

TAKING LEGAL AID TO THE PEOPLE: UNLEASHING LOCAL POTENTIAL IN SOUTH AFRICA

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SUMMARY

Two of the principal elements necessary for the establishment, maintenance and expansion of legal aid services are funding and the political will to provide the services. As far as criminal legal aid is concerned, it is clear that the will exists and the levels of funding have increased steadily over the past few years. Civil legal aid is, however, almost non-existent and it is here that the greatest need lies. South Africa being a developing country with other pressing needs, it is unrealistic to expect any drastic state-sponsored intervention any time soon. It therefore becomes imperative that innovative measures to meet the demand for basic civil legal aid, using existing resources such as members of the legal profession, students, the university law clinic and the ward committee system, should be investigated with a view to implementing at least a pilot scheme.

1 INTRODUCTION

Traditionally, countries are referred to as either “developed” or “developing” with the implication for the latter that they should strive to become “developed”. One of the characteristics shared by developed and developing countries is the fact that legal aid in some form or another is provided. Although, within the “developing” category,¹ legal aid structures may vary from rudimentary to highly sophisticated,² the provision of legal aid services to those who cannot afford to pay for them is one of the key mechanisms for the achievement of “developed” status.

¹ McQuoid-Mason *Lessons from South Africa for the Delivery of Legal Aid in Small and Developing Commonwealth Countries* (2005). Paper prepared for the *International Conference on Legal Aid* presented by the Institute for Sustainable Government and Development of the Nelson Mandela Metropolitan University, the Association of University Legal Aid Clinics and the SA Legal Aid Board in Port Elizabeth, South Africa, 6-8 April 2005.

² The level of sophistication is normally directly linked to the level of state funding.

Development is dependent upon two main elements: economic wealth and political will. Being a developing country, it is understandable that this topic is very high on the South African political agenda. Constitutionally, there are three spheres of government in South Africa – national, provincial and local, and it is in the latter sphere that the duty to develop is primarily vested. One of the objects of local government is to promote social and economic development³ and it has a duty to structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.⁴ For this purpose, Chapter 5 of the Local Government: Municipal Systems Act⁵ is dedicated to the process of integrated development planning, providing evidence of a co-ordinated effort to promote material and social welfare by means of proper planning and service delivery. On the other hand no development will be effective without the simultaneous availability of access to legal services that can be employed to enforce all generations of rights and thus ensure the empowerment of all members of society. Access to legal aid services also promotes the establishment of a “legal culture”, which in itself improves development.

Although it is difficult to determine the role played by law in the economic and social development of a country,⁶ in South Africa it is accepted that law can be a catalyst for social change. However, it should be borne in mind that without exception, economic development increases the need for legal services, particularly amongst the needy, necessitating the exercise of care that the availability of legal services, in view of the greater demand, does not decrease.⁷

If it is accepted that law is a vehicle for development, and that the two are inextricably linked, it can be reasoned that the two major elements needed for legal aid development are economic wealth (funding) and political will. The political will to provide legal aid, at least criminal legal aid, is indisputable, and this leaves the question of whether it is realistic to expect any major increases in state funding in order to provide for legal aid in civil matters. The following graph clearly indicates the increased financial pressure placed on the state since independence in 1994:

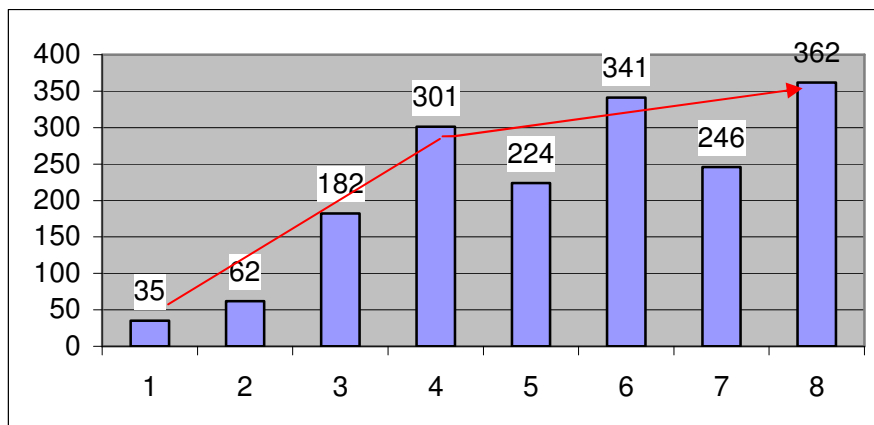
³ S 152(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996.

⁴ S 153 of the Constitution.

⁵ 32 of 2000.

⁶ Seidman “Law and Development: A General Model” 1972 6 *Law & Soc Rev* 311.

⁷ Committee on Legal Services to the Poor in the Developing Countries *Legal Aid and World Poverty* (1974) 4.



(The years reflected are 1991/1992, 1993/1994, 1995/1996, 1997/1998, 2000, 2001, 2002 and 2003)
(The amounts are in millions of rands)

A breakdown of the funding for 2003/2004 reveals that 78% of all new matters were handled by Justice Centres, 16% were referred to Judicare and 6% were handled by co-operation partners. Of the cases handled by Justice Centres, 88% were of a criminal nature.⁸ It can thus be concluded that, as far as its duty to provide criminal legal aid is concerned, the state (through the provision of funding) and the Legal Aid Board (through its service delivery) are making huge inroads. Based purely on numbers serviced and the application of available funds, it is clear that the provision of civil legal aid is lagging far behind. In view of the Constitutional imperative to provide criminal legal aid, the fact that thousands of accused still go unrepresented irrespective of increased levels of funding and representation, and the fact that the Legal Aid Board, being operative in a developing country **must** prioritise, the possibility of increased state funding to provide for civil legal aid seems remote.

In view of the above, the link between law (and thus legal aid) and development gives rise to the question whether the “heart” of development, namely local government, should not consider the provision of elementary legal aid services as a basic service and therefore as one of its developmental functions? In attempting to address this issue, it is accepted that local spheres of government (municipalities) do not possess the financial resources necessary to embark upon this journey and that innovative measures, using available resources, should be investigated.

Thirty-seven years ago, when confronted with a vaguely similar situation, Gary Bellow of Harvard University asked: “Must we not recognize that the present system for providing legal [aid] services cannot cope with volume of this nature? Must we not ask ourselves how many of the thousands of cases and problems that arise daily could be handled as well by trained laymen as

⁸ Legal Aid Board *Annual Report 2003/2004*: 20.

by lawyers?”⁹ An analysis of this question reveals its relevance for contemporary legal aid in South Africa and in order to provide answers, the following need to be determined:

- What constitutes “legal services”?
- What does the present system entail?
- What are the problems that arise daily?
- Can the system cope?
- Can trained non-lawyers contribute towards fulfilling the needs?
- What resources are there?

In order to address the above, the system for the provision of legal aid in the Nelson Mandela Metropole, as being representative of urban South Africa, will be investigated, conclusions will be drawn based on research undertaken and proposals will be made for increased access to basic civil legal aid services. The broad goal of the paper is to establish the nature of legal needs and legal aid service provision in selected areas of the Nelson Mandela Metropolitan Municipality and it is hoped that the findings could inform processes for improving the provision of legal aid services by using available resources more effectively. The paper was conceptualized with the object of improving access to justice for the less fortunate members of society.

2 THE LOCAL SPHERE OF GOVERNMENT IN SOUTH AFRICA

Government is constituted as national, provincial and local spheres of government that are distinctive, interdependent and interrelated.¹⁰ The local sphere of government consists of municipalities in which the executive and legislative authorities of municipalities are vested.¹¹ Communities residing in municipal areas are represented by democratically elected councillors and the number depends on the size of the municipality. The Nelson Mandela Metropolitan Municipality has 108 councillors of which 54 are proportional representatives elected according to political party lists. The city is also divided into 54 wards and a ward councillor represents each ward. In order to encourage community involvement in the matters of local government, ward committees, consisting of up to 10 members, are elected in each ward. Administratively, ward councillor assistants support the wards. The ward offices are situated within the wards and are easily accessible.

Most of the ward committees have offices equipped with a computer, telephone and fax and most of the assistants have received basic training in dealing with members of the public, using the equipment and running an office. One of the functions of ward committees is to make recommendations

⁹ Bellow “The Extension of Legal Services to the Poor: New Approaches to the Bar’s Responsibility” in Sutherland (ed) *The Path of the Law from 1967* (1968) <http://www.garybellow.org/garywords> (2003/11/26) 4.

¹⁰ S 40(1) of the Constitution.

¹¹ S 151 of the Constitution.

on any matter affecting its ward.¹² It is also a requirement that women should be equitably represented and that a diversity of interests in the ward should be represented. In the metro the latter refers to youth, business, religion and the handicapped. A project undertaken by the erstwhile PE Technikon¹³ in 2002 on behalf of and funded by USAID,¹⁴ revealed that apart from being a key instrument for participatory governance, the ward committee system is also an excellent vehicle for needs identification and communication.

3 METHODOLOGY

In order to establish the legal needs that exist and to determine the accessibility of current legal aid services, exploratory research, adopting both a qualitative and quantitative approach, was conducted.¹⁵ The main study group included Justice Centre staff, ward councillors, ward councillor assistants and ward committee members. Semi-structured one-to-one interviews were conducted with representative samples from these groupings in order to gain a picture of the participants' beliefs about, or perceptions of, the topic.

In order to determine perceptions from the supply side, key informant interviews were conducted with Justice Centre staff, employees at the Nelson Mandela Metropolitan University law clinic and a representative from the regional office of the South African Legal Aid Board. Key informant interviews were also conducted with ward councillors and ward councillor assistants to determine the nature, extent and frequency of requests for help with "legal problems". Ward committee members, being representative of the community at large, were interviewed to gain further insight.

Six ward councillor assistants were requested to complete survey forms for all visitors to their offices over a period of four days in February 2005 in order to determine the reasons for visits to the offices of ward councillors. Only four of the six assistants managed to complete the survey forms. The responses to the pilot study were received from the areas of Langa, Walmer Township, KwaZakhele and Motherwell.¹⁶ The survey was limited by the fact that the failure of two ward councillor assistants to keep record of the visits they received from members of the community influenced the representivity of the sample. The quality of legal aid services was not measured.

4 WHAT CONSTITUTES "LEGAL [AID] SERVICES"?

The South African Legal Aid Board (the Board) was established by the Legal Aid Act, 22 of 1969, and its object is to render or make available legal aid to indigent persons.¹⁷ The Act does not define "legal aid" and it does not provide any particulars of the scheme. The Legal Aid Guide provides for the

¹² S 74(a) of the Local Government Municipal Structures Act 117 of 1998.

¹³ On 1 January 2005 PE Technikon merged with the University of Port Elizabeth and the Vista University, Port Elizabeth to form the Nelson Mandela Metropolitan University.

¹⁴ Van As *Building of Community Structures and Councillors for Effective Governance* (2003) ISGAD.

¹⁵ De Vos *et al Research at Grass Roots* (2002) 109.

¹⁶ The third biggest "township" in South Africa.

¹⁷ S 3 of the Legal Aid Act 22 of 1969.

latter in terms of section 3 of the Act. The mission of the Board is to become a leading provider of legal services, ensuring quality access to justice for the poor and vulnerable in an independent manner.¹⁸

Based upon the responses elicited from key informant interviews conducted with regional office staff of the SA Legal Aid Board, Justice Centre staff and employees at the university legal aid clinic, legal aid can be defined as “the rendering of free legal assistance and advice to people who cannot afford to pay for those services in order to improve equality before the law through improved access to the law”.

According to the Board, only the poor and the vulnerable qualify for civil legal aid as set out in the Legal Aid Guide. The question arises whether developing countries can afford to carry on ignoring those who are almost poor, who do not qualify for legal aid and who are without the resources, either financially or in terms of personal capacity, to address their own legal needs. By making civil legal aid available to the poor alone, the classification of citizens is continued and the poor are compartmentalized.

5 THE PRESENT SYSTEM FOR THE SUPPLY OF LEGAL AID IN THE METROPOLE

The state endeavours to fulfil its Constitutional obligations and to provide access to justice through the Legal Aid Board, an autonomous statutory body established by the Legal Aid Act, 1969.

Whereas the bulk of legal aid services were provided by the Judicare system up to approximately three years ago, a shift to the direct service delivery method, relying on full time attorneys deployed in Justice Centres, is now almost complete.¹⁹ A network of 58 Justice Centres covers the majority of the courts. Those courts not covered by the network continue to be serviced through the Judicare system. In areas where the Board has no capacity of its own, assistance is rendered through the Co-operation Partnership Programme resulting in a mixed model of service delivery.

5.1 Who qualifies for legal aid?

It is accepted that South Africa is a developing country with a limited tax base and many demands on the fiscus. In recognition of the financial constraints, the Board prioritised the following areas of service delivery:²⁰

- The positive rights to legal aid contained in the Constitution, namely:
 - (a) The right of children to have a legal practitioner assigned to them by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;²¹

¹⁸ Legal Aid Board *Annual Report 2003/2004* (2005).

¹⁹ Whereas 41% of new matters were assigned to Judicare in 2002/3, this figure dropped to 16% in 2003/2004. Justice centres handled 78% (236,282 cases) of all new matters in 2003/2004 as opposed to 53% (114,189 cases) the previous year.

²⁰ Legal Aid Guide 23.

²¹ S 28(1)(h).

- (b) The right of detained persons, including sentenced prisoners,²² and accused persons²³ to have a legal practitioner assigned to them by the state, and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; and
 - (c) The right of accused persons of appeal to, or review by, a higher court.²⁴
- Vulnerable groups, particularly women and children; and
 - The landless.

As far as criminal matters are concerned, legal aid is granted to indigent persons and in terms of the Constitution.

5 2 Legal aid to indigent persons

The term “indigent” is not defined, but the Board has laid down a means test for legal aid other than in terms of the Constitution, which is revised from time to time. According to the Legal Aid Guide,²⁵ a single person or an estranged spouse with a calculated income not exceeding R600,00 per month, together with an addition thereto of R180,00 per child per month, qualifies for legal aid. A combined income of R1200,00 per month is set for married persons with a rebate of R180,00 per month per child.

Indigent persons who do not qualify for legal representation at state expense in terms of the Constitution, do not receive representation on a *Judicare* basis²⁶ and, if they qualify, are catered for by the Justice Centres,²⁷ which means that public defenders are assigned to them in criminal matters. In civil matters a large number of cases are expressly excluded from *Judicare* legal aid and thus, in view of the low threshold set by the means test and the limited availability of civil legal aid in general, they are denied access to the courts and therefore access to justice.

5 3 Legal aid in terms of the Constitution

The Constitution grants the right to be assigned a legal practitioner if substantial injustice would otherwise result. This moved the Board to declare “*substantial injustice would otherwise result*” where an accused was not provided with legal representation at state expense in the following circumstances.²⁸

- The accused could not afford the cost of his or her own legal representation; and
- The accused would, if convicted, probably receive a sentence of imprisonment of which the unsuspended portion would be more than

²² S 35(2)(c).

²³ S 35(3)(g).

²⁴ S 35(3)(o).

²⁵ 152.

²⁶ Legal Aid Guide 42.

²⁷ See par 4 1 above.

²⁸ Legal Aid Guide 18.

three months, without the option of a fine, or if given the option of a fine, such fine would not be paid within two weeks of being sentenced; and

- If adequate legal representation would make a material difference to the prospects of the accused receiving a fair trial. Aspects to be taken into consideration include the nature and gravity of the charge, whether any or other legal representation at state expense is available or has been provided and any other factor which the CEO of the Legal Aid Board or a court may direct a legal aid officer to take into account.

As far as the latter circumstance is concerned, a legal aid officer has no discretion in the matter if a court has granted an order declaring that an accused is entitled to legal representation at state expense, either in terms of section 35(3)(g) of the Constitution, 1996 (in terms of which every accused person has the right to a fair trial, which includes the right to have a legal practitioner assigned at state expense if substantial injustice would otherwise result, and to be informed of the right) or in terms of section 73(2)(c) of the Criminal Procedure Act.²⁹ Before a court directs that a person be provided with legal representation at state expense, it must take the following into account:³⁰

- The personal circumstances of the person concerned;
- The nature and gravity of the charge or the offence of which the person has been convicted;
- Whether any other legal representation at state expense is available or has been provided; and
- Any other factor which in the opinion of the court should be taken into account.

After the above have been taken into account, the court must refer the matter for evaluation and report to the Board.³¹ In order to alleviate the potential administrative burden that may be caused by this sub-section, a two-stage approach has been designed in terms of which courts allow accused persons reasonable time to apply for legal aid, and only if it is refused, should courts contemplate referring the matter to the Board for evaluation and report.

5 4 Methods employed to facilitate the delivery of legal aid services

For the first 30 years of its existence the Board met its mandate through the Judicare system in terms of which cases were assigned to private practitioners. However, the advent of democracy and the commitment to equal access to justice led to a dramatic increase in demand for legal aid – an increase the Judicare system could not cope with. It is estimated that, from 1970 to 1998, a total of 997 707 legal aid cases, mostly criminal matters, were referred to attorneys. Fifty-six percent of these legal aid

²⁹ 51 of 1977. See Legal Aid Guide 23-49 for the priorities, inclusions and exclusions on criminal matters.

³⁰ S 3B(1)(a) of the Legal Aid Amendment Act 20 of 1996.

³¹ S 3B(1)(b) of the Legal Aid Amendment Act 20 of 1996.

applications were granted between 1994 and 1998.³² This means that in the twenty-four years since 1970 the system handled 438 991 cases and in the next four years it had to service 558 716 matters. This resulted in the Board being unable to process claims and that, in turn, led to a breach in the relationship between the Board and the private profession, resulting in the former being sued for payment by practitioners.

In 1998 a National Legal Aid Forum was convened and it was agreed that Judicare had to be replaced with a Justice Centre model. This decision has been influenced by a number of factors, including:

- the Constitutional requirement for legal representation;
- massive fraud by practitioners;
- the inability of the Board to process practitioners' claims;
- cost; and
- the success of pilot public defender projects.

The South African Legal Aid Board sees itself as the facilitator of poor people's access to justice in relation to issues which most concern and affect their livelihood. It views access to justice as the provision of different means by which the poor can achieve something akin to equality before the law and it equates equality before the law with meeting the need for legal assistance. It intends to achieve this through an access to justice approach that exhibits four broad streams, namely:

- Justice Centres;
- co-operation agreements;
- impact legislation; and
- a national legal internship programme.

By March 2005, there were 58 Justice Centres and 27 satellite offices in South Africa. Four regional offices were also opened to co-ordinate the work of the Justice Centres.³³ The ultimate aim of the centres is to provide legal aid applicants with a one-stop-shop, employing salaried legal practitioners whose entire focus is on service to the poor. The Justice Centre approach is new in the following ways:

- The centres employ salaried legal practitioners.
- Theoretically, they attend to both criminal and civil matters, but in practice it is almost exclusively the former. A clear distinction is drawn between criminal and civil work. Staff members do not address, for example, civil implications where they deal with a criminal matter.³⁴

³² McQuoid-Mason "The Legal Aid Board and the Delivery of Legal Aid Services in South Africa" in Public Interest Law Initiative (2002) *Access to Justice Source Book* 108 (<http://www.pili.org.publications> 13-05-2004).

³³ Legal Aid Board *Annual Report 2002/2003*, Pretoria, 2003, 7.

³⁴ Personal interview with the Justice Centre Executive for the Port Elizabeth Justice Centre, Ms L Franklin on 18-02-2004. This centre is one of the largest in South Africa and it primarily serves one of the busiest courts in the country.

- There is a national Access to Justice director whose task it is to give guidance in this regard to all Justice Centres and the centres are tasked with ensuring access to justice in its fullest sense for the poor.
- They must take on matters that fall within the ambit of certain prioritised areas of the law, which are certain criminal matters, women, children and landless people.

6 WHAT ARE THE NEEDS OF THE INHABITANTS OF THE NELSON MANDELA METRO?

In the 2003/4 Annual Report of the SA Legal Aid Board,³⁵ the chairperson, Judge Mlambo, addresses three challenges, namely the need to restore the nation's confidence in the justice system, a dire need for civil legal aid and the need to transform the profession. As far as civil legal aid is concerned, he states that the Board was inundated with requests for assistance from the vulnerable and marginalized sections of society, in particular, women, children and those living under constant threat of eviction. According to him, it is clear that the need for civil legal aid cannot be ignored much longer. Applications to Parliament for increased funding to provide for this need have met with resistance.

A survey of 102 visitors to the Port Elizabeth and Uitenhage Justice Centres and the four ward councillor offices³⁶ over a period of 4 days³⁷ revealed the following trends:

WC Office	Description	Justice Centre
20	Average number of visitors received	11 ³⁸
52	Percentage who felt they had a "legal" problem	100
12	Percentage (of total) who needed assistance with a criminal matter	77
7	Number of "legal" problems relating to family matters	8
14	Number of "legal" problems relating to domestic violence	1
5	Number of "legal" problems relating to maintenance and custody	3
26	Number of "legal" problems relating to property	2
5	Number of "legal" problems relating to debt	2
2	Number of "legal" problems relating to inheritance	3
15	Number of "legal" problems relating to access to social services	0

³⁵ Legal Aid Board 6.

³⁶ Langa, KwaZakhele, Motherwell and Walmer.

³⁷ From 15-18 March 2005.

³⁸ It appears as if the Uitenhage Justice Centre failed to keep proper records, with the result that the figure is most probably not correct.

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- 74% of the visitors to the ward committee offices indicated that they experience “legal problems” of a civil nature.
 - 58.5% of the visitors to the ward committee offices indicated that they approach their ward councillor first when they experience any problem, whilst a further 39% indicated that they see the ward councillor’s assistant as their first point of contact for assistance.
 - 48% of the visitors to the ward committee offices experienced “non-legal” problems mostly related to municipal matters, looking for employment, applications for housing, *etcetera*.

Key informant interviews were conducted with 11 ward committee members³⁹ and it transpired that:

- Members of the public often approach ward committee members for assistance with legal problems. 82% of the ward committee members expect the ward office to assist. 55% approach the ward councillor and 27% approach the ward councillor assistant.
- The most prevalent legal problems experienced are being victims of crime, inheritance under customary law, debt, domestic violence, poor control over taverns, and family matters.
- When asked who the people are that have difficulty in accessing legal services and where they go for assistance, all the interviewees indicated that they are poor (including pensioners) and that they don’t know where to go. 82% of the interviewees indicated that no one provides legal aid services in their area (9% mentioned social workers and 9% police sector managers). The result of the above is that they end up at the ward office because there is someone there and the office is accessible.

Key informant interviews conducted with six ward councillor assistants revealed that:

- The most prevalent problems in the areas are domestic violence, crime, maintenance, debt, access to social services and property related matters.
- One third of the interviewees considered themselves able to dispense limited legal advice, one third felt comfortable with giving very limited advice whilst the final third stated that they were incapable of giving any advice that contains a legal component.
- All the interviewees would welcome assistance from a law student during certain hours of a week and all expressed interest in receiving basic legal training that would enable them to address minor problems.

Interviews were also conducted with six ward councillors in the metropole. According to them:

- Their constituents approach them on a daily basis for assistance with legal problems. Two of them feel that they can dispense elementary advice whilst four feel themselves unable to do so. They refer people to

³⁹ From wards in KwaNobuhle, Helenvale, KwaZakhele and Motherwell.

the Legal Aid Board, the Human Rights Commission, the police, the court and the municipal legal officer.

- All the councillors would welcome assistance from a law student and all expressed interest in receiving basic legal training that would enable them to address minor problems.
- The ward committee offices are seen as points of first contact for almost any problem that arises in the community.

From the above it is clear that the need for assistance with legal problems, especially civil legal problems, is very high and that legal aid is considered to be a very important service. The establishment of a network of providers that will allow cooperation and coordination of legal aid activities, as well as the exchange of ideas and experiences, are seen by most of the key informants as very important.

Similar to a legal needs analysis undertaken in Uganda,⁴⁰ the survey revealed that crime does not feature as high on the list of priority areas of law for legal aid as is generally assumed. Indigent people experience "legal problems" that are peculiar to their circumstances. When faced with a justiciable event they simply want to solve the problem or obtain compensation for harm and loss.⁴¹ They want routes to solutions that are quick, cheap and relatively stress-free and if these routes fail to materialize, they abandon the quest for justice.

7 IS THE CURRENT SYSTEM FOR THE DELIVERY OF LEGAL AID IN THE METRO COPING WITH DEMAND?

There are two Justice Centres servicing the metropole, one in Port Elizabeth and one in Uitenhage. At the Port Elizabeth Justice Centre, 6 159 new criminal matters were handled as opposed to 444 civil matters – 93% criminal as opposed to 7% civil.⁴² At the Uitenhage Justice Centre⁴³ 2 918 new matters were handled in the period 1 March 2004 to 28 February 2005. Of this figure, 2 534 (87%) were criminal matters and 384 were civil (13%) matters. During the same period, 2 751 matters were finalized of which 93% were criminal.

In 1995 the erstwhile University of Port Elizabeth and the Legal Aid Board entered into a co-operation agreement. The agreement was for a pilot period of two years and although it has not been formally renewed, a relationship still exists. According to the director of the university law clinic there exists uncertainty about the continuance and nature of the relationship. Two of the university law clinic's primary objectives are:

⁴⁰ Legal Aid Service Provider's Network (LASP-NET) *Access to Justice for All: Report on the Baseline and Needs Analysis Survey on Legal Aid Provision in Uganda* (2004) 36.

⁴¹ Genn *Paths to Justice* (1999) 254.

⁴² Statistics supplied by Mr H Stander, Manager: Administration of the PE Justice Centre in February 2005. Nationally, the split between criminal and civil matters in the justice centres was 88% as opposed to 12%.

⁴³ Information supplied by Mr Brian Nel, Manager: Administration in March 2005.

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- To provide legal aid services to indigent persons; and
 - To develop working partnerships with para-legal offices and other community advice centres.

In 2003, an average of 100 persons visited the clinic per month. The total number of visitors was 1 202 and 327 files were opened. One hundred and sixty-nine court appearances were made of which 75% were either divorce or maintenance matters.⁴⁴

According to the interviews conducted with regional office staff of the SA Legal Aid Board, Justice Centre staff and employees at the university legal aid clinic that serve the metropole, the following gaps exist in the delivery of legal aid services:

- The Justice Centres cannot cope with the volume. According to the director of the Port Elizabeth Justice Centre, approximately 150 persons visit their offices per day. It was also indicated that the current staff is unable to fulfill the needs that exist.
- The university should become more involved with legal aid at an elementary level as part of its community service.
- The university legal aid clinic lacks the means (staff and funds) to increase paralegal training and the community does not know about the services it renders.
- Civil legal needs are inadequately addressed.
- There is a need for greater access to legal aid and advice.

In view of the above and in view of the needs identified and set out in paragraph 6, it is obvious that current structures are incapable of fulfilling existing needs for civil legal assistance. Any increase in resources, be it capital, staff or whatever, will, however, not necessarily result in the removal of backlogs. The developmental nature of South Africa and improvements in the delivery of services such as housing, electricity and water greatly contribute to an increase in legal problems. Therefore, innovative use of existing structures and resources is needed not only to assist those who are left behind, but also to absorb newcomers on the scene.

8 WHAT RESOURCES ARE AVAILABLE IN THE METRO AND IS THERE A ROLE FOR NON-LAWYERS?

It is accepted that developing countries have limited financial resources. Prioritization is a mechanism often employed to allocate the available assets under these circumstances, but it often leads to the exclusion of deserving cases and the perpetuation of a system of compartments. More often than not it is argued that the cases that fall outside the ambit of legal aid are simple cases,⁴⁵ but this is not a proper response. They are simple because they are handled superficially. A total of 1 201 clients consulted the

⁴⁴ University of Port Elizabeth Law Clinic *Annual Report 2003* (2004) 5.

⁴⁵ Bellow 4.

university legal aid clinic in 2003, but only 338 files were opened (28%) as “a file is not necessarily opened for every client ... since many ... problems can be solved by, for example, telephone calls”.⁴⁶ It is true that many problems can be resolved by making a phone call, but how would it be known whether the matter could not have been more adequately protected if there were time to investigate the facts or research the issues?⁴⁷

A study in Uganda⁴⁸ as well as the key informant interviews referred to above, reveal that there is an express need for an accessible structure or office that would facilitate the utilization of legal aid services. One visit to the Justice Centre in Port Elizabeth by a resident from Motherwell, for example, could require the equivalent of one day’s income for a pensioner. It is therefore not surprising that people may elect not to pursue their rights. The survey also made it clear that many people don’t know of any legal aid providers in their area, even where these, and some providers are aware of this,⁴⁹ but a lack of resources prevents them from making the availability of their services known. In Uganda the need to use existing local government structures was seen to be instrumental in affecting access to services.

Lawyers, magistrates, courts and prisons are often perceived to be the key elements of a legal system, but more often than not, non-lawyers act as the unrecognized, unsung legal resources for their communities. They may be paralegals with specialized training or they may be ordinary residents in a particular community who use the law to collectively or individually help themselves.⁵⁰

In South Africa, law students and paralegals are allowed to provide limited legal aid. This approach increases opportunities for expanding legal aid services, but the possibilities it holds have not been utilised to its full extent. Each tertiary institution receives a subsidy from the state. In view of the acute need for legal aid services, some form of restitution should be considered. A period of service at a local government or advice office under the supervision of academics or practitioners should be considered. In *Argersinger v Hamlin*⁵¹ the judge was of the opinion that students who were allowed to act as legal representatives under academic supervision, positively impacted qualitatively as well as quantitatively on the legal needs of the poor.

It is trite that paralegals have a prominent role to play in augmenting measures to improve access to justice. In Ontario, Canada, for example, the first community legal workers were recruited to provide in-depth knowledge of the specific communities and to bridge the gap between the legal

⁴⁶ University of Port Elizabeth Law Clinic *Annual Report 2003* (2004) 5.

⁴⁷ Bellow 4.

⁴⁸ Legal Aid Service Provider’s Network (LASP-NET) *Access to Justice for All: Report on the Baseline and Needs Analysis Survey on Legal Aid Provision in Uganda* (2004) 34.

⁴⁹ Mr Dolf Coetzee, director of the University Legal Aid Clinic in the Nelson Mandela Metro identified this as a key shortcoming in the provision of legal aid services in the area they serve.

⁵⁰ Golub “Non-lawyers as Legal Resources for Their Communities” in McClymont and Golub (eds) *Many Roads to Justice* (2000) 297 <http://fordfound.org/publications>.

⁵¹ 407 US 25 (1972).

profession and low-income individuals.⁵² Creating a network of community-based volunteer paralegals will extend the reach of legal services into communities. Experience has shown that there are several important aspects of paralegal development that should be borne in mind.⁵³ Firstly, training should be provided and the training should be specific, centering on aspects that are crucial in the communities in which they operate. The focus can be on educating and helping women, land related matters, the urban poor, *etcetera*. Secondly, they should be properly organised. Thirdly, in-depth training should be provided for extended and repeated periods. Finally, there should be ongoing contact with greater sources of expertise.

Another indispensable element that seems to be declining in importance in the South African legal aid scheme is the involvement of the professions. A high level of state involvement and the contribution of the organised legal profession have been identified as prerequisites for a more or less effective system.⁵⁴ The growth of legal aid and the shift in the methods of delivery appear to have resulted in the marginalization of the professions. The following table serves to illustrate.⁵⁵

Delivery system	Total new matters 2003/4	Total new matters 2002/3	% new matters 2003/4	% new matters 2002/3	% increase/decrease in new matters
Justice Centre new matters	236 282	114 189	78	53	107
Judicare matters	46 613	87 178	16	41	-47
Co-operation partners new matters	17 244	13 113	6	6	32
Total	300 139	214 480	100	100	40

Private attorneys can, and should, help to address the unmet legal needs of indigent people in many ways and it is important that the rift that developed between legal aid and the professions be healed. Members of the professions are resources that are currently under-utilised and a number of models have been developed to facilitate their involvement in *pro bono* work.⁵⁶

⁵² Zemans *Community Legal Workers in Ontario* (2005). Paper prepared for the *International Conference on Legal Aid* presented by the Institute for Sustainable Government and Development of the Nelson Mandela Metropolitan University, the Association of University Legal Aid Clinics and the SA Legal Aid Board in Port Elizabeth, South Africa, 6-8 April 2005.

⁵³ Golub 304.

⁵⁴ Blankenburg "Comparing Legal Aid Schemes in Europe" 1992 11 *Civil Justice Quarterly* 106 119.

⁵⁵ Legal Aid Board *Annual Report 2003/2004* (2004) 19.

⁵⁶ Goldstein, McGough, Murphy and Rose *Improving Access to Justice: Legal Services Funding and Private Bar Involvement in Public Interest Lawyering Around the World* (2000).

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- *A central contact point* where central coordinating points are established. Existing programmes continue to operate independently, but the central contact point refers organizations and individuals to the most appropriate outlet for the required service. The agency does not provide direct legal services and typically it receives inquiries and makes referrals, students are involved and it develops information on the range of services offered by affiliates which include lawyers.
 - *A central clearinghouse*⁵⁷ that allows clients to go to a single source for legal assistance. This model would accept and assess applications for assistance, deal with what it can and refer those it cannot handle. It also focuses on promoting *pro bono* work within the legal profession and general public, monitors quality and provides training to affiliates.
 - *An advisory committee* that is created to allow for the development and implementation of a coordinated approach to legal aid services delivery. This model allows for programmes to remain independent, but affiliated service providers meet regularly to discuss common issues of concern. The committee may consist of representatives of major *pro bono* programmes, legal aid societies, community law centres, the organised professions and non-legal organizations. Typical functions may include the provision of a forum to discuss policy issues and the exchange of ideas, coordinating the establishment of a network of non-legal experts, promoting *pro bono* work within the professions, and collecting and publishing statistical data.

Sight must not be lost of the fact that members of the legal profession have always regarded it as a moral obligation to render gratuitous legal services in deserving and needy cases.⁵⁸ In 1935 the Law Society of the Transvaal was, for example, instrumental in the first attempt to establish an organised legal aid system in South Africa. A moral rejuvenation is necessary and it is here that academic institutions can play a significant role in bringing all the stakeholders together.

The objects of the Legal Aid Board are to render or to *make available* legal aid to indigent persons as *widely as possible* within its financial means, to provide legal representation at State expense as contemplated in the Constitution and to provide legal services in terms of any co-operation agreement that may be in force.⁵⁹ These objectives place a daunting responsibility on the shoulders of the Board and, in a civil context, are capable of being interpreted in a number of ways. Firstly, attempts to try and give every person a little bit of help should be stopped. Effectively, prioritization achieved this and it is strengthened by the recognition that Justice Centres and Judicare will never be able to satisfy the demand and that the present system cannot cope with the volumes.⁶⁰ Has the time not

Paper read at a conference *Partnerships Across Borders: A Global Forum on Access to Justice*, New York City, 6-8 April 2000.

⁵⁷ Examples include New York Lawyers for the Public Interest and the Public Interest Law Clearinghouse in Australia.

⁵⁸ Cook "A History of Legal Aid in South Africa" in University of Natal *Legal Aid in South Africa* (1974) 28.

⁵⁹ Legal Aid Guide 4.

⁶⁰ Bellow 4.

come to recognize that thousands of problems that are experienced by the poor and almost poor on a daily basis could be handled as well by trained laymen as by lawyers? Every day the poor give up on having to complete forms, negotiate agreements, express grievances, challenge decisions that affect their lives, or fight bureaucracy, because they have no access to any form of legal advice and assistance. Much of this could be undertaken by non-lawyers – legal technicians – trained to address the problems experienced by the poor and almost poor within their various communities.

Recent studies in England and Wales showed that lawyers are not the most important sources of advice, with about 24% of the respondents seeking assistance from those quarters,⁶¹ and that it is incorrect to assume that non-lawyer services are cheaper because they are inferior.⁶² A client satisfaction survey showed that non-lawyer clients were more satisfied that their advisers knew the right people to speak to, paid attention to their emotional concerns and generally showed more empathy. Genn's research demonstrates that people need help with knowledge and advice about how to respond to common legal problems, such as obligations, rights, remedies and procedures for resolving justiciable problems.⁶³ The pervasive lack of the most basic knowledge about legal rights and procedures for enforcing or defending rights, or the impossibility to access rudimentary knowledge, can lead to a high and unnecessary level of helplessness. The study⁶⁴ has shown that about half of those interviewed in the survey who dealt with their problem without advice and assistance eventually abandoned the matter. This demonstrates the need for advice and assistance in enforcing rights and defending claims. The Ugandan⁶⁵ study revealed that in the case of advice giving and referral, many respondents consider it important that the service provider should do follow-ups or carry out checks. In the survey under discussion, a key informant, when asked about client satisfaction, responded as follows: "We refer them and they don't come back, so they must be satisfied". This clearly illustrates the need for following up.

Key informant interviews conducted with regional office staff of the SA Legal Aid Board, Justice Centre staff and employees at the university legal aid clinic reveal the following attitudes toward non-lawyer involvement:

- Closer collaboration with existing structures may open opportunities to provide education on human rights.
- They would be willing to provide training.
- There should be closer contact with the municipality as the sphere of government closest to the people as it can provide a good indicator of legal needs. This would assist with the customization of services.
- Increased use of students could alleviate the burden on Justice Centre staff.

⁶¹ Genn 83.

⁶² Moorhead, Paterson and Sherr "Contesting Professionalism: Legal Aid and Non-lawyers in England and Wales" 2003 37 *Law & Society Review* 765 784.

⁶³ Genn 255.

⁶⁴ Genn 250.

⁶⁵ See fn 40 above.

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- All the stakeholders working with legal aid should be clustered in order to co-ordinate the rendering of services and to improve communication.
 - Private practitioners should contribute part of their time to render services for free.
 - The Legal Aid Board should improve on the number of points of contact it has with the public.

The attitude displayed by the key role players in the primary system of service delivery is one of collaboration, inclusivity and a resistance to keeping the ball close to the chest. It is obvious that they are not jealously guarding their turf and that the time is ripe to extend the scope and methods of legal aid service delivery to include all available resources.

9 CONCLUSION

Use of the ward committee system has the potential to enhance disadvantaged peoples' access to justice, or at least to what they perceive to be justice, by increasing their capacity to use legal processes. They can also strengthen the implementation of laws by applying informed pressure on government bodies, they can bring previously unheard voices into local decision-making processes and they can contribute to the establishment or increase of a culture of rights-awareness.⁶⁶ Experiences in other developing countries, such as Kenya, China, Namibia and Bangladesh, have shown that paralegal activity, widespread legal awareness and the use of strategies such as community organising can help disadvantaged groups become more cohesive and active in addressing legal problems and related issues. Apart from assisting disadvantaged groups to become more legally self-sufficient, they can help to fill the legal void that exists as a result of the absence of lawyers and government programmes aimed at addressing their needs. Their effectiveness is also enhanced because they are in touch with community dynamics.

Key informants expressed the need for a network of legal aid providers and a forum where they can network among themselves and other key stakeholders. Such a structure will supplement and strengthen the services rendered by the providers of secondary legal aid services as well as improve relations between legal aid providers, local government and the police. Local government can no longer afford to evade its duties as far as access to the law and legal aid services are concerned. Its constitutional obligations include the promotion of economic and social development and the promotion of a safe and healthy environment,⁶⁷ whilst its developmental duties include the obligation to structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community. In view of this and in view of the pressing needs that exist, there is no reason why local governments should not support legal aid through specific budget allocations.

⁶⁶ Golub 298.

⁶⁷ S 152(1) of the Constitution of the Republic of South Africa Act 108 of 1996.

The use of the ward committee structure has the potential to create formal networks among legal aid providers and linkages with government departments where a large percentage of the problems experienced by the poor are capable of being solved. These networks could start out by sharing best practices, developing partnerships with departments within local government and by establishing proper referral systems with a follow-up procedure in place. Ward committee offices have the potential to amount to the launching of a system that could be equated with the "neighbourhood law firms" that established themselves in the USA in the 1960's.⁶⁸ This resulted in decentralized service delivery and maximum contact with the less fortunate segments of society. Eventually, this led to the professionalization of a class of lawyer who has the rendering of legal services to the poor as a primary function.⁶⁹

When establishing these offices, care must be taken that the mistakes made in the USA are not repeated. It must not be assumed that the provision of legal aid services to the poor is separate from the general problem of unavailability of legal services to others in low-income areas and the rest of the country.⁷⁰ It is understandable that the initial focus should be on the poorest of the poor, but the problems of the disadvantaged cannot be defined in terms of the destitute alone. There are millions of "almost poor" who cannot afford the services of attorneys. In terms of the current means test, only genuinely indigent people qualify to benefit from legal aid. The current threshold is R600 per month for single persons and a joint income of R1 200 per month for married persons.⁷¹ The means test calculation relates to the total financial situation of the parties, taking aspects such as property ownership into consideration. This may well exclude a large percentage of the needy.

We should not lose sight of the fact that, in South Africa, many of those who are destitute own property. The government's drive to deliver housing to the poor results in increased home ownership and thus in exclusion from legal aid. Experience from the "great sales campaign" in the mid-1980's, when municipal houses were sold off for as little as R500, has shown that ownership more often than not leads to legal problems as the responsibilities that go with it are often new experiences. Increased home ownership, coupled with the steep rise in property prices, has put civil legal aid beyond the reach of a large part of society.

Everything points towards the fact that the services rendered by the principal suppliers of legal aid (the Legal Aid Board and the university law clinics) in the metro are supply driven (assistance in criminal matters and divorce) and not needs driven. When the legal aid scheme in England and Wales was set up after the Second World War, it reflected the interests of the legal profession.⁷² The Law Society administered the funds, and it

⁶⁸ Stumpf and Janowitz "Judges and the Poor: Bench Responses to Federally Financed Legal Services" 1969 21 *Stanford LR* 1058 1059.

⁶⁹ Menkel-Meadow "Legal Aid in the United States: The Professionalization and Politicization of Legal Services in the 1980's" 1984 22 *Osgoode Hall LJ* 29 31.

⁷⁰ Bellow 2.

⁷¹ Legal Aid Guide 152.

⁷² Moorhead *et al* 2003 37 *Law & Society Review* 772.

focused on the strongholds of private practice such as divorce and crime. Although the role of the legal professions in South Africa diminished quite severely in recent years, the application of legal aid funding still reflects a proclivity for its mainstays (crime and divorce) and not necessarily that of society.

The South African Legal Aid Board is, to a large extent, measuring its success in terms of the number of people represented, but legal representation is merely one of a number of elements of access to justice. Each element comprises various components that need to be integrated to ensure that individuals enjoy effective access to justice, which has been described as:

“The most basic requirement – the most basic ‘human right’ – of a modern egalitarian legal system which purports to guarantee and not merely proclaim the legal rights of all.”⁷³

This approach requires a total strategy and the coordination of a number of activities, including the expanded use of paralegals and the creation of legal technicians as a form of legal aid practitioner that can satisfy the basic legal needs of people as expressed by them. Reality is far removed from the standard set in *Gideon v Wainwright*.⁷⁴ Serious consideration should be given to the role that legal technicians can play in the provision of legal services. Such technicians can be described as persons who possess the necessary training and skills to handle specified legal matters up to a certain level. A technician must *know* certain things and be able to *do* others. The latter aspect is one that is often neglected by universities.

Sight must also not be lost of the fact that the current network of almost 80 legal clinics in Ontario, Canada, began through the initiative of lawyers, legal academics and community leaders who were committed to providing adequate access to justice.⁷⁵ The proposed model, involving local government through the ward committee/ward councillor system displays all the elements that eventually resulted in the Ontarian system as it is today:

- The Justice Centres employ lawyers and should be augmented by mandatory *pro bono* work by members of the professions. Financial contributions should be accepted in lieu of time in exchange for the market privileges that are enjoyed.
- The Nelson Mandela Metropolitan University has a well-established law faculty.
- The ward councillors are the acknowledged, elected community leaders who are under increased political pressure to perform. Using this structure will provide an additional 54 access points within the metropole. These offices may qualify for donor funding such as the support provided by the International Commission of Jurists (Swedish Section) through the AULAI Trust.

⁷³ Cappelletti *Access to Justice* (1978) 9.

⁷⁴ 372 US 335 (1963).

⁷⁵ Zemans 2.