

SOME REFLECTIONS ON THE IMPACT OF THE CONSTITUTION ON LEGAL AID IN SOUTH AFRICA 1994-2014

David McQuoid-Mason, President, Commonwealth Legal Education Association, Professor of Law, Centre for Socio-Legal Studies, University of KwaZulu Natal, Durban, South Africa

In 1969 the South African Legal Aid Board (now Legal Aid South Africa) was established but it only began operating a national legal aid scheme in 1971. Under the apartheid regime, in its early years, the legal aid scheme spent most of its very limited budget on civil matters involving mainly the minority white population. The South African system was modeled on the original United Kingdom scheme and used referrals to private lawyers as the method of delivery.

During the apartheid era the national legal aid budget was gradually increased and the emphasis changed from civil cases to criminal. Throughout this period the method of delivery remained the judicare model. With the introduction of a democratic Constitution in 1994 and a right to legal aid in certain criminal cases there was an unprecedented demand on the services of the scheme. The majority of the beneficiaries of the scheme were black accused persons who could not afford the services of lawyers.

The huge demand for legal aid in criminal cases following the introduction of South Africa's first democratic Constitution caused the administration of the judicare system to break down. Expenditure on lawyers' fees under the system also began to escalate out of control. The scheme was compelled to consider other models of delivery. Pilot projects were established to consider different ways of using salaried lawyers. In the end it was decided to move towards a public defender model that included both qualified lawyers in public defender offices and law intern public defenders attached to State funded law clinics. Eventually a more holistic approach to legal aid services was adopted and justice centres have been set up. These include the two public defender models as well as para-legals and legal aid officers. The present scheme also enters into cooperation agreements with 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 clients the latter are referred to private lawyers.

1. Introduction

The South African Legal Aid Act¹ states that the objects of the Legal Aid Board (now Legal Aid South Africa) are to “render or make available legal aid to indigent persons and to provide legal representation at state expense as contemplated in the Constitution” – without defining legal aid but specifically referring to “legal representation”.² Although the Act does not define “legal aid” it is trite that legal aid includes legal advice, assistance and representation. Legal Aid South Africa, has also recognized that it should “focus on a constitutional rights awareness and training programme for our communities as this is neglected”.³

In order to assess the effectiveness of the legal aid system in South Africa over the past 20 years since the introduction of the country's first democratic Constitution, a number of factors need to be considered, including: (a) the structure of the legal profession, (b) the provisions of the Constitution; (c) the structure of the legal aid scheme; (d) the available budget; and (f) the models of delivery used. Each of these will be discussed in turn.

¹ Legal Aid Act No. 22 of 1969.

² Section 3 of the Legal Aid Act.

³ Legal Aid South Africa *Annual Report 2009-2010* (2010) 8.

2. Structure of the legal profession

South Africa has a divided legal profession consisting of attorneys (similar to British solicitors), and advocates (similar to British barristers), with the occasional fusion of the two. For instance, it is now possible for certain attorneys to appear in the High Court – where previously this was reserved for advocates. As in the UK, while about 90% of practising lawyers are attorneys, about 10% are advocates.⁴ In 2011 it was estimated that the South African legal profession consisted of approximately 20 000 practising attorneys⁵ and more than 2 000 practising advocates⁶ who served over 50 million people.

The university law schools in South Africa produce more than 4 000 law graduates annually,⁷ of whom it is estimated about half do internships either as pupil advocates or candidate attorneys so that they can be admitted to practice. Many of the remaining law graduates go into government service or become in-house counsel for large commercial enterprises. The numbers have remained fairly constant over the years. All law graduates in South Africa wishing to practice as advocates who are members of a bar council or attorneys have to undertake an internship either as pupil advocates or candidate attorneys⁸ beforehand.⁹

The vast majority of the 19 university law schools in the country have law clinics, and this together with the large pool of law graduates required to undertake apprenticeships with qualified lawyers, enables law students and law graduate interns to play a valuable role in assisting the national legal aid body with the delivery of legal aid services.¹⁰

3. Constitutional provisions

⁴At the end of the apartheid era in 1994 85% of the legal profession were white and 15% black, while 85% of the population was black (David J McQuoid-Mason “The Delivery of Civil Legal Aid Services in South Africa” (2000) 24 *Fordham International Law Journal (Symposium)* S 111).

⁵D Dewar “Too many attorneys? Oversubscription to the attorneys’ profession” (2011) 509(6) *De Rebus* 19.

⁶www.advocatesa.co.za (accessed on 6 January 2014).

⁷Legal Education and Development (LEAD) of Law Society of South Africa *Statistics: Universities* (Unpublished) (2010) 24.

⁸Candidate attorneys also have to attend an approved practical training course (Attorneys Act of 1979 s 2). Such courses vary from five month full-time practical training schools to part-time five week short courses (Law Society of South Africa *Practical Legal Training: Courses 2002* (2002) 1 and 11). In addition, both aspiring attorneys and advocates who wish to join a bar council must pass national admission examinations.

⁹*Ibid.*

¹⁰See below paras 6.4, 6.5 and 6.10.

The South African Constitution¹¹ guarantees everyone not only access to impartial and independent courts,¹² but also to legal aid services - particularly in respect of criminal cases and breaches of fundamental rights. These provisions have had a major impact on the criminal justice system.

3.1 Legal aid in criminal cases

The South African Constitution provides that indigent arrested and detained¹³ or accused persons¹⁴ must be provided with legal representation by the State “if substantial injustice would otherwise result”.

The sections in the South African Constitution providing for legal aid services to arrested and detained persons and accused persons, state that such persons have the right “to have a legal practitioner assigned to the accused by the State, and at State expense” where “a substantial injustice would otherwise result.”¹⁵ The Constitutional Court has interpreted this to mean that an accused is not entitled to be represented by a legal representative of his or her choice at State expense.¹⁶

The Constitutional Court has also stated that the factors that should be taken into account when interpreting “if substantial injustice would otherwise result” are: (a) the complexity of the case in fact and in law; (b) the “personal equipment” of the accused to fend for himself or herself; and (c) the gravity of the case, the nature of the alleged offence, and the possible consequences for the accused if convicted.¹⁷

These provisions of the Constitution impacted strongly on the demand for legal representation in the criminal justice system: It was estimated in 1992 that 150 890 convicted persons were sentenced to periods of imprisonment without legal representation, while the then Legal Aid

¹¹ Constitution of the Republic of South Africa of 1996.

¹² Section 34 of the Constitution of South Africa.

¹³ Section 35(2) of the Constitution of South Africa.

¹⁴ Section 35(3) of the Constitution of South Africa.

¹⁵ Sections 35(2) and (3) of the Constitution of South Africa.

¹⁶ *S v Vermaas, S v Du Plessis* 1995 (3) SA 292 (CC). It has been suggested, however, that where possible there is no reason why the State should not attempt to accommodate the choice of the detainee, arrested or accused person (Etienne du Toit “Criminal Procedure” in Mathew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz and Stewart Woolman (eds) *Constitutional Law of South Africa* (1996) 27-5.).

¹⁷ These guidelines had been provided by Didcott J in *S v Khanyile* 1988 (3) SA 795 (N) 815. Later as a member of the Constitutional Court Didcott J suggested that these criteria could be applied to the constitutional right to counsel in criminal cases: *S v Vermaas; S v du Plessis* 1995 (3) SA 292 (CC).

Board provided defences for 43 228 accused persons.¹⁸ In 1993, immediately before the first democratic elections, the Board estimated that in the regional courts about 60% of 82 408 accused persons were unrepresented, while in the district courts, where 671 177 criminal trials were heard, about 89% of accused persons were unrepresented.¹⁹

Since democracy in 1994, the number of unrepresented accused fell dramatically due to the influence of the constitutional right to legal representation in criminal matters. Thus during 1996-1997 the Legal Aid Board provided 123 983 criminal defences,²⁰ and by 2002-2003 the Board estimated that it was providing defences in about half the total number of criminal cases in the country.²¹ During the period 2006-2007 the Board provided 279 691 criminal defences.²² By 2011-2012 the number of new criminal cases handled by Legal Aid South Africa (formerly the Legal Aid Board) had risen to 382 125,²³ and by 2012-2013 to 383 567.²⁴

4.2 Legal aid in civil cases

Unlike in criminal cases, there is no mention in the Constitution of a specific right to legal representation at the expense of the State in civil cases - except in the case of children where a special duty is imposed on the State to provide legal aid in civil cases “where substantial injustice would otherwise result”.²⁵ The result is by 2012-2013 still only 13% of cases handled by Legal Aid South Africa were civil.²⁶

The Constitution, however, does provide that “[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing in a court or, where appropriate, another independent and impartial forum.”²⁷ It could be argued therefore, that for there to be “a fair public hearing” in all civil cases where “substantial injustice would otherwise result” if no legal representation was granted to an indigent party, such a right should be implied. The “equality of arms” interpretation adopted by the European Court could be use

¹⁸ Legal Aid Board *Annual Report 1991-92* (1993).

¹⁹ Legal Aid Board *Annual Report 1994-5* (1996) 28.

²⁰ Legal Aid Board *Annual Report 1996-7* (1999) 23.

²¹ Legal Aid Board *Annual Report 2002-3* (2004) 7.

²² Legal Aid Board *Annual Report 2006-2007* (2007) 24.

²³ Legal Aid South Africa *Annual Report 2011-2012* (2012) 57.

²⁴ Legal Aid South Africa *Annual Report 2012-2013* (2013) 27.

²⁵ Section 28(1)(h).

²⁶ Legal Aid South Africa *Annual Report 2012-2013* (2013) 27. The actual number was 55 277 out of 438 844 cases (ibid).

²⁷Section 34.

used to argue strongly that such a duty should lie on the State.²⁸

4. Structure of the legal aid scheme

Initially the South African legal aid system operated by using the *judicare* method of referring legal aid clients to private lawyers,²⁹ rather than the salaried lawyer approach.³⁰ With the advent of democracy this changed.

As previously mentioned, the South African Legal Aid Board was set up in 1971 "to render or make available legal aid to indigent persons".³¹ Legal Aid South Africa (previously the Legal Aid Board) carries out its mandate in terms of the Legal Aid Act by establishing a set of rules that are incorporated in a *Legal Aid Guide*.³² The *Guide* provides for LASA's resolutions to be carried out under the supervision of its Chief Executive Officer. During the early 1970's most of the then Legal Aid Board's budget was spent on civil matters such as divorces and personal injury claims at the expense of criminal cases. Since 1994, however, an ever decreasing amount has been spent on civil matters and the vast majority of expenditure has been earmarked for criminal cases, particularly after the first interim democratic Constitution³³ came into effect.

Legal Aid South Africa mainly relies on public defenders, but it recognises the need for to employ lawyers on a *judicare* basis. The latter are paid for their work and Legal Aid South Africa, in consultation with the two branches of the legal profession, sets a tariff of fees for attorneys and advocates. It also prescribes a "means test" for legal aid applicants that is adjusted from time to time. The means test has been simplified to allow eligible legal aid applicants to earn up to R5 000 (about \$500) a month or less for single or estranged persons or a total of R5 500 (about \$550) for married couples.³⁴ In cases where the applicant does not

²⁸ *Airey v Ireland* ECHR (1979) Series A, No 32; 2 EHRR 305 314-5; cf Carol Harlow "Access to Justice as a Human Right: The European Convention and the European Union" in Philip Alston (ed) *The EU and Human Rights* (1999) 203-4.

²⁹ See below para 6.2.

³⁰ See below para 6.3. During its early years most of the Legal Aid Board's budget was spent on civil matters such as divorces and personal injury claims at the expense of criminal cases. In recent years, however, an ever decreasing amount has been spent on civil matters and the vast majority of expenditure has been earmarked for criminal cases, particularly after the first interim democratic Constitution (Constitution of the Republic of South Africa 200 of 1993 s 25) came into effect.

³¹ Section 3 of the Legal Aid Act 22 of 1969.

³² Legal Aid South Africa *Legal Aid Guide 2009* 11 ed (2009).

³³ Constitution of the Republic of South Africa 200 of 1993 s 25.

³⁴ Legal Aid South Africa *Legal Aid Guide 2009* 11 ed (2009) paras 5.1.4 and 5.1.5.

qualify, the legal aid officer must refer the person to another suitable government department or other institution.

The Board of Legal Aid South Africa 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 national legal aid scheme, and not more than six additional members appointed by the President of the Republic in consultation with the cabinet.³⁵

Legal Aid South Africa is based in Johannesburg and during 2011-2012 had 64 justice centres and 64 satellite offices in the main cities and towns in the country.³⁶ Legal Aid South Africa generally provides legal aid in all cases where the assistance of a legal practitioner is normally required, but has a list of restrictions in both criminal³⁷ and civil cases³⁸.

³⁵ Section 20 s 4(1)(g)).

³⁶ Legal Aid South Africa *Annual Report 2011-2012* (2012) 59

³⁷ In criminal cases, the phrase "if substantial injustice would otherwise result" in terms of the Constitution is interpreted in the *Legal Aid Guide* as taking place if: (a) a person cannot afford legal representation; (b) without legal representation would be imprisoned, or has the possibility of being sentenced, to direct imprisonment of more than 3 months; and (c) if given the option of a fine, the fine is or would remain unpaid 2 weeks after the date of sentence. (Legal Aid South Africa *Legal Aid Guide 2009* 11 ed (2009) para 4.1). In criminal appeals, an accused gets legal representation when (a) sentenced to an effective term of imprisonment of more than 3 months and if given the option of a fine, the fine is unpaid 2 weeks after the date of sentence, and (b) he or she is unable to afford legal representation. (*Legal Aid Guide* para 4.1).

³⁸ In civil matters, except in the case of children under 18 years, "where a substantial injustice would otherwise result" legal aid is not provided: (a) for financial enquiries in debtors courts proceedings; (b) for the administration estates and insolvency cases; (c) in actions for damages on the grounds of defamation, breach of promise, infringement of dignity, invasion of privacy, seduction, adultery or inducing someone to desert or stay away from another's spouse – (but legal aid may be granted to defend these actions); (d) for any action which may be instituted in the Small Claims Court or where the amount of the claim does not exceed the quantitative jurisdiction of the Small Claims Court (at present R15 000 (about US\$1 500)) by more than 50%; (e) where the Justice Centre Executive (JCE) is satisfied on a balance of probabilities that are insufficient prospects of success, enforcement and costs; (g) in matters where, in the opinion of the JCE, there is no substantial and identifiable material benefit to the client – except in burial disputes, Equality Court and impact litigation matters; (h) in civil appeals unless the National Operations Executive (NOE) is satisfied on a balance of probabilities that there is a chance that the appeal will succeed and the costs of the appeal will justify the benefit to the legal aid applicant; (i) in cases excluded by Legal Aid South Africa from time to time; (j) in cases in which, in the opinion of the JCE, the benefit or the potential benefit to the client does not justify the anticipated costs of the case; (k) in cases where a claim has prescribed or is unlikely to be acted on within the time left before prescription and where condonation is unlikely to be obtained; (l) in conveyancing and notarial matters – where applicants should be sent to the relevant law society for *pro bono* assistance; (m) in *judicare* cases legal aid is not available for any non-litigious matter, including any arbitration or mediation – this exclusion does not apply to justice centres or cooperation partners, labour matters or land disputes regarding tenancy or evictions under specific legislation; (n) in civil cases where the applicant is already entitled to legal representation at State expense (e.g. the State Attorney or a government department); (o) Road Accident Fund and personal injury claims – except where it involves children – such cases can be taken on contingency basis by private lawyers; and (p) where a client has unrealistic expectations of what can be achieved or awarded through winning a case (*Legal Aid Guide* para 4.9.1). Persons who are denied civil legal aid in divorce matters may apply to the registrar of the high court for assistance by way of *in forma pauperis* proceedings in terms of rule 40 of the Uniform Rules of Court. When providing legal aid in civil matters LASA must be satisfied that the case has prospects of success on a balance of probabilities and depends on the availability of resources where substantial

5. Available budget

The size of the budget for legal aid in any country is not only dependent upon the economic wealth of the country but also on the political will of the government. In South Africa the then Legal Aid Board was grossly under-funded in its early years, when the apartheid government was not really committed to legal aid. However, during the 1990s as the country moved towards democracy funding by the State increased dramatically, particularly after the new democratic dispensation.³⁹

There is a special line item allocated by Parliament in the Ministry of Justice budget for legal aid. For the year 2010-2011 Parliament allocated R1,1 billion⁴⁰ (about \$110 million) to Legal Aid South Africa, or an amount of about \$2,20 per head for each member of South Africa's approximately 50 million people.⁴¹ The total Justice Budget for the year was R10,2 billion⁴² (\$1 billion) or 1,2% of the total Budget for the country of R818,1 billion⁴³ (\$81,8 billion). Thus legal aid accounted for 10.8% of the Justice Budget or 0,1% of the total Budget in 2010-2011.

6. Models for delivery of legal aid services

South Africa has experimented with a wide variety of models for the delivery of legal aid services over the years, including: (a) *pro bono* legal aid work; (b) State-funded *judicare* or referral to private

injustice would otherwise result (*Legal Aid Guide* para 4.1). A legal aid applicant who is refused legal aid by a JCE has a right of appeal to the Regional Office Executive (ROE). The JCE must inform the applicant of this right. An applicant who wishes to appeal must set out the grounds in writing and submit them to the JCE who must forward them to the ROE (*Legal Aid Guide* para 6.2.1). A legal aid applicant whose appeal is refused by the ROE may appeal to the NOE (*Legal Aid Guide* para 6.2.2).

³⁹The exponential increase from R66.3 million in 1994-5 to nearly 17 times that amount by 2010-2011, is almost solely due to the effect of the Board (now Legal Aid South Africa) acting as the agent of the State in respect of its Constitutional legal aid obligations. 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 then Board in terms of the Constitution (*Legal Aid Board Report on Activities* (1996) A5). By 2010-2011, the amount allocated to Legal Aid South Africa had increased to R1,1 billion (about US\$110 million) (*Legal Aid South Africa Annual Report 2011-2012* (2012) 94), and by 2012-2013 to R1,2 billion (about US\$120 million) (*Legal Aid South Africa Annual Report 2012-2013* (2013) 117).

⁴⁰*Legal Aid South Africa Annual Report 2011-2012* (2012) 94.

⁴¹ This compares with the *per capita* expenditure on legal aid in England and Wales of \$59 (39 Pounds) and in New Zealand of \$27 (18 Pounds) for 2010 (Ministry of Justice (UK) *International Comparisons of Public Expenditure on Legally Aided Services; Ad Hoc Statistics Note* (2011) 3). In 2008 England and Wales spent \$59 (39 Pounds) *per capita*; Scotland \$47 (31 Pounds); Spain and France each \$8 (5 Pounds); and Portugal \$5 (3 Pounds) (Ministry of Justice *International Comparisons* op cit 7). In the same period LASA in South Africa was granted R613 million (then about \$77 million for 49 million people) or about \$1,6 *per capita* (based on figures in *Legal Aid South Africa Annual Report 2008-2009* (2009) 77).

⁴² Department of Justice and Constitutional Development *Annual Report 2010/11* (2011) 7.

⁴³ Editors Inc. *South Africa at a Glance 2010-2011* 16 ed (2011) 119.

lawyers; (c) State-funded public defenders; (d) State-funded interns in rural law firms; (e) State-funded law clinics; (f) State-funded justice centres; (g) State-funded impact litigation units; (h) State-funded legal advice telephone services; (i) privately funded public interest law firms; (j) university law clinics; and (k) privately funded para-legal advice offices.

6.1 *Pro bono* legal aid work

Most lawyers claim to do formal or informal *pro bono* or *pro amico* work. However, although *pro bono* legal aid work may be used to supplement State-funded legal aid services, it is not a substitute for them. Legal aid lawyers should be paid for their services, and in democratic countries the duty to pay for such services rests with the State.⁴⁴ In South Africa there has been a long tradition of lawyers doing some *pro bono* or *pro amico* work.⁴⁵ However, for years this was not mandatory. The Cape Law Society was the first provincial law society in South Africa to make *pro bono* work compulsory for its members,⁴⁶ and *pro bono* rules have been adopted by law societies and bar councils throughout the country. There is, however, little evidence of them being enforced.⁴⁷

South Africa is a good example of why a legal aid scheme cannot be run on *pro bono* services alone. An attempt was made in 1962 to set up a national legal aid scheme based on *pro bono* work by attorneys and advocates. The Department of Justice negotiated with the advocates' and attorneys' professions to provide free legal service to persons referred to them by local legal aid committees set up at every lower court.⁴⁸ The system never worked because it was not properly advertised, there was too much red tape, and more importantly because members of the profession were not paid for their services.⁴⁹

Legal Aid South Africa concedes that more should be done regarding *pro bono* services,⁵⁰ and has been in discussions with the Law Society of South Africa (the umbrella body governing the attorneys profession) and the General Council of the Bar (the umbrella organization for the

⁴⁴However, the American Convention on Human Rights seems to contemplate legal aid services being provided *pro bono* where it refers to "counsel provided by the State, paid or not" in article 8.2.e (see above para 3.2.2).

⁴⁵GW Cook "A History of Legal Aid in South Africa" in Faculty of Law, University of Natal *Legal Aid in South Africa* (1974) 28.

⁴⁶For instance, the Cape Law Society in South Africa governs the attorneys profession in the Western Cape, Eastern Cape and Northern Cape provinces.

⁴⁷D Holness "Recent developments in the provision of *pro bono* legal services by attorneys in South Africa" (2013) 16(1)129 137.

⁴⁸Cook op cit 31-32.

⁴⁹PH Gross *Legal Aid and its Management* (1976) 176-177.

⁵⁰Legal Aid South Africa *Annual Report for 2009-2010* (2010) 8.

advocates profession), regarding the provision of *pro bono* legal aid services by attorneys and advocates.⁵¹ A non-governmental organization ProBono.org, acts as a clearing house for requests regarding *pro bono* work, and has arrangements with hundreds of attorneys' law firms and practicing advocates in a several of the provinces to provide such services.⁵²

6.1.1 Lessons learned

Pro bono schemes if supported by the legal profession, can encourage public service by legal practitioners, and are also cheap to administer. However, *pro bono* clients may not receive the same level of service as paying clients, and many lawyers are reluctant to take on *pro bono* cases. Even if *pro bono* work is mandatory for the profession some lawyers may “buy out” the time they would be required to devote to them, as sometimes happens in the United States.⁵³ The South African experience demonstrates that an effective national legal aid scheme cannot exist unless lawyers are properly paid for delivering legal aid services.⁵⁴

6.2 State-funded judicare or referral to private lawyers

During its early years the then Legal Aid Board relied exclusively on the British model of judicare or referrals to private lawyers who are paid for their services at fixed tariffs.

With the introduction of a democratic Constitution⁵⁵ and a justiciable Bill of Rights, there was a devastating effect on the ability of the then Legal Aid Board to continue using the judicare model. The huge increase in the demand for criminal legal aid defences meant that the Board became notionally bankrupt and had to revise its strategies concerning the delivery of legal aid services.

In the period from 1971-2 to 1997-8, a total of 997 707 legal aid cases were referred to attorneys, of which the vast majority involved criminal matters. Of these 559 238 were referred after 1994-5 and the advent of the new Constitution. This means that the number of legal aid applications granted during the five year period 1994-5 to 1997-98 constituted 56% of all legal aid applications handled

⁵¹ Legal Aid South Africa *Annual Report for 2008-2009* (2009) 33.

⁵² See www.probono.org.za (accessed on 18 January 2014).

⁵³ See Justice Earl Johnson Jr “Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies” (2000) 24 *Fordham International Law Journal (Symposium)* S 83.

⁵⁴ David McQuoid-Mason “Lessons from South Africa for the Delivery of Legal Aid in Small and Developing Commonwealth Countries” (2005) 26(2) *Obiter* 219.

⁵⁵Section 35.

by the Board during the previous 27 years.⁵⁶ The overall increase during the period 1989-90 to 1998-9 was 709%.⁵⁷ In sharp contrast, since 2008-2009 Legal Aid South Africa has been handling over 400 000 cases annually.⁵⁸ Thus in 2012-2013 the figure was 484 844 cases.⁵⁹

The exponential growth in the number of judicare cases in respect of criminal matters eventually led to the abandonment of the judicare model as the main method of delivering legal aid services by the then Board.⁶⁰ It introduced a pilot public defender programme in 1990⁶¹ and a pilot Board-funded law clinic public defender scheme in 1994.⁶²

6.2.1 Lessons learned

The judicare system worked in South Africa when the number of cases was comparatively few and the then Legal Aid Board had the resources to handle them administratively. This meant that there had to be adequate staffing and administrative structures to support the system; proper accounting systems to deal with claims for fees and disbursements expeditiously; and budget constraints that kept pace with demand. When the centralized staffing establishment could no longer keep pace with the demands of practitioners for payment within a reasonable period of time the referral system broke down.⁶³ As a result of pilot projects testing the cost of public defenders and law clinic public defender interns the Board decided to opt for a predominantly public defender model involving justice centres,⁶⁴ with judicare being used as an additional method of delivery in areas where there

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

⁵⁷Ibid.

⁵⁸Legal Aid South Africa *Annual Report 2008-2009* (2009) 19; Legal Aid South Africa *Annual Report 2011-2012* (2012) 56.

⁵⁹Legal Aid South Africa *Annual Report 2012-2013* (2013) 27.

⁶⁰See below para 6.3. During the period 1997-8 private attorneys were paid for completing 105 732 cases of which 87 469 (83%) involved criminal cases and 17% civil matters. The latter involved 14 156 divorce (13%), 3 617 (3.5%) other civil cases and 490 (0.5%) labour cases. The average cost per case finalised by the Legal Aid Board during the same period was R864 (about \$108) a case for ordinary criminal matters, R1 707 (about \$213) for Constitutional criminal matters, and R1 498 (about \$187) a case for civil matters under the judicare system. The average cost of all judicare cases was R1 423 (about \$178) (Legal Aid Board *Legotla: Overview of the Board and its Activities* (Unpublished) (November 1998) 8).

⁶¹Legal Aid Board *Annual Report 1991/92* 32-3.

⁶²See below para 6.5.

⁶³New computer systems were installed at the then Legal Aid Board head office, but on a daily basis the incoming new accounts exceeded the number of old accounts that the staff were physically able to process. This resulted in 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. In some instances lawyers sued the Board for outstanding fees. The need to build up a huge contingency fund to cover amounts owing by the Board for matters that had not been completed compounded the problem and was criticized by the Auditor-General. In order to effect savings the Board capped fees for criminal cases and this alienated the legal profession (McQuoid-Mason (2000) 24 *Fordham International Law Journal* (Symposium) S 121).

⁶⁴See below para 6.6.

are no justice centres or the latter could not handle cases for logistical or ethical reasons.⁶⁵

The South African experience is that if judicare is to be retained as part of the legal aid system it is best to use a fixed contract approach where the annual fees to be paid to participating partners is capped. This has been done with the cooperative agreements entered into between Legal Aid South Africa and public interest law firms and university law clinics.⁶⁶ In developing countries judicare is likely to remain the preferred way of delivering legal aid services particularly in the small towns and villages that have lawyers, but there may be scope to try a public defender approach in the larger towns.⁶⁷

6.3 State-funded public defenders

By 1990 in South Africa the then Legal Aid Board was virtually insolvent, and as a result of widespread discussions with a variety of lawyer associations, the Board persuaded the Minister of Justice to authorise a pilot State-funded public defender system and to appropriate R2.5million (about \$625 000 at the time) for this purpose. This enabled the Board to employ legally qualified persons to represent indigent accused. Initially a pilot State-funded public defender office in Johannesburg was approved for two years.⁶⁸ Subsequent estimates that each public defender would be able to deal with approximately 200 district court criminal cases a year proved to be correct.⁶⁹

During an extension of the public defender pilot project in 1995 it was estimated that the average cost of a judicare criminal case was R822 (then about \$103), the average cost of a public defender criminal case R555 (then about \$69),⁷⁰ and the average cost of a State-funded law clinic cases even less.⁷¹ The pilot public defender project was considered a success by the Board and a permanent

⁶⁵McQuoid-Mason (2000) 24 *Fordham International Law Journal (Symposium)* S 121-S 122.

⁶⁶See below paras 6.9 and 6.10.

⁶⁷David McQuoid-Mason "Lessons from South Africa for the Delivery of Legal Aid in Small and Developing Commonwealth Countries" (2005) 26(2) *Obiter* 221.

⁶⁸Legal Aid Board *Annual Report 1991/92* 32-3.

⁸²DJ McQuoid-Mason "Public Defenders and Alternative Service" (1991) 4 *SACJ* 267 270. 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 (*Business Day* 2 November 1992). During 1993-4 the office provided legal representation for 2 808 accused persons, while during 1995-6 it represented 3 794 (Legal Aid Board *Annual Report 1995/96* (1997) 27).

⁷⁰Legal Aid Board *Annual Report 1995/96* (1997) 27

⁷¹See below para 6.5.

public defender office was established.⁷² Since then public defenders, together with law intern public defenders,⁷³ have been included in Legal Aid South Africa's justice centres⁷⁴ as an integral component of its work.

6.3.1 *Lessons learned*

Public defender models are generally regarded as cheaper than the judicare system,⁷⁵ and the South African experience has shown that justice centres that combine public defenders with intern public defenders can be established for a modest annual *per capita* expenditure on legal aid by the State.⁷⁶ Therefore, in developing countries justice centres incorporating public defenders and intern public defenders, could probably be established in the larger cities and towns and supplemented by judicare in the other areas.⁷⁷

6.4 State-funded legal aid interns in rural law firms

In 1995 the then Legal Aid Board, in partnership with Lawyers for Human Rights, established a pilot project in which private attorneys in selected rural towns were given funding by the Board to employ candidate attorney interns to do legal aid work. The participating law firms were assisted with the payment of the salary of the candidate attorneys. Lawyers for Human Rights identified suitable attorneys and monitored the progress of the project. The candidate attorneys handled at least 10 new legal aid matters a month for the Board and performed community service one day a week.⁷⁸ The project worked very well. It not only expanded legal aid services in rural areas, but also enabled formerly disadvantaged persons to be employed in the legal profession in the areas where

⁷²In 1996-7 the public defender offices in Johannesburg and Soweto employed 31 staff members who approved 3 515 applications for legal aid and finalised 3 386 court cases. The offices handled 23 appeals and withdrew from 1 069 cases (Legal Aid Board *Annual Report 1996/97* (1999) 23.).

⁷³ See below par 6.5.

⁷⁴ See below par 6.6.

⁷⁵ It has been suggested that this may not be the case in the United Kingdom and Canada but this seems to be against the trend in other countries.

⁷⁶ Assuming that e.g. \$2 *per capita* can be regarded as modest – see note 55 above for comparative *per capita* expenditure by some European countries and New Zealand.

⁷⁷ David McQuoid-Mason "Lessons from South Africa for the Delivery of Legal Aid in Small and Developing Commonwealth Countries" (2005) 26(2) *Obiter* 222.

⁷⁸ During 1996-7 two projects involving eight candidate attorneys were in operation (Legal Aid Board *Annual Report 1996/7* (1999) 21). The work of the legal aid interns mainly involves criminal cases, but they also undertake civil cases such as divorce. For instance, during 1997-1998 the interns in four rural law firms completed 400 criminal cases and 73 civil cases. (These calculations were made by the 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).

they lived.⁷⁹

6.4.1 *Lessons learned*

The South African experience is that the legal aid internship model involving partnerships between the State-funded legal aid body and private practitioners to employ young lawyers is very cost effective. It is much cheaper to supplement the salaries of candidate attorneys in rural law firms than to establish justice centres and satellite offices⁸⁰ in areas where there is a limited demand for legal aid services.⁸¹ Law graduates who are required to serve an apprenticeship with qualified lawyers can enhance legal aid services in developing countries with internship requirements and rural populations.⁸²

6.5 State-funded law clinics

In South Africa State-funded law clinics were established by the then Legal Aid Board to employ law graduate interns as public defenders in the district criminal courts. The clinics proved to be an efficient and cost effective method delivering legal aid services.⁸³ They also provide practical training and access to the legal profession for aspiring young lawyers.

In 1993 the South African Attorneys Act⁸⁴ was amended to allow candidate attorneys with the necessary legal qualifications to obtain practical experience by undertaking community service rather than serving articles in an attorney's office.⁸⁵ Community service may be done at Legal Aid South Africa's justice centres, public interest law firms or law clinics accredited by provincial law

⁷⁹Legal Aid Board *Annual Report 1995/96* (1996) 24.

⁸⁰See below para 6.6.

⁸¹Legal Aid Board *Annual Report 1996/7* (1999) 21

⁸² See generally, David McQuoid-Mason "Lessons from South Africa for the Delivery of Legal Aid in Small and Developing Commonwealth Countries" (2005) 26(2) *Obiter* 223.

⁸³The Board calculated that the average cost of the 24 513 criminal and 12 997 civil cases handled by the law clinics during the pilot period 1 July 1994 to 31 December 1996 was R433 (then about \$108). This included the costs for clinics that had only just been established. Ultimately the cost per case was estimated at much less for the established clinics - about R350 or then about \$87,50 per case (Legal Aid Report *Monthly Report* (4 February 1997)). This was less than half of the average cost of R976 (then about \$244) per case charged under the judicare system during the same period, 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%) civil. (Calculations by present writer based on statistics in Legal Aid Board *Legotla: Delivery of Legal Aid by way of Salaried Staff Models, Public Defenders, Attorneys and Candidate Attorneys as at 30 October 1998* (unpublished) (November 1998) 1-5). This figure compared favourably with the 18 263 civil cases done under the judicare scheme for the same period at probably twice the cost (Legal Aid Board *Legotla: Overview of the Board and its Activities* (Unpublished) (November 1998) 8.).

⁸⁴Act 53 of 1979.

societies, including clinics funded by Legal Aid South Africa. 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 and professional assistants in the regional and high courts. Interns who have been articulated for more than a year as apprentices to a qualified attorney employed by Legal Aid South Africa may also appear in the regional courts. Candidate attorney interns may be employed to do community service at a maximum ratio of ten interns to one supervising attorney,⁸⁶ as opposed to maximum ratio of articulated clerks to supervising attorneys in private law firms which is three clerks to one attorney.⁸⁷

In 1994, the then Legal Aid Board established a pilot project involving partnerships between it and five university law clinics to test the efficacy of a State-funded law clinic public defender programme. The project was regarded as a success. It was extended to 22 university and other law clinics, and the Board allocated up to R430 000 (then about \$107 000) per clinic to enable them to employ a supervising attorney and up to ten community service interns each.⁸⁸ Most of the State-

⁸⁵ Act 115 of 1993 s 2.

⁸⁶ Legal Aid Board *Annual Report 1996/7* (1999) 20. The former first Chief Justice of a democratic South Africa, Arthur Chaskalson, suggested that compulsory community service for law graduates could help solve the problem of delivery of legal aid to poor sections of the community, particularly in respect of criminal cases (Arthur Chaskalson “Legal Interns could solve Legal Aid Problems” *De Rebus* December 1997 782. The present writer had previously made a similar suggestion as an alternative to national service when conscription still applied in the country: DJ McQuoid-Mason “Public Defenders and Alternative Service” (1991) 4 *SACJ* 267). The suggestion was greeted with some hostility in an editorial in the official journal of the attorneys’ profession, which warned that representation by interns and para-legals “could be of such inferior quality that, in the worst cases, it would not satisfy the constitutional right to representation”(Editorial “Legal Aid Again: The Profession should not be Sidelined” *De Rebus* April 1998 5). It went on to say: “The legal aid system should not be used as an avenue to allow disadvantaged students to have access to the profession: that is not its purpose” (Ibid). The question of whether South African law graduates should be required to undertake compulsory community service, (as is the case for all university graduates in Nigeria – see David McQuoid-Mason “Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council” (2003) 47 *Journal of African Law* 107-116), was raised at the 1998 National Legal Aid Forum. The concept was discussed by a working commission on internship and training at the National Legal Aid Forum in 1998 which recommended that (a) community service should be introduced to improve the administration of justice, primarily to provide legal aid services; (b) the question of whether it should be compulsory (like medical internships) or voluntary should be further investigated; (c) community service should be primarily in the form of work in law clinics, public defender’s offices and public interest law firms; (d) community service should be for not less than one year after graduation; (e) an independent body should be set up to control the enrolment and training of community service interns; (g) community service interns should receive proper training before providing services to the public; (h) the question of whether community service should replace all other forms of internship should be investigated; and (i) a pilot project on a voluntary basis should be introduced (David McQuoid-Mason “National Legal Aid Forum, Kempton Park, 15-17 January 1998: Working Commission Recommendations” (1999) 12 *SACJ* 48 54-57). Since then the Ministry of Justice has re-examined the entry requirements for the legal profession, including the issue of community service (cf Department of Justice Legal Policy Unit *Transformation of the Legal Profession* (Issue Paper, First Draft) (unpublished) (1999) 8), and as a result Parliament recently passed the Legal Practice Act No 28 of 2014. Section 29 of the Act deals with community service but the rules for its implementation have not yet been promulgated.

⁸⁷ Attorneys Act 53 of 1979 s 3(3).

⁸⁸ Where the nature of the work demanded it some clinics employed eight interns and two qualified professional

funded law clinics have since moved from the universities and have been incorporated into the Legal Aid South Africa justice centres.⁸⁹

6.5.1 *Lessons learned*

State-funded law intern public defender programmes provide expanded legal aid services at a moderate cost to needy members of the public, and develop expertise, practical experience and career opportunities for aspiring young lawyers. The model also provides employment for young law graduates wishing to render community service to their country. The South African experience is that provided the interns are properly trained and supervised, their standard of service in the lower courts can match those of qualified attorneys, or privately employed candidate attorneys, because of their specialized knowledge in the conducting of criminal cases.⁹⁰ There may be scope for similar programmes in other countries with similar apprenticeship requirements or national youth service programmes.⁹¹

6.6 State-funded justice centres

Legal Aid South Africa has established a national network of justice centres or “one stop legal aid shops” in order to prevent legal aid applicants being sent from pillar to post to obtain assistance. Justice centres operate similarly to legal aid law firms that have developed elsewhere,⁹² except that they are fully State-funded and staffed by salaried lawyers and administrative staff in the employ of the organisation. The justice centres bring together under one roof legal aid officers, public defenders, law clinic intern public defenders, professional assistants, supervising attorneys, paralegals, administrative assistants and administrative clerks. The qualified public defenders deal with criminal cases in the regional courts and high courts.⁹³ Law clinic interns do both civil and criminal

assistants instead of ten interns so that the professional assistants could appear in the regional (senior) magistrate’s courts (Legal Aid Board *Annual Report 1996/7* (1999) 20).

⁸⁹See below para 6.6.

⁹⁰See generally, David McQuoid-Mason “Lessons from South Africa for the Delivery of Legal Aid in Small and Developing Commonwealth Countries” (2005) 26(2) *Obiter* 225.

⁹¹For instance, the suggestion that Nigerian law graduates in the National Youth Service Corps programme could be seconded to the Legal Aid Council to assist as public defenders (David McQuoid-Mason “Legal Aid in Nigeria: Using National Youth Service Corps Public Defenders to Expand the Services of the Legal Aid Council” (2003) 47 *Journal of African Law* 107-116), has been implemented in a number of Nigerian states on a pilot basis.

⁹²See generally Eleventh Annual Philip D Reed Memorial Issue Symposium “Partnerships across Borders: A Global Forum on Access to Justice: April 6-8 2000” (2000) 24 *Fordham International Law Journal (Symposium)*.

⁹³Regional courts can impose fines of up to R300 000 (about \$46 000) and imprisonment of up to 25 years (Magistrates’ Courts Act 32 of 1944).

work in the district courts.⁹⁴ Professional assistants appear in the regional courts. Supervising attorneys appear in the high courts and the regional courts. Para-legals assist with the initial screening of clients. Administrative assistants and clerks provide the necessary administrative back-up, and private lawyers are only used if the justice centre cannot handle a case⁹⁵ because of a conflict of interest, lack of expertise or for some other reason.

The smaller towns and villages are served by satellite offices under the supervision of the nearest justice centre, and are usually staffed by a couple of paralegals. The para-legals do the initial screening of legal aid clients regarding the means test and the nature of the client's problem; give basic advice or refer clients to other agencies; enter client details in the office data base; visit prisons; and conduct community outreach legal literacy workshops. In addition there are one or two public defenders and intern public defenders, who operate on a circuit basis out of the justice centre in the nearest large town.⁹⁶

The establishment of justice centres and their satellite offices is justified in the larger cities and towns, but not in the rural areas where there is insufficient work to justify the expense of a satellite office. In such circumstances, another model, such as previous cooperation agreements between the then Legal Aid Board and rural law firms,⁹⁷ and the present cooperation agreements between Legal Aid South Africa and public interest law firms,⁹⁸ the independent law clinics,⁹⁹ and para-legal advice offices,¹⁰⁰ are more feasible.

6.6.1 *Lessons learned*

The South African experience is that the justice centres are significantly more cost effective than the judicare system once the initial start-up costs have been factored in. Justice centres are not as cheap to run as public defender and intern public defender law clinics that have very low overheads because they focus primarily on criminal work, but they provide legal aid applicants with a user-

⁹⁴District courts can impose fines of up to R100 000 (about \$15 333) and imprisonment of up to 3 years (Magistrates' Courts Act 32 of 1944).

⁹⁵See McQuoid-Mason (2000) 24 *Fordham International Law Journal (Symposium)* S 126.

⁹⁶David McQuoid-Mason 'Legal Aid Approaches in South Africa and their Impact on Poverty Reduction and Service Delivery' in Stephen Golub, John Berry and Kate Epstein (eds) *Legal Empowerment* (2013) 98 99.

⁹⁷See above para 6.4.

⁹⁸See below para 6.9.

⁹⁹See below para 6.10

¹⁰⁰See below para 6.11.

friendly ‘one stop shop’.¹⁰¹

6.7 State-funded impact litigation units

Impact litigation units focus on public interest law cases. Legal Aid South Africa maintains an impact litigation unit to deal with certain types of public interest litigation. The unit only takes on cases that affect large numbers of people, with a special focus on: (a) child-headed households and AIDS orphans; (b) women; (c) the rural poor; (d) the landless and farm workers; and (e) socio-economic rights of the poor. Specialist cases requiring expertise not available in the Legal Aid South Africa impact litigation unit are outsourced through cooperation agreements with public interest law firms such as the Legal Resources Centre (LRC).¹⁰² The LRC provides legal aid for class actions and public interest cases and engages in related forms of legal lobbying and advocacy.¹⁰³

6.7.1 *Lessons learned*

The Legal Aid South Africa impact litigation unit enables the legal aid body to bring about systemic changes in the law by challenging or enforcing certain aspects of the law affecting large numbers of people. Legal Aid South Africa has not attempted to “reinvent the wheel”, and where there is a capable and effective independent public interest law firm that specializes in the area of the law concerned (such as the LRC), it enters into cooperation agreements with such a firm instead of trying to conduct cases less effectively through its own impact litigation unit.

6.8 State-funded telephonic legal aid advice service

Legal Aid South Africa provides a legal aid advice line at its head office which responds to the “gap in reaching the poor and specifically the rural poor, by allowing them access to primary legal advice on the phone without having to travel to a justice centre of satellite office”.¹⁰⁴ The advice line is staffed by trained paralegals under the supervision of a qualified lawyer. When a call comes in it is

¹⁰¹See McQuoid-Mason (2000) 24 *Fordham International Law Journal (Symposium)* S 126- S 127. For instance, the South African Legal Aid Board has calculated that during 2002 after establishing 26 justice centres it was able to save R114,6 million (about \$15 million) or about a third of its budget compared with the cost of judicare (Legal Aid Board *Annual Report 2002* (2003) 10). See David McQuoid-Mason “Lessons from South Africa for the Delivery of Legal Aid in Small and Developing Commonwealth Countries” (2005) 26(2) *Obiter* 226.

¹⁰² See below para 6.9.

¹⁰³ David McQuoid-Mason “Legal Aid Approaches in South Africa and their Impact on Poverty Reduction and Service Delivery” in Stephen Golub (ed) *Legal Empowerment* (2013) 99-100.

taken by a para-legal who, where necessary, consults with the lawyer before giving the advice. All calls are monitored and logged into LASA's electronic data base.¹⁰⁵

6.8.1 *Lessons learned*

The Legal Aid South Africa legal aid advice line ensure that persons in conflict with the law - especially arrested and accused persons - obtain proper pre-trial advice to safeguard their interests so that they obtain a fair trial. The service is cost effective because it is staffed by para-legals who are properly trained and supervised. The supervisors are present to deal with any situations that require urgent advice and assistance that are beyond the capabilities of the para-legals concerned.

6.9 Public interest law firms

The most widely respected public interest law firm in South Africa is the Legal Resources Centre (LRC), the first of which was established in Johannesburg in 1979.¹⁰⁶ Since then the LRC has assisted millions of disadvantaged South Africans either as individuals or as groups or communities who share a common problem. The LRC used litigation and the threat of litigation to advance the rights of thousands of disadvantaged South African in several areas of the law during the apartheid era. The LRC has also worked with networks of advice centres staffed by para-legals.¹⁰⁷ After the 1994 democratic elections, the LRC reassessed its position and has focused on constitutional rights and land, housing and development.¹⁰⁸ The LRC charges no fees and receives no direct State funds. It is financed by the Legal Resources Trust which receives money from overseas and local donors. The LRC, together with the then Association of University Legal Aid Institutions, (AULAI),¹⁰⁹ (now the South African University Law Clinic Association (SAULCA)), took the lead in

¹⁰⁴ Legal Aid South Africa *Annual Report 2009-2010* (2010) 11.

¹⁰⁵ Legal Aid South Africa *Annual Report 2009-2010* (2010) 26; cf David McQuoid-Mason "Legal Aid Approaches in South Africa and their Impact on Poverty Reduction and Service Delivery" in Stephen Golub (ed) *Legal Empowerment* (2013) 100.

¹⁰⁶ At present there are six centres that are located in Johannesburg, Cape Town, Port Elizabeth, Grahamstown, Durban and Pretoria (Legal Resources Centre *Annual Report* (1996) 25).

¹⁰⁷ Legal Resources Centre *Annual Report* (1996) 9.

¹⁰⁸ 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 (Legal Resources Centre *Annual Report* (1998) 4; cf McQuoid-Mason (2000) 24 *Fordham International Law Journal (Symposium)* S 128). An important part of the LRC programme is the training of para-legals and lawyers from disadvantaged communities. It employs 12 to 15 young law graduates each year and trains interns from elsewhere in Africa and the developing world (Legal Resources Centre *Annual Report* (1998) 7).

encouraging Legal Aid South Africa to enter into cooperative agreements with independently funded organizations to extend legal services to previously marginalized parts of the country.¹¹⁰

6.9.1 Lessons learned

Public interest law bodies such as the LRC provide a valuable supplement to legal aid services for the poor and marginalised. The LRC has highly professional staff and receives strong foreign and local donor-based financial support. It also receives support from leading lawyers in the country as well as the judiciary and enjoys an excellent national and international reputation. The LRC has responded to the changing dynamics of South African society by shifting its emphasis since the advent of democracy from civil and political rights to socio-economic rights.¹¹¹ Cooperation agreements between Legal Aid South Africa and the LRC has meant that the national legal aid body has managed to fund a number of high profile public interest law cases in areas of the law where it does not have the necessary expertise in its impact litigation unit.¹¹²

6.10 University law clinics

Most of the 19 universities that have law faculties in South Africa operate campus law clinics independent of the State-funded law clinics,¹¹³ and employ directors who are practising attorneys or advocates. Where the director is a practising advocate or attorney, the law clinic may seek accreditation from the local law society. If granted and if the director is a practicing attorney who has practiced for at least three years, law graduates may serve their apprenticeships as candidate attorneys there and may be trained at these institutions before being admitted to practice.¹¹⁴

Funding for law clinics is provided by the universities as well as outside donors. The Attorneys Fidelity Fund¹¹⁵ subsidizes accredited legal aid clinics by providing funds equivalent to what is

¹⁰⁹See below para 7.8.

¹¹⁰See generally McQuoid-Mason (2000) 24 *Fordham International Law Journal (Symposium)* S 127- S 128.

¹¹¹ See David McQuoid-Mason “Lessons from South Africa for the Delivery of Legal Aid in Small and Developing Commonwealth Countries” (2005) 26(2) *Obiter* 228.

¹¹² David McQuoid-Mason “Legal Aid Approaches in South Africa and their Impact on Poverty Reduction and Service Delivery” in Stephen Golub (ed) *Legal Empowerment* (2013) 100-101.

¹¹³DJ 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.

¹¹⁴ Attorneys Amendment Act 115 of 1993 s 2.

¹¹⁵The 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.

required to employ a practitioner (attorney or advocate) to control the clinic.¹¹⁶ In the late 1990s AULAI (now SAULCA) set up the AULAI Trust with an endowment from the Ford Foundation to strengthen the funding of law clinics in the country.¹¹⁷ The Trust now provides funding mainly for national meetings and workshops for SAULCA, as well as for the development of training materials for its law clinic members. SAULCA also acts as a conduit for funding from donors to provide training and back-up services for para-legal advice offices by law clinics.¹¹⁸

In South Africa law clinics provide free legal services to the needy and use Legal Aid South Africa's means test as a flexible guideline. Professionally qualified law clinic staff may represent clients in the lower and high courts in both criminal and civil matters.¹¹⁹ Candidate attorneys serving apprenticeships in the clinics may represent clients in the district courts. Law students may not represent clients in court. Student practice rules for law clinic students were drafted in 1985, (at the request of the then Association of Law Societies of South Africa), to enable final year law students attached to law clinics to appear in criminal cases for indigent accused in the district courts. However, these were never implemented. The same happened under the post-apartheid dispensation despite the first Minister of Justice in the newly formed democratic government expressing an interest in reviving them.¹²⁰

¹¹⁶DJ McQuoid-Mason "The Organisation, Administration and Funding of Legal Aid Clinics in South Africa" (1986) 1 *NULSR* 189 193.

¹¹⁷Stephen Golub "Battling Apartheid, Building a New South Africa" in Ford Foundation *Many Roads to Justice* 38.

¹¹⁸ See below para 6.11.

¹¹⁹Since 1994 the South African legal aid clinics have continued to deal with poverty law problems, some of which such as housing, the quality of police services and social security have continued as a result of non-delivery by the new government (Constitution of the Republic of South Africa Act 200 of 1993 s 236(2)). Several clinics have begun to focus more on constitutional issues. At the University of KwaZulu-Natal, Durban, for instance, the law clinic specializes in problems concerning women and children, administrative justice and HIV/AIDS. However, the majority of clinics still engage in general practice. Fewer restrictions are being imposed by the law societies and candidate attorneys may do their mandatory internships as community service in accredited law clinics. As has been previously mentioned the Attorneys Act 53 of 1979 s 2 (1A) (b) was amended by s 2 of Act 115 of 1993 to allow aspiring attorneys to "perform community service approved by the society concerned" - provided that the person who engages them is practising the profession of attorney, *inter alia*, "in the full-time employment of a law clinic, and if the council of the province in which that law clinic is operated, certifies that the law clinic concerned complies with the requirements prescribed by such council for the operation of such clinic" (s 3(1)(f)).

¹²⁰ The Student Practice Rules for South Africa were 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 to the Association of Law Societies of South Africa in April 1985 for onward transmission to the then Minister of Justice. Although the rules were approved by all branches of the practising profession and the law schools they appear to have been blocked by bureaucrats in the Department of Justice. The same seems to have happened under the new democratic order. See generally, D McQuoid-Mason "Whatever happened to the proposed student practice rules?" (2008) 41(3) *De Jure* 580-595.

As previously mentioned¹²¹ approximately 4 000 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 40 000 criminal accused.¹²²

University law clinics play a valuable role in supplementing the work of the national legal aid body.¹²³ Legal Aid South Africa has entered into cooperation agreements with several university law clinics in which it compensates them for handling a certain number of cases a year – mainly civil cases. However, only one percent of all the cases handled by Legal Aid South Africa are done by cooperation partners, including law clinics.¹²⁴

Thirty five years ago the role that law clinics can play in developing countries in Africa was described as follows:

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.¹²⁵

6.10.1 Lessons learned

The university law clinics in South Africa play a valuable role in assisting legal aid litigants to compel the governments to deliver in terms of their constitutional obligations, including the right to counsel. Legal Aid South Africa enters into cooperation agreements with only a few university law clinics. There needs to be many more such agreements between the national legal aid body and the university law clinics, as this will not only improve the accessibility of legal aid services to the

¹²¹See above para 2.

¹²²Cf. 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.

¹²³See generally, John C Mubangizi and David J McQuoid-Mason 'The role of university law clinics in public interest litigation, with specific reference to South Africa' (2013) 38 (1) *JJS* 46-66.

¹²⁴Legal Aid South Africa *Annual Report 2012-2013* (2014) 26 .

¹²⁵J Reyntjens in FA Zemans (ed) *Perspectives on Legal Aid* (1979) 36. The statement is still true today. The value of using properly supervised law students to deliver legal services has also been recognized as fulfilling the requirement of a constitutional right to counsel by the United States Supreme Court which stated: "Law students can be looked to make a significant contribution, qualitatively and quantitatively, to the representation of the poor in many areas": *Argersinger v Hamlyn* S Ct 2006 (1979). See generally McQuoid-Mason (2000) 24 *Fordham International Law Journal (Symposium)* S 131.

poor, but will also help to make the law clinics more financially viable.¹²⁶

6.11 Para-legal advice offices

In South Africa a variety of organisations are involved in para-legal advice work. Many of these organisations also provide access to justice by educating the public about their legal rights, as well as training para-legals to give advice.¹²⁷ Some bodies concentrate in urban areas, while others focus on rural areas.¹²⁸ Services are provided at a variety of levels ranging from advice only to providing full legal aid services. Organisations such as the Community Law and Rural Development Centre (CLRDC) have helped rural communities to establish para-legal committees to select certain community residents for training as para-legal advisers and educators.¹²⁹

¹²⁶ See David McQuoid-Mason “Lessons from South Africa for the Delivery of Legal Aid in Small and Developing Commonwealth Countries” (2005) 26(2) *Obiter* 230.

¹²⁷ In the past training of para-legal staff has varied from formal training offered by Lawyers for Human Rights at Rhodes University, and the Community Law and Rural Development Centre at the former University of Natal, 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 Legal Resources Centre, Lawyers for Human Rights and the Community Law and Rural Development Centre, Durban, 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 Legal Aid South Africa's offices or to a sympathetic law firm. Para-legals are also being included in Legal Aid South Africa's justice centres and in Legal Aid South Africa's cooperative agreements. (See generally McQuoid-Mason (2000) 24 *Fordham International Law Journal (Symposium)* S 131-S133).

¹²⁸ Para-legal advice offices are particularly useful in rural areas. A good example of a rural para-legal advice office was the Community Law and Rural Development Centre (CLRDC) in Durban which was established at the then University of Natal in 1989 to set up a network of rural para-legal advice offices and to do law-related education. It served a rural population of about one million living in the provinces of KwaZulu-Natal and the Eastern Cape and promoted the attainment and maintenance of democracy through development of a rights-based culture in which all levels of government were expected to honour their obligations and be accountable to their citizens (see McQuoid-Mason (2000) 24 *Fordham International Law Journal (Symposium)* S 134.). At its height the CLRDC supervised 56 rural para-legal advice offices in communities that were governed by customary law and ruled by tribal authorities who had no formal training and were expected to administer communities and issues of traditional customary law in a manner that may conflict with "Western law" and the new Constitution (Community Law and Rural Development Centre *Annual Report for the Financial Year 1 January to 31 December 2000* (2001) 10). However, as a result of a number of key donors withdrawing from South Africa after the initial transition to democracy the number of CLRDC paralegal advice offices has fallen to about 30.

¹²⁹ The para-legals underwent two full-time two month programmes on law-related topics, including customary law and human rights, after which they did one year practical training in their communities under the supervision of the CLRDC staff (Community Law and Rural Development Centre *Annual Report for the Financial Year 1 January to 31 December 2000* (2001) 10.). At the end of the course the successful candidates were issued with a diploma by the Faculty of Law, University of Natal, Durban. Other para-legal university certificate courses are run at Rhodes University, the University of Johannesburg and North West University, Potchefstroom. Unfortunately, recently the government has discouraged universities that are not “comprehensive universities” (former technical training colleges merged with traditional universities), from offering undergraduate diploma courses by not allocating State universities with a funding subsidy for such courses, but they are still being offered at some traditional universities on a self-funded basis. The CLRDC also provides continuing legal education for para-legals who have already completed the programme. Apart from giving advice the para-legals are required to conduct law-related workshops in their communities. For instance, in 2010 CLRDC para-legals conducted 182 such workshops for 22 620 rural people (David McQuoid-Mason “Legal Aid Approaches in South Africa and their Impact on Poverty Reduction and Service Delivery” in Stephen Golub (ed) *Legal Empowerment* (2013) 102).

The National Association for the Development of Community Advice Offices (NADCAO) has been established to assist with the development and funding of 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. NADCAO works closely with SAULCA and the AULAI Trust in a project in which the latter acts as a financial conduit for donors to fund training and legal back-up for clusters of advice offices supported by the law clinics at the different universities.¹³⁰ Legal Aid South Africa recently signed a cooperation agreement with NADCAO and hopes that this will expand its networking with non-governmental organisations and community-based organisations. The latter are local, sometimes informal, associations comprising community residents, women, farmers, or other groups.¹³¹

6.11.1 *Lessons learned*

Para-legal advice offices in South Africa complement conventional lawyer-based legal aid service schemes. They are located where communities make their first contact with the law and can play a valuable role in screening initial legal complaints and referring potential litigants to lawyer-based services. Para-legals should be paid for their services and properly trained. In order to achieve this, para-legal offices should be adequately funded. This can be done in part by integrating them into the national legal aid scheme.¹³²

7. **Conclusions and recommendations**

7.1 **Conclusions**

The following conclusions can be drawn regarding the development of legal aid services in South African during the past 20 years:

¹³⁰ See above para 6.10.

¹³¹ David McQuoid-Mason “Legal Aid Approaches in South Africa and their Impact on Poverty Reduction and Service Delivery” in Stephen Golub (ed) *Legal Empowerment* (2013) 102.

¹³² See David McQuoid-Mason “Lessons from South Africa for the Delivery of Legal Aid in Small and Developing Commonwealth Countries” (2005) 26(2) *Obiter* 232. In the past the then Legal Aid Board recognized the important role played by para-legals by incorporating cluster arrangements involving advice offices and university law clinics into its cooperation agreements with the law clinics. Donor funding may still be available for such initiatives as part of the recent focus by the World Bank and United Nations on Legal Empowerment of the Poor (see World Bank Commission for the Legal Empowerment of the Poor *How to Make Law Work for Everyone* (2008)). The South African initiatives began with funding by the International Commission of Jurists (Swedish Section) for clinics that undertook to support clusters of advice offices through the Association of University Legal Aid Institutions Trust (AULAI Trust). Some of

- 7.1.1 The delivery legal aid services in South Africa has been influenced by the structure of the legal profession, the provisions of the Constitution, the nature of the national legal aid structures, the financial resources available, and the political will of the government.
- 7.1.2 Prior to 1994 the judicare approach whereby clients are referred to State-funded private lawyers was used to deliver the bulk of legal aid services, but as the demand for criminal legal aid services increased exponentially as a result of the new Constitution it became too expensive and too difficult to administer.
- 7.1.3 Pilot projects indicated that a public defender system and the use of intern public defenders consisting of apprenticed law graduates, were a much more cost effective of delivering legal aid services in South Africa.
- 7.1.4 As a result of the pilot projects Legal Aid South Africa introduced a network of justice centres and satellite offices that combine public defenders, intern public defenders and para-legals to provide a convenient ‘one stop shop’ for legal aid applicants.
- 7.1.5 The use of judicare by Legal Aid South Africa has been dramatically reduced since 1994, it is still used where no justice centre lawyers are available or there would be a conflict of interest if only the justice centre lawyers were used.
- 7.1.6 Legal Aid South Africa has been entering into cooperation agreements with university law clinics, public interest law firms and para-legal advice offices to assist with the delivery of legal aid services, particularly in civil cases, but this constitutes a very small percentage of its work.

7.2 Recommendations

Much has been achieved in the provision of legal aid since 1994, but much still remains to be done to enlarge the footprint of legal aid services in South Africa, particularly in respect of civil matters

these initiatives have since been taken over by other funders.

and in rural areas.¹³³

The following recommendations are made:

- 7.2.1 Legal aid in civil matters should be increased to more than the present 13% of Legal Aid South Africa's work. Access to justice in this respect could be achieved without increasing the burden of the legal aid budget by lifting the current limit on the small claims courts' monetary jurisdiction from R15 000 (about US\$1 500) to R50 000 (about US\$5 000) as the high costs of legal fees makes it is no longer worth litigating in the courts for such amounts.¹³⁴
- 7.2.2 More use needs to be made of law graduates and law clinic students by introducing student practice rules for properly trained and supervised graduates and students.¹³⁵
- 7.2.3 Law students and graduates should be obliged to do community service in law clinics, justice centres or Street law programmes.¹³⁶
- 7.2.3 Paralegals funded by Legal Aid South Africa should be placed at every traditional chief's place in rural areas to: (a) advise the chiefs on new developments in the law; (b) educate communities on the law; (c) provide legal advice to people living in rural areas; and (d) to refer legal aid applicants to appropriate legal aid providers.¹³⁷
- 7.2.4 Paralegals should be given a limited right of appearance in bail applications and for arguments in mitigation of sentence in cases involving unrepresented accused persons in rural areas where no lawyers are available.¹³⁸
- 7.2.5 The amount allocated by Parliament for legal aid in criminal cases should be commensurate with the amount allocated for the salaries of prosecutors in regional court cases where a substantial injustice would result if the accused were not provided with legal representation at state expense.¹³⁹
- 7.2.6 The Legal Aid Act should be amended to provide for "intermediaries" based on the

¹³³ See generally, David McQuoid-Mason 'Challenges in increasing access to justice in the next decade' in Marita Carnelley and Shannon Hoctor *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 169-205.

¹³⁴ McQuoid-Mason 'Challenges in increasing access to justice in the next decade' op cit 191.

¹³⁵ McQuoid-Mason 'Challenges in increasing access to justice in the next decade' op cit 193. The introduction of student practice rules is consistent with Principle 14 and Guideline 16 of the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (2013).

¹³⁶ McQuoid-Mason 'Challenges in increasing access to justice in the next decade' op cit 193. The Legal Practice Act No. 28 of 2014 s 29 provides for community service but the rules for implementing it have not yet been promulgated.

¹³⁷ McQuoid-Mason 'Challenges in increasing access to justice in the next decade' op cit 194. These suggestions are consistent with Principle 14 and Guideline of the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (2013).

¹³⁸ McQuoid-Mason 'Challenges in increasing access to justice in the next decade' op cit 193.

¹³⁹ McQuoid-Mason 'Challenges in increasing access to justice in the next decade' op cit 195.

“McKenzie friend”¹⁴⁰ principle in the United Kingdom, whereby a person appointed by the court, who is not a qualified lawyer may assist but not represent an unrepresented person. This should be allowed where no lawyers are available in the district where the case is heard and persons such as law students or paralegals are available to help an unrepresented person. In such cases, however, if an accused person is sentenced to a term of imprisonment the record should go on automatic review to a High Court judge in chambers to certify that the trial was in accordance with justice and was fair in terms of the Constitution.¹⁴¹

[New York Law School 20 years of Democracy Legal Aid paper].

¹⁴⁰*McKenzie v McKenzie* [1970] 3 WLR 472 (CA)). This is in line with Principle 14 of the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (2013) and Pillar 1 of the *Report of the United Nations Commission on Legal Empowerment of the Poor* (2008).

¹⁴¹ See s 303 of the Criminal Procedure Act No. 51 of 1977. Cf. McQuoid-Mason ‘Challenges in increasing access to justice in the next decade’ op cit 175-176.