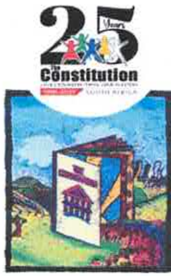

EMBARGO: FOR IMMEDIATE RELEASE

MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION CONCERNING ITS RELEASE OF THE REPORT ON PROJECT 142: INVESTIGATION INTO LEGAL FEES, INCLUDING ACCESS TO JUSTICE AND OTHER INTERVENTIONS

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973. It is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.

The investigation into legal fees and tariffs payable to legal practitioners, including access to justice and other interventions, is prescribed by sections 35(4) and (5) of the Legal Practice Act, No.28 of 2014, which came into operation on 1 November 2018.

The report contains the SALRC's final recommendations for law reform, including a proposed draft Bill, titled Justice Laws General Amendment Bill, with regard to Project 142: Investigation into legal fees, including access to justice and other interventions. The report follows on Issue Paper 36 and Discussion Paper 150 which were published for general information and comment on 7 May 2019 and 18 September 2020 respectively. It takes into account all the input and comments received from the stakeholders, the community workshops held in all the nine provinces of the Republic of South Africa, as well as the international conference on "Access to Justice, Legal Costs and Other Interventions" held in November 2018 in Durban.

Legal fees in South Africa are largely determined by market forces. The empirical study conducted by the Human Sciences Research Council found in no uncertain terms that legal costs in South Africa are high. Likewise, the study conducted by the Socio-Economic Rights Institute into the public interest legal services sector in South Africa found that "the cost of legal services, and particularly counsel's fees, were simply too high." The study also found that "there is no publicly available tariff or illustration of counsel's fees" and that "commercial rates are significantly higher than these guides might suggest". The majority of South Africans are unable to access lawyers

because of unattainable legal fees, making access to justice a commodity that only the privileged can buy.

First, the report identifies several factors and circumstances giving rise to legal fees that are unattainable for most people. These factors and circumstances are grouped into four (4) categories, namely: the legal system; court processes and procedures; legal profession; and socio-economic factors. Recommendations are made in order to address the identified factors and circumstances giving rise to exorbitant legal fees. Paragraph 85 of the Executive Summary of the report lists the challenges relating to the daily operation of the courts in particular, and government departments in general, which affect access to justice and have an impact on legal fees. The SALRC points out under paragraph 89 of the executive summary that the high costs of litigation is materially affected by two sets of factors, that is, fees and tariffs, on the one hand, and inefficiencies in the court system, on the other hand. It is imperative that both these factors be meaningfully addressed in order to make legal fees more affordable. Recommendations around improving the efficiency of the court system are as material as the recommendations made in respect of fee guidelines and tariffs. An impression should not therefore be created that the non-legislative interventions are less important. If anything in the long term, non-legislative interventions could become as important as legislative interventions.

Second, the report contains recommendations on the desirability of establishing a mechanism that will be responsible for determining fees and tariffs payable to legal practitioners, the composition of the mechanism and the process it should follow in determining fees and tariffs. Regarding the mechanism for party-and-party costs, the SALRC recommends that the Rules Board, as presently constituted in terms of section 3 read with section 5(1) of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), is the appropriate existing mechanism for determining recoverable legal fees and tariffs payable to legal practitioners and juristic entities in litigious matters, subject to the following modifications:

(a) that the party-and-party tariffs must be reviewed annually and updated to keep up with inflation;

(b) that the party-and-party tariffs in respect of attorneys' and counsels' fees must be reviewed in relation to each other and in respect of the various hierarchies of court to provide a consistent and uniform structure and show progression in monetary terms from the Magistrates' Court level right up to the Supreme Court of Appeal and Constitutional Court. A tariff for counsels' fees is required to guide taxing masters in

the taxation of counsels' fees and to establish uniformity in the taxation of counsels' fees with those of attorneys with the right of appearance in the High Court.

The SALRC recommends that the Rules Board must adopt an effective consultative process of all the stakeholders prior to determining legal fees and tariffs.

Regarding the mechanism for attorney-and-client fees, three options are proposed for consideration by the Minister. These options are premised on the division of users of legal services into three socio-economic bands, namely: the lower income, middle income, and upper income bands. This three-tier distinction is based largely upon the submissions received and public consultations and workshops held in response to Issue Paper 36, which clearly points out that users of legal services who fall within the lower to middle income bands have problems with access to justice and the cost of legal services is a prohibitory factor to them.

Option 1 entails the amendment of legislation (subsections 6(6) and 6(7) of the Rules Board for Courts of Law Act, 1985) so as to bring about a mechanism, that is, tariff with limited targeting, that will be responsible for determining fees and tariffs for legal services that are within the reach of users of legal services. This option entails that:

(i) the litigious tariff determined by the Rules Board for use in the Magistrates' Courts be extended by default or operation of law as a basis for determining service-based attorney-and-client fees payable to legal practitioners;
(ii) this will be in respect of the users of legal services whose total income / turnover per annum is below the maximum threshold to be determined by the Minister by notice in the *Gazette*; and
(iii) the user will have no option of voluntarily agreeing to pay such fees less or in excess of any amount that may be determined by the mechanism (Rules Board).

This proposal is recommended as an interim arrangement pending the development of service-based attorney-and-client fee guidelines by the Legal Practice Council (LPC) in all the branches of the law. The effect of Option 1 is that attorney-and-client fees will be the same as the party-and-party tariff in respect of the users of legal services who fall within the lower and middle-income bands in litigious matters.

The difference between options 1 and 2 is that option 2 allows not more than 20% surcharge, or such percentage as may be approved by the Minister acting upon the recommendation of the Rules Board, on the tariff amount to be determined at taxation by the registrars and clerks. The

effect of option 2 is that attorney-and-client fees will not be the same as the party-and-party tariff in respect of the users of legal services who fall within the lower and middle-income bands in litigious matters. Option 2 is generally not supported by many stakeholders on the grounds that allowing a 20% surcharge could in itself become quite expensive given that on a R20 000 party-and-party bill, it will cost a litigant R4000 more, which is substantial for a low to the middle-income litigant. Accordingly, this option is not recommended by the SALRC.

Option 3 entails the development of service-based attorney-and-client fee guidelines by the LPC. The SALRC recommends that the LPC, as the regulatory body for the legal profession in the Republic, is the appropriate body to develop service-based attorney-and-client Fee Guidelines for determining legal fees in respect of all branches of the law. The LPC must establish a Committee to be responsible for determining service-based attorney-and-client Fee Guidelines. The Committee should comprise of fit and proper persons drawn from the following sectors of society:

- (i) Legal profession;
- (ii) Judiciary;
- (iii) Government; and
- (iv) Civil society.

The detail about the composition of the Committee and the number of members who may constitute such a Committee are all matters to be decided by the LPC. The SALRC is of the view that there is no need for another mechanism to be established when an existing mechanism can be adapted for this purpose. The SALRC recommends that the LPC must adopt an effective consultative process of all the stakeholders involved before determining legal fees and tariffs.

Third, section 35(4)(e) of the LPA invites the SALRC to make a determination on the desirability of giving users of legal services the option to pay legal fees less or in excess of any amount that may be set by the mechanism, taking into account the need for the proposed mechanism to recognise and protect contractual freedom, independence of the legal profession and the right to choose trade, occupation or profession freely. Two options in respect of the choice to opt-out of the fee determined by the mechanism were proposed in Discussion Paper 150 for public comment. The Commission recommends that it is not desirable that users of legal services whose total income / turnover per annum does not exceed the maximum threshold to be prescribed by the Minister by notice in the *Gazette*, be given the option of voluntarily agreeing to pay fees for legal services in excess of any amount that may be set by the mechanism (tariffs prescribed by the Rules Board) in the Magistrates' (district and regional) Court on the following grounds:

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

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

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

Fourth, section 35(4)(f) of the LPA invites the SALRC to make a determination on the obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services. The SALRC recommends that it should be obligatory for all legal practitioners to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services. Should parties fail to conclude a mandatory fee arrangement, the attorney or an advocate referred to in section 34(2)(b) of the LPA would have failed to comply with the statutory requirements stipulated under subsections 35(7)-(11) of the LPA and that this should constitute misconduct to be adjudicated by the LPC and appropriate sanction determined.

Fifth, on the subject of the effectiveness and desirability of retaining, with or without amendment, the current scheme of permissible contingency fees agreements in terms of the Contingency Fees Act, No.66 of 1997, the SALRC argues for the retention of the scheme of contingency fees agreements on the grounds that it promotes access to justice for the majority of the people who do not have the money to pay for legal fees. This is, however, subject to the following proposed amendments to the current scheme:

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

(b) that courts should consider applying the proportionality test in addition to that of reasonableness when awarding costs on party and party scale and attorney and client scale. The aim of the proportionality test is to maintain a sensible correlation between costs, on the one hand, and the value of the case, its complexity and significance on the other hand.

(c) that a definition of success fee be inserted in section 1 of the Contingency Fees Act, No.66 of 1997 to read as follows:

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

The inclusion of counsel fees in the calculation of success fee is aimed at curbing the widespread abuse of the 25% cap by some members of the legal profession.

(d) There is strong evidence from case law (for instance, *Masango and Another v Road Accident Fund and Others* [2016] (6) SA 508) that points to widespread abuse of contingency fees agreement contrary to the objective that the legislature had in mind. To curb the conflict of interest that actually arises between a legal practitioner's own interest and those of his or her client, it is recommended that it be made a peremptory requirement that CFAs be entered into in circumstances whereby a legal practitioner if in his or he opinion, there is some foreseeable risk involved and that there are reasonable prospects that his or client may be successful in any proceedings. Legal practitioners bear the liability for costs and disbursements whilst the matter is pending resolution. Therefore, there is some risk transferred to legal firms pending the outcome or finalization of the matter.

Against this background, the Commission recommends that section 2 of the Contingency Fees Act be amended by the substitution for subsection (1) of the following subsection (1):

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

On the question whether there should be a body focusing specifically on preventing the abuse of contingency fee arrangements, the SALRC recommends that the LPC, as the regulator for the legal profession, is the appropriate mechanism to deal with allegations of excessive fees in terms of section 5(b) of the Legal Practice Act (LPA). The LPA has already created a mechanism to

adjudicate disputes not only about the terms in a contingency fees agreement but also any fees chargeable in terms thereof.

The SALRC is required in terms of section 35(4) of the LPA to report back to the Minister on, among others, the legislative interventions in order to improve access to justice by the members of the public. A draft Bill, titled Justice Laws General Amendment Bill, is attached to the report. The SALRC recommends the following:

Clause 1(a): section 29(2) of the LPA be amended so as to include all Chapter Nine institutions as places where community services may be rendered.

Clause 1(b): that section 29(2) of the LPA be amended so as to recognize community advice offices as some of the structures through which community service could be delivered by candidate legal practitioners and legal practitioners.

Clause 1(d): that section 29(2) of the LPA be amended so as to recognize *pro bono* legal services as part of community service.

Clause 1(e): that the LPA be amended in order to align community service with the purpose of the LPA as provided for in section 3(b) of the LPA, that is, "to broaden access to justice" and not to confine the concept to the provision of legal services only.

Clause 2: Should recommendation 6.12, being the proposed interim arrangement [that is, **Option 1: use of Rules Board's litigious tariff with limited targeting**] pending the development of service-based attorney-and-client fee guideline in all branches of the law by the LPC be approved by the Minister, section 35(1) of the LPA be amended to read as follows:

> "35(1)**[Until the investigation contemplated in subsection (4) has been completed and the recommendations contained therein have been implemented by the Minister, [f]**Fees in respect of litigious **[and non-litigious]** legal services rendered by legal practitioners[,] and juristic entities, **[law clinics or Legal Aid South Africa referred to in section 34]** must be in accordance with the tariffs made by the Rules Board for the Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act No.107 of 1985)."

Clause 3: Should Recommendation 6.15 be approved by the Minister, [that it, it is not desirable that users (natural persons) of legal services whose total income/turnover per annum does not exceed the maximum threshold to be prescribed by the Minister by notice in the Gazette, be given the option of voluntarily agreeing to pay fees for legal services in excess of any amount that may be set by the Mechanism in the Magistrates' Courts], that section 35(3) of the LPA be amended to read as follows:

> "[Despite any other law to the contrary], Save for the users of legal services in Magistrates' Court matters whose total income/turnover per annum does not exceed the maximum threshold to be determined by the Minister by Notice in the Gazette, nothing in this [section] Act precludes any user of litigious or non-litigious legal services, on his, [or] her or its own initiative, from voluntarily agreeing with a legal practitioner in writing, to pay fees for the service in question in excess of or below any tariffs determined as contemplated in this [section] Act."

Clause 4: that section 95(1) of the LPA be amended by the insertion of a new paragraph (zNA) as the empowering provision to enable the LPC to make rules in respect of fees and tariffs payable to legal practitioners.

Clause 5: Should Recommendation 6.12 [that is, option 1- interim arrangement] be approved by the Minister, that sections 6(6) and 6(7) of the Rules Board for the Courts of Law Act, 1985 be amended to enable the Rules Board to advise the Minister on the tariff of legal fees applicable to users of legal services in the lower and middle-income bands in accordance with section 3(b)(i) of the LPA.

Clause 7: that section 1 of the Contingency Fees Act, 1997 be amended by the addition of the following definition of success fee as discussed above:

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

Clause 8: that section 2 of the Contingency Fees Act be amended by the substitution for subsection (1) of the following subsection (1):

"2(1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there is some foreseeable risk in the matter and there are reasonable prospects that his or her client may be successful in any proceedings,...

Clauses 6, 9, 10 and 11: that obsolete and redundant terminology in the Contingency Fees Act, 1997 with reference to a "professional controlling body" be updated.

The **Report** is available on the Commission website: http://salawreform.justice.gov.za. Printed copies can also be obtained on request, free of charge, and in this regard, Mr Jacob Kabini is contactable at Jakabini@justice.gov.za or 012 622 6346.

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ISSUED BY THE SECRETARY: SA LAW REFORM COMMISSION: CENTURION
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