

LEGAL AID BOARD



LEGAL AID IN SOUTH AFRICA IN THE NEXT TWO DECADES

Discussion Document for submission to the Minister of Justice

EXECUTIVE SUMMARY

10 April 2006

I. Background

- i. The Minister of Justice has requested comment and clarification from the Legal Aid Board on the future need for legal-aid services in South Africa.
- ii. The need for legal aid is created by the inability of persons to provide legal assistance for themselves in any justiciable matter impacting on them and in which they have to protect or defend the violation of their rights.
- iii. This document examines the various factors which impact on the continuing need for legal aid:
 - a. The ability of South Africans to provide legal assistance for themselves, or not, within their socio-economic reality
 - b. The political and economic context in the country
 - c. The constitutional and legislative imperatives for the provision of legal-aid
 - d. The legal sector trends impacting on the need for state funded legal-aid, and
 - e. Community demand for legal-aid and
 - f. Supply of legal-aid services to meet the need of the poor in SA.

II. Preamble

The motivation for state-funded legal aid services in South Africa stems from the commitments we have made as a constitutional democracy in the Bill of Rights in our Constitution. These commitments relate to the upholding of our constitutional values of human dignity, equality and human rights. The rights enshrined in our Constitution have to be promoted, respected, protected, defended and fulfilled to ensure justice for all.

Poverty should not be a barrier to the people of South Africa progressively realising all the rights guaranteed in our Constitution. Furthermore, the inability to afford legal representation should never diminish a person's right to access

justice. The 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. 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.

III. Factors impacting on the need for legal aid and how these are likely to change in the next 20 years

i. Development / Socio Economic context

Household incomes, Poverty and Unemployment

- a. High levels of poverty and unemployment across all the provinces will impact on the number of persons that will not be able to access the legal justice system with their own means thus increasing the demand for legal aid.
- b. The 37% of the population that are not of a working age (i.e. younger than 15 or older than 65 years) will all increase the dependency on the working population and the state.
- c. Despite the positive economic growth rates the level of dependency of persons for income support from the state continues. These persons will also require assistance to access justice.

Impact of HIV/AIDS

- d. The rights of people infected by HIV will have to be defended eg discrimination, access to medication
- e. The number of criminal charges brought against infected persons who intentionally infect others may increase
- f. The AIDS disease is debilitating, impacting on the ability to work, resulting in economic hardship for the infected and their dependants.
- g. The increasing trajectory of AIDS orphans, the consequential increase in children headed households, resulting in an increasing number of vulnerable children under the age of 15 whose rights must be protected, upheld and defended.

Rural poverty and marginalization

The SAHRC Recommendations to the Legal Aid Board include the following

- h. *There is a clear need for the LAB to extend its services into the rural areas and to provide legal representation to farm dwellers faced with eviction.*

- i. *The LAB is urged to continue to extend its services into the rural areas and communicate its policies regarding access to legal representation for farm dwellers to rural LAB officers.*
- j. *The LAB needs to train its attorneys in land law and alternative dispute resolution (ADR) mechanisms;*
- k. *Justice Centres should have mobile units to reach people in farming communities. This would enable existing centres to service communities.*

Challenges of urbanisation and changing settlement patterns

- l. Rapid urbanisation is continuing to take place, increasing the demand for services (including legal services) in fast growth cities viz Johannesburg, Ekurhuleni and Tshwane and secondary growth points eg Mogale City, Polokwane
- m. Migrants to urban areas remain socially and economically vulnerable due to the lag in the socio-economic transition in the urban areas.
- n. Rural households have become even more vulnerable due to the declining trend in the ability of employed family members being able to remit an income to the rural household. Instead rural households are increasingly reliant on social grants. They remain socially and economically vulnerable and will continue to require legal assistance.
- o. The increasing number of refugees and asylum seekers migrating to South Africa has implications for the demand for legal services especially in Gauteng.

ii. Political – Economic context

Political context

- a. The government's commitment to a rights based approach is clear in its Constitutional provisions;
- b. The safety and security of the citizens of this country continues to be a priority; The government's response to this focuses on both the efficiency of the criminal justice system as well as convictions;
- c. The need for an effectively functioning public defender system is critical to an efficient criminal justice system as will be expanded on below.
- d. The state's focus on convictions may be understandable in a context of high crime but it should be tempered by an equal focus on justice and rights.

State economic policy and the Development State

- e. The provision of legal services to the poor is critical to building both the pillars of a developmental state
 - o Firstly it is necessary in the response to poverty and ensuring that poverty does not lead to social deprivation ie the peoples' inability

to afford legal services should not exclude them from accessing justice and

- o Secondly an effective public defender and legal aid system is key to making the criminal justice system and the legal justice system work which boosts investor confidence in the country resulting in expanded economic growth.

State Medium Term Expenditure Framework (MTEF).2007-2010

- f. Government has not fully embraced the significant role that the provision of legal aid can play in its response as a developmental state.
- g. With a greater emphasis on convictions the funds earmarked for the justice cluster are prioritised for prosecution and the courts.

iii. Constitutional and Legislative Provisions

- a. The Constitution explicitly provides for legal assistance to be made available to arrested, accused, detained persons and children at state expense if "substantial justice would otherwise result".
- b. The Constitution also guarantees socio-economic rights, which will also require state assistance to protect, defend and fulfill such rights.
- c. Various laws require the state to provide legal assistance to persons in various circumstances. These legislative provisions also have to be complied with.
- d. There is an increasing trend for the legislature to approve new laws which commit the state to providing legal assistance in various circumstances without making the budgetary provision for this.
- e. All these impact directly on the continuing need for legal aid.

iv. Legal – Justice System - Trends

Criminal Justice System Review initiated by government

- a. The LAB will endeavour to highlight that the inadequacy of resources for legal aid impacts on the efficient functioning of the criminal justice system ie by not having sufficient public defender capacity to match the prosecution capacity causes delays and blockages at courts.
- b. Insufficient resources for legal-aid impacts on the quality of legal-aid services provided to poor people. This will also contribute to a negative perception of the justice system.
- c. These factors will contribute to a lack of confidence on the part of the public in the effectiveness of the criminal justice system.

Legal Sector Trends

a. Integrated Justice System

- The greater the number of people that are arrested, the greater the number of matters being brought to court;
- Unless LAB capacity increases, in some cases it will be the non-availability of LAB lawyers that will lead to the postponement of trials;
- Increases in postponement will mean that more people will spend more time awaiting trial – often behind bars – leading to a perverse situation; and
- Uncoordinated growth within the Criminal Justice System will lead to bottlenecks causing court rolls getting fuller and growing pressure being felt by court managers, magistrates and prosecutors which may result in increased withdrawal rates and the undermining of the commitment to justice.

b. Crime

- The rates of arrest are increasingly resulting in the rate of referral of cases to Court by the police improving steadily;
- the number of cases referred to Court by the prosecution has increased substantially;
- the high rate of under-reporting of crime can be reversed over time;
- all of these factors imply an increased need for public defender capacity to manage the legal aid needs of arrested persons and of accused persons being brought to court ie an increase in the demand for legal aid.

c. Awaiting Trial prisoners (ATPs) and overcrowding in prisons

- A great percentage of ATPs will require LAB assistance
- LAB will have to intervene in those cases experiencing court delays to defend the rights of an accused to a speedy trial
- The ATP population is not likely to decrease drastically in the next 5 years.

d. Automatic Reviews

- The LAB has to ensure that the number of unrepresented person through the courts is reduced in accordance with the provisions of the Constitution and to ensure that substantial injustice does not result.

v. Community need for legal assistance from State

- a. The demand for legal-aid from communities is clear.
- b. The state has to decide to what extent it is able to respond to this demand to withstand public and civil society pressure as well as

the pressure from the courts that rule in favour of awarding legal assistance to persons at state expense.

vi. Supply of legal-aid services to meet the needs of the poor

- a. The cost of private legal services is prohibitive to all South Africans being able to access legal services;
- b. The NGO sector's ability to provide legal services is diminishing;
- c. The ability of the private legal profession to provide services to the poor through its pro-bono systems is minimal;
- d. The complexity of the legal system renders it impossible for persons to represent themselves in legal matters;
- e. The only provider of legal-aid services to the poor, at a scale that corresponds to the demand is the Legal Aid Board.

IV. Concluding comments and recommendations to the Minister

Expanding on the motivation captured in the preamble,

- i. the motivation for continuing support of legal aid provision by the state has been hinged on the socio-economic circumstances of poor persons continuing as a structural element of the economic system that we operate in; This is corroborated by continued state intervention in providing income support to vulnerable persons.
- ii. It is unlikely that improved economic growth will reduce this demand for legal aid. This is due to the reality that poverty and unemployment will remain even under improved economic circumstances. This is further evident from the experience of developed countries, which have a high economic performance and low unemployment and poverty and yet have an increasing demand for legal aid.
- iii. The state commitment to a rights based approach as per the Constitution of RSA, as well as specific provisions of the Constitution and other legislation also necessitates state funding for legal-aid;
- iv. The need for continuing legal-aid to fund an effective functioning public defender system is essential to an effectively functioning criminal justice system which is a critical pillar of a functioning democracy.
- v. The need of communities for legal assistance is documented through various research projects and requires no further elaboration.
- vi. Finally, it is evident from an examination of the supply of legal-aid services that the only agency able to respond to the legal services needs of the poor at a scale that will match the demand, is the Legal Aid Board.

It is clear from this that there should little doubt as to the continuing need for legal assistance to poor persons. If this is not forthcoming from the state, the people of the country will lose faith in the justice system and their ability to obtain a fair trial and obtain redress for the violation of their rights. Overall this will mean that the rights enshrined in our Constitution will remain meaningless for the poor people of our country.

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1 Background

- 1.1 The Minister of Justice has requested comment and clarification from the Legal Aid Board on the future need for legal-aid aid delivery in South Africa.
- 1.2 The Strategic Plan of the Legal Aid Board has to respond to client and community need and other factors impacting on the demand for legal aid in the future period. The attached Legal Aid Board Strategic Plan 2006 details the context within which the LAB operates and the demand for legal-aid.
- 1.3 The need for legal aid is created by the inability of persons to provide legal assistance for themselves in any justiciable matter impacting on them and in which they have to protect or defend the violation of their rights.
- 1.4 This document examines the various factors¹ which impact on the continuing need for legal aid:
 - o The ability of South Africans to provide legal assistance for themselves, or not, within their socio-economic reality
 - o The political and economic context in the country
 - o The constitutional and legislative imperatives for the provision of legal-aid
 - o The legal sector trends impacting on the need for state funded legal-aid, and
 - o Community demand for legal-aid and
 - o Supply of legal-aid services to meet the need of the poor in SA.

¹ Disclaimer: The Legal Aid Board has listed all sources of data and information. The Legal Aid Board however cannot accept responsibility for the accuracy of the economic, statistical, political or social projections / scenarios that have been cited by the various sources.

2 Preamble

The Republic of South Africa is a constitutional democratic state founded on constitutional values of human dignity, equality and human rights. The Bill of Rights contained in Chapter 2 of the Constitution of the Republic of South Africa affirms these democratic values. The people of South Africa acknowledging the injustices of the past have as a nation committed to laying the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law. The rights enshrined in our Constitution have to be promoted, respected, protected, defended and fulfilled to ensure justice for all.

Equality before the law and equal protection and benefit of the law is only achievable when:

- Any person alleging that a right in the Bill of Rights has been infringed or threatened is able to approach a competent court for appropriate relief;
- Every accused, arrested and or detained person is afforded access to legal representation and a fair trial so that there is no substantial injustice;
- Every child is afforded legal representation to ensure that there is no substantial injustice in matters affecting the child; and
- Equality before the Court and "parity of arms" are achieved between the State and the accused person in criminal trials and between parties bringing their disputes before the Court in civil proceedings.

Poverty should not be a barrier to the people of South Africa progressively realising all the rights guaranteed in our Constitution. Furthermore, the inability to afford legal representation should never diminish a person's right to equality before the law, equal protection by the law and access to the courts to seek relief. This is recognised and therefore enshrined in sections 28 and 35 of our Constitution. It is out of this societal and constitutional principle that the need for a strong public defender system is borne. The South African public defender system is realised through the establishment of the Legal Aid Board of South Africa.

The 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. The duty on the state under sec 7(2) of the Constitution to "fulfill" 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. 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.

Justice must be done and must be seen to be done. Access to justice must be within reach of every citizen and community as the courts have a crucial role to play in providing relief, redress and protection. The result of a legal system which marginalises the poor will be a loss of faith in the rule of law. Communities and individual who have lost faith in the rule of law will resort to vigilantism and civil unrest. The role of law in society and in providing redress on justiciable matters in ordinary people's lives can never be over emphasized.

3 Factors impacting on the need for legal aid and how these are likely to change in the next 20 years

3.1 Economic development projections for SA

- Economic growth over past year was 5% and is expected to continue at 5% over the next period - Overall world economy is growing at 4,3% per annumⁱ
- Employment is rising strongly, at about 350,000 new opportunities a yearⁱⁱ
- Incomes and opportunity are still profoundly unequal in the South African economyⁱⁱⁱ
- Consumer Price Inflation (CPI) for the year ending December 2005 was 2,8%. CPI is expected to average at 4,5% over the next three years.^{iv}
- This economic growth can impact positively on unemployment and poverty levels over a period.
- Government aims to halve unemployment over the next decade.

3.2 Development / Socio Economic context

3.2.1 Household incomes, Poverty and Unemployment

- Average household income of R46,000 per annum with six provinces reporting an average household income for the province below this.^v
- Poverty levels in the country are very high.² An estimated 49% (22million) persons living below the poverty line and struggling to survive.^{vi}
- 26,5% of the economically active population is unemployed.^{vii}
- 37% of the population is not of a working age (i.e. younger than 15 or older than 65 years).
- 10 million (±22%) persons receive Income support from the state; It is the fastest growing expenditure item since 2001 and amounts to R70billion/ annum or 3.4% of GDP.^{viii}
- Social grants constitute more that half of the income of the poorest 20 percent of households.^{ix}

² The poverty line is defined as a monthly income of R800 or less per household. In terms of the Census 2001, poverty is defined as those people living in households with an income less than the poverty income. Poverty income varies according to household size.

- 7 million children receive the child support grant.^x

Implications for legal-aid:

- The high levels of poverty and unemployment across all the provinces will impact on the number of persons that will not be able to access the legal justice system with their own means thus increasing the demand for legal aid.
- The 37% of the population that are not of a working age (i.e. younger than 15 or older than 65 years) will all increase the dependency on the working population and the state.
- Despite the positive economic growth rates the level of dependency of persons for income support from the state continues. These persons will also require assistance to access justice.

3.2.2 Impact of HIV/Aids^{xi}

The impact of HIV/Aids epidemic should also be taken into account in the planning of service delivery. The Actuarial Society of South Africa (ASSA) has developed a model tool to project the impact of the disease in the provinces. Based on a worst case scenario in 2002, the model projected the following:

- new HIV infections peaked in 1998 and would begin to slowly decline and stabilize from about 2006.
- The total number of HIV infections are expected to peak in 2006 at 8 million people ($\pm 18\%$ of the South African population)
- The number of AIDS deaths are expected to peak in the year 2010 at 800,000 people per annum
- the number of AIDs orphans peaking in the year 2014 at 1,6 million children.
- The snapshot attached^{xii} projects Kwa-Zulu Natal as having the highest prevalence of the disease among mothers attending antenatal clinics and the Western Cape as having the lowest.

Implications for legal-aid:

- The rights of infected people will have to be defended eg discrimination, access to medication
- The number of criminal charges brought against infected persons who intentionally infect others may increase
- The disease is debilitating, impacting on the ability to work resulting in economic hardship for the infected and their dependants.
- The high mortality rates amongst the relatively young sector of the population leaving the elderly and the very young without breadwinners resulting in poverty.
- The increasing trajectory of AIDS orphans, the consequential increase in children headed households, resulting in an increasing number of vulnerable children under the age of 15 whose rights must be protected, upheld and defended.

3.2.3 Rural poverty and marginalization

- Apartheid planning served to geographically displace the problem of poverty to the periphery of both urban areas and the country as a whole placing the bulk of South Africa's poverty in peri-urban and rural areas.
- However, the incidence, depth and severity of poverty are highest in South Africa's rural areas and small towns.
- Research^{xiii} by the Nkuzi Development Association indicates that in the last decade (1994-2004) 2,3million persons were displaced from farms and that 942,303 were evicted from farms.
 - *The majority of evictees are black South Africans, predominantly African (very small proportion white)*
 - *77% of evictees are women and children*
 - *Over two thirds of evictions were work related whether the affected person was working on the farm or not*
 - *Only 1% of those evicted were involved a legal process*
 - *Farm dwellers have a limited awareness of their rights and an even lower awareness of where they can get support*
 - *Reasons for evictions are largely economic and business related; including attempts to avoid the risk and cost of new policies/laws*
 - *Urgent policy and programme steps are needed to reverse the trend and establish new relations in commercial farming areas*
- An Inquiry into Human Rights in Farming Communities, (2003) by the South African Human Rights Commission (SAHRC) found that with respect to access to the realisation of rights in farming communities and access to justice and service providers
 - *"There is a lack of access to legal assistance provided by the state in farming communities.*
 - *Many farm dwellers cannot access the service providers, both state and civil society, who can assist them to realise their economic and social rights.*
 - *This lack of access impacts negatively upon the inherent right to dignity, the achievement of equality and human rights generally.*
 - *There are adequate laws that are even-handed. Those who have resources use the law as a tool. It is of concern that in fulfilling constitutional obligations to ensure tenure security, a system was created that relies on access to justice to enforce ESTA rights and that very little has been done to assist farm dwellers to enjoy the constitutional protections enshrined in the legislation.*
 - *The Nkuzi judgment is not being adhered to in most instances and farm dwellers faced with legal proceedings, in which an eviction order is sought, are not being afforded the necessary legal representation."*

Implications for legal-aid:

The SAHRC Recommendations to the Legal Aid Board include the following

- "There is a clear need for the LAB to extend its services into the rural areas and to provide legal representation to farm dwellers faced with eviction.
- The LAB is urged to continue to extend its services into the rural areas.
- The LAB is urged to take immediate steps to communicate its policies regarding access to legal representation for farm dwellers to rural LAB officers.
- The LAB needs to train its attorneys in land law and alternative dispute resolution (ADR) mechanisms.
- Specialist legal services are needed in rural areas to deal with land disputes.
- Justice Centres should have mobile units to reach people in farming communities. This would enable existing centres to service communities."

3.2.4 Challenges of urbanisation³ and changing settlement patterns

- The nine cities comprising the South African Cities Network, Buffalo City, Cape Town, Ekurhuleni, eThekweni, Johannesburg, Mangaung, Msunduzi, Nelson Mandela Metropole and Tshwane, comprise 37% (16.58million) of South African population in 2001.
- The population in these cities increased from 2.89million in 1946 to 16.58 million in 2001.
- Refugees and asylum seekers are a further category of migrants which influence settlement patterns, particularly in Gauteng. The total number of refugees and asylum seekers was estimated at 142,907 in 2004 by the Department of Home Affairs^{xiv}
- Research^{xv} on Migration, Settlement and Dynamics of HIV/AIDS indicates that migratory movements to urban centres are far from over with the rural population moving to urban centres. The high rate of growth in secondary cities means that they are becoming migrant destinations.
- The research also makes the additional point that during apartheid rural-urban ties were characterised by the family member employed in the urban areas visiting the rural areas a few times a year to, inter alia, remit economic resources. With the decreased labour absorption of urban areas, economic resources of rural and peri-urban households mainly take the form of social grants. Whilst rural ties remained strong, when people made visits to rural areas they were more "ceremonial" in nature.
- The research indicates that whilst South Africa is nearing the peak of urban transition, the socio-economic side of the transition is lagging

³ Urbanisation refers to shifts in the country's population from rural to urban. Whilst generally, urbanisation takes place due to citizens seeking greater economic prospects, the case in South Africa is somewhat more complex due to the impact of apartheid era planning being experienced today and possibly far into the future

behind, meaning that whilst migrant people physically make it to the city they remain socially, economically and institutionally outside of it.

Implications for legal-aid

- Rapid urbanisation is continuing to take place, increasing the demand for services (including legal services) in fast growth cities viz Johannesburg, Ekurhuleni and Tshwane
- Similarly, secondary hyper growth cities viz Mogale City, Polokwane, Rustenburg and uMhlathze will also experience an increase in demand for services
- Migrants to urban areas remain socially and economically vulnerable due to the lag in the socio-economic transition in the urban areas.
- Rural households have become even more vulnerable due to the declining trend in the ability of employed family members being able to remit and income to the rural household. Instead rural households are increasingly reliant on social grants. They remain socially and economically vulnerable and will continue to require legal assistance.
- The increasing number of refugees and asylum seekers migrating to South Africa has implications for the demand for legal services especially in Gauteng.

3.3 Political – Economic context

3.3.1 Political context

- New democratic government elected in 1994 with a new Constitution for SA adopted in 1996
- Constitution regarded as one of the most progressive in the world, in particular in its guaranteeing of basic rights in the Bill of Rights
- Government has committed to realization of the rights enshrined in the Constitution.

The President of SA in his State of the Nation Address (3 February 2006) listed the following expectations of the people of SA:

- ** we should move faster to address the challenges of poverty, underdevelopment and marginalisation confronting those caught within the Second Economy, to ensure that the poor in our country share in our growing prosperity;*
- * we should make the necessary interventions with regard to the First Economy to accelerate progress towards the achievement of higher levels of economic growth and development of at least 6% a year;*
- * we must sustain and improve the effectiveness of our social development programmes targeted at providing a cushion of support to those most exposed to the threat of abject poverty;*
- * we must act more aggressively with regard to our criminal justice system to improve the safety and security of our people, especially by improving*

the functioning of our courts and increasing our conviction rates to strengthen the message that crime does not pay;"

In responding to these he committed his government "to respond with all necessary seriousness and determination to all these challenges, and play its role to give new content to our Age of Hope."

Implications for legal-aid

- The government's commitment to a rights based approach is clear in its Constitutional provisions;
- The safety and security of the citizens of this country continues to be a priority; The government's response to this focuses on both the efficiency of the criminal justice system as well as convictions;
- The need for an effectively functioning public defender system is critical to an efficient criminal justice system as will be expanded on in 2.6 below.
- The state's focus on convictions may be understandable in a context of high crime but it should be tempered by an equal focus on justice and rights.

3.3.2 State economic policy

- In its more recent communication the state has announced the Accelerated and Shared Growth Initiative of South Africa (ASGISA) which will review the dynamics of economic progress and the constraints that hold back development.^{xvi}
- It is intended that the accelerated growth will expand the resource envelope and also reduce unemployment levels.
- At the same time the focus will also be on 'equity and empowerment'. Minister Manuel in his presentation of the State's Medium Term Budget Policy Statement (October 2005) explains that
 - Accelerated growth expands the resource envelope which makes redistribution of wealth and income possible through the process of development, but not at its expense;
 - Underlying this will be job creation which is the source of increasing revenue collection and the resulting expansion in the public service;
 - Investment in people capabilities and development infrastructure and investment in the second economy are also growth enhancing initiatives ie by broadening participation and opportunities the dynamic of growth will also be strengthened.

3.3.3 Developmental State

- The ANC's commitment to building a strong developmental state capable of tackling poverty and joblessness is mentioned as early as 2003.^{xvii}