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LEGAL AID BOARD

THE NEED FOR THE LEGAL AID BOARD TO PROVIDE LEGAL SERVICES IN CIVIL MATTERS

EXECUTIVE SUMMARY

1 The Minister of Justice and Constitutional Development indicated her concern at whether the LAB had a clear plan of where it was going (i.e. understanding where legal aid would be in 50 years) as well as its involvement in civil legal aid. This document sets out the need for the Legal Aid Board to provide legal services in civil matters as well as the reasons for such need.

2 The Legal Aid Board has, since its establishment in 1969, provided legal aid in both criminal and civil cases. The new Constitution resulted in a huge increase in legal aid in criminal cases. They now consume virtually all of the Board's funds. For this reason, in 2004/5 only 11% of the new cases taken on at Justice Centres were civil cases.

3 The criminal legal aid system is now up and running. There are several reasons why it is essential that the next step now be taken, and that civil legal aid be provided by the Board on an adequate scale.

4 The first reason is that there is a constitutional right to a fair civil trial. Section 34 of the Constitution states that everyone has the right to

have any dispute that can be resolved by the application of law decided in "*a fair public hearing*". This guarantees effective access to courts. The Constitutional Court has stated that it also guarantees the right to a fair civil trial. A fair civil trial requires effective legal representation.

5 The second reason is that legal representation gives effect to the transformative rights in our Constitution. The rights in the Bill of Rights are a means of achieving transformation to a society based on human dignity, equality and freedom. The duty on the state under sec 7(2) of the Constitution to "*fulfil*" the rights, obliges the state to take measures to enable people to achieve and enforce their rights.

6 The third reason is that Parliament has repeatedly recognized the need for civil legal aid, and placed an obligation on the Legal Aid Board to provide it. This is reflected in various laws dealing with children, labour, mental healthcare users, land reform and housing. If the Board fails to provide legal aid in these instances, it will be acting unlawfully.

7 The fourth reason is that there is a substantial public demand for civil legal aid. The Board holds regular Stakeholder Forums at which its programmes and activities are reviewed by its stakeholders. At successive Stakeholder Forums, the main complaint has been the need for civil legal aid to be extended.

8 The fifth reason is that an equitable and accessible justice system is necessary for sustainable development. This has been pointed out by the World Bank. Creating an accessible justice system is therefore not just a matter of providing a social benefit: it is a necessary element of the developmental state. The courts are a vital institution for dealing

with conflict, but can do this only if those who have a grievance (imagined or real) have effective access to the courts.

9 The sixth reason is that if the State does not provide civil legal aid, it will increasingly be sued to do so. It is costly, time consuming, and inequitable for individual requests for legal aid to be dealt with by way of litigation. It is also irrational: if the state is going to pay, it should not be necessary to sue it before this happens.

10 The seventh reason is that there is a need for a coherent and affordable system for providing civil legal aid. A structured framework makes it possible to place principled and constitutionally justifiable limits on the right to legal aid. The limitation will be permissible if the underlying rights have been recognized in principle, significant resources have been allocated for this, and decisions on which cases to support are made in a rationally justifiable manner. Civil legal aid can then be rolled out incrementally, as financial and human resources become available.

11 These are seven reasons of both principle and pragmatism. For all of these reasons, it is essential that the Legal Aid Board should continue its involvement in civil legal aid, should extend that involvement, and should be adequately funded to make this possible.

THE NEED FOR THE LEGAL AID BOARD TO PROVIDE LEGAL SERVICES IN CIVIL MATTERS

DETAILED MOTIVATION

12 The Minister of Justice and Constitutional Development at a meeting held with the Chairperson and Chief Executive Officer of the Legal Aid Board on 29 August 2005 indicated her concern at whether the LAB had a clear plan of where it was going (i.e. understanding where legal aid would be in 50 years), the need for government to reduce the social wage and the involvement in civil legal aid. This motivation seeks to document the need for the Legal Aid Board to provide legal services in civil matters as well as the reasons for such need.

13 The Legal Aid Board was established by the Legal Aid Act 22 of 1969. The purpose of the Act is described in the short title as "*to provide for legal aid for indigent persons*". The term "*legal aid*" is not defined. It is clear from the context and from the practice over these past 36 years that it covers both civil and criminal cases. In the early years of the Board, most of its work was on civil cases.

14 In the pre-democratic era, an attempt was made to establish through the courts that there is a right to legal aid in criminal cases. This claim was based on the right to a fair trial and the right to equality before the law. In S v Rudman and Others; S v Mthwana 1992 (1) SA 343 (AD), the then Appellate Division held that the Court of Appeal "*does not enquire whether the trial was fair in accordance with 'notions of basic fairness and justice'*" Rather, *"the enquiry is whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted."* (377B-C).

15 The interim Constitution changed all of that. It stated explicitly, in sec 25(3), that every accused person "*shall have the right to a fair trial*", which included, where substantial injustice would otherwise result, to be provided with legal representation at state expense (sec 25(3)(e)). Section 35(3) and specifically sec 35(3)(g) of the 1996 Constitution are to the same effect.

16 The state chose to carry out this obligation to provide legal aid in criminal matters "*where substantial injustice would otherwise result*" through the Legal Aid Board. The result was a very substantial increase in the funding of the Board. In 2004/5 the Legal Aid Board provided legal representation at state expense in 270 918 criminal cases. Most of the representation is provided through salaried lawyers employed by the Legal Aid Board in the Justice Centres.

17 The dramatic increase in criminal cases, brought about by the Constitution, had another effect. It resulted in a sharp reduction in the amount of civil legal aid provided by the Board, because the Board used virtually all of the resources available to it in an attempt to provide a criminal defence in every case where substantial injustice would otherwise result.

18 Over a number of years, major effort has been put into extending and improving the criminal legal aid system. It is now up and running on scale, and functioning effectively.

19 Meanwhile, there is growing demand and pressure for the provision of legal aid in appropriate civil cases. For financial reasons, the Board is able to provide only a very limited service in this regard. In 2004/5, only 11% of the new matters taken on at Justice Centres were civil

cases. The major reason is the unavailability of funds, because most of the funds available to the Board have had to be used for criminal cases.

20 When the Board cut back civil legal aid in order to be able to provide for criminal cases, one of the methods it used was to decide that money claims would not be dealt with at all through private lawyers paid by the Board, and that they would be dealt with by the Board's Justice Centres only if they had sufficient capacity. The hope was that such cases would be undertaken by private lawyers on a contingency basis. This has however not happened. Experience has shown that poor people have great difficulty in persuading law firms to take on cases where there is no certainty of a fee at the end of the case.

21 The Board also excluded certain other civil work from legal aid, and limited the amount of civil work which could be undertaken, by accepting that it was obliged to give priority to criminal cases.

22 The result of the process which we have described is that while legal aid in criminal matters is now being provided on scale, the demand for civil legal aid is not being met.

23 In this memorandum we set out seven reasons why it is essential that the next step now be taken, and that civil legal aid be provided on an effective scale by the Legal Aid Board.

Reason 1: There is a right to a fair civil trial under the Constitution

24 Section 22 of the interim Constitution guaranteed "*the right to have justiciable disputes settled by a court of law or, where appropriate,*

another independent and impartial forum". In Bernstein v Bester NO 1996 (2) SA 751 (CC) at [106], the Constitutional Court stated that the failure to use a phrase such as *"a fair hearing"* in the interim Constitution might justify a conclusion that the framers of that Constitution deliberately chose not to constitutionalize the right to a fair civil trial.

25 The drafters of the "*final*" Constitution of 1996 responded to the Bernstein judgment by providing explicitly in sec 34 that everyone has the right to have any dispute that can be resolved by the application of law decided in "*a fair public hearing*". Section 34 uses the very words which the Constitutional Court had pointed out in the Bernstein case *do* guarantee the right to a fair civil trial. It follows that the right to a fair civil trial, like the right to a fair criminal trial, is now part of our law.

26 Section 34 of the Constitution guarantees the right of access to court. Because of the way in which it is now formulated, it also guarantees the right to a fair civil trial. The implications of this are the following.

27 The *right of access to court* addresses the position of a person who has a grievance which he or she wishes to place before a court. It deals with both the right to bring one's case to court, and the right to be enabled to do so effectively. This has been well-established in the jurisprudence of the European Court of Human Rights, starting with the leading case of Airey v Ireland (1979) 2 EHRR 305. The right of access requires the provision of legal aid by the state in those cases where the person concerned would not otherwise be able to place his or her case effectively before a court.

28 The *right to a fair hearing* deals with the situation once a case is before a court. It has two elements which are relevant here:

28.1 First, it includes the right to legal representation if the party is not able to participate effectively in the case. This has been recognized by the Supreme Court of Canada in the case of New Brunswick (Minister of Health and Community Services) v G(J) 66 CRR (2nd) 267 (1999). A similar approach was taken by the Land Claims Court in Nkuzi Development Association v Government of the Republic of South Africa 2002 (2) SA 733 (LCC). Simply put, the proposition seems self-evident: if a party is not able to participate effectively, there is a real risk that it will not receive a fair trial.

28.2 The second relevant element of fairness in a fair hearing is what has been referred to as "*equality of arms*". The Constitutional Court has held that the principle of equality of arms is implicit in the right to a fair trial: Bernstein v Bester NO 1996 (2) SA 751 (CC) at footnote 154. What this means is that a party must be afforded a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-a-vis* its opponent. Total equality of arms is not necessary. However, where there is substantial disadvantage, the provision of legal aid may be obligatory. This has been held repeatedly by the European Court of Human Rights, most recently in Steel & Morris v United Kingdom [2005] ECHR 103.

29 From all of this, it follows that there are cases in which the constitutional right to a fair hearing in a civil dispute carries with it the right to legal representation at state expense. This can also be seen as one of the manifestations of the broader constitutional right to equality before the law.

30 If one draws from the test set out by the Constitutional Court for deciding *"substantial injustice would otherwise result"* in a criminal case, and from the decisions of the European Court of Human Rights and the Supreme Court of Canada with regard to civil disputes, one comes up with the following criteria for deciding whether there is a right to legal aid at state expense:

30.1 The seriousness of the issue for the applicant: what is at stake. (If the applicant's constitutional rights are at risk, that is necessarily a serious matter.)

30.2 The complexity of the relevant law and procedure;

30.3 The ability of the applicant to represent himself or herself effectively, without a lawyer;

30.4 The financial situation of the litigant;

30.5 The litigant's prospect of success in the case;

30.6 Whether there is a substantial disadvantage *vis-a-vis* the adversary.

31 Where those criteria have the result that a fair hearing requires legal representation at state expense, then the state is under a duty to provide it. As things currently stand, there is no institution other than the Legal Aid Board which would be able to do this.

Reason 2: Legal representation gives effect to the transformative rights in our Constitution

32 The generous rights conferred by the Bill of Rights are a means of achieving transformation to a society based on human dignity, equality and freedom. They are designed to enable people who are marginalized, discriminated against or powerless to assert and achieve their human dignity. The Constitution recognizes categories of people who fall into this class: women, children, disabled people, landless people, homeless people and many others.

33 The duty on the state under sec 7(2) of the Constitution to "*fulfil*" the rights in the Bill of Rights, places a positive obligation on the state to take measures to enable people to achieve and enforce their rights. This is the underlying premise of the judgment in the Land Claims Court in the Nkuzi case, where Moloto J (with Gildenhuys J concurring) declared that in eviction cases, labour tenants and occupiers under the land reform legislation "*have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and they cannot reasonably afford the cost thereof from their own resources.*" The Court declared that the state was under a duty to provide such legal representation or legal aid through mechanisms selected by it.

34 This principle is explicitly recognized by sec 28(1)(h) of the Constitution, which provides that every child has the right *"to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result"*.

35 Even if one does not accept that the state is under a constitutional duty to provide legal aid to enable people to achieve their constitutional rights, it seems to us self-evident that this is in any event an action which the state should take. We say because of the nature of our Constitution, and because it is essential that the Bill of Rights be effective.

36 Ours is a transformative Constitution. The rights in the Bill of Rights are a means by which transformation is to be achieved. One of the means by which people can achieve those rights is to assert and enforce them in courts and other tribunals and fora. Without the capacity to do so, for many people the rights (and the promised transformation) will simply be empty.

Reason 3: Parliament has repeatedly recognized the need for civil legal aid, and placed an obligation on the Legal Aid Board to provide this

37 The democratic Parliament has repeatedly recognized that in crucial areas of our national life, civil legal aid is essential to protect the vulnerable and the marginalized. We quote some examples here:

Children:

Section 8A of the Child Care Act 74 of 1983, after amendment by the Child Care Amendment Act 96 of 1996, and the Adoption Matters Amendment Act 56 of 1998:

"(4) *A children's court may, at the commencement of a proceeding or at any stage of the proceeding, order that legal representation be provided for a child at the*

expense of the state, should the children's court consider it to be in the best interest of such a child.

(5)(a) If a children's court makes an order referred to in subsection (4), the clerk of the children's court shall be responsible for requesting the legal aid officer in respect of the magisterial district concerned, to appoint a legal practitioner, in accordance with the legal aid guide determined by the Legal Aid Board, to represent the child.

(b) The Legal Aid Board, established under section 2 of the Legal Aid Act, 1969 (Act 22 of 1969), is designated to provide legal representation at the expense of the state pursuant to an order made by the children's court in terms of subsection 4."

Clause 55 of the Children's Bill 70 of 2003:

Legal representation of children

55. *(1) Where a child is involved in a matter before the children's court and is not represented by a legal representative of his or her own choice and at his or her own expense, the court must refer the child to the Legal Aid Board established by section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969) as contemplated in section 3B(1) of that Act.*

(2) (a) A child may request the court to appoint a legal practitioner to represent him or her in such matter.

(b) If a legal practitioner appointed in terms of paragraph (a) does not serve the interests of the child in the matter, the court may terminate the appointment.

(3) If no legal practitioner is appointed in terms of subsection 2)(a), the court must inform the parent or care-giver of the child or a person who has parental responsibilities and rights in respect of the child, if present at the proceedings, and the child, if the child
is capable of understanding, of the child's right to legal representation.

(4) If no legal practitioner is appointed in terms of subsection (2)(a) after the court has complied with subsection (3), or if the court has terminated the appointment of a legal representative in terms of subsection (2)(b), the court may order that a legal practitioner be assigned to the child by the state, and at state expense, if substantial injustice would otherwise result.

(5) The court must record its reasons if it declines to issue an order in terms of subsection (4).

(6) If the court makes an order in terms of subsection (4), the clerk of the children's court must request the Legal Aid Board to instruct a legal practitioner to represent the child.

Labour:

Section 149 of the Labour Relations Act 66 of 1995:

"(1) If asked, the Commission may assist an employee or employer who is a party to a dispute –

(a) together with the Legal Aid Board, to arrange for advice or assistance by a legal practitioner;

(b) together with the Legal Aid Board, to arrange for a legal practitioner –

(i) to attempt to avoid or settle any proceedings being instituted...

(ii) to attempt to settle any proceedings instituted ...

(iii) to institute on behalf of the employee or employer any proceedings in terms of this Act;

(iv) to defend or oppose on behalf of the employee or employer any proceedings instituted against the employee or employer in terms of this act."

Mental healthcare users:

Section 15 of the Mental Healthcare Act 17 of 2000:

"*(2) An indigent mental healthcare user is entitled to legal aid provided by the State in respect of any proceedings instituted or conducted in terms of this Act subject to any condition fixed in terms of Section 3(d) of the Legal Aid Act, 1969 (Act 22 of 1969."*

Land reform:

Section 22 of the Restitution of Land Rights Act 22 of 1994:

"*(2) Where a party cannot afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the state legal aid system or, if necessary, at the expense of the Commission.*"

Housing:

Section 4(5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 provides that a notice of eviction proceedings must-

"*(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.*"

38 These are all instances where the democratic Parliament has already recognized the need for civil legal aid. There is no body other than the Legal Aid Board to provide this. In most of these instances, Parliament has explicitly placed the obligation on the Legal Aid Board to provide civil legal aid.

39 Court rules also recognize the need for legal aid. For example, Rule 3 of the Divorce Court Rules provides as follows:

"(8)(a) A party who does not make use of the services of a legal practitioner, may request-

(i) the registrar, if the party resides in the district in which the seat of the registrar is situated; or

(ii) the clerk of the court of the district in which the party resides, if the party does not reside in the district in which the seat of the registrar is situated, for assistance with the preparation of any process of court or other document concerning the action.

(b) The registrar or the clerk of the court requested in accordance with paragraph (a) shall render such assistance or refer the party to a convenient legal aid centre."

40 The laws passed since the achievement of democracy have two implications with regard to civil legal aid:

40.1 They show that the democratic Parliament has already, and regularly, recognized the need for vulnerable groups to have access to civil legal aid;

40.2 They place a duty on the Legal Aid Board to provide civil legal aid in these particular circumstances.

41 The Board is therefore *already* under a clear legal obligation to provide civil legal aid in these particular circumstances. If it fails to do so, it will be acting unlawfully.

42 The Legal Aid Board is currently unable to provide the legal representation which Parliament has instructed must be provided. The Board is willing and indeed keen to do this. However, as described above, it can not do so because most of its funds are already fully spent on the criminal defences which are required by the Constitution.

43 Logic suggests that civil legal aid should not be limited to the specific instances which are mentioned above, and should also be provided in other areas where the rights of vulnerable people are at risk.

Reason 4: There is a substantial public demand for civil legal aid

44 The Legal Aid Board holds regular Stakeholder Forums at which its programmes and activities are reviewed by its stakeholders. At successive Stakeholder Forums, the main complaint has been the need for civil legal aid to be extended.

45 Members of the public find it difficult to understand why the government, through the Board, provides free legal representation to people who have been charged with serious offences, but does not do so to people who have serious problems with matters such as housing, family disputes, domestic violence, inheritance issues, social welfare, pensions and labour issues.

46 Members of the public also find it difficult to understand why alleged perpetrators of crime receive assistance, but victims of crime receive no assistance to recover what they have lost or to claim compensation.

47 The recent National Evictions Survey, which was presented by Nkuzi Development Association to various Portfolio Committees, has demonstrated the pressing nature of the need for civil legal aid.

48 These are matters which are frequently raised with the staff of the Board. The only answer the Board can give is that it is not able to provide these services because its budget does not permit this.

49 At present, civil legal aid is provided mainly through non-governmental organizations, university legal aid clinics. Insurance schemes, and pro bono work by private practitioners.

50 Each of these institutions and mechanisms provides important and valuable services. However, they are not an adequate or sustainable means of providing civil legal aid on the scale which is necessary:

50.1 Non-governmental organizations have reduced in number, and are in an increasingly precarious position. They are largely dependent on foreign funding, which is diminishing.

50.2 University legal aid clinics have expanded substantially in recent years. There is no prospect that they will expand to the extent that they can cover the field on a national basis. Their geographic coverage and their resources are limited. The extent of the service they provide is inherently limited by the fact that they generally have teaching as well as service functions.

50.3 It is in the nature of private insurance schemes that they serve only those who can afford to pay insurance premiums.

50.4 Private pro bono services need to be encouraged, but nowhere in the world has this been an adequate means of providing civil legal aid. There is no reason to think that South Africa is any different.

51 These institutions and mechanisms can and should play an important supplementary role in the provision of civil legal aid. However, at

present they are not supplementary service providers – they are core service providers. Only the state can provide the core national service which is demonstrably needed.

Reason 5: An equitable and accessible justice system is necessary for sustainable development

52 As the World Bank has pointed out in its 2006 World Development Report (Chapter 8), building an equitable justice system is a necessary element of sustainable economic development. This requires effective access to the system:

> "Society's rules, and the institutions that establish, maintain, and transform them, govern market and non-market interactions. They determine people's endowments, their rights and obligations, and their ability to generate fair returns. Reflecting and producing the distribution of power among groups, good institutions (so necessary for prosperity) emerge only when the distribution of political power and enforceable rights is equitable.
>
> "Legal institutions play a key role in the distribution of power and rights. They also underpin the forms and functions of other institutions that deliver public services and regulate market practices. Justice systems can provide a vehicle to mediate conflict, resolve disputes, and sustain social order. But inequitable justice systems may perpetuate inequality traps by maintaining or reproducing elite interests and discriminatory practices.

> "Equitable justice systems are thus crucial to sustained equitable development. Building more equitable justice systems runs into three main challenges—often interrelated and reinforcing. First, legal institutions may be open to capture by elite interests or may discriminate against certain groups. Second, these institutions are often inaccessible, because they are incompatible with local norms and customs and they are physically or economically inaccessible, or because people lack the knowledge or capacity to navigate the system. Third, elite capture and the inaccessibility of the legal system may mean that policies relating to crime and personal security are inequitable and perpetuate crime-related inequality traps."

53 Creating an accessible justice system is therefore not just a matter of providing a social benefit: it is a necessary element of the developmental state. This is so because unless people have confidence in the justice system, and access to it, social conflicts are resolved by 'self-help' and action outside the system: instead of being mediated through the courts by the application of legal rules, conflict is resolved on the streets or behind closed doors, by the application of force. If people do not believe that they can obtain a fair deal through the courts, they take the law into their own hands, with socially and economically destructive results. Social order can then not be maintained. The courts are an institutional mechanism for dealing with conflict. However, they can do this only if those who have a grievance (imagined or real) have access to the courts.

54 The courts thus provide a critical mechanism for resolving conflict at both social and individual level. Effectively functioning courts are not a desirable luxury. They are part of the infrastructure of a country. If the

legal system is able to regulate relationships and resolve conflicts and disputes in an ordered, fair, and predictable way, this encourages both domestic and foreign investment.

55 The courts are not the only effective mechanisms for conflict resolution. Mechanisms for alternative dispute resolution (ADR) are also important. South Africa has learnt this from the experience of the CCMA in labour matters, and mediation in family disputes. In Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC), the Constitutional Court pointed to the importance of mediation in resolving disputes around land occupation. In the world of commercial disputes, this is recognized on a daily basis. Wealthy people use legal services as a means of resolving disputes without litigation. Poor people need the same access to legal services for resolving their disputes without litigation where possible.

56 For all of these reasons, the World Bank has given particular attention to the need for legal aid funding:

> "The poor face multiple obstacles to legal and judicial services. As a basic public service, citizens must have access to conflict resolution and rule enforcement mechanisms. The most common approach to improve access is to introduce subsidized legal services for criminal defendants and for family, land, and civil matters.... The World Bank has targeted legal aid funding specifically at poor women and their children, who face particularly high obstacles to legal and judicial services. Successful legal aid services for poor women have been shown to increase the probability of obtaining favorable judgments in child support cases, increase the chance of actually obtaining child

support payments, and decrease the probability of severe physical violence from ex-spouses or -partners."

Reason 6: There will be increasing litigation if the State does not respond to the public demand for civil legal aid

57 In the Nkuzi case, the Government and the Legal Aid Board were sued on the basis that the state was under a duty to provide legal representation to occupiers and labour tenants in eviction cases, where substantial injustice would otherwise result. The state did not oppose the application. It acknowledged that there was an underlying justice to the claim. The Land Claims Court heard argument and made an order, and issued a judgment explaining why the state was under this obligation.

58 More recently, in the Richtersveld land restitution case, the community claimants were represented by the Legal Resources Centre. The case is extremely complex, and the state is itself spending large sums on opposing the claim. The Centre had run out of funds to pay advocates and expert witnesses. It was willing to continue to provide the services of its own staff for free, but the result was that the community would no longer be able to obtain the necessary services of advocates and experts. The community then applied to the Land Claims Court, seeking an order that the state should provide legal assistance to them to enable them to pursue their claim effectively in the court.

59 The state opposed the application, and filed affidavits seeking to justify its position. The case was then argued in the Land Claims Court. After the case had been argued and the judge had reserved judgment, the state agreed to make payment of approximately R5,4 million for the

legal costs of the community claimants. The agreement was made an order of court.

60 This case has been fairly widely publicized. It is inevitable that other litigants will now pursue this course, and institute claims against the state if they are not provided with legal aid. The consequence will be that the state will either have to pay whenever a claim is made through litigation, or be put to the expense of defending multiple cases, without having a clear and principled basis to do so.

61 The likely result is that many claims will be settled by the provision of legal aid. This is an inefficient way in which to deal with the claim for legal aid – it is costly and time consuming for individual requests for legal aid to be dealt with by way of court proceedings. It is also irrational: if the state is going to pay, it should not be necessary to sue it before this happens.

Reason 7: There is a need for a coherent and affordable system for providing civil legal aid

62 The legal obligation and the social and economic need for an effective legal aid system do not mean that the duty on the state to provide legal aid is indefinite and unqualified. The recognition of the need for civil legal aid does not mean that the state is not entitled to define and limit the circumstances in which it will provide legal aid. What is necessary is to:

62.1 endorse the principle of the provision of civil legal aid; and then

62.2 establish a system which defines and applies justifiable criteria for deciding which claims for civil legal aid will be approved, and which will be rejected.

63 The Legal Aid Board is currently not in a position to establish such a system, because it simply does not have the funds to provide civil legal aid on a systematic basis.

64 The alternative to a coherent and justifiable system is a continuation of the inadequate services currently provided by the Board, supplemented by those cases where the litigants take the state to court to force it to provide legal aid. This is not a rational or fair way of deciding who gets legal aid. It favours those who are most able to make demand, rather than those whose need is greatest. It also makes effective budgeting very difficult.

65 A rational and structured framework makes it possible to place principled and justifiable limits can be placed on the right to legal aid. The availability of resources is a justified limitation of the right to a fair civil trial, and of the right to legal aid to enable the fulfillment of the other rights in the Bill of Rights. However, for a limitation based on affordability to meet the constitutional standard, it will have to be shown that:

65.1 the underlying rights are recognized in principle (which is not the case at the moment);

65.2 significant resources have been allocated for this purpose (also not the case at the moment); and

65.3 decisions as to which cases are to be supported are made in a rationally justifiable manner, which has due regard to the nature of the rights affected (the Board attempts to do this, but this is very difficult because of the lack of resources for this work).

66 Once a principled basis has been established, then priorities can be determined in a manner which has regard to social and national need. Civil legal aid can be rolled out incrementally, as financial and human resources become available.

67 If however a properly justified and funded system is not set up, the inevitable consequence will be an ever-growing string of cases in which the state and the Board are sued to provide civil legal aid, and will not be able to put up any justifiable defence to these claims. This creates the risk that the cost will spiral out of control.

Conclusion

68 The seven reasons we have advanced are reasons of both principle and pragmatism.

69 We submit that for all of these reasons, it is essential that the Legal Aid Board should continue its involvement in civil legal aid; should extend that involvement; and should be adequately funded to make this possible.