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Submission

to the

South African Law Reform Commission

on

Discussion Paper 150 of Project 142: Investigation into Legal Fees, Including Access to Justice and Other Interventions

By the

Centre for Applied Legal Studies

30 November 2020

c/o The Secretary
South African Law Reform Commission
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A) INTRODUCTION

About the Centre for Applied Legal Studies

1. The Centre for Applied Legal Studies ("CALS") welcomes the opportunity provided by the South African Law Reform Commission (SALRC) to submit comments on the Discussion Paper on the Investigation into Legal Fees and Access to Justice.

2. The CALS is a civil society organisation based in the School of Law at the University of the Witwatersrand. CALS is also a law clinic, registered with the Legal Practice Council. As such, CALS connects the worlds of academia and social justice and brings together legal theory and practice. CALS' vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights. CALS practices human rights law and social justice work with a specific focus on five intersecting programmatic areas, namely, Home, Land and Rural Democracy; Business and Human Rights; Environmental Justice; Gender Justice; and Civil and Political Rights. We make use of research, advocacy and strategic litigation, adopting an intersectional and gendered understanding of human rights violations.

3. These comments draw on CALS' experience in working with clients and partners who suffer the consequences of the significant barriers present within the South African legal system. Access to justice is a right that we firmly respect and strive to defend.

4. The following inputs are presented on a chapter by chapter basis, giving specific comments on each point of interest.

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B) CHAPTER-SPECIFIC COMMENTS

Chapter 1: Introduction and Context

5. We agree with the contextual frame presented in the discussion paper. The majority of South Africans are, indeed, unable to access lawyers due unattainable legal fees, reinforcing economic status privilege. This is particularly true for many South Africans who reside in rural areas far removed from serviced central city regions. We further strongly agree with the assertion that access to justice becomes further limited in times of crisis.

6. The current global COVID-19 pandemic has exposed and re-enforced the structural and systemic barriers that are present in accessing the South African legal system and associated services. The right of access to justice is a fundamental human right, and is embodied in section 34 of the Constitution. South Africa's legacy of structural inequality is closely associated with the exclusion of the marginalised black majority, strongly favouring well-resourced sectors of society.

7. Tariffs and fees are structural mechanisms that require attention in order to ensure the system is more accessible and equitable for lower income citizens. Although particular institutions, such as Legal Aid, have been developed to fill this void, it is clear that the desired extent of the reach of these institutions does not service all needs efficiently.

8. This exclusion must also be viewed within the context of the exorbitant fees being charged by certain service providers. Legal fees have risen to inflated levels, not only making access to legal services by the public the domain of the wealthy, but also making access to legal services unaffordable to the State.

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9. While we respect the regulation versus deregulation debate within the context of the legal profession debate, an equitable balance must be struck in order to ensure that legal fees charged by legal practitioners for legal services rendered are reasonable and within the reach of the broader citizenry. We welcome any workable and efficient mechanisms that promote the attainment of this balance.

Chapter 2: Factors and circumstances giving rise to unattainable legal fees

10. Access to legal services is essential in South Africa given the high levels of illiteracy, as well the complexity of our legal system. However, there are barriers to accessing legal services in South Africa and the SALRC has done well by setting out and highlighting a number of socio-economic barriers that prevent people from accessing legal services. CALS supports the comprehensive list of barriers listed by SALRC in Discussion Paper 150,[1] and therefore we only wish supplement what has already been mentioned by discussing the impact of COVID-19 on accessing legal services.

11. On 15 March 2020, the Minister of Cooperative Governance and Traditional Affairs, Minister Nkosazana Dlamini-Zuma, acting in terms of the Disaster Management Act 57 of 2002, declared a national state of disaster in terms of s27(1) of the aforementioned Act.[2] The State of Disaster came about because of the magnitude and severity of the COVID-19 pandemic. The President further placed the entire country on lockdown, he explained that this would enable the government to put measures in place to minimise the devastating effect of the virus.

[1] SALRC included the following factors as barriers to accessing legal services: lack of funds to pay legal expenses; transport, accommodation, and other indirect costs of litigation; lack of support for vulnerable groups with regard to legal costs; lack of tax funding for necessary legal services ; power imbalance in opposing litigants who are wealthier; cost of translators and interpreters; lack of general education; lack of knowledge about laws, legal rights and available avenues; language and culture; corruption; and a breakdown in service delivery.
[2] Published in Government Gazette No. 43096.

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12. The lockdown had a devastating impact on the socio-economic position of the most vulnerable in our country. The South African Social Security Agency (SASSA) paid out almost 20 million payments of the COVID-19 state unemployment grant to persons who were unemployed and also increased amounts for the child support grants as well as the old age and disability grants.[3] According to the UNHCR in South Africa almost 36,800 refugees received emergency cash assistance to help make ends.[4]

13. COVID-19 also had a devastating effect on the informal sector, people who could afford legal fees because they were self-employed found themselves without an income during lockdown because of restrictions on the freedom of movement. The restrictions on movement pertained to entry into South Africa and the limitation of gatherings, only movement to access essential services was allowed such as to buy essential goods, seek medical attention, buy medical products, collect social grants, attend a funeral of no more than 50 people, or access public transport for essential services during specified times.[5] Therefore, people in the informal sector were essentially left without any form of income.

14. In the aftermath of levels 3-5 of lockdown, which had the most impact on people's livelihoods, those who were previously able to afford legal fees will no longer be able to do so. The net effect is that the shocks are most severe on poorer, more vulnerable households. On their own, these negative economic shocks are sufficiently large to push many households into positions of food insecurity.

[3] https://www.sassa.gov.za/Pages/Grant_Enquiries.aspx.
[4]https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20SAMCO%20Fact%20Sheet%20September%202020.pdf.
[5] See the Disaster Management Act 56 of 2002.

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15. Given the severe impact of COVID-19 on people's socio-economic wellbeing, we propose that a fund be put in place to support distressed communities so that the provision of legal services can be accessed by those who cannot afford it.

Chapter 3: Access to justice for lower and middle income band persons

16. Access to legal services for lower and middle income persons is critical for ensuring fairness, equality and justice in South Africa. Our constitutional democracy requires that we be consistent and effective in addressing inequalities, disadvantage and marginalisation that is maintained by our legal systems and legal profession.

17. We submit that some of the difficulties in accessing justice for middle to lower income persons arise as a result of the inaccessibility of quality legal services due to exorbitant legal fees, the exclusion of middle income persons from free legal services, and the inability to easily access offices that provide legal assistance.

18. Specialised legal services, such as those of notaries, are also inaccessible to those in the lower and middle income band. This can, for example, have devastating consequences for couples in the lower and middle income band who are unable to conclude an antenuptial contract to protect themselves as they prepare to enter a marriage.

19. Free and affordable access to justice needs to be made visible and attainable for the majority of the population who currently cannot afford these services. In order to ensure access to justice, pro bono legal services through private practice legal practitioners, community advisory offices, the capacitation of Legal Aid and the expansion of law clinics becomes a necessity.

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Legal Aid

20. It is important that the work of Legal Aid is expanded and that staff is capacitated in order to deal with the increasing demand for pro bono legal services. While we welcome the Commission's recommendation to make the availability and services of Legal Aid more known country wide including in rural and remote areas, the resultant increase in clients will mandate that Legal Aid be *extensively* capacitated.

21. In order for Legal Aid to also be accessible to middle income users, the income threshold to qualify for legal assistance has to be increased and reviewed annually. We submit that the threshold of 7400 for singles and 8000 for households excludes an enormous amount of the population and further marginalises the missing middle.

22. The possibility of also introducing Legal Aid Local Offices in key areas and providing specialised services according to the specific legal issues that are prevalent in those areas should also be explored. This could greatly assist in ensuring quality access to justice as well as assist with resource management of Legal Aid.

Community advisory offices

23. In addition to capacitating Legal Aid, it is also recommended that community advisory offices be rolled out nationwide in communities that are remote and marginalised. These would, for instance, include informal settlements, villages, inner cities as well as other marginalised areas. The need for well-resourced community advisory offices is urgent and critical for the access to justice to lower and middle income persons.

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24. Free legal services must also be made accessible on a community level where lower and middle income persons can, with ease, access offices within their local community that can readily provide legal advice and legal assistance. Additionally, such legal advice and assistance should be made available in the client's home language as far as practicable.

25. Community advice offices should be properly resourced and capacitated in order to ensure that specialised services are also available for communities burdened with shared and persisting communal issues. Communities facing shared challenges such as a lack of water, high rate of gender based violence as well as impact from mining and similar activities, would greatly benefit from accessible legal information and legal services.

26. The additional benefits of effectively rolling out community advisory offices include:

- Community level access to legal information: Empowering communities with legal information available in their own language. This allows communities to be able to know and understand their rights, responsibilities and entitlements in terms of the law, and being able to access information on how to assert such rights.
- Community level access to legal services: This allows communities to have ease of access to legal practitioners and paralegals who can provide legal assistance.
- Specialised legal services: persons serviced by the community offices will also have access to legal practitioners with specialised legal services. This improves the quality of legal services available to lower and middle income persons who often cannot afford specialist legal practitioners.
- First point of contact: The community advisory offices will also be a first point of contact for persons with a legal issue. This will greatly assist in reducing the amount of requests for assistance that come to law clinics, public interest

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litigation organisations and non-profit organisations who are also faced with serious capacity constraints and limited resources.

Community based Paralegals

27. Part of the work required in order to make community based offices successful is to train, regulate and support the paralegal profession. The work of paralegals including their professional conduct, certification, support and continued training should fall within the scope and powers of the LPC. The formalisation of the paralegal profession, however, should not be exclusionary in nature and should not have the counterproductive effect of no longer creating accessible jobs for community members who may want to become paralegals. In addition, paralegals in such community based centres should be well funded and supported by legal practitioners in private practice, NGOs, Legal Aid and university law clinics.

Community service and pro bono

28. We are of the view that the provision of pro bono legal service and/or community service should be mandatory for every legal practitioner (both attorneys and advocates). This should also be made a precondition for the continued enrolment of the legal practitioner with the LPC. Creative solutions need to be employed such as additional advocate pro bono hours and increased state internship programmes which would assist in the production of a well-trained legal officers and hopefully lead to better service. Additionally, partnerships between law clinics, Legal Aid, community advisory offices, and private practice law firms should be created and supported by the Department of Justice as well as the LPC.

29. Such partnerships would ensure that in addition to the mandatory community service/pro bono hours rendered by legal practitioners, private law firms are also consistently and continuously contributing towards resolving the crisis of

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unaffordable legal fees and unattainable access to justice for marginalised people in the lower and middle income bands.

30. The ambits of what such community service or pro bono work would entail must be clarified by the LPA. The Commission's recommendation of the amendment to section 29(2) of the LPA is welcomed. We further recommend the addition of service, on a pro bono basis, at law clinics, Legal Aid, public interest litigation organisations or similar non-governmental organizations.

31. We also submit that further clarity is needed on how community service will be measured and how compliance will be enforced. The current mandated 24 hours of community service is grossly insufficient. It fails to respond to the demand for free and affordable legal services in South Africa and it fails to address the crisis of exorbitant legal fees and the resultant unattainable access to justice for a majority of people.

Law clinics

32. One of the biggest challenges concerning law clinics is how they exacerbate the plight of the missing middle. Law clinics, similar to Legal Aid, only provide access to justice to people in the lower income band. This means that those in the middle income band will likely not get assistance from their local law clinic or Legal Aid South Africa. This has the effect of widening the gap and disadvantage experienced by the missing middle in their pursuit for free and affordable legal services. As such, university law clinic's should actively aim to expand their services to middle income persons by increasing the means test amount that allows a person to qualify for their services. This amount should be intentionally made higher than that of Legal Aid and should be reviewed annually.

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Traditional Courts

33. While traditional courts could be an avenue in which people have direct access to dispute resolution mechanisms, there have been several challenges identified around traditional courts that the Traditional Courts Bill ("TCB"), in its current form, does not adequately address. One of the fundamental challenges with the TCB is the lack of regulation of traditional courts to ensure that they are fair and just in both procedure and substance. There is also a failure to ensure traditional courts conform to the prescripts of the Constitution as the supreme law of this country. For example, many traditional courts still prohibit women from making representations before them. Other noted challenges of the TCB include how the Bill fundamentally alters customary law by centralising power in the hands of senior traditional leaders and adding powers that they did not traditionally hold under custom.[6] This goes against the nature of traditional custom that is foundationally localised wherein disputes are resolved on a local level before they can be escalated to senior traditional leaders.

34. The Land and Accountability Research Centre (LARC) succinctly captures some of the difficulties with the TCB as follows:

> "The Bill also creates new challenges and inequalities, including denying people the right to appeal to state courts and empowering chiefs to deny people land or sentence them to forced labour, among other punishments. The TCB entrenches the power of traditional leaders within controversial apartheid tribal boundaries. It makes it a criminal offence for people to reject those boundaries, or to challenge chiefly abuse of power. People are denied the right to opt out of traditional courts. The Bill ignores living customary law that builds on how people practice this law in their daily lives. Because of these fundamental flaws, the TCB does not address historical distortions of custom that denied justice

[6] https://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/

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and perpetuated oppression. Rather, it gives these distortions new legitimacy to entrench a separate legal system for black people living in the former Bantustans. The TCB turns rural black people into subjects who are denied the full rights of citizenship that urban South Africans enjoy."[7]

35. In the TCB's current form, access to justice for poor and marginalised communities will not be enhance but rather made further inaccessible, discriminatory and exclusionary.

Alternative Dispute Resolution

36. The Commission's observations around alternative dispute resolutions is noted. We would, however, want to caution the Commission against mandating mediation for domestic violence, harassment and other predominately gendered offences. Mandated mediation for these harms can have the effect of excusing such harms, perpetuating the victimisation of the survivor of, re-traumatising the survivor and facilitating the continued return of the survivor to the unsafe environment of their abusers. It may also delay the survivor's ability to access courts to seek legal justice against their abuser.

Legal Expense Insurance

37. Theoretically, Legal Expense Insurance (LEI) should be able to address, at the very least, people falling in the middle income band. However, LEI often takes advantage of people's illiteracy and lack of understanding of terms and conditions. Therefore, when a policy holder claims for legal assistance, there would be numerous reasons given to them for why they will not be assisted.

[7] https://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/

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38. LEI therefore do not adequately address access to justice for middle income persons. We recommend that the LPC take it upon itself to regulate the LEI industry to function beyond short term insurance to its proper regulation under the LPC as far as this is possible. LEI must additionally align with the objectives of the LPC and the LPA which include making access to justice a reality for all people in South Africa.

Chapter 4: Mandatory Fee Agreements

39. We are of the view that there should be mandatory fee agreements that are concluded between legal practitioners and clients prior to commencing the provision of legal services to the client. While it is accepted that the attorney or advocate drawing up the fee agreement would not necessarily know the entire process which the matter (especially litigious matters) may go through, an estimate containing the most likely avenues and/or processes that may follow can be foreseen and included in the fee estimate. This not only gives the client a roadmap of what to expect in their matter (and thus provide legal information to the client) but it will also assist the client in properly understanding the likely cost implication of their matter.

40. Regulations to the LPA must be created that will speak to the content of such fee agreement and further provide standardised forms for the format of fee agreements for different types of matters. The standardised form will act as a guideline to the legal practitioner drafting the fee agreement, however variations and customisation according to the needs of the client and their matter will of course be necessary.

41. As with the provision of pro bono services, the failure to provide mandatory fee agreements should attract sanctions against the legal practitioner. This could include a forfeiture of a portion of the fees due to the legal practitioner. In appropriate circumstances, it could also include a removal of the legal practitioner

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from the roll of the LPC in extreme circumstances. The recommendation of the Commission that a legal practitioner who fails to provide and verbally explain to the client a fee agreement should be guilty of misconduct due to their violation of section 35(7) to (11) of the LPA is welcomed.

Chapter 5: Cost Recovery by Legal Practitioners

42. Chapter 5 of the Discussion Paper deals with the option of cost recovery by legal practitioners that render free legal services. This is set out in terms of section 92 of the LPA and would cover much of the work done by CALS and other public interest, not-for-profit, legal entities.

43. The question before the Commission is whether costs in successful litigation should accrue to the legal representatives rather then, as with ordinary litigation, to the winning client? The responses to this in the Discussion Paper was that there was no issue related to this type of arrangement. On this CALS agrees.

44. In relation to the recommendations in terms of both contingency agreements CALS supports the recommendation that courts impose appropriate monetary limits in relation to these agreements. Furthermore, courts must scrutinise the general actions of practitioners as well as bodies such as the RAF when looking at contingency agreements as well as settlement agreements. This is *very* important when one considers the recent case presided over by Justice Fisher in the South Gauteng High Court.

45. In this case Justice Fisher found that in two specific RAF matters, De Broglio Attorneys settled matters which were 'so excessive, taking into account the facts of the cases'.[8] In relation to the specific cases Justice Fisher found that damages

[8] Z, Venter 'Judge says Road Accident Fund should be liquidated or placed under administration', IOL, 18 November 2020, see https://www.iol.co.za/pretoria-news/news/judge-says-road-accident-fund-should-be-liquidated-or-placed-under-administration-7a8f962e-58d3-404a-8f55-49deaae479d9.

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amounts were contrived and inflated and there was collusion by various bodies, including the actuaries and the attorneys. Justice Fisher called for the RAF to be liquidated or put under administration urgently as this seemed to be a systemic issue. On this she said,

"These are not isolated incidents… these cases expose the defiant attempts by legal representatives to avoid judicial scrutiny of settlements entered into under circumstances which are strongly suggestive of dishonesty and/or gross incompetence of those involved."[9]

46. In light of the above, CALS supports the recommendation that a mechanism be created for the LPC to deal specifically with allegations of excessive fees being charged in contingency agreements. Although the LPC asserts that there is provision in terms of section 5 of the Act, more must be done in eradicating the problem. If this section and action taken in terms of this section were in fact effective, then the issue would not be systemic. We thus call for the LPC to set out specific measures for dealing with the systemic nature of the problem, where this mechanism is efficient, effective and has severe consequences for legal practitioners who are found to have committed acts of excessive billing.

<u>Chapter 6: Mechanism for party-party cost</u>

47. Chapter 6 of the Discussion Paper deals with the mechanism for party and party costs. The chapter broadly deal with the mechanism for determining party-and-party costs by looking at the composition at both institutional and functional levels such as general rule, fee structure and taxation of legal fees.

[9] T, Broughton, 'Damning Judgment: Court calls for Road Accident Fund to be liquidated', *Daily Maverick*, 17 November 2020, see https://www.dailymaverick.co.za/article/2020-11-17-damning-judgment-court-calls-for-road-accident-fund-to-be-liquidated/ .

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48. Section 35 of the Legal Practice Act[10] (Herein after LPC) looks at the desirability and process of establishing a mechanism that will be responsible for determining fees and tariffs payable to legal practitioners.[11] CALS submits that such a commission and rules of board is necessarily to be established and should further have a representation from Legal Aid South Africa, a representative from one of the Public Interest Litigation Centers ("PILS") like ourselves and a representative from a university based law clinics.

49. CALS submits supports the view expressed by Legal Aid when they posit that "any institution that is tasked with setting maximum fees for the legal profession would require a diversity of skills to adequately dispense with this complex task. The representation of parties and institutions may not provide all the necessary skills required to adequately achieve this objective."[12]

50. CALS further submits the rationale is that such Boards and/or Commission can be construed as independent and neutral in the determination of legal fees and tariffs payable to legal practitioners and juristic entities.

Pre-litigation costs

51. In South Africa we have envisaged and encouraged parties to often engage on Alternative Dispute Resolution as a way to facilitate access to justice for all. The structure of ADR in South Africa has enabled greater access to justice for the

[10] Act 28 of 2014.
[11] Section 35(4)(c)-(e) of the LPA provides that the Commission must investigate:
(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 process 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).
[12] Legal Aid SA "Response by Legal Aid South Africa Part A" (September 2019) 38.

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poor, the illiterate and in particular rural communities. However, the awarding of party and party costs goes against the principle envisaged by ADR as parties are not rewarded for Pre-litigation costs. Party and party costs are legal costs that a court may order the defendant to pay to the plaintiff in a court case. This doesn't mean that if you win your case, the "losing side" will simply pay all your legal fees. CALs submits that this quite this straightforward.

52. This is because party and party costs are costs incurred in the course of prosecuting or defending a claim in court. They are specific to the court case. They don't include legal costs incurred before a summons or notice of motion has been issued and served.

53. They also do not include costs related to attendances, communication between client and the attorney. Which is the critical aspects and expensive for those practicing public interest litigation as they often have to travel long distances, pay for accommodation and use costly experts.

54. CALS submits that taxing masters should be capacitated to develop tariffs for pre-litigation costs and also for non-litigious matters.

Non-litigious matters

55. CALS notes that Section 35(1) of the LPA expresses a view, that is supported by CALS, that the mandate of the board and/or the commission ought to be extended to include the determination of tariffs in non-litigious matters. An inclusion of non-litigious matters will also give credence to the developing concept of alternative dispute resolution and resolving of matters outside of the courts of law.

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Taxation of legal fees

56. Taxation entails the quantification of legal costs, there is still much debate on the applicable principles in preparing the different kinds of bills of costs and the taxation of these in determining reasonable costs in accordance with the existing rules and tariffs.

57. Section 5(b) of the LPA provides that "the objects of the Council are to ensure that fees charged by legal practitioners for legal services rendered are reasonable and promote access to legal services, thereby enhancing access to justice." The act is also silent on the requirement that legal fees must also be proportional to the value of the case.

58. We submit that at times costs consultants, taxing master or even candidate attorney might not be experienced and skilled to apply the proportional value, importance, complexity of case and therefore taxation of costs must be certain and discretion be left to the Presiding officer (the Judge) to make the pronouncement on the proportional value of the case that will enable the taxing master to depart from the tariffs and rules.

59. We further submit and support the view of the LSSA which submits that taxation should remain the responsibility of the taxing master.[13] However, more taxing masters ought to be appointed and capacitated instead of using experienced legal practitioners who are going to costs more money and resources to perform this task and further impede access to justice.

[13] LSSA "Submission by the LSSA on Issue Paper 36 Regarding the Investigation into Legal Fees" (30 September 2019) 36 Regarding the Investigation into Legal Fees" (30 September 2019) 52.

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Tariffs for advocates' fees

60. Counsel who are briefed by law clinics and legal aid should be encouraged to depart from their normal rate and be willing to reduce their fees as the bar comprises of advocates in direct competition with one another, competing directly on the basis of quality of work and fees. The bar further allows an avenue for attorneys to dispute counsel invoices and fees in order to evaluate whether they were reasonable or not. We support this type of dispute process.

61. We further submit that Legal Aid, the State Attorney and some public interest law organisations have published their own fee structure. The imposition of a tariff would prove to be costly as counsel will refuse to be paid below the minimum fee structure.

Chapter 7: Mechanism for attorney-client fees

62. Attorney and client costs include party and party costs, as well as other legal costs including charges for attendances between attorney and client. In some situations, the Courts may award attorney and client costs, or a portion of these costs, to the successful litigant in a case. However, this is seldom done. When this does occur, it may be because there was a contractual dispute and it was a specific term of the contract that attorney and client costs would be payable in the event of such a dispute.

63. It may occur at times where a Court believes that a litigant's conduct in the course of the litigation has been such that a punitive costs order is warranted. Where attorney and client costs are awarded, the costs are subject to the same court tariffs as party and party costs.

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64. These costs refer to costs that are paid by one party to the opposing party. Secondly, they refer to costs that a client has to pay to her/his attorney for legal services rendered.

65. CALS submits that legal costs are excessively high in South Africa, if the currently status quo persists in terms of which there is neither a statutory tariff nor fee guidelines for legal services, this will deter citizens from a certain social stratum to either defend or institute proceedings. The fees charged by big firms would deter anyone from instituting or defending proceedings against a client who is represented by the larger firms if one has to pay costs.

66. CALS supports the view/proposal of the commission to equate attorney-and-client fees with party-party costs in litigious matters in respect of users of legal services in the lower and middle income bands. We submit that if attorney-and-client fees are made to be higher than the party-and-party tariff, then this must be done in terms of a fixed percentage so that it is predictable and determinable upfront.

Middle and lower in-come bands

67. We have argued in Chapter 3 that some of the difficulties in accessing justice for middle to lower income persons arise as a result of the inaccessibility of quality legal services due to exorbitant legal fees, the exclusion of middle income persons from free legal services, and the inability to easily access offices that provide legal assistance. Therefore, CALS agrees with the proposal that to have a three tier distinct system to legal fees or alternatively extend the scope of university-based law clinics and legal aid to cover middle income persons as they struggle to pay legal fees since they do not qualify to be represented by these bodies.

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68. The Board and or commission should take into cognizance that the legal services provided for by the public interest centers is not cost effective but rather free as no costs are recovered from client. We submit that a recommendation be made for a manual to be developed to regulate attorney-and-client fees in respect of users of legal services in the lower and middle income bands in litigious matters as a permanent arrangement.

Chapter 8: Cost Recovery by Legal Practitioners

69. Chapter 8 of the Discussion Paper deals with legal services for the 'upper income band' natural persons and juristic entities. The Law Reform Commission appears to have predominantly received submissions which amounted to law firms saying, 'hands off' with regard to regulating their non-litigious pricing. These firms suggested no regulation of their internal pricing in non-litigious matters where the 'upper income band' is concerned and relied on reasons such as being able to retain specialist expertise and maintain global best practice.[14]

70. These entities describe their work as being 'highly specialised legal services' which are 'generally complex' and 'involve interdisciplinary expertise and collaboration' which should be considered as a motivating factor for high pricing and no regulation.[15]

71. These submissions are disingenuous in so far as they fail to acknowledge that many fields of law practice are highly specialised, complex and call for interdisciplinary collaboration. For example, the work of legal NGO's dealing with social justice embody all of these facets of work, yet do not call for freedom from regulation.

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[14] Discussion Paper, 421.

1. [15] As above.

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72. It is agreed that this Project by the Law Reform Commission may not be the vehicle for addressing this type of legal service however there is no valid reason why these types of services should not be regulated at all. South Africa does not have a wholly free market system and we must protect even those who make up the 'upper income band' from being exploited.

Chapter 9: Public Response to Issue Paper 36

73. It is clear from the "Public Response" section that many of the above-mentioned issues are also important to community members. The important views expressed by many community members was that legal fees are too expensive and unaffordable for the majority of the people of South Africa. The communities experience of social assistance reliance makes the government intervention in the form of regulating legal fees all the more urgent.

74. Furthermore, it is unacceptable that the language barrier continues to create obstacles to court access, we, as a society, cannot in any way justify this impediment. Fair and meaningful participation in the court process, whether it be through court documentation of hearings must be open to all official languages of South Africa.

75. Practical logistical issues remain a central concern to indigent families and far-removed rural communities. Travelling extreme distances, having to arrange accommodation and leaving families without support excludes meaningful access and participation in the judicial process. This can be said for not only courts but also for police stations, Legal Aid offices, the Independent Police Investigative Directorate (IPID) offices and other government offices.

76. A major recurring issue is the role of traditional leaders in the management of traditional court processes. Issues such as ignorance of the law, corruption, patriarchal and unconstitutional decisions seem to be a central concern to

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communities. Moreover, legal representatives are usually not allowed to argue for people or to advise a traditional leader on constitutional matters. As a result, people's rights are not sufficiently protected in these courts and people lose their property and children among other things.

77. The Department of Justice must do more to initiate educational programmes to empower communities about their legal rights. The importance of legal training to community-based activists and paralegals cannot be understated. The value of having an informed and engaged community allows state parties the ability to respond meaningfully to concerns and tailor-make solutions of the unheard majority.

C) CONCLUSION

78. In sum, the need for increased support is clear and has become ever more pressing in the current COVID-19 pandemic. Many of the access to justice issues can be somewhat addressed if more focus is given to legal clinic and pro bono support. The above concerns are structural, systemic and require a concerted effort to make the most vulnerable and marginalised sectors of society feel supported in accessing their fundamental right to justice.

79. Thank you for providing the opportunity to provide input. For queries and further information, please contact Dr. Louis Snyman (Senior Attorney, Head: Environmental Justice) at Louis.Snyman@wits.ac.za or 011 717 8629. CALS welcomes any opportunity for further engagement.

80. These comments were drafted and complied by: Thandekha Khati, Sheena Swemmer, Busi Kamolane, Vuyo Mntonintshi and Louis Snyman.