

THE LEGAL AID BOARD AND THE DELIVERY OF LEGAL AID SERVICES IN SOUTH AFRICA

For the past three decades the Legal Aid Board has been the main vehicle for the delivery of legal aid services in South Africa. The Board was established by the Legal Aid Act in 1969¹ and began operating a national legal aid scheme in 1971.² It was given very general powers to 'to render or make available legal aid to indigent people'³ and drew up a detailed *Legal Aid Guide* which contained a large number of exclusions in respect of both civil and criminal matters.⁴ After the advent of democracy in South Africa the brief of the Board was extended to include the provision of "legal representation at State expense as contemplated in the Constitution".⁵

The Board is an independent statutory body⁶ and has representatives from the bench, the advocates' profession, the attorneys' profession, government departments, an independent expert on legal aid, three additional members who can further the aims of the Board, and not more than six additional members appointed by the President of the Republic in consultation with the cabinet.⁷

The apartheid state had previously recognised the need to provide legal aid in civil matters, and during its early years spent most of its budget on civil matters such as divorces and personal injury claims at the expense of criminal cases.⁸ Over the years the budget of the Board was gradually increased and the emphasis changed from civil cases to criminal. Towards the end of the apartheid era the budget was largely spent on criminal cases and the vast majority of beneficiaries were black South Africans. However, the method of delivery remained the *judicare* model.⁹ The introduction of a democratic Constitution in 1994 led to unprecedented demands on the services of the Board. The Board became responsible¹⁰ for providing legal aid in criminal cases where accused persons could not afford lawyers and 'a substantial injustice would otherwise result' if they were not represented.¹¹

The Board was flooded with criminal cases and the *judicare* system started to break down. At the same time expenditure under the system began to escalate out of control. The Board was

1 Legal Aid Act 22 of 1969.

2 Peter J Brits *Legal Aid Guide* 10 ed (2002) 7.

3 Legal Aid Act s 3.

4 See now *Legal Aid Guide* (2002) Chapter 3 paras 1.5 and 3.1.

5 Legal Aid Amendment Act 20 of 1996 s1.

6 Legal Aid Act s 2.

7 Section 4(1)(g).

8 See DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 84, where Table 24 indicates that as late as 1980 only 10% of legal aid applications were in respect of criminal matters.

9 *Legal Aid Guide* (2002) 7.

10 Legal Aid Amendment Act 20 of 1996 s 1.

11 Constitution of the Republic of South Africa Act 108 of 1996 s 35(2)(c) and (3)(g). See below.

compelled to consider other models of delivery.¹² Pilot projects were established to consider different ways of using salaried public defenders.¹³ In the end it was decided to move towards a public defender model that included both qualified lawyers in public defender offices and law interns attached to Board-funded law clinics. The final stage in the evolution of a holistic approach to legal aid services involved setting up of justice centres.¹⁴ These include the two public defender models as well as para-legals and legal aid officers. In addition the Board enters into cooperation agreements with legal service providers such as public interest law firms and university law clinics, and runs its own impact litigation division. Where the justice centres or impact litigation division cannot handle cases they are referred to private lawyers. In the magistrates' courts in towns where the Board has no offices it relies on assistance from designated legal aid officers employed by the department of justice.¹⁵

A. OPERATION OF LEGAL AID BOARD

1. FINANCIAL CONSTRAINTS

There is no definition of an "indigent person" in the Act, but the Legal Aid Board has laid down a "means test" which has been revised from time to time. The ceiling was recently raised to R1 750 (about \$219) a month for single or estranged persons and R2 500 (about \$313) for married couples.¹⁶ The Chief Executive Officer (CEO) of the Legal Aid Board may, however, in exceptional cases, grant legal aid to a person who falls outside the "means test".¹⁷

2. PRIORITIES, INCLUSIONS AND EXCLUSIONS

The Legal Aid Board lists as its priorities for legal aid service delivery as criminal matters in terms of the 1996 Constitution,¹⁸ vulnerable groups, particularly women and children, and the landless.¹⁹

Prior to the democratic dispensation in South Africa there was a long list of exclusions in criminal matters under the *Legal Aid Guide*,²⁰ but many of these have now fallen away as a result of the impact of the Constitution.²¹ There are now detailed provisions concerning

¹² See below.

¹³ *Legal Aid Guide* (2002) 7.

¹⁴ *Ibid.*

¹⁵ *Legal Aid Guide* (2002) 8 par 5.6.

¹⁶ A decision taken by the Legal Aid Board at its meeting on 29 March 2003.

¹⁷ Legal Aid Board *Legal Aid Guide* Chapter 2 paras 2.5 and 5.1.

¹⁸ Constitution of the Republic of South Africa Act 108 of 1996.

¹⁹ *Legal Aid Guide* (2002) 23.

²⁰ See for instance, *Legal Aid Guide* (1993) par 3.1.

²¹ Section 35 dealing with arrested, detained and accused persons.

legal representation in criminal matters that are required in terms of the Constitution.²²

There is still a long list of exclusions in civil matters,²³ especially in cases where the Board can provide assistance by way of salaried lawyers in the justice centres or through cooperation agreements. In civil matters the Board must always be satisfied that there is merit in the case and that there is a reasonable prospect of success and recovery.²⁴ Furthermore, if there is good reason to believe that an applicant is wilfully abstaining from entering into employment within his or her capabilities or that he or she has resigned from employment merely to obtain legal aid, assistance will be refused.²⁵

There are special provisions concerning labour matters in general,²⁶ conciliation and arbitration procedures in labour matters,²⁷ divorce and family law matters,²⁸ the Commission on the Restitution of Land Rights,²⁹ labour tenant and land tenure issues,³⁰ asylum seekers,³¹ and the Hague Convention on child abduction.³²

3. APPLICATIONS

In South Africa under the judicare system, (unlike the English scheme), legal aid applicants were never able to apply for assistance directly to private lawyers, they had

²² *Legal Aid Guide* (2002) 23 - 49. See below for the impact of the Constitution.

²³ *Legal Aid Guide* (2002) 49-53 para 3.1. For instance, no legal aid on a judicare basis will be rendered: (i) in debtors courts proceedings; (ii) for the administration an estate or the voluntary surrender of any estate; (iii) in actions for damages on the grounds of defamation, breach of promise, infringement of dignity, invasion of privacy, seduction, adultery and inducing someone to desert or stay away from another's spouse;(iv) for any action which may be instituted in the Small Claims Court or where the amount of the claim does not exceed the jurisdiction of the Small Claims Court by more than 25%; (vii) in a civil appeal unless the CEO is satisfied that there are reasonable prospects of the appeal succeeding; (viii) in certain arbitration, conciliation or other alternate dispute resolution matters; (ix) in matters where in the opinion of the CEO there is no substantial and identifiable benefit to the client; (x) on a judicare basis for claims sounding in money; (xi) on a judicare basis for family matters in the High Court; (xii) in matters excluded by the Board from time to time; (xiii) in matters where in the opinion of the CEO that the chances of enforcing an order in favour of the applicant are slim; (xiv) in enquiries in the Children's Court on a judicare basis without the prior approval of the CEO; (xv) on a judicare basis for domestic violence matters; (xvi) in any matter in which in the opinion of the CEO the potential benefit to the client does not justify the anticipated costs of the contemplated litigation; and (xvii) on a judicare basis in any inquest save with the prior consent of the CEO.

²⁴ *Legal Aid Guide* (2002) 58-59 par 8.2.

²⁵ *Legal Aid Guide* (2002) 58 par 8.1.

²⁶ *Legal Aid Guide* (2002) 53-54 par 4.

²⁷ *Legal Aid Guide* (2002) 54-55 par 5.

²⁸ *Legal Aid Guide* (2002) 55-57 par 6.

²⁹ *Legal Aid Guide* (2002) 62-68 par 10.

³⁰ *Legal Aid Guide* (2002) 68-73 par 11.

³¹ *Legal Aid Guide* (2002) 73-75 par 12.

³² *Legal Aid Guide* (2002) 75-76 par 13.

first to be screened by legal aid officers, either at the Board's branch offices or designated magistrate's courts, and then referred to lawyers. If they did approach a private lawyer first the latter would have to refer them to the local legal aid officer in order to obtain instructions to act as a legal aid funded lawyer. The screening by legal aid officers was to ensure that the applicants satisfied the means test, and were not excluded in terms of the *Legal Aid Guide*.

Since the advent of salaried lawyers applicants are now referred to the justice centres which either take the case or refer the applicant to service provider under a cooperation agreement or a law clinic and only as a last resort to a private lawyer.³³

4. REFUSALS

A legal aid applicant has the right of appeal to the CEO of the Legal Aid Board against a refusal of legal aid by a legal aid officer. The legal aid officer is obliged to inform the applicant of this right. The grounds of the appeal must be submitted in writing to the legal aid officer who must forward them to the CEO.³⁴

5. COST OF LEGAL AID SCHEME

Since its establishment the Legal Aid Board has been funded almost exclusively with public funds from Parliament. The funds allocated to the Board annually increased markedly during the periods 1992-1993, 1995-1996 and 1997-1998 which were watershed years in the Constitutional development of the country:

1991-2	R35.2 million.
1992-3	R56.4 million.
1993-4	R62.1 million.
1994-5	R66.3 million.
1995-6	R182.4 million
1996-7	R156.5 million.
1997-8	R301.2 million.
1998-9	R260 million. ³⁵
1999-2000	R224 million. ³⁶
2000-2001	R341 million. ³⁷
2001-2002	R246 million. ³⁸
2002-2003	R362 million. ³⁹

³³ See below.

³⁴ *Legal Aid Guide* (2002) 93 par 12.

³⁵ Legal Aid Board *Legotla: Overview of the Board and its Activities* (Unpublished) (November 1998) 6.

³⁶ The Board estimates that it has been under-funded by about R425, 8 million for 1998-1999 and R428 million for 1999-2000 (Legal Aid Board *Business Plan Covering the Period 2000 to 2003* (1999) 20).

³⁷ Legal Aid Board *Annual Report 2001* (2001) 37.

³⁸ *Ibid.*

The current budget of R362 million (about \$45 million) amounts to expenditure of just over R8.00 (about \$1.00) per head for each member South Africa's estimated 42 million people.

The exponential increase from R66.3 million in 1994-5 to about four times that amount in subsequent years, is almost solely due to the effect of the Board acting as the agent of the State in respect of its Constitutional legal aid obligations.⁴⁰ For instance, the budget for the period 1995-6 amounting to R182.4 million, reflected R66.4 million in respect of the conventional legal aid scheme, and R116 million for the provision of legal consultation services and legal representation by the Board in terms of the Constitution.⁴¹

In spite of the substantial increases the Board does not have sufficient funds to provide legal aid to everybody who requires it in South Africa, particularly in respect of civil matters. The State alone will not be able to shoulder the burden, and other methods will have to be found in order to provide a meaningful service to the large number of indigent citizens in South Africa.

At one stage the Board was investigating the feasibility of introducing a telephone advice service by subscription which, at a fee of about R10 or R15 a month, would enable subscribers to obtain free legal advice and access to lawyers for a free consultation. It was estimated that such a scheme could raise up to R350 million a year for the Legal Aid Board if the scheme was run under its auspices. This would relieve Parliament of the burden of having to provide funding for legal aid services and would be sufficient to meet the legal aid needs of the country. The scheme, however, was never implemented because it was thought that the legislation does not empower the Legal Aid Board to raise funds in this manner. In 2001-2002 the Board received about R2.8 million from legal costs ceded to it by successful litigants⁴² in terms of the Legal Aid Act.⁴³

6. IMPACT OF THE CONSTITUTION

6.1 Accused persons

Section 35(3) (g) of the Constitution requires legal representation to be provided in criminal trials to indigent accused at the expense of the State "where substantial injustice would otherwise result" and this has had a major impact on the demands of the services of the Legal Aid Board. The Constitutional Court has held that the words "where a substantial injustice would otherwise result" should be interpreted with reference to (a) the complexity of the case in fact and in law; (b) the personal "equipment" of an accused

³⁹ Information provided at meeting between Lithuanian Public Defender Delegation and representatives of the Legal Aid Board in Johannesburg on 1 April 2003.

⁴⁰ Legal Aid Board *Business Plan Covering the Period 2000 to 2003* (1999) 20.

⁴¹ Legal Aid Board *Report on Activities* (1996) A5.

⁴² Legal Board *Annual Report 2002* (2003) 56.

⁴³ Legal Aid Act 22 of 1969 s 8A.

to fend for himself or herself; and, (c) the gravity of the case, the nature of the offence alleged, and the possible consequences for the accused if convicted.⁴⁴ The Legal Aid Board has interpreted this to apply to accused persons who cannot afford legal representation and who are likely, if convicted, to be sentenced to with or without the option of a fine, to a period of 3 months imprisonment, or if granted the option of a fine would not be able to pay such fine within two weeks of having been sentenced.⁴⁵

In 1993 it was estimated that if only 20% of unrepresented accused amongst the approximately 684 000 accused in the lower courts qualify for legal representation by the State, the State would have to provide representation for at least 136 840 accused. If the judicare system was used it would cost the Board nearly R92 million in legal costs. At the time because only a relatively small percentage of the 12 000 legal practitioners in private practice were likely to do criminal defence work, it would probably not be possible to provide legal representation for nearly 137 000 accused annually by way of the judicare scheme, and an extended public defender system would have to be considered. It was estimated that a public defender scheme that could provide defences for approximately 144 000 accused a year would cost about R67 million.⁴⁶

6.2 Arrested and detained persons

Section 35(2)(c) of the Constitution provides that detained and arrested persons are entitled to consult with a legal practitioner at the expense of the State where "substantial injustice would otherwise result". The Board applies the same criteria regarding a "substantial injustice" to sentenced prisoners as it does to accused persons who cannot afford legal representation.⁴⁷ In respect of detained and arrested persons who cannot afford to consult their own lawyer the Board provides legal representation to any person who "reasonably needs to do so in relation to his/her continued detention".⁴⁸

In 1998 it was calculated that there were approximately 1 000 police stations in South Africa, and that almost 1.6 million people were being detained annually. If only 50% of them were entitled to services of lawyers by the State, on average over 2 000 consultations a day would have to be arranged and provided for by the State.⁴⁹ To deal with this the Board planned to introduce a 24-hour telephone service at its head office which could be used by detained or arrested persons who wished to obtain advice. The telephone number would be displayed at all police stations and prisons, and the authorities would be required to allow detained or arrested persons access to the toll-free number. Such persons would be entitled to consult with a practitioner, employed by the Board, over the telephone, or could arrange that a practitioner consult with them in prison

⁴⁴ *S v Vermaas; S v du Plessis* 1995 (3) SA 292 (CC).

⁴⁵ *Legal Aid Guide* (2002) 4 par 1.

⁴⁶ *Legal Aid Board Annual Report 93/94* (1994) 29.

⁴⁷ *Legal Aid Guide* (2002) 4 par 1. See above par 8.1.

⁴⁸ *Legal Aid Guide* (2002) 4 par 1.

⁴⁹ *Legal Aid Board Memorandum for the Minister of Justice* (1998) (unpublished) 24.

or the place where they were being detained. In the latter case the practitioner would receive a telephonic instruction from a member of the Board's staff to consult with the detainee. The practitioner's fees and travel expenses would be paid by the Board on behalf of the State.⁵⁰ The call-in scheme was recently abandoned because the Board calculated that it would be too expensive to maintain and a new scheme is presently being devised.⁵¹

B. EVOLUTION OF THE DELIVERY OF LEGAL AID SERVICES BY THE LEGAL AID BOARD

The Legal Aid Board has used the following methods of delivering legal aid services: (i) referrals to private counsel (judicare); (ii) public defenders; (iii) Board-funded candidate attorneys in rural law firms; (iv) Board-funded law clinics; (v) justice centres; (vi) cooperation agreements with private specialist law firms; and (vii) cooperation agreements with independent law clinics. It is also considering the possibility of cooperation agreements with para-legal advice offices.

1. REFERRALS TO PRIVATE COUNSEL (JUDICARE)

For many years judicare was the main method of delivering legal aid by the Legal Aid Board. The Board has used the assigned counsel approach whereby legal aid officers refer matters to private lawyers and the latter render legal aid services at fixed tariffs. The introduction of the new Constitution⁵² had a devastating effect on the ability of the Board to continue using this method. The Board became notionally bankrupt because of the large increase in the number of cases and lawyers' accounts it had to handle. This led the Board to rethink its strategies concerning the delivery of legal aid services.

It was estimated that during the 28 years from 1970 until 1998 a total of 997 707 legal aid cases were referred to attorneys, the vast majority of which involved criminal matters. Of these 559 238 had been granted since 1994-5 and the advent of the new Constitution. This means that the number of legal aid applications granted during the last four years up to 1998 constituted 56% of all legal aid applications ever handled by the Board.⁵³ The overall increase during the period 1989-90 to 1998-9 was 709%.⁵⁴ This exponential growth in the number of judicare cases in respect of criminal matters eventually led to the abandonment of the judicare model as the prime method of delivering legal aid services by the Board.⁵⁵

⁵⁰ Ibid. See also *Legal Aid Guide* (2002) 41 par 1.3.

⁵¹ Information provided at meeting between Lithuanian Public Defender Delegation and representatives of the Legal Aid Board in Johannesburg on 1 April 2003.

⁵² Section 35.

⁵³ Legal Aid Board *Legotla: Overview of the Board and its Activities* (Unpublished) (November 1998) 8.

⁵⁴ Ibid.

⁵⁵ See below.

In 1997-8 private attorneys were paid for completing 105 732 cases of which 87 469 (83%) involved criminal cases. Only 17% of cases concerned civil matters: 14 156 divorce (13%), 3 617 (3.5%) other civil cases and 490 (0.5%) labour cases.⁵⁶ The average cost per case finalised by the Legal Aid Board during the same period was R864 a case for ordinary criminal matters, R1 707 for Constitutional criminal matters, and R1 498 a case for civil matters under the judicare system. The average cost of all judicare cases was R1 423.⁵⁷

The Board has taken a decision drastically to reduce the emphasis on judicare and to move towards a predominantly salaried lawyer system. As a result the number of judicare cases is now beginning to fall. In 1999 179 428 cases were dealt with by private lawyers, while by 2001 the number had fallen to 108 259.⁵⁸ During 2001-2002 the average cost of cases under the judicare system was R1 221⁵⁹ while in the justice centres it was R456.⁶⁰

Private lawyers and public interest law firms will continue to be used in special impact litigation cases for which a special fund has been set aside.⁶¹

Lessons Learnt

The South African experience is that judicare system is more expensive than the salaried lawyer system and works where there are adequate staffing and administrative structures in place to support it. However, once the centralized staffing establishment can no longer keep pace with the demands of practitioners for payment within a reasonable period of time the referral system broke down. Despite new computer systems the incoming daily new accounts exceeded the daily number of old accounts the head office staff were physically able to process. This led to long delays in payment sometimes stretching into years, and loss of confidence in the system by practitioners who were no longer prepared to accept legal aid work, and in some instances sued the Board for outstanding fees.

Matters were compounded by the build up of huge contingency sums to cover amounts owing by the Board for matters that had not been completed - something with which the Auditor-General was not comfortable. In desperation the Board placed severe caps on fees for criminal cases and this further alienated the legal profession. The Board decided to opt for a salaried lawyer justice centre model as the norm with judicare as a subsidiary method of delivery where such centres are not viable.

The overall lesson from the South African judicare experience is that the assigned counsel method is not feasible in an environment of budget restraints as accurate

⁵⁶ Legal Aid Board *Legotla: Overview of the Board and its Activities* (Unpublished) (November 1998) 8.

⁵⁷ Ibid.

⁵⁸ Legal Aid Board *Annual Report 2002* 11.

⁵⁹ The fall in the average cost over previous years is probably due to the capping of fees for criminal cases.

⁶⁰ Legal Aid Board *Annual Report 2002* 4.

⁶¹ Legal Aid Board *Annual Report 2002* 17-18.

forecasts of expenditure have to be made. Where judicare is to be retained as part of the system it should be based on a contract approach with fixed tariffs per case, particularly in criminal matters. However, it should be seen as a last resort where salaried lawyers and other more cost effective methods of delivering competent legal services are not available.

2. PUBLIC DEFENDERS

In South Africa in 1990, after widespread discussion with a variety of lawyer associations and non-governmental organisations (NGOs), the Legal Aid Board persuaded the Minister of Justice to establish a pilot project to investigate the feasibility of a public defender system in South Africa and to appropriate R2.5million for this purpose. This enabled the Board to employ legally qualified persons to represent indigent accused. Initially the pilot project Johannesburg office was approved for two years.⁶² Estimates that each public defender should be able to deal with approximately 200 criminal cases a year⁶³ proved to be correct.

By November 1992 more than 2 200 cases had been dealt with by the ten public defenders in Johannesburg, with a 57% success rate on not-guilty pleas, and a 90% success rate for bail applications. The average cost per case during 1992 compared very favourably with the costs allowed to private practitioners by the Legal Aid Board.⁶⁴ During 1993-4 the office provided legal representation for 2 808 accused persons,⁶⁵ while during 1995-6 it represented 3 794.⁶⁶

During 1995 it was estimated that while the average cost of a judicare criminal case was R822 the average cost of a public defender criminal case was R555.⁶⁷ The pilot project was considered a success by the Legal Aid Board, and public defenders have been incorporated into the new justice centres⁶⁸ as a permanent component of the Board's work. In 2001 public defenders were operating in 40 regional magistrates courts and dealing with 20 cases each a month. In 2001 it was estimated that they could provide 8 800 criminal defences a year.⁶⁹

Lessons Learnt

Public defender models are considerably cheaper than the judicare system, and those developing countries relying exclusively on the judicare model, and limited by budget

⁶² Legal Aid Board *Annual Report 1991/92* 32-3.

⁶³ DJ McQuoid-Mason "Public Defenders and Alternative Service" (1991) 4 *SACJ* 267 270.

⁶⁴ *Business Day* 2 November 1992.

⁶⁵ Legal Aid Board *Annual Report 1994/95* (1996) 32.

⁶⁶ Legal Aid Board *Annual Report 1995/96* (1997) 27.

⁶⁷ *Ibid.*

⁶⁸ See below.

⁶⁹ Legal Aid Board *Annual Report 2001* 14.

constraints, should seriously consider introducing aspects of public defender schemes, particularly in criminal cases. However a fully-fledged network of public defender offices is too expensive for South Africa and other developing countries. Other creative methods of using the model such as Board-funded law clinics need to be explored.⁷⁰

3. LEGAL AID BOARD-FUNDED CANDIDATE ATTORNEY INTERNS IN RURAL LAW FIRMS

In 1995 the Legal Aid Board entered into an agreement with Lawyers for Human Rights, (a human rights NGO), to establish a pilot project whereby the Board would arrange with private attorneys in a few rural towns to employ candidate attorney interns who would be funded by the Board to do legal aid work. The firms were identified by local legal circles, and the Board then negotiated with the persons identified to assist financially with the payment of the salary of the candidate attorneys. Lawyers for Human Rights assisted with the recruitment of appropriate attorneys and thereafter monitored the progress of the project. The project not only expanded access to legal aid services in rural areas, but also enabled formerly disadvantaged persons to be employed in the legal profession in the areas where they live.⁷¹

The candidate attorneys were required to handle at least 10 new legal aid instructions per month free on behalf of the Board, as well as to perform community service one day a week. Two projects involving eight candidate attorneys were operating by the end of 1996-7.⁷² Most of the work done by the interns involved criminal cases, but some civil cases, mainly divorces are also done. For instance, interns in four rural law firms during the period 1 March 1997 to 28 February 1998 completed 400 criminal cases and 73 civil cases.⁷³

Lessons Learnt

This model is very cost effective and could be expanded to do more cases. It could be replicated in those countries that require law graduates to undergo a period of internship before being admitted to legal practice. This would apply particularly to countries with large rural populations and small town law firms. In South Africa it is much cheaper to subvent the salaries of candidate attorneys in rural law firms than to establish branch offices of the Legal Aid Board in areas where there is a limited demand for legal aid services⁷⁴ because other methods of dispute resolution are used.

⁷⁰ See below.

⁷¹ Legal Aid Board *Annual Report 1995/96* (1996) 24.

⁷² Legal Aid Board *Annual Report 1996/7* (1999) 21.

⁷³ Calculations by present writer based on statistics in Legal Aid Board *Legotla: Statistics on the Work done by way of Salaried Staff Models* (unpublished) (November 1998) 6-7.

⁷⁴ Legal Aid Board *Annual Report 1996/7* (1999) 21

4. LEGAL AID BOARD-FUNDED LAW CLINICS

In 1993 the South African Attorneys Act⁷⁵ was amended to allow prospective attorneys with the necessary legal qualifications to obtain practical experience other than in an attorney's office under articles of clerkship by undertaking a period of community service.⁷⁶ Community service may be done at law clinics accredited by provincial law societies, including clinics under the auspices of the Legal Aid Board. The clinics are required to employ a principal, (an attorney with sufficient practical experience), to supervise law graduates in the community service programme. The candidate attorneys appear in the district courts and the principals in the regional and high courts. Interns who have been indentured for more than a year may also appear in the regional courts.

In 1994 the Board began employing candidate attorney interns and supervising attorneys with a maximum ratio of ten interns to one supervisor. The objectives of the scheme were (a) to render legal services to persons who satisfy the means test, and (b) to alleviate the shortage of internship opportunities for candidate attorneys by providing 'articles of clerkship' or 'contracts of community service' to law graduates.⁷⁷ In the period 1996-1997 150 candidate attorneys qualified for admission to legal practice, of whom 49% were women, and 60% from previously disadvantaged groups.⁷⁸

The Board began with a pilot project during which it funded 5 university law clinics in 1994. Since then it has allocated up to R430 000 per clinic to 20 university law clinics and two others to enable them to employ a supervising attorney and up to ten community service law clerks (interns) each. The Board later changed its strategy by employing a ratio of eight interns and two qualified professional assistants instead of ten interns so that the professional assistants could appear in the regional (senior) magistrate's courts. The interns appear in the district magistrate's courts.

The Board calculated that the average cost of the 24 513 criminal and 12 997 civil cases handled by the law clinics during the period 1 July 1994 to 31 December 1996 was R433.⁷⁹ This was less than half of the average cost of R976 per case charged under the judicare system during the same period,⁸⁰ and was also cheaper than the pure public defender model. During the period 1997-1998 twenty law clinics completed 33 951 cases of which 20 042 (59%) were criminal, and 13 909 (41%) were civil.⁸¹ This figure

⁷⁵ Act 53 of 1979.

⁷⁶ Act 115 of 1993.

⁷⁷ Legal Aid Board *Annual Report 1993/1994* (1994) 35.

⁷⁸ Legal Aid Board *Annual Report 1996/7* (1999) 20.

⁷⁹ Legal Aid Report *Monthly Report* (4 February 1997). This includes the costs for clinics which have only just been established. Ultimately the cost per case will be much less as the more established clinics cost about R350 per case (ibid).

⁸⁰ This figure is the average for criminal and civil cases - about 75% of the work in the clinics is criminal and 25% civil. See above.

⁸¹ Calculations by present writer based on statistics in Legal Aid Board *Legotla: Delivery of Legal*

compared favourably with the 18 263 civil cases done under the judicare scheme for the same period⁸² at probably twice the cost.

The Board-funded law clinics are now being incorporated into the new justice centres.⁸³ The clinics in the justice centres generally work on a ratio of 10 candidate attorneys to one supervising professional assistant but this may vary according to needs. It was estimated in 2001 that each candidate attorney could handle about 30 cases a month in the magistrates courts.⁸⁴ Thus 310 candidate attorneys in 31 justice centre clinics would handle about 103 000 cases.⁸⁵

Lessons Learnt

The community service programme provides extended legal services at a moderate cost to needy members of the public, and at the same time develops fields of expertise, practical experience and career opportunities for aspiring lawyers. It is a useful model for consideration by countries with legal systems that require law graduates to serve an apprenticeship before being admitted as practitioners. It could also be used by other developing countries which do not require internships as a mechanism for integrating newly qualified law graduates into the legal profession. The South African experience has been that the standard of service of the Legal Aid Board clinic candidate attorneys in the lower courts is often at least equal to, and sometimes better than, that of qualified attorneys or privately employed candidate attorneys because the interns obtain specialist knowledge in the conducting of criminal and poverty law cases.

5. JUSTICE CENTRES

The Legal Aid Board has decided to up a network of justice centres which provide a 'one stop' service for legal aid clients as its main method of delivery. The centres amalgamate the different constituents of the legal aid scheme under one roof: legal aid officers, public defenders, law clinic personnel (principals, professional assistants and candidate attorneys), para-legals, administrative assistants and administration clerks. All the salaried lawyer components are brought under one roof so that economies of scale can be reaped in respect of overheads.

Legal aid officers only refer matters to private counsel where the justice centre cannot handle a case, usually where a conflict of interest may arise if two or more practitioners from the centre were to be involved in representing different clients in the same case. Principals and professional assistants deal with criminal cases in the regional courts and

Aid by way of Salaried Staff Models, Public Defenders, Attorneys and Candidate Attorneys as at 30 October 1998 (unpublished) (November 1998) 1-5.

82 Legal Aid Board *Legotla: Overview of the Board and its Activities* (Unpublished) (November 1998) 8.

83 See below.

84 Legal Aid Board *Annual Report 2001* 14.

85 Based on cases for 11 months of the year.

high courts⁸⁶. Candidate attorney interns do both civil and criminal work in the district courts.⁸⁷ Para-legals assist with the initial screening of clients. Administrative assistants and clerks provide the necessary administrative back up.

The centres are designed to provide a full range of legal and para-legal services to indigent clients. The ‘one stop shop’ concept works well in the larger cities and towns, but not in the rural areas where there is insufficient work to justify their expense. In such circumstances, other models, such as the justice centre staff going out on circuit to individual courts in the surrounding districts, and ‘cooperative agreements’ between the Board, the independent law clinics⁸⁸ and public interest law firms⁸⁹ are used.

Between January and April 2001 eight justice centres were established, and it is planned to set up 60 such centres between 2001 and 2004.⁹⁰ By the 31 March 2002 there were 26 justice centres operational that finalised 112 117 matters at a cost of R53,5 million. The same matters would have cost R168 million in terms of the judicare system which meant that the Board saved R114,5 million that could be used for additional legal aid services.⁹¹ In 2001 it was estimated that the professional assistants would be handling 20 cases a month in the regional courts and candidate attorneys 30 cases a month in the magistrates courts.⁹² By 31 March 2003 the number of justice centres had increased to 37.⁹³

Lessons Learnt

The justice centres provide a useful ‘one stop shop’ legal aid service for poor members of the community. Legal aid clients receive a whole range of services varying from legal counselling and advice to representation in the district magistrates courts, regional magistrates courts and the High Courts. The costs of the justice centres are considerably less than those incurred under the judicare or referral system.

6. COOPERATIVE AGREEMENTS WITH PRIVATE SPECIALIST PUBLIC INTEREST LAW FIRMS

Private specialist law firms that deal with public interest law matters play a valuable role in the delivery of civil legal aid services to indigent people. They exist in many

⁸⁶ Regional courts can impose fines of up to R300 000 and imprisonment of up to 25 years (Magistrates’ Courts Act 32 of 1944).

⁸⁷ District courts can impose fines of up to R100 000 and imprisonment of up to 3 years (Magistrates’ Courts Act 32 of 1944).

⁸⁸ See below.

⁸⁹ See below.

⁹⁰ Legal Aid Board *Annual Report 2001 9-10*.

⁹¹ Legal Aid Board *Annual Report 2002 10*.

⁹² Legal Aid Board *Annual Report 2001 14*.

⁹³ Information provided at meeting between Lithuanian Public Defender Delegation and representatives of the Legal Aid Board in Johannesburg on 1 April 2003.

countries,⁹⁴ including the United States where they originated⁹⁵, and in developing countries in South America,⁹⁶ Asia,⁹⁷ Africa,⁹⁸ and, more recently, in Eastern Europe.⁹⁹ South Africa is no exception and the best example of a private specialist law firm in the country is the Legal Resources Centre (LRC). The LRC has played a major role in assisting the Legal Aid Board to improve its capacity to deliver legal services, particularly by way of cooperation agreements with non-governmental organisations (NGOs).

Legal Resources Centre

The first Legal Resources Centre (LRC) was established in Johannesburg in 1979, and six Centres are now located in Johannesburg, Cape Town, Port Elizabeth, Grahamstown, Durban and Pretoria.¹⁰⁰ The LRC gives practical help to individuals and communities who would not otherwise be able to obtain professional advice or to enforce their legal rights, particularly in civil cases. In the 23 years of its existence the country's first non-profit law centre has assisted millions of disadvantaged South Africans either as individuals or as groups or communities who share a common problem. In addition the LRC has worked with numerous advice centres that are staffed by para-legals.¹⁰¹

The LRC's mission statement states that:

'It works for the development of a fully democratic society based on the principle of substantive equality, by providing legal services for the vulnerable and marginalised, including the poor, homeless and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic and historical circumstances'.¹⁰²

Prior to the 1994 elections the LRC primarily used litigation and the threat of litigation to assert the rights of thousands of disadvantaged South African in several areas of the law. The LRC has reassessed its position in post-apartheid South African and is now focussing

⁹⁴ See generally NAACP and LDF *Public Interest Law around the World* (1992).

⁹⁵ See Helen Hershkoff and David Hollander 'Rights into Action: Public Interest Litigation in the United States' in Ford Foundation *Many Roads to Justice* (2000) 89.

⁹⁶ See Hugo Fruhling 'From Dictatorship to Democracy: Law and Social Change in the Andean Region and the Southern Cone of South America' in Ford Foundation *Many Roads to Justice* (2000) 55.

⁹⁷ See for example, Stephen Golub 'From the Village to the University: Legal Activism in Bangladesh' in Ford Foundation *Many Roads to Justice* (2000) 127; Stephen Golub 'Participatory Justice in the Philippines' in Ford Foundation *Many Roads to Justice* (2000) 197.

⁹⁸ See Stephen Golub 'Battling Apartheid, Building a New South Africa' in Ford Foundation *Many Roads to Justice* (2000) 19.

⁹⁹ See Aubrey McCutcheon 'Eastern Europe: Funding Strategies for Public Interest Law in Transitional Societies' in Ford Foundation *Many Roads to Justice* (2000) 233.

¹⁰⁰ Legal Resources Centre *Annual Report* (1996) 25.

¹⁰¹ Legal Resources Centre *Annual Report* (1996) 9.

¹⁰² Legal Resources Centre *Annual Report* (1998) 1.

on two programmes: a constitutional rights programme and a land, housing and development programme. The constitutional rights programme deals with access to justice, gender equality, children's rights, the enforcement of socio-economic rights such as health care, education, housing and water, and a constitutional reform programme. The land, housing and development programme includes rural and urban restitution and redistribution of land, urban and rural land tenure security, housing, land law reform and urban and rural land development.¹⁰³

An important part of the LRC programme is the training of para-legals and lawyers. It also provides a fellowship programme, primarily to bring more black lawyers into the profession, and employs 12 to 15 young law graduates each year. It also trains interns from elsewhere in Africa and the developing world.¹⁰⁴

The LRC charges no fees and receives no State funds, it is financed by the Legal Resources Trust which receives money from overseas and local donors. Recently the LRC, together with the Association of University Legal Aid Institutions,¹⁰⁵ has taken the lead in encouraging the Legal Aid Board to enter into cooperative agreements with independently funded organizations to extend legal services to previously marginalised parts of the country.

Lessons Learnt

The Legal Resources Centre is the most successful specialist public interest law firm in South Africa. It has consistently received support from leading members of the advocates' profession, attorneys' profession and the judiciary and enjoys a high national and international reputation. The LRC has been a prime mover in encouraging cooperation agreements between the Legal Aid Board and non-governmental organisations. It has played an invaluable role in providing legal services in civil cases for the poor and marginalised in the country. .

7. COOPERATION AGREEMENTS WITH INDEPENDENT LAW CLINICS¹⁰⁶

The Ford Foundation funded a legal aid conference in South Africa in 1973 which proved to be the catalyst for the law clinic movement.¹⁰⁷ At the time of the conference there were only two clinics in the country, but within two years five others had been established.¹⁰⁸ Most of the 21 universities in South Africa now operate campus law clinics independent

¹⁰³ Legal Resources Centre *Annual Report* (1998) 4.

¹⁰⁴ Legal Resources Centre *Annual Report* (1998) 7.

¹⁰⁵ See below.

¹⁰⁶ For a description of the operation of the independent law clinics see the article DJ McQuoid-Mason 'University Legal Aid Clinics in South Africa' (unpublished) (2002).

¹⁰⁷ For the Conference Proceedings see Faculty of Law, University of Natal *Legal Aid in South Africa* (1974).

¹⁰⁸ McQuoid-Mason *Outline of Legal Aid* 139.

of the Legal Aid Board-funded clinics,¹⁰⁹ and employ directors who are practising attorneys or advocates. Where the director is an attorney, the law clinic may seek accreditation by the local law society, and if granted, candidate attorneys may be employed and trained at these institutions with a view to admission. Funding for law clinics is provided by outside donors, and the Attorneys Fidelity Fund¹¹⁰ subsidises accredited clinics by providing funds to enable them to employ a practitioner (attorney or advocate) to control the clinic.¹¹¹ More recently the Association of University Legal Aid Institutions (AULAI) has set up the AULAI Trust with an endowment from the Ford Foundation to strengthen the funding of the clinics.

Law clinics provide free legal services to the needy who must comply with a means test which is less stringent than that applied by the Legal Aid Board. Representation of persons takes place in the lower and high courts (if the clinic employs an advocate) in both criminal and civil matters. Student practice rules were drafted in 1985 to enable final year law students attached to law clinics to appear in criminal cases for indigent accused in the district courts.¹¹² The first post-apartheid government undertook to introduce legislation to provide for such rules during its first term of office but these promises have still not materialised. Approximately 3 000 law graduates are produced annually by South African law schools. If each final year law student were only to do 10 cases a year, mainly during the summer and winter vacations, this could provide criminal defences for 30 000 criminal accused.¹¹³ This would ease the criminal case load of the justice centres which could then spend more time on civil matters.¹¹⁴

Funding for law clinics is a critical issue and a limiting factor on the capability of clinics to train candidate attorneys and provide satisfactory legal services. The independent university law clinics play a valuable role in supplementing the work of the Board and several have entered into cooperation agreements with the Board which enable them to be

¹⁰⁹ DJ McQuoid-Mason “The Role of Legal Aid Clinics in Assisting Victims of Crime” in WJ Schurink, Ina Snyman, WF Krugel and Laetitia Slabbert (eds) *Victimisation: Nature and Trends* (1992) 559 n 1. See also P Maisel *Clinical Legal Education in South Africa: Part I A Statistical Report* (unpublished) (1999).

¹¹⁰ The Attorneys Fidelity Fund is a fund that has accumulated out of the interest paid on monies held in attorneys’ trust accounts. It is used to compensate members of the public who have suffered loss as result of fraud by practising attorneys, but also makes money available for legal education.

¹¹¹ DJ McQuoid-Mason “The Organisation, Administration and Funding of Legal Aid Clinics in South Africa” (1986) 1 *NULSR* 189 193.

¹¹² The present writer drafted Student Practice Rules for South Africa based on the American Bar Association Model Rules for Student Practice (Council for Legal Education and Professional Responsibility *State Rules Permitting the Student Practice of Law: Comparisons and Comments* 2 ed (1973) 43) and submitted them to the Association of Law Societies of South Africa in April 1985 for onward transmission to the then Minister of Justice. Although the rules have been approved by all branches of the practising profession and the law schools they have been consistently and clandestinely blocked by bureaucrats in the Department of Justice. The new Minister of Justice, who took office in 1994, has given an undertaking to have the rules implemented.

¹¹³ Minister of Justice and Department of Justice *Enhancing Access to Justice through Legal Aid: Position Paper for National Legal Aid Forum* (unpublished) (15-17 January 1998) 25.

¹¹⁴ See above.

compensated regularly for their services. The Board initially set aside R10 million for this purpose. Stringent requirements are provided for the cooperation agreements such as the organisation must have ‘a proven track record track record in public interest law and effective community services’.¹¹⁵

The cooperation agreements are entered into with legal service providers ‘who either have an established infrastructure in a region where the Legal Aid Board has no presence or who specialise in matters identified by the Board as priorities for service delivery’.¹¹⁶

Over 20 years ago it was pointed out that law students can play a valuable role in legal aid issues in Africa and this is still true today:

‘Students represent a cheap source of manpower, which in the presence of proper supervision reaches a standard at least equal to that of a young qualified lawyer ...The well-supervised use of law students will significantly ease the limitations under which most of the legal aid programmes in Africa now have to work; it is only through student programmes that there is any possibility in the near future for legal services becoming widely available to the poor’.¹¹⁷

The use of properly supervised law students to deliver legal services has been recognized as fulfilling the requirement of a constitutional right to counsel by the United States Supreme Court:

“Law students can be looked to make a significant contribution, qualitatively and quantitatively, to the representation of the poor in many areas”.¹¹⁸

Lessons Learnt

The advent of a democratic legal system and more State expenditure on legal aid should have eased the service loads of the independent law clinics. In fact the contrary has occurred because of the reduced spending on civil cases by the Legal Aid Board and the increasing challenges to the State to deliver on social and economic rights. The law clinics are playing a useful role in delivering legal services to the poor. The recognition of the valuable contribution made by the independent clinics has resulted in them being

¹¹⁵ Legal Aid Board *Annual Report 2001* 11: ‘Full disclosure of all funding and activities is also required, as is submission of audited balance sheets each year and if necessary, a financial audit by the Board and the Auditor-General. Other requirements are that the service must be provided to the poor at a cost less than Judicare and, at no charge, to those who cannot afford the services in accordance with the means test which must always be conducted’.

¹¹⁶ Ibid.

¹¹⁷ J Reyntjens in FA Zemans *Perspectives on Legal Aid* (1979) 36.

¹¹⁸ *Argersinger v Hamlyn* S Ct 2006 (1979).

increasingly regarded as an integral part of the national legal aid scheme. For this reason the Board has entered into cooperative agreements with several of them.

8. POTENTIAL COOPERATIVE AGREEMENTS WITH PARA-LEGAL ADVICE OFFICES

Para-legal advice offices exist in many countries in both the developed and developing worlds. In some cases para-legals are paid professionals, while in others they are volunteers.¹¹⁹ Some work closely with lawyers while others act completely independently. In most cases they interface directly at grass-roots level with the communities they serve, and provide a valuable front-line link for providers of legal aid services.

In South Africa a variety of organisations are involved in para-legal advice work. Many of these also provide access to justice by educating the public concerning their legal rights, as well a training para-legals to give advice. Some bodies (e.g. the Black Sash) concentrate in urban areas, while others (e.g. Community Law and Rural Development Centre (CLRDC), Durban and Lawyers for Human Rights (LHR), Stellenbosch) focus on rural areas. Services are provided at a variety of levels which vary from simple advice only offices in the high-density townships to those providing full legal aid services such as the Legal Aid Bureau in Johannesburg.¹²⁰

Employees at advice offices in South Africa are generally paid, but often the remuneration is very low and in some cases staff work for nothing. Training of para-legal staff varies from, formal training offered by LHR, and the CLRDC in Durban, leading to diploma courses, to mainly practical experience which is obtained "on the job". Some of the more sophisticated advice offices are linked to organisations such as the university law clinics, the LRC, LHR and the CLRDC, while others rely on free services provided by legal practitioners in private practice. Most advice offices offer mainly legal advice which very often resolves the problem. Many of them have built up expertise in particular areas eg pensions, unemployment insurance, unfair dismissals etc. Where the advice office cannot solve the problem the party concerned is usually directed to the Legal Aid Board's offices or to a sympathetic law firm. Para-legals are also being included in the Board's new justice centres and cooperative agreements. A National Par-Legal Institute (NPLI) has been set up to assist the more than 350 para-legal advice offices in the country with training and fund-raising. It is also investigating para-legal accreditation certification procedures. The NPLI works closely with the Association of University Legal Aid Institutions.¹²¹

¹¹⁹ See generally Stephen Golub 'Non-lawyers as Legal Resources for their Communities' in Ford Foundation *Many Roads to Justice* 297 301-306.

¹²⁰ In 1996 the Legal Aid Bureau experienced financial difficulties and the Legal Board agreed to provide substantial funding for it.

¹²¹ See above.

Para-legal advice offices are particularly useful in rural areas and some have begun entering into cluster agreements with law clinics that have cooperation agreements with the Legal Aid Board. A good example of a rural para-legal advice office programme is the Community Law and Rural Development Centre in KwaZulu-Natal.

Community Law and Rural Development Centre (CLRDC)

The CLRDC in Durban was established in 1989, and presently serves a population of about 1 million rural South Africans living in the provinces of KwaZulu-Natal and the Eastern Cape. The CLRDC was established to empower rural communities, through advice and education, to: (a) participate in a changing South Africa by increasing individual accountability, skills, self-reliance and confidence; (b) educate rural communities about democracy, voting and civil society; and (c) to strengthen the rule of law in rural South Africa. It has worked on developing a self-sustaining programme of legal advice, education and training which it believes will be a model in rural development.

The CLRDC teaches rural communities how to raise and administer funds and tries to develop a broad based understanding of the role and application of law in South Africa. It assists rural communities with skills development to participate in the changing South Africa, through increasing their sense of self-reliance, confidence and responsibility while developing an awareness that although law is an important tool for self-reliance, it is not the only tool. The CLRDC promotes the attainment and maintenance of democracy through development of a rights-based culture in which all levels of government are expected to honour their obligations and be accountable to their citizens.

The CLRDC operates in 56 target rural communities, which are governed by customary law and ruled by tribal authorities. The latter consist of tribal chiefs, tribal administrators and unpaid tribal councillors. There is no formal training for tribal authorities who are expected to administer increasingly complex affairs in their communities and there is often conflict between "Western law" and customary practices. This conflict has increased under the new Constitution.¹²²

At present the CLRDC responds to requests from communities who have established para-legal committees to provide training for para-legal advisers. The CLRDC uses an intensive four month training programme divided into two seminars of two months each in about 36 areas of law. After which the para-legals undertake 12 months practical training in their communities under the supervision of the CLRDC trainers who visit the offices at least once month to monitor work and performance.¹²³ At the end of the training period the para-legals are issued with a diploma from the Faculty of Law, University of Natal, Durban. During 2001 the CLRDC handled 2 551 cases and

¹²² See above.

¹²³ Community Law and Rural Development Centre *Annual Report 1 January -31 December 2000* (2001) 10-12.

recovered over R9 million for rural residents and provided numerous community legal education workshops and monitored State administrative functions to measure accountability.¹²⁴ The CLRDC is a useful model for rural communities, and every year it attracts a number of interns from developing countries.

Lessons Learnt

Para-legal advice offices are a useful adjunct to conventional lawyer-based legal aid service schemes. Legal aid services must be considered holistically and para-legals are in the front-line in the field where communities make their first contact with the law. Para-legal advice offices can play a valuable role in screening initial legal complaints and referring potential litigants to lawyer-based services. This role has been acknowledged by the Legal Aid Board which has integrated para-legals into its justice centres,¹²⁵ and hopes in future to include them in some of the cooperative agreements. For the effective functioning of para-legal advice offices workers should be paid for their services and properly trained. The offices themselves should be placed on a sound financial footing and this can best be done by integrating them into the national legal aid scheme. In some instances clusters of para-legal advice offices have entered into agreements with independent law clinics that have cooperation agreements with the Board.

C. CONCLUSIONS

In the light of the above the following conclusions can be drawn from the South African experience concerning the delivery of legal aid services by the Legal Aid Board:

1. There is no single effective method of delivering legal aid services and a holistic approach must be adopted. As in most other countries different combinations of judicare and salaried lawyer programmes are used.
5. The judicare model is the most expensive model and the Board has decided to move away from referrals to private lawyers towards the employment of salaried lawyers in justice centres.
6. Where the public defender model is used it has been modified to suit local conditions. Thus law graduate interns are being used as a valuable resource for providing legal aid services in the lower courts.
7. University legal aid clinics provide a most useful resource, and are increasingly being incorporated into the national legal aid scheme through cooperation agreements.
5. The Board has entered into a number of cooperative agreements with independent

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Community Law and Rural Development Centre *Annual Report 1 January -31 December 2001* (2001) 28.

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See above.

providers of legal services, particularly specialist NGOs that have strong links to indigent communities.

6. The Board should work more closely with para-legal advice offices and recognise their potential as a front-line resource. Where appropriate, the Board should enter into cooperative agreements with them.

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