

S649 SMITH, H.D. Legal aid.

HEATH D. SMITH

**LEGAL AID: AN EXAMINATION OF THE
GOVERNMENT'S RESPONSE TO THE CURRENT
FINANCIAL CRISIS**

**LLB(HONS) RESEARCH PAPER
LAW AND SOCIAL POLICY (LAWS 537)**

**LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON**

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THE LEGAL AND ECONOMIC EXAMINATION OF THE
GOVERNMENT RESPONSE TO THE CURRENT
FINANCIAL CRISIS



VICTORIA UNIVERSITY OF WELLINGTON
LAW AND SOCIAL POLICY DEPARTMENT

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I. INTRODUCTION

Universal access to justice is a fundamental right of every citizen in society. Its provision is necessary to legitimate the state, meet international obligations, and satisfy the rule of law. In New Zealand, access to justice is ensured by Legal Aid, a state-funded social service which provides legal representation to poor litigants in criminal and civil proceedings. At the present time however, Legal Aid is under threat because of its growing costs to the state. This growth is primarily a result of an increasing emphasis on legal rights in today's reformed welfare state, and a rise in legally aided litigation. To answer this escalating expenditure, the government is implementing several cost-saving measures to the legal aid scheme. These measures include reductions to remuneration rates for legal aid lawyers, the introduction of Public Defenders and Block Contracting, the changing of eligibility and contribution levels for legal aid, and a review of funding for community law centres. This essay examines these measures and comments on their ability to maintain the level of access to justice in the current scheme. It is suggested that the government's measures are not desirable because of their potential to undermine the quality of legal representation for poor people, the right to choice of counsel, the accessibility of the scheme, and the poor's need for legal information. Although the government's measures are necessary to contain expenditure, it is thus thought that alternatives must be considered to maintain an adequate level of access to justice in society.

II. THE FINANCIAL CONTRIBUTIONS REQUIRED FROM APPLICANTS

The text of this paper (excluding contents page and footnotes) comprises approximately 14,500 words.

III. OTHER SCHEMES

IV. THE CURRENT FISCAL CRISIS

V. CUTS TO LAWYERS' REMUNERATION RATES

VI. INTRODUCING PUBLIC DEFENDERS

Block Contracting: A Review of the Current Scheme

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I INTRODUCTION

The universal provision of legal services for the poor is of prime importance in modern society. Not only is it essential for fundamentals like equality before the law and the health of the adversarial system, but it plays a crucial role in legitimising the whole existence and authority of the state. However, in most western nations today, the adequate provision of legal services to the poor is under threat. This threat is a result of the state's increasing financial unwillingness, or perhaps inability, to ensure that universal access to legal services is a reality.

Here in New Zealand, the situation is no different. Our technique for providing legal services to the poor is the system of 'legal aid', through which the government purchases the representation services of the legal profession and provides these to the poor on demand. In 1990-1991, this system cost the government \$37 million.¹ Only eight years later, this figure has ballooned to over \$94 million and consequently, legal aid is recognised as the most steeply accelerating government expense today.² To halt this rise and prevent the budget from ballooning over the \$100m mark, the government has announced³ its intention to effect several measures for the future reduction of funding on the legal aid scheme.⁴

The first of these measures has already been enacted. Over the past two years the government has made significant reductions to the amounts which lawyers are paid for legal aid work. Further changes are proposed under the Legal Services Bill 2000.⁵ These include the piloting of a public defender scheme to more efficiently represent the poor in criminal proceedings, and the bulk funding of private practitioners to perform legal aid work in civil areas. In the mode of reducing expenditure, the government is also conducting extensive reviews of the eligibility criteria for legal

¹ Legal Services Board *Annual Report 1990-1991* (Wellington, 1991).

² Stephen Zindel "What's going on with legal aid?" (1999) 520 *Lawtalk* 1, 1.

³ Tony Ryall "New Accountability and Innovation for Legal Aid" in Zindel above n 2, 2.

⁴ The change of government in November 1999 has put the intended changes for legal aid on hold. Consequently, the changes are still being debated at the present time.

⁵ Legal Services Bill 2000.

aid, the financial contributions required from successful applicants, and the funding and operation of community law centres.⁶

While these measures may thus prove effective in reducing the current financial costs of the legal aid scheme, concerns are raised for the resulting level of access to justice. Remuneration cuts, for example, may mean that many lawyers are dissuaded from participating in the delivery of legal services to the poor. An unfortunate consequence of this may be the lessening in quality of legally aided representation. Likewise, the introduction of public defender and bulk contracting programmes, while innovative, may inadvertently create an inferior service to the private market and would remove poor litigants' right to counsel of choice. Changes to eligibility and contribution levels in turn may put the legal aid scheme beyond the reach of many needy citizens, while a neglect of community law centres may prevent legal awareness in society.

The focus of this essay is thus to examine the current state of legal aid and the government's answers for its financial problems. It will be argued that the government's measures for containing expenditure are undesirable in light of the need to maintain a reasonable standard of access to justice in society. Section II thus begins the essay by looking at why a comprehensive legal services scheme is necessary and how the factors of quality representation, choice of counsel, legal advice, and effective targeting are essential to its proper operation. Sections III and IV then look at New Zealand's attempts to provide these services over the years, through to the establishment of a comprehensive social service under the Legal Services Act 1991. Continuing on, section V highlights the current financial threat to this service while section VI begins the look at the government's various measures for countering the current fiscal problems.

II WHY DOES THE STATE PROVIDE LEGAL AID?

A Equal Access to Justice

⁶ See Ryall above n 2.

Essentially, the reason that the government provides legal assistance to the poor is to ensure 'equal access to justice'. This concept of access to justice is a central tenet of the rule of law and of international human rights legislation. The reason for this, as many authors would argue, is that access to justice effectively brings about recognition of the law itself, and hence the political legitimacy of the state.⁷

To explain, it is argued a feature of our society is that governments depend upon the law and its observance in order to regulate the conduct of their citizens. However, the government recognises that in order to effect this observance, citizens must see the law being applied in a fair and just manner. Accordingly, the state maintains a justice system, and its major organ the courts, so that all citizens, regardless of their social, economic, or political standing, can have the opportunity to challenge the law, to determine its meaning, and to gauge fairly the legality of their conduct. Access to this institution thus enables some degree of access to justice, and gives citizens the confidence required to observe the law and hence provide the state with 'the consent of the governed'.⁸

This notion of political legitimacy therefore illustrates why the government has an obligation to ensure equal access to justice. In addition, over the past century it has been recognised that access to justice has a wider importance in allowing for the exercise of fundamental civil, economic and social rights.⁹ In any welfare state, civil rights such as freedom and free expression, as well as social rights to adequate housing and healthcare, are common. However, these rights are effectively meaningless without an accessible mechanism for their enforcement. Thus for citizens to potentially 'possess' rights, each of them must have the ability to seek their enforcement in a court of law.

The obligation to provide equal access to justice is reflected in some of New Zealand's most important statutes. For example, the Magna Carta states "we will not deny or defer to any man, either justice or right".¹⁰ International human rights

⁷ David Luban "The Right to Legal Services" in Paterson & Goriely *Resourcing Civil Justice* (Oxford University Press, New York, 1996).

⁸ Luban, above n 7, 63.

⁹ T.H. Marshall "Citizenship and Social Class" in Paterson & Goriely above n 8, 41.

¹⁰ Clause 29 Magna Carta 1297.

legislation echoes this by asserting the state has a responsibility to see that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations".¹¹

B. Ensuring Equal Access to Justice

While these sources thus set out the government's obligations, this responsibility is not merely satisfied by the provision of the courts. In modern times it has been acknowledged that financial, intellectual, and even cultural barriers may arise which prevent a citizen's access to the justice system.¹² Many of these barriers arise as a result of the rigid, formalistic, and complex nature of the court system. Because of this, a citizen will almost always require legal representation so that his or her case is adequately put forward. Unfortunately, legal representation means legal fees, and since these cannot be afforded by all, financial barriers to justice will arise for those of limited means.

In line with its responsibility to ensure equal access to justice, the state thus has an obligation to remove these financial barriers. This latter obligation is reflected in the human rights legislation mentioned above, where it is stated that access to justice is a requirement for every citizen, "without distinction of any kind...such as that based on property".¹³ Arguably, this therefore implies that for the government to allow high financial costs for legal representation means that it is effectively denying poor people their right to equal justice and thus discriminating against those without property.

To avoid discriminating or disadvantaging the poor, governments across the globe have thus gradually established schemes of legal assistance which look to encapsulate these access rights. A 1978 study by Cappelletti and Garth, featuring a world survey of comparative legal aid systems, in fact concluded that there was a pleasing world-wide trend whereby governments were taking affirmative action to introduce comprehensive legal aid systems for the poor.¹⁴ Through these systems,

¹¹ Article 10 Universal Declaration of Human Rights.

¹² Luban, above n 7.

¹³ Article 2 Universal Declaration of Human Rights.

¹⁴ Cappelletti and Garth (eds.) *Access to Justice: a World Survey* (Sitjhoff and Noordhoff, Alphen aan den Rijn, 1978).

states were meeting their obligations for equal access to justice by supplying the poor with state-funded legal representation in civil and criminal proceedings.

B Ensuring Equal Access to Justice

1 The obligation to provide 'quality' legal services

For the state to meet its obligation for equal access to justice, it is argued that the mere provision of state-funded legal representation will not be enough. The government also has a responsibility to ensure that the legal assistance it provides is of a standard and quality equal to that, which can be obtained through private practice. While the differing ability of individual lawyers will make this objective difficult, as long as the state is able to retain skilled and experienced practitioners to represent the poor then equality in the standard of representation will be satisfied. The poor will then be equipped with the same resources as other litigants in presenting their case, and will thus not be disadvantaged by inequalities in the competence of legal counsel.

There is legislative support for this obligation. The Universal Declaration of Human Rights, and our own Bill of Rights Act, outline every citizen's right to equal justice¹⁵. Arguably, this therefore implies an obligation for the court to witness 'equality of arms' – the equal balancing of legal resources for each side.¹⁶ This requirement was emphasised by the Honourable J R Marshall at the passing of the Legal Aid Act 1969, when he stated "the balance of justice should not be loaded in favour of the man with means, the large corporation or the state itself".¹⁷ To achieve this balance of justice then, the poor should enjoy the same level of legal representation as the more affluent litigants in society.

2 The obligation to provide a choice of counsel

¹⁵ Article 10 Universal Declaration of Human Rights, Section 27 New Zealand Bill of Rights Act 1990.

¹⁶ This argument is made by Hugh Brayne in "Is Legal Aid a Human Right?" (1989) 3 Law Society Gazette 25,25.

¹⁷ Rt Hon. J.R.Marshall (November, 1969) 363 NZPD 2680.

Additionally, it is argued that the state's obligation for access to justice will not be completely met without allowing poor litigants a 'choice of counsel'. There are two reasons for this. Firstly, by giving individual litigants the freedom to select their own counsel, their confidence in the resulting representation is enhanced. As a result, the communication, trust and disclosure essential to a healthy lawyer-client relationship is much more likely to be present.¹⁸ A lawyer can then mount an effective case which caters to the needs and situation of his or her client and thus reduces the imbalance in justice caused by inequalities in legal counsel.

Secondly, and related to the point above, is the fact that choice of counsel advances the efficiency and fairness of the adversarial system. Our system of justice works on the ground that partisan advocacy on both sides of the case will best promote the ultimate objective that the guilty be convicted and innocent be free.¹⁹ However, the lawyer's role as an effective advocate will be largely dependent upon the basic relationship of trust and confidence that the lawyer can establish with a client. The prevalence of this trust, and thus the health of the adversarial system, will be much greater when a client has specifically chosen a particular lawyer to act on his or her behalf.

Because of these reasons, the right to choice of counsel has thus been recognised by England's Justice Report as an important right for individual litigants, and for maintaining the fairness of the justice system itself.²⁰ Similarly, in the United States 'choice of counsel' has emerged as a fundamental right for defendants in criminal proceedings.²¹ It is submitted that this right should be maintained by legal assistance schemes in New Zealand.

¹⁸ Wayne Holly *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?* [1998] 64 Brook L Rev 183, 184.

¹⁹ Holly above n 18.

²⁰ James Morton *A Public Defender – a Report by Justice* (Justice, London, 1987).

²¹ *Gideon v Wainwright* 372 US 335 (1963). The United States courts have not yet extended the right to choice of counsel to poor litigants. The rationale for this is that because defendants receive legal services at the expense of the taxpayer, they should not be heard to complain that they were not permitted to select their own counsel. Several academics have however validly pointed out that requirements for contributions to the legal aid schemes mean the indigent should enjoy this right as well. Holly above n 19.

3 *The obligation to provide legal advice*

A third factor for improving the level of access to justice in society is the provision of legal advice. In recent times it has been recognised that the government's obligation to provide access to justice is not satisfied by the mere provision of legal representation. Rather, as the Hughes Commission in Scotland has noted, the state should also "ensure that people have the advice and assistance they need to discover their legal rights and, if they choose, pursue legal solutions to their problems."²²

Thus in England, the government's legal aid scheme allows for legal representation *and* the giving of legal advice to the poor. Unfortunately, in New Zealand legal aid is not available for legal advice that is unconnected with court proceedings - the 1969 Legal Aid Act choosing not to include state-funded advice for fear of the potential costs to the state.²³ Voluntary organisations such as community law and public education centres have thus been relied upon to provide the necessary legal information to the public, educating and informing them on their respective rights and legal avenues available. The continuing operation of these centres is thus crucial for maintaining access to justice in this country.

4 *The obligation to make legal aid accessible*

Finally, while the presence of a legal aid scheme goes a long way to remedying the imbalance in access to legal services, its actual effectiveness will be largely dependent upon how well the system is targeted. As a needs-based social service, it is clear that people should not be eligible for assistance if they can afford to pay for their own representation through the private market. More importantly however, it is essential that people who *do* have a need for the legal assistance are included in the scheme's coverage.

It is thus argued that there are two relevant requirements for targeting legal aid at those in need. Firstly, the eligibility criteria, or means-test, for the system must be

²² Hughes Commission *Royal Commission on Legal Services in Scotland* (HMSO, Edinburgh, 1980)

3.

²³ Joanne Morris *Women's Access to Legal Services* (Law Commission, Wellington, 1999) 148.

adequately designed to cover all those financially unable to access a lawyer through the private market. Secondly, once assistance is provided, there must be no requirements upon users of the scheme that effectively deters them from utilising its benefits. In some jurisdictions this has been seen with requirements for excessive repayment contributions. Clearly, access to justice will not be achieved if eligibility and contribution levels are inaccurately calculated, and the legislation will therefore defeat its own objective of ensuring access to justice.

III BACKGROUND: LEGAL AID IN NEW ZEALAND

For most of New Zealand's legal history, lawyers have been the ones to enable equal access to justice for the poor.²⁴ The early twentieth century saw lawyers heavily subsidising their legal services, or even undertaking pure charity work, so that those of limited means could be adequately represented. The primary reason for this sacrifice is that the legal profession has felt an obligation, in their position as monopoly holders of legal service, to make a contribution towards the principle of access to justice.²⁵

Unfortunately, it was clear that New Zealand's legal profession would not always be able to cater for the needs of the poor. The inevitable increase in legislation during the twentieth century caused a significant growth in the number of disputes and consequently, a rise in the volume of litigation before the courts.²⁶ Lawyers were thus called upon more and more to provide their charitable services. However, because they had to charge for their work to remain in practice, lawyers found that they were unable to meet the poor's demand for free representation.²⁷

The latter part of the twentieth century thus saw the government begin to take responsibility for providing legal services to the poor. In line with the worldwide movement to ensure equal access to justice, and consistent with its commitments under the welfare state to provide a level of social well-being for all citizens, the

²⁴ Graham Cowley "Legal Aid – from modest beginnings to ?" (1999) 514 *Lawtalk* 12.

²⁵ See Section VI below for further discussion of this point.

²⁶ Cowley above n 24, 1.

²⁷ Cowley above n 24, 1.

government gradually established a system of state-funded legal assistance for the poor in legal proceedings. Alongside social security and family benefit schemes, 'legal aid' was thus to be a means-tested social service which would ensure equal access to legal services.

The introduction of the legal aid system did not however occur equitably for all types of legal proceedings. Indeed, it is a feature of legal aid systems worldwide that they have developed separately and differently along their civil and criminal sides. By and large this has reflected the fundamental difference in nature between legal aid for the criminally accused, and legal aid for parties in civil proceedings.

For example, criminal law is more concerned with anti-social conduct and thus deals with the most critical sphere – that of a person's liberty. Criminal legal aid must therefore be available on the spot, and without complex procedures, in order to ensure that a defendant obtains a fair hearing with adequate legal representation.²⁸

On the other hand, civil proceedings are more a matter of personal choice. The justice system's desire to see assistance provided to these litigants has thus always been significantly less.²⁹ This reflects the 'rights' theory common in many jurisdictions whereby in criminal proceedings, because it is the state who is prosecuting the citizen, that citizen has a right for the state to supply an adequate defence.³⁰ It follows then that because the state has no direct involvement in civil proceedings, no right to representation exists.

In fact, in many jurisdictions it is recognised that divorce was the only reason civil legal aid developed at all. For example, in England, the Gorell Commission recognised that many poor citizens whose marriages had broken down irretrievably needed state assistance.³¹ Without it, these citizens could not afford the High Court divorce necessary for a legitimate remarriage and would thus face the possible social

²⁸ A Paterson *Legal Aid as a Social Service* (The Cobden Trust, London, 1971) 3.

²⁹ Goriely & Paterson "Introduction: Resourcing Civil Justice" in Goriely & Paterson above n 7, 6.

³⁰ Luban above n 7, 45.

³¹ Tamara Goriely "Rushcliffe Fifty Years On: The Changing Role of Civil Legal Aid Within the Welfare State" in Goriely & Paterson above n 7, 219.

stigmas of adultery and bastardy. To fairly cater for these citizens a scheme of legal assistance was thus required.

Nowadays, the extension of legal aid to virtually all types of civil proceedings demonstrates the equal importance of civil representation. Primarily, this may be because there are many types of civil proceedings that resemble criminal law and its fundamental concern with the protection of people and their freedoms. Examples of this include domestic protection orders and even the resolution of matrimonial disputes which prevent the continuance or occurrence of disagreements and even violence. As preventive measures, these proceedings thus arguably involve the state in an equally direct way and therefore require legal representation for their just resolution.

Generally however, due to their more obvious differences, it is no surprise that criminal forms of legal aid, as opposed to civil, have been present for a long time. Criminal legal aid began in New Zealand with the Justices of the Peace Amendment Act 1912³² which, essentially a copy of Britain's earlier Poor Prisoners Defence Act 1903,³³ provided financial assistance for the accused in all trials on indictment. The lawyers who undertook this work were thus remunerated by the state at a rate analogous to Crown solicitors. In 1933, New Zealand's Poor Prisoners Defence Act then extended state assistance to poor defendants who were charged with serious summary offences, or whose 'exceptional circumstances' justified a grant.³⁴ It was not until the passing of the Offenders' Legal Aid Act 1954 however that the scope of criminal aid was widened to all cases brought before the criminal courts, whether the accused was appearing on sentence or not.³⁵

In civil proceedings, the generosity of the New Zealand legal profession and a smaller number of cases meant that a legal aid system was unnecessary for many years. In 1926, the Law Society even took over the responsibility for poor persons to see that their needs were met.³⁶ Gradually however, as increasing cases tested this

³² Justices of the Peace Amendment Act 1912.

³³ Poor Prisoners Defence Act 1903 (UK).

³⁴ Poor Prisoners' Defence Act 1933.

³⁵ Offenders Legal Aid Act 1954.

³⁶ Department of Justice *Access to the Law: A Research and Discussion Paper* (Wellington, 1981).

charity and as pressure arose from human rights legislation, the legislature saw it as necessary to establish a system whereby civil legal aid was also guaranteed. The passing of the Legal Aid Act 1969 thus provided this assistance and also ensured that lawyers were adequately remunerated by the state for their services to the poor.³⁷

In the later decades of the twentieth century, the Offenders Legal Aid Act 1954 and the Legal Aid Act 1969 thus served to provide sufficient state assistance for poor litigants in legal proceedings. However, while this system generally worked well, several inequalities in the way civil and criminal legal aid was administered, along with the differing pay rates for lawyers under each, meant that some unifying system was needed.³⁸ In 1991, the Legal Services Act was thus enacted to bring legal aid for criminal and civil proceedings under one umbrella.³⁹

IV THE PRESENT FRAMEWORK: LEGAL SERVICES ACT 1991

A A Judicare Scheme

Legal aid in New Zealand has always been delivered through the classic 'judicare scheme'. Generally, this model operates through the state funding private lawyers to provide legal services to the poor on demand. Although potentially limitless and thus expensive, this form of delivery has proven to be very effective in providing poor litigants with equal access to the justice system. Provided the eligibility criteria are accurate, whoever qualifies as a person of 'insufficient means' can obtain the same private legal assistance as other citizens and will have the freedom to select a lawyer of their choice. Thus it has been stated of the judicare scheme that the only difference to the private market is in who pays the bill.⁴⁰ Notably, the effectiveness of this model is demonstrated by its predominance in most industrial countries of the Western world.

³⁷ Legal Aid Act 1969.

³⁸ Cowley above n 24, 1.

³⁹ Legal Services Act 1991.

⁴⁰ A Paterson "Financing Legal Services: A Comparative Perspective" in Goriely & Paterson above n 7, 245.

Typically, the judicare system can be contrasted with the 'staff-model' of delivery. This model features 'public sector' or 'salaried' lawyers being employed *directly* by the state to provide legal assistance to the poor. The staff-model system is thus known for its ability to save expense and to provide a more specialised service for poor litigants. However, it is also widely known for an inferior standard of legal service and an absence of the free right to choose counsel.⁴¹ Primarily, this model is used in jurisdictions such as the United States and Quebec.

A combination of both the judicare and staff-model option is often referred to as a 'mixed-welfare system'. These are utilised in jurisdictions such as Australia and Canada and feature the staff-model being used to *supplement* the judicare scheme. Thus, in most situations the staff model works to cover legal matters for which the private profession has no experience, for example, legal *advice* to the poor and law reform in welfare matters.⁴² The staff-model is thus characterised here by its restricted scope of service and its inability to compete with private practitioners. By comparison, in jurisdictions such as England and New Zealand the staff model is partly represented by the use of community-based law centres. These utilise some paid staff to supply legal services but are by and large voluntary organisations. There is thus no genuine integration of the staff and judicare models.

Under the Legal Services Act 1991, New Zealand thus continues to utilise a classic 'judicare' model. While this model is seen in many variations across the western world, there are certain characteristics that are commonly present. These characteristics, which range from the independent administration of the scheme to the requirement of contributions from applicants, all feature under the framework of New Zealand's 1991 Act.

B The Independent Administration of Legal Aid

⁴¹ Paterson above n 40, 250.

⁴² M Zander 'The First Wave' in Mauro Cappelletti (ed) *Access to Justice and the Welfare State* (Sigthoff, Alphen aan den Rijn, 1981) 20.

Section 94 of the New Zealand Act authorises legal aid to be administered by an independent corporate body called the 'Legal Services Board'.⁴³ The primary aims of this Board are to efficiently administer the granting of civil and criminal legal aid, and to ensure that the operation of the respective schemes are as inexpensive and as efficient as possible.⁴⁴

To carry out these objectives, the Legal Services Board receives government funding from Vote: Justice and distributes this amongst the various 'district legal services committees'. These committees, set up along the lines of district law societies, have the task of deciding how the funds will in fact be allocated in each particular district.⁴⁵ The actual decision of whether or not the legal aid fund will be used in a particular case is left to 'district *sub-committees*'.⁴⁶

The sub-committees thus perform the bulk of the day-to-day legal aid administration. Comprising only volunteer practitioners, these committees consider the merits of each application for legal aid and, if they decide to provide assistance, will grant the applicant a total sum.⁴⁷ Normally, this total sum will be based upon the Board's 'Remuneration Instructions' which are revised every year by government directive. These Instructions indicate that the total sum is to be calculated by the set hourly rate for the particular lawyer, and then totalled according to the practitioner's estimate of the length of the case, the disbursements needed, the degree of urgency, and the complexity of the case.⁴⁸

C Eligibility for Legal Aid

Part I of the Act determines who may apply for legal aid. The eligibility criterion does however differ according to whether the proceedings are civil or criminal in nature. In criminal proceedings, an applicant will be granted legal aid if, upon appearance in court, the Registrar of the court decides that assistance would be

⁴³ Section 94 Legal Services Act 1991.

⁴⁴ Section 95(1) Legal Services Act 1991.

⁴⁵ Section 115 Legal Services Act 1991.

⁴⁶ Where a case will involve large sums of money, the application is referred to the district committee.

⁴⁷ Sections 11 and 35 Legal Services Act 1991.

⁴⁸ Legal Services Board *Civil and Criminal Legal Aid Remuneration Instructions* (Wellington, 1999).

“desirable in the interests of justice”.⁴⁹ In exercising this discretion, the Registrar must consider the gravity of the offence and any other circumstances that the Registrar thinks are relevant.⁵⁰ Thus where the alleged offence is serious, the consequences of conviction will be detrimental to the accused and so it is more likely that he or she will receive assistance to ensure an adequate defence. A grant will also be in the interests of justice if the Registrar is satisfied that the applicant does not have ‘sufficient means’ to obtain legal assistance themselves.⁵¹ This concept of ‘sufficient means’ will be satisfied if the applicant’s disposable income or disposable capital is below a \$2000 threshold.⁵²

In the case of civil proceedings, legal aid is granted more as of right. Applications for legal assistance are made to district subcommittees who will make a grant if the applicant’s disposable income or disposable capital does not exceed the \$2000 threshold.⁵³ The subcommittee may only refuse the application if either there are not reasonable grounds for taking or defending the proceedings; the applicant’s chances of success do not justify the grant; the nature of the proceedings does not justify the grant of aid; or for any other reason it is unreasonable for the grant to be made.⁵⁴

D The Scope of Legal Aid

Part I of the Act also determines the situations in which an eligible person may apply for and receive legal aid. For criminal proceedings, section 4 states that legal aid may be granted to an applicant for any criminal proceedings which are heard in the District Court, Youth Court, High Court, Court of Appeal or Privy Council.⁵⁵ In a

⁴⁹ Section 7(1)(a) Legal Services Act 1991.

⁵⁰ Section 7(2) Legal Services Act 1991.

⁵¹ Section 7(1)(b) Legal Services Act 1991.

⁵² Disposable income is calculated by taking an applicant’s annual net tax-paid income and deducting a personal living allowance of \$9841. Further deductions are allowed if the applicant has a partner or children.

Disposable capital is calculated by taking the sum financial total of the applicant’s capital and deducting the value of any vehicle, household furniture, contingent liabilities, unsecured debts, or the applicant’s house if its value is less than \$41 000. (Reg 36 Legal Services Regulations 1991).

⁵³ Section 28 Legal Services Act 1991.

⁵⁴ Section 34 Legal Services Act 1991.

⁵⁵ Section 4 Legal Services Act 1991.

similar vein, section 19 states that civil legal aid may be obtained for civil proceedings in any court of law or tribunal.⁵⁶

E The Financial Contributions Required From Applicants

Successful applicants for legal aid will, where possible, be required to make financial contributions to the Legal Services Board in the way of repaying their grant. For criminal legal aid this requirement is enforced at the discretion of the Registrar, yet an applicant will only normally be excused if the payment of such a contribution would cause hardship.⁵⁷

For civil legal aid, the provision of assistance is more clearly in the way of a loan than a grant. Firstly, every applicant is required to pay an initial contribution of \$50 to the Board when applying for financial assistance.⁵⁸ Secondly, an applicant will also be liable to the Board for further contributions until the grant/loan is repaid.⁵⁹ To ensure that its funds are repaid, any property 'recovered or preserved' in the proceedings will be automatically subject to a charge owing to the board.⁶⁰ At its discretion, the Board may also impose a charge on any applicant's private property for the reason of recouping unpaid contributions.⁶¹

F Lawyers' Remuneration for Legal Aid Work

A current feature of the legal aid system is that lawyers who undertake criminal or civil legal aid work are not remunerated at market rates. Rather, when a case is completed, the lawyer will forward a claim for fees and disbursements to the respective Registrar or district subcommittee. The lawyer's fees will then be determined by the Remuneration Instructions, which set similar hourly fixed rates of pay for both civil and criminal legal aid work. This rate will be dependent upon the

⁵⁶ Section 19 Legal Services Act 1991.

⁵⁷ Section 8 Legal Services Act 1991.

⁵⁸ Unless there is hardship under section 37 of the Act or it is an application for an order under section 49A Domestic Violence Act 1995.

⁵⁹ These further contributions are required at \$1 for every \$2 of disposable income for the first \$1000 of an applicant's disposable income and \$2 for every \$3 of disposable income for the next \$2000. After this, all income must go to repaying the Board.

⁶⁰ Section 40(1) Legal Services Act 1991.

level of experience of the individual practitioner and the level of the court in which the case was heard. As an example, a lawyer with eight years experience who conducts a criminal or civil case in the High Court can expect to be paid \$150 an hour.⁶²

Additionally, it is important to note that in certain civil cases, the hourly rate will only be paid for a certain length of time. That is, proceedings under the Employment Contracts Act 1991,⁶³ and most family law cases as well, have a capped time period for which a lawyer can charge. In an application for an occupancy order under the Matrimonial Property Act 1976⁶⁴ for example, the lawyer has a maximum of 6 paid hours to conduct the client's case.⁶⁵ The reason for this limitation is clearly to cut down on the maximum amounts lawyers can claim for individual cases.

G Community Law Centres

As alluded to before, the need for legal advice and information in New Zealand has never been addressed by the government's legal aid schemes. Unfortunately, this is a crucial requirement for helping the poor identify legal solutions to their problems and thus to utilise the state assistance scheme. In the past, the poor's need for legal information and advice has thus fallen on the shoulders of volunteer agencies like the New Zealand Association of Citizens' Advice Bureaux and other specialised groups.⁶⁶

It is only since the early 1980s that 'community law centres' have developed in the major cities to specifically address the lack of legal knowledge in society. Essentially comprising the volunteer work of local practitioners, these centres provide free legal advice and information to members of the public on a wide variety of legal matters.

Since the 1991 legislation, the government has recognised the importance of these centres in meeting its access to justice obligations. They have thus ensured their

⁶¹ Section 40(2) Legal Services Act 1991.

⁶² Remuneration Instructions above n 48.

⁶³ Employment Contracts Act 1991.

⁶⁴ Matrimonial Property Act 1976.

⁶⁵ Remuneration Instructions above n 48.

continued funding by giving the Board 'first call' on the New Zealand Law Society's 'Special Fund'.⁶⁷ This Special Fund, created under the Law Practitioners Act 1982⁶⁸, comprises the total monetary interest generated from all solicitor trust accounts across the country. This certainty of funding has led to the establishment of nineteen current law centres spread throughout New Zealand which meet the information and advice needs of the community.⁶⁹

H Other Schemes

The Legal Services Act also provides for the 'duty solicitor scheme'. This scheme is designed to meet a criminal defendant's need for 'instant' representation on their first appearance in court.⁷⁰ Duty solicitors are thus imbued with the role of advising defendants as to their plea (including whether to exercise their right to elect a jury), how to arrange private representation or obtain criminal legal aid, and how to arrange bail.

V THE CURRENT FISCAL CRISIS

Initially, as a matter of meeting its own objectives, the Legal Aid system seemed to be working well. A review of the system in 1993 by a specially appointed 'legal aid committee' found that the Act was achieving its aim of providing those of insufficient means with access to the law.⁷¹ A more comprehensive study undertaken by the Legal Services Board in 1995 found that with respect to criminal legal aid, 88% of those granted aid were unemployed, while 79% were receiving a benefit.⁷² The study thus concluded that the Board was achieving its objective of targeting the needy and providing them with an opportunity to have their rights heard.⁷³

⁶⁶ For example, Victim Support Groups and Women's Refuges.

⁶⁷ Section 91F Law Practitioners Act 1980.

⁶⁸ Law Practitioners Act 1980.

⁶⁹ Morris above n 23, 110.

⁷⁰ Section 156 Legal Services Act 1991.

⁷¹ Legal Services Committee *Review of the Legal Services Act 1991* (Wellington, 1993).

⁷² Legal Services Board *In the Interests of Justice – an evaluation of Criminal legal Aid in New Zealand* (Wellington, 1995).

⁷³ *Interests of Justice* above n 72, 131.

In recent times however, the fiscal demands of the legal aid scheme have placed it in a state of crisis. Some authors in particular are of the opinion that the earlier optimism shown by Cappelletti & Garth of a worldwide access to justice movement has been replaced in most jurisdictions by a feeling of pessimism. For example, from as early as 1983, Zemans commented on the limited funding of legal services in all nations and the gradual restrictions imposed on their eligibility and scope.⁷⁴ Likewise, Goriely & Paterson now assert that in almost every country with a developed legal aid programme the same conclusion has been reached - legal aid is too expensive.⁷⁵ They therefore state that while the containment of expenditure has always been an important policy for legal aid, it can now be seen as an overriding objective.

This has been the attitude in New Zealand in recent times. Over the past two decades, expenditure on legal aid has grown enormously. Figures in 1980/1981 showed legal aid expenditure to be at \$3.6m.⁷⁶ This rose to \$36m in 1991, and most recently to \$94m in the 1998-1999 year.⁷⁷ There has thus been genuine concern from the public and politicians for this growing depletion of taxpayer monies.

The media in particular have sought to lay blame for these burgeoning costs. In particular, they have focused their attention on the enormous sums paid out annually for the defence of individual citizens. Examples of this include the \$385,000 awarded to convicted paedophile Peter Ellis for his various court appearances, and the \$359,000 lost when "a Maori woman unsuccessfully brought a fisheries case before the United Nations Human Rights Committee".⁷⁸

The media have also focused on the high salaries that have been collected by individual lawyers for their legal aid work. For example, a successful and prolonged campaign in 1999 enabled lawyers' legal aid income to be publicly disclosed, and revealed one prominent Auckland lawyer, Peter Kaye, to have received \$416,645

⁷⁴ Frederick Zemans "Recent Trends in the Organisation of Legal Services" (1991) 11 Queen's LJ 26, 43.

⁷⁵ Goriely & Paterson above n 7, 20.

⁷⁶ *Access to the Law* above n 36, 18.

⁷⁷ Legal Services Board *Annual Reports 1990-1991 and 1998-1999* (Wellington).

⁷⁸ "\$385,000 for Ellis" *The Dominion*, Wellington, New Zealand, 23 March 2000, 3 and "\$359,000 for Maori Legal Aid Case" *The Dominion*, Wellington, New Zealand, 20 November 1999, 2.

from the legal aid fund in the 1998-1999 year.⁷⁹ At least another 100 lawyers were stated to have picked up more than \$200,000 each.

In light of this media attention on huge public spending, the present government has gone to great lengths to cap future expenditure on legal aid at the budget for the 1999-2000 year. As a matter of general policy, this move is by no means unexpected. Over the past few decades, dissatisfaction has arisen with the fiscal demands of the welfare state and its assurances of a measure of well-being for all citizens.⁸⁰ Thus most social services today like health and housing are undergoing significant cost cut-backs. Additionally, governments are removing themselves from the welfare process and are instead concentrating on developing 'mixed welfare' or 'pluralist' systems through which all sectors of society share the responsibility for delivering welfare.⁸¹

In New Zealand's current social climate of the decline from the welfare state, cost cut-backs can thus be expected. Unfortunately, as some commentators argue, the problem for legal aid is that this retreat from universal welfare provision heralds an inevitable increase in demand for its state-funded legal assistance. Tamara Goriely, for example, maintains that as the government withdraws from welfare delivery in today's welfare state, there is an increasing emphasis on individual legal rights.⁸² This is shown by the fact that the state ceases to have control over complaints in public services and instead, individuals are given the right to bring judicial review of many public sector decisions.⁸³ The emphasis now is thus on individuals pursuing their grievances through the courts rather than relying on state regulation. This means that there will be an increasing reliance on legal aid schemes to effect these civil and social rights.

⁷⁹ "Earnings List Released" (1999) 523 Lawtalk 1.

⁸⁰ Jonathan Boston "New Zealand's Welfare State in Transition" in Boston et al (eds) *Redesigning the Welfare State in New Zealand* (1999) 3.

⁸¹ Judith Healy *Welfare Options: Delivering Social Services* (Allen & Unwin, NSW, 1998) viii.

⁸² Goriely, above n 31.

⁸³ In New Zealand this can be seen with increasing rights to challenge providers of health care. See Mental Health Act 1992. Also emphasis on individual rights shown by Children, Young Persons & Their Families Act 1989 and Domestic Violence Act 1995.

In addition to this inexorable rise in legal aid claims, there are also other factors which are increasing the demand upon the scheme. The continual growth of legislation for example will afford more rights to the poor and thus more possible claims for legal assistance. The Domestic Violence Act 1995⁸⁴ for instance, which has been enacted to give legal protection to partners from abuse in their domestic relationship, is expected to add another \$6m to the legal aid budget for the 1999-2000 year. Another factor is the increasing rate of unemployment. As more and more people lose their source of income, they also lose their ability to acquire legal services through the private market. There will thus be more pressure on the legal aid scheme to enable access to justice for these people.

Clearly then, the increasing need for legal aid at a time when financial resources are limited creates serious issues. In times of high demand, registrars and district sub-committees may be pressured to prioritise their granting of legal assistance, while litigants will be forced to show that their case is more deserving of assistance than others.⁸⁵ The result would thus appear to be not access to the law for all citizens, but access for only those citizens who have suffered a serious breach of their legal rights.

In defence, the government has stated at all times that it cannot maintain an open chequebook for legal services.⁸⁶ Just as for any social service like housing or healthcare, it must balance priorities, weighing the cost of legal services against the gravity of their need. In doing so however, the government does accept that it cannot undermine the fundamental right of access to justice. Politicians at this time are thus looking for ways in which low-cost legal services can be delivered to the poor without undermining their right to equal justice. The government's present and proposed attempts are examined below.

VI CUTS TO LAWYERS' REMUNERATION RATES

⁸⁴ Domestic Violence Act 1995.

⁸⁵ This is currently a concern with the English Legal Aid system. See Michael Zander "Twelve Reasons for Rejecting the Legal Aid Paper" 1995 NLJ 1098.

⁸⁶ Stephen Zindel "Legal Aid Refoms Announced" (1999) 514 Lawtalk 12.

The government's first method for bringing down the costs of legal aid has been to reduce remuneration rates for lawyers. In 1998, the government directed the Legal Services Board to reduce lawyer's set hourly rates for civil and criminal legal aid work by 10%.⁸⁷ Further in September 1999, the Board's Legal Aid Remuneration Instructions again reduced lawyer's hourly rates, this time by 13%, with travel rates being reduced by 25%. Significantly, the Board also reduced the number of paid hours for which a lawyer could complete certain civil cases.⁸⁸

This move has been by no means surprising and has been brought about to a large extent by the media attention on lawyers' annual incomes from legal aid work. As a consequence of this, there have been allegations that lawyers are taking an "easy and unmerited ride at the taxpayer's expense".⁸⁹ The public and politicians have thus successfully called for remuneration rates to be reduced.

So far, these cuts have definitely worked to reduce the costs of legal aid. From the 1998-1999 to the 1999-2000 year, the average cost per case of civil legal aid has dropped from \$800 to \$625.⁹⁰ The success of these cuts over the last two years and the continuing cost-saving attitude may thus mean that further cuts are in order. This however raises serious questions concerning the sacrifices that are to be expected of the legal profession and the impact it might have on the quality of service for legally aided litigants. In light of the need to ensure equal access to justice, should cuts to lawyers' remuneration rates be made at all? Are lawyers a valid source for cost-savings to the legal aid scheme?

A Arguments Against Lawyers' Fee Reduction

1 Providing legal services to the poor is a responsibility of the state

A popular argument against penalising lawyers arises from the fact that fundamentally, legal aid is a social service. As such it should be the state's

⁸⁷ Legal Services Board *Civil Legal Aid Remuneration Instructions 1998*, (1 August 1998).

⁸⁸ Legal Services Board *Civil Legal Aid Remuneration Instructions 1999*, (1 September 1999).

⁸⁹ See Jock Anderson "NBR's Spirited Campaign Speeds Up Reform of Legal Aid Scheme" *National Business Review* 8 October 1999, 3.

⁹⁰ "New Instructions Cut Legal Aid Rates Again" (1999) 520 *Lawtalk* 1.

responsibility to see that this system has the financial resources to meet its objectives.⁹¹ In doing so, the state fulfils its obligations to ensure access to justice for all citizens and, as with housing and healthcare, to provide a modest level of social well-being for all citizens.

Lawyers would thus argue that universal access to justice is no concern of theirs. Why should they have a responsibility to ensure a civil and social right? Duncan Webb raises the point that builders do not have a responsibility to ensure adequate housing, nor doctors a duty to ensure affordable healthcare. Thus, when the state's financial resources become limited, it should not be the profession's job to make sacrifices to ensure legal aid's continued provision. Rather, the costs of legal aid should be borne equitably by all citizens and not by lawyers alone.⁹² By reducing remuneration for lawyers, the government has opted out of responsibility and forced the Legal Services Board to pursue unjustified avenues for relieving its financial burdens.

2 Lower rates lead to a lesser quality of legal aid work

The New Zealand Law Society raises the most fundamental concern with fee reductions. It maintains that the gradual reductions in remuneration are persuading senior lawyers to forsake legal aid work for the rewards of private practice.⁹³ The inevitable result of this is that young, inexperienced lawyers are becoming prevalent amongst legal aid litigation. This, they say, is having disastrous effects for the quality of legal service provided for poor litigants, and thus for the achievement of equal access to justice in New Zealand.

Recent evidence would suggest that these claims are not pure fantasy. A 1997 study of 439 New Zealand lawyers, conducted by Gabrielle Maxwell at Victoria University of Wellington, revealed that the majority of 'moderately experienced lawyers'

⁹¹ This argument is made in D Webb "Why should poor people get free lawyers?" (1998) 28 VUWLR 65, 75.

⁹² Webb above n 91, 76.

⁹³ Ian Haynes "Legal Aid Stance Misconstrued" (1999) 530 Lawtalk 1, 2.

believed their fees to be 'slightly inadequate'.⁹⁴ Importantly however, the majority of 'senior lawyers' reported remuneration levels to be best expressed as 'very inadequate'. The continuing cuts in remuneration since this study was conducted would suggest that these attitudes have worsened. Consequently, this may very well mean that for the most experienced lawyers, the rates of pay act may as a deterrent to undertaking legal aid work.

Unfortunately, this quality issue has been exacerbated by a recent reduction in the number of paid hours for family law cases. As of this year for example, a typical application for a separation order under the Family Proceedings Act 1980 will permit a lawyer a maximum of 4 hours, instead of the usual 8, to wrap up his or her client's case.⁹⁵ Lawyers thus have less time to conduct a case in an area which is known to be particularly time consuming and labour intensive. The consequence of this is that it will be harder, particularly for women, to obtain protection, as they are the most frequent users of legal aid in these areas.⁹⁶

To take the problem even further, the Ethics Committee appears to have recognised the shortcomings of these legal aid pay rates. Traditionally, the Barristers and Solicitors Rules of Professional Conduct have imposed a duty upon lawyers to accept any client's instructions *unless* that practitioner has no time or is incompetent in the relevant area of law.⁹⁷ This rule has always ensured that poor people could not be unreasonably turned down in their quest for legal services and is thus influential in allowing poor litigants to retain the same lawyer as any other member of society.

However, due to the low remuneration rates at present, the committee has proposed that clause 3.01 be added to the Rules of Professional Conduct. Rule 3.01 states:⁹⁸

⁹⁴ G Maxwell *Legal Aid Remuneration: Practitioner's Views* (Legal Services Board, Wellington, 1997)

⁹⁵ Remuneration Instructions above n 48, 23.

⁹⁶ This point is made by Naomi Larkin 'Battered Wives Will Pay' *New Zealand Herald*, Auckland, New Zealand, 10 April 1999, 1.

⁹⁷ *New Zealand Law Society Rules of Professional Conduct for Barristers and Solicitors* (4th ed, Wellington, 1996) Rule 1.02.

⁹⁸ "Ethics Committee Proposed New Rules: Legal Aid" (1999) 520 *Lawtalk* 1, 2.

“a practitioner may decline to act where the client is legally aided if the practitioner believes: (a) the legal aid rate or the likely legal aid rate is not fair remuneration; (b) the grant of legal aid in the particular case has been capped at an unacceptably low figure.

This clause appears to allow lawyers to effectively refuse their representative services to poor litigants. Obviously, the Ethics Committee merely recognises the fact that lawyers should not be forced to accept a lower level of remuneration when there are more rewarding opportunities elsewhere. This is perhaps then the harsh commercial reality of today's legal world.

Unfortunately, the lawyers likely to thus utilise this clause will be the ones of experience that have more remunerable private work available. The remaining lawyers will not then accurately reflect the legal services available to other citizens through the private market. Consequently, there is thus a very real threat to the standard of legal representation for poor people in society. It seems that the benefit of the legal aid system in allowing any man on the street to have the best lawyer might thus be eroded by the government's cost-cutting attitude.

3 *Only penalising certain lawyers*

Another objection to making lawyers bear the brunt of cost-cuts is that it is only certain lawyers who undertake legal aid work. This is shown by the Maxwell study mentioned above which highlighted that the average contributions from lawyers to the job of legal aid ranged from 7% of their normal workload to over 80%.⁹⁹ What this suggests is that the new cuts will penalise some lawyers more than others. Clearly, this does not fit with the traditional responsibility upon the profession as a whole to provide for the legal needs of the poor without reward.

⁹⁹ Maxwell above n 23, 6.

4 *Already significant contributions made by lawyers*

The New Zealand Law Society maintains that the current cuts ask too much of the law profession. Even before the recent series of pay cuts in 1998 and 1999, lawyers were already contributing a great deal to the needs of the poor as a significant disparity existed between legal aid pay rates and those received for private practice.¹⁰⁰ Notably, this was partly due to the fact that lawyers would only charge 85% of their usual fee for legal aid work. The present fixed rates and capping of hours clearly represents a substantial move from this position.

Additionally, many lawyers already make significant contributions through their voluntary work for community law centres. This commitment is not a requirement of the profession, yet many lawyers throughout the country regularly give up their time to give citizens free legal advice and information. Significantly, lawyers are also well represented in citizens' advice bureaux and, of course, the district subcommittees which administer the grants of legal aid.

The Law Society would also argue that a further significant contribution is made through its donation of the interest on solicitors' trust accounts to the Law Society's Special Fund. This is used primarily by the Legal Services Board to fund community law centres and educational packages so that society is more aware of the law. Many lawyers already see this as a sufficient financial contribution to the needs of the poor.¹⁰¹

5 *The real costs of legal aid are unavoidable*

Perhaps the strongest argument against fee reductions for lawyers is that they are not responsible for the burgeoning costs of the legal aid system. Rather, rising costs are the results of inevitable and uncontrollable factors which feature in New Zealand's modern legal system.¹⁰² These factors include the new legislation brought in each year which entitles people to claim for legal aid and thus increases demands upon the

¹⁰⁰ Cowley above n 24, 1.

¹⁰¹ Benedict Birnberg "Community Legal Service" (1997) October NLJ 1559.

system. One example of this, as stated earlier, is the recent Domestic Violence Act 1995 which is expected to add another \$6m to the budget for legal aid.¹⁰³ Another factor is the gradual trend toward the use of expensive expert evidence, for example DNA technologies, which drive up the cost of litigation and consequently the size of grants. Finally, rising costs are also more a result of haphazard events like the Scott Watson and John Barlow trials which have required sustained financing over a long period of time.

Proponents of this argument therefore suggest that what the Legal Services Board should be concentrating on is new innovative ways to reduce court costs and to thus make the whole legal system less expensive.¹⁰⁴ This echoes claims from the legal profession that the funding of legal aid has simply not kept pace with legislative change and thus to cope with funding pressures the Legal Services Board has had to unjustifiably penalise lawyers.¹⁰⁵

B Arguments For Lawyers' Fee Reduction

1 The contractualist view

The contractualist view is the oldest and most popular argument for requiring lawyers to make sacrifices when servicing the poor. This argument's essential claim is that there is an implied contract between the state and lawyers through which certain rights and benefits flow. Under this contract lawyers enjoy a monopoly over the exercise of legal services in society from which they reap substantial monetary rewards and a high status in the community.¹⁰⁶ As part of their expectation of these benefits however, lawyers have a reciprocal responsibility to meet the *community's* expectation of competence, public protection, and access to the law. This expectation

¹⁰² See "Legal Aid system requires innovation rather than curbs" *The Daily News*, Wellington, New Zealand, 6 October 1999, 10.

¹⁰³ 'Budget Blowout for Legal Aid' *The Dominion*, Wellington, New Zealand, 10 March 2000.

¹⁰⁴ 'Budget Blowout' above n 103.

¹⁰⁵ John Rowan 'Inferior Aid Advice Likely Say Lawyers' *The Dominion* Wellington, New Zealand, 13 April 2000, 6.

¹⁰⁶ Although in recent times there have been signs that this monopoly is under threat. For example the Conveyancers Bill 1998 proposes to allow a separate profession to undertake property transactions.

was emphasised as early as 1925 by England's Lawrence Committee when it wrote:¹⁰⁷

“there exists a moral obligation on the part of the profession, in return for the monopoly in the practice of law which it enjoys, to render gratuitous legal assistance to those members of the community who cannot afford to pay for such assistance, provided that no undue burden is thereby cast upon any individual member of the profession.”

Clearly then, these reciprocal responsibilities have been the spur for the early charitable movement which saw lawyers offering free advice and representation to the poor. There has thus always been an aspect of tradition in the acceptance of sacrifices by the profession. In more recent times, this has been highlighted by one of New Zealand's own High Court judges. In *Darvell v Auckland District Legal Services Subcommittee*, where a practitioner appealed against a district subcommittee to obtain adequate remuneration for his legal services, Williams J found in favour of the award made by the district committee, stating that there was:¹⁰⁸

“an important and longstanding professional tradition that counsel should acknowledge some obligation to undertake legal aid briefs and in so doing accept that a sacrifice in terms of their usual remuneration is involved”.

This statement holds strongly in light of the fact that the legal profession has previously committed itself to a partnership effort with the government, despite the latter's control of assisting the poor through the legal aid system. When the Legal Aid Act was enacted in 1969, it was agreed that on the one hand the government would meet the costs of legal aid by providing the funding for needy litigants, while in return, the profession would provide its services to the government at a reduced rate.¹⁰⁹ Additionally, lawyers were to ensure that they would cater for all the cases brought to them by those of insufficient means. This partnership agreement cannot be forgotten in these times of financial pressure.

¹⁰⁷ Lawrence Committee (1925) in *Law Society Solicitors Serving Society* (Law Society, London, 1995).

¹⁰⁸ *Darvell v Auckland District Legal Services Subcommittee* [1993] 1 NZLR 111, 120 per Williams J.

2 A higher duty to preserve the legal system

In addition to the duties owed to the community under the contractualist view, it may also be argued that lawyers have a duty to preserve the legal system itself.¹¹⁰ That is, in being imbued with a monopoly power to profit from the practice and exercise of the law, lawyers must also be concerned with upholding and maintaining the integrity of the legal system. The idea is thus that in benefiting from the privileges of the legal system, a lawyer must be ready to protect its values. Importantly, these values will only be upheld if access to the law is enabled for all and thus it becomes a responsibility for every lawyer, as part of the wider profession, to lend his or her services to those who cannot obtain services through normal financial means.

C An Alternative Approach

Overall, arguments of contractualism, tradition and partnership are very persuasive in suggesting that some effort is required from the legal profession to assist in meeting the needs of the poor. If this is not to take the form of pure charity work, then at least some subsidisation of fees is required. However, where is the limit for such requirements? Lawyers can argue that it cannot condone further pay reductions and that it is in fact the government which is abstaining from its responsibilities for servicing the poor.

Unfortunately, the public remains unsympathetic to the plight of lawyers. As one commentator has said, "before grief-stricken briefs weep into their Bloody Marys, they need to reflect on just exactly who the taxpayer is helping – clients, not lawyers".¹¹¹ While this might be the case, legal aid operates in the context of the above average salaries of the legal profession. Thus while salaries may still have room for reduction, it must be remembered that as long as private work is available, lawyers will be encouraged by the low remuneration and Ethics Committee's proposals to move to this more lucrative source of work. Unfortunately, this will

¹⁰⁹ Nicolette Levy *Current Issues in Legal Aid* (LLM Research Paper, Wellington, 1989).

¹¹⁰ Webb above n 91, 88.

¹¹¹ Anderson above n 89.

pose serious problems for the quality of legally aided representation and will actually cause barriers to equal justice.

Thus the answer does not lie in reducing remuneration. Doing so merely leads to a lower quality of service and imposes sacrifices inequitably amongst the profession. Therefore, what perhaps needs to be done is to keep legal aid remuneration rates at a reasonable level, and instead to require a greater contribution from the profession as a whole towards the plight of the poor.

It is thus submitted that an American type obligation be introduced to the Law Society's rules of Professional Conduct. In the United States, the American Bar Association Model Rules of Professional Conduct provide that every lawyer should aspire to render at least 50 hours of pro bono legal services each year.¹¹² It then states that the majority of this pro bono work should be provided to those of limited means, or to charitable, educational or religious organisations. Although these rules are merely guidelines and have no legal force, they are being given effect by several large US companies like Ford and First Union who are refusing to hire lawyers who cannot provide evidence of meeting these requirements.¹¹³

In New Zealand, a similar rule should be introduced for the situation of legal aid work. Lawyers can thus be required to spend a certain number of hours each year doing legal aid work at its moderately reduced rates. In the event that lawyers are unwilling to put aside lucrative private practice for this, it is also submitted that they be able to 'buy-out' of their obligation by contributing a compensatory sum to the Legal Services Board. In this way, the responsibility is not simply a moral and thus unenforceable duty. It can be noted that in Ontario, a mandatory levy of £83 is imposed on each lawyer for legal aid work and this brings in a total of £2 million per annum.¹¹⁴ Similar revenue would be sorely needed by New Zealand's struggling scheme and would ensure that all lawyers are contributing to the legal aid system, and hence to their obligation for the poor.

¹¹² American Bar Association *American Bar Association Model Rules of Professional Conduct* (United States, 1999).

¹¹³ Greg Winter 'Legal Firms Cutting Back on Free Services for Poor' *The New York Times* New York, United States of America, 17 August 2000.

¹¹⁴ Paterson, above n 40, 239.

Significantly though, a problem in New Zealand would of course be the enactment of such a measure. While the Council of the New Zealand Law Society has the power under section 17 of the Law Practitioners' Act to make rules concerning the conduct of its members, the drafting of new rules is typically done by the Ethics Committee. And typically, the Committee will consult the whole profession on any proposed rule changes.¹¹⁵ It is thus uncertain whether New Zealand lawyers would vote for such a move. Clearly, legal aid lawyers would be in support of a shifting of the financial responsibility for serving the poor to the whole profession. However, because legally aided work is a minority practice, it is unlikely that such a rule would be supported.¹¹⁶

Nevertheless it is submitted that the legal profession must make some move to see that the needs of the poor are further provided for. Otherwise, it may mean that the government takes unjustified and undesirable moves to save costs in the delivery of legal aid, and may even go so far as to take control of the delivery of legal services in New Zealand. Positive action from the whole profession is thus necessary for lawyers to ensure that the proper steps are taken in the maintenance of access to justice. As Graham Cowley, retired president of the Legal Services Board, has pointed out, it is the failure of practitioners as a whole to perpetuate the traditional willingness to provide accessible services to the public that has in fact put the whole legal aid system at risk.¹¹⁷

VII THE LEGAL SERVICES BILL 2000

As a further answer to the financial problems of legal aid, the government has drafted the Legal Services Bill 2000. Set to come into force on 1 July, this Bill seeks to introduce a new framework for the state's system of legal assistance that emphasises improved administration, accountability, and efficiency.¹¹⁸ Primarily, these goals will

¹¹⁵ See for example the consultation for Rule 3.01 in Lawtalk above n 98.

¹¹⁶ The Maxwell study above n 94 suggests a third of lawyers have Legal Aid as their major workload.

¹¹⁷ Cowley above n 24, 1.

¹¹⁸ See Explanatory Note to Legal Services Bill 2000.

be effected through a new Legal Services Agency which will replace the current Legal Services Board and its subsidiaries.¹¹⁹

In general, the 'Legal Services Agency' will have the same functions and role that the Legal Services Board possessed. The major difference for the Agency however is that it will maintain the sole overall control of legal aid through supervising its distribution nationwide. By centralising legal aid in this way some consistency and certainty might be attained in the granting of assistance across the districts of New Zealand. Additionally, lawyers, or 'legal service providers', will be able to be monitored and controlled to ensure they are being remunerated correctly and working at acceptable standards.¹²⁰

Phrases such as 'improved administration' and 'efficiency' are thus the cornerstones of the new Bill. This reflects the view that in the modern welfare state, the government's role is not necessarily to *provide* all social provision, but merely to organise and to regulate it efficiently and fairly.¹²¹ Consequently the Bill does not attempt to address the overarching cost problems of legal aid and its effects on access to justice. The Bill does however provide for the trial of two pilot programmes which may prove to be solutions for legal aid's problems in the future.

A Trial 1: The Public Defender Scheme

Under the Legal Services Bill, the Legal Services Agency intends running a 'public-defenders' office in one New Zealand city.¹²² These offices, typically employed overseas, are run by the state and employ salaried lawyers to carry out all the criminal defence work for which legal aid is normally claimed. Upon appearance in court, a state-employed 'public defender', instead of a selected private practitioner, will thus automatically represent the accused.

Public defender schemes do feature overseas in jurisdictions such as Australia and the United States. They have also been introduced as a pilot programme in Scotland

¹¹⁹ Clause 77 Legal Services Bill 2000.

¹²⁰ Tony Ryall above n 3.

¹²¹ Pat Shannon *Social Policy* (Oxford University Press, Auckland, 1991).

under the Crime and Punishment Bill.¹²³ However, the use of these schemes in these countries has had a mixed reception. It will thus be useful to look at the costs and benefits of such a model.

1 Advantages of the Public Defender scheme

One advantage of the public defender scheme is that it allows for the use of the staff-model of delivery for legal aid. In New Zealand, this has been strongly discouraged by the Law Society who value their autonomy and independence in distributing legal services.¹²⁴ However, experts on delivery systems for legal aid argue that the staff or 'public-sector' model can provide a valuable counterbalance to the costs and benefits of using the judicare system.¹²⁵

For example, by working salaried staff on specific areas of law, these lawyers are likely to generate a significant area of expertise in the criminal law and in defending criminal offenders. Consequently, poor litigants can arguably be assured at least the same or higher quality of service from the scheme's specialised, experienced staff. Here in New Zealand, this can perhaps be illustrated by Meredith Connell, a private Auckland law firm, which has developed an excellent reputation in acting solely as prosecutors for the Crown.¹²⁶

Obviously though, the main advantage of the public defender scheme is that it will allow the government to rein in lawyer's access to the open-ended taxpayer chequebook. Lawyers will be paid on a salaried system and will work only in a particular district or field of criminal law. Thus they will not be able to take on board a large number of cases at once which calls to doubt their resulting quality. Australian studies have shown that salaried staff cost at least half of that when using private practitioners at sessional rates.¹²⁷

¹²² Tony Ryall, above n 3.

¹²³ Ian Hart 'Reforming the System' (1998) May NLJ 1402.

¹²⁴ See "Public Defender's Office Could Cap Legal Aid" *New Zealand Herald*, Wellington, New Zealand, 4 August 1999, 7.

¹²⁵ Zander above n 42, 22.

¹²⁶ "Public Defender's" above n 124, 7.

¹²⁷ N.S.W Public Solicitor *Public Defenders in Access to the Law* above n 36, 137.

2 Disadvantages of the Public Defender scheme

Despite these benefits of a public defender system, there is strong criticism for this scheme worldwide. In particular, where they are used in the United States, Canada, and some Australian states, there are doubts concerning the quality of public the defender counsel. For example, the United States programmes have been recently commented on by Marcel Berlins who is of the opinion that public defenders are either young, idealistic and boring and grow up to be highly paid trial lawyers in private practice, or they are cynical, seedy deadbeats and losers, badly dressed, always smoking, with a history of drink and bad relationships.¹²⁸ The reason for this negative view of public defender counsel is that the lower salaried pay in these schemes attracts only the inexperienced and substandard lawyers. Consequently, public defenders are often considered a poor equivalent to the private system or *judicare* model.

More specifically however, the difference in quality between private and public defender counsel has been the subject of many empirical studies in the United States. Many of these studies have been disparaging of the public defender system. For example, one Indiana study found that whereas 70% of clients of court-appointed counsel who went to trial were convicted, only 49% of the defendants who retained private counsel were convicted.¹²⁹ Likewise, a Pennsylvanian report concluded that the clients of private lawyers were much less likely to be convicted or receive jail sentences than were defendants represented by public defenders.¹³⁰

There is however opposition to these findings. A more recent study hints that the above results are due to the fact that public defender clients tend to be younger, poorer, more heavily minority, and charged with more serious offences than clients who retained private counsel.¹³¹ Consequently, this summary of more accurate

¹²⁸ Marcel Berlins "Who's Afraid of the Public Defender?" (1997) Nov NLJ 1629.

¹²⁹ Bodensteiner, Bork & Moskowitz *Unequal Justice Under Law: An Analysis of Indigents in the Criminal Justice System - The Indiana Experience* (1983) 6 W.New Eng. L.Rev. 263, 296.

¹³⁰ Wettick, *A Study of the Assignment of Judges to Criminal Cases in Alleghany County - The Poor Fare Worse* (1970) 9 Duq.L.Rev. 51, 65.

¹³¹ Floyd Feeney & Patrick Jackson "Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?" (1991) 22 Rutgers L J 361.

studies has found that there is essentially no difference on any measure of results between public defenders and private lawyers.

While empirical evidence is thus inconclusive, a significant fact is that in all studies the defendants themselves rated their private lawyers more highly than public defenders.¹³² By and large, this is thought to be because of the greater consultation time involved with private lawyers.¹³³ Public defenders tend to fail in keeping their clients' informed of developments and case particulars. Greater client satisfaction was therefore seen in private lawyers and defendants thus preferred selecting their own attorneys through a judicare scheme. Retaining the judicare scheme may thus be important for maintaining defendants' confidence in the law profession, and in the justice system itself.

Perhaps the biggest concern however for proponents of access to justice is the loss of the ability to have a lawyer of personal choice in public defender schemes. Under the current system, poor litigants may retain the litigation services of any lawyer who has the time and knowledge to take on the case. However, under the public defender scheme the defendant will instead be serviced by one of the staff from the public defender's office who is best able to deal with the accused's particular circumstances.

The obvious problem then is that the accused may be denied the services of a lawyer with which he or she has a good pre-existing relationship. This particular lawyer will be accustomed to dealing with the accused's behaviour and with the background of their alleged offence. Consequently, being assigned representation by the court would heavily disadvantage the poor litigant. This is especially so if the litigant is a minority as they may acquire lawyers who have no understanding of them, their background, their language, or their inherent disadvantages.¹³⁴

It is no surprise then that the Women's Access to Justice Report has noted women were only slightly concerned with having a lawyer of skill and experience. Rather,

¹³² Feeney above n 131, 382.

¹³³ Feeney above n 131, 382.

¹³⁴ Morris above n 23, 107.

they saw it as more essential that they have a lawyer they can choose for his or her personal qualities, someone they could confide in and trust, and who had particular personal knowledge and skills.¹³⁵ This would enable effective interaction with the lawyer as “Effective interaction...depends on the lawyer’s awareness of, and sensitivity to, the client’s values, experiences and needs.”¹³⁶ Unfortunately, these important factors may be lost under a public defender scheme.

3 Conclusion

Evidence from overseas jurisdictions thus suggests that while public defender schemes may indeed be cost-effective, their quality of service is in doubt. Add to this the loss of the right to counsel of choice and a public defender scheme may not be desirable at this present time. However, it is encouraging to see that the government is at least piloting the method to observe what results it brings in New Zealand.

Indeed, the use of the public defender scheme may yet prove worthwhile. It has been noted that the problems which arise in the United States are really a result of the gross underfunding which their schemes receive.¹³⁷ An optimistic view has thus been adopted by Stephen O’Driscoll, chairman of our Legal Services Board, who acknowledges that a public defender scheme may just work if it attracts high-quality lawyers at appropriate remuneration.¹³⁸ This view is similar to England’s Justice Report, which recommends making public defender representation optional if adequate scales of remuneration can be maintained.¹³⁹ This would then ensure that the scheme would be staffed by lawyers of extensive practical experience, commitment, and expertise, who have the resources to mount effective defences.

Unfortunately, if the public defender system is to be introduced as a cost-saving measure in New Zealand, it is unlikely that remuneration levels would be high. Unless there is a greater volume of cases heard through the scheme the same limited

¹³⁵ Morris above n 23, 108.

¹³⁶ Morris above n 23, 108.

¹³⁷ Berlins above n 128, 1.

¹³⁸ “Public Defender’s” above n 124, 1.

¹³⁹ Justice above n 35, 32.

source of funds would be utilised it is thus unlikely that it would be financially successful. Really, in terms of saving costs, the government should remember that it is not the criminal cases which suck up most of legal aid's funding. Rather, civil cases contribute to most of the ballooning budget and it is to this that the government should be directing its energies.

B Trial 2: Block Contracts

Block contracts are the second of the Bill's innovations for Legal Aid. Through clause 74 of the Bill, the Legal Services Agency has the power to enter into a bulk funding agreement with any individual lawyer or firm.¹⁴⁰ Under this agreement, the respective lawyer or firm will essentially be paid a lump sum in return for providing legal aid services to all the poor in a particular geographical district or field of law.¹⁴¹

1 Advantages of Block Contracting

The benefits of such a scheme are obvious. By working under a fixed budget, the government will not be offering an open chequebook to legal aid applicants and lawyers. Instead, the legal service providers will shoulder the risk that the population will actually require more legal services than what was predicted by the lump sum. Depending on the accuracy of the bulk funding tenders, block contracting may thus prove to be very cost-efficient.

Further, like the public defender scheme, there is also the benefit that by specialising in a particular field of law, the firm will develop experienced representation for poor people. This may also mean that faster assistance is provided which will save money in court costs and speed up the justice system. In Australia, where trials have had excellent results, these traits have been seen along with great reductions in delays for representation.¹⁴²

¹⁴⁰ Clause 74 Legal Services Bill 2000.

¹⁴¹ Block Contracting is known in other jurisdictions as 'bulk funding' or the 'contracting out' of legal services.

¹⁴² Paterson above n 40, 257.

The distribution of bulk-funding agreements will also give the Legal Services Agency a measure of control over the legal aid system. By choosing where it will offer its tenders for legal aid work, the Agency will be able to place legal services where they are needed most. Consequently, by transferring resources around the country, the Agency can act as a "vehicle for prioritisation" and thus improve the level of access to legal services.¹⁴³

2 Disadvantages of Block Contracting

However, there are of course certain disadvantages with the bulk-funding scheme. Already, select committees on the Bill have heard submissions from lawyers that contracting out legal services to willing firms will seriously undermine the quality of legal representation to the poor.¹⁴⁴ The reason for this is that like the public defender scheme, the lawyers who are likely to accept the government's tenders are likely to be the under priced and inexperienced junior lawyers. Senior lawyers who are unwilling to accept the government's low rates will thus be persuaded to private practice.

Further, the select committee has also heard concerns regarding the limited budgets under block contracting. In England, where 'block contracts' are being trialled under the Green Paper¹⁴⁵, the contract determines the price and specific volume of legal services that are to be provided in a particular district. Criticism has arisen therefore over the uncertainty in situations where the services in one district are used up. What happens when there are more clients than what are catered for? It is possible government guidelines could be used to decide who gets priority of service yet solicitors may be influenced by what case is the most profitable. This may then defeat the aim of legal aid to provide for the poor and may "turn legal aid into a lottery".¹⁴⁶

¹⁴³ Paterson above n 40, 257.

¹⁴⁴ "Inferior Aid Advice Likely Say Lawyers" *The Dominion* Wellington, New Zealand, 13 April 2000.

¹⁴⁵ Lord Chancellor's Department *Legal Aid – Targeting Need* (HMSO, London, 1995).

¹⁴⁶ Tamara Goriely "The Government's Legal Aid Reforms" in A Zuckerman & R Cranston (eds) *Reform of Civil Procedure* (Clarendon Press, Oxford, 1995) 363.

In New Zealand, there is the potential for similar problems. If a particular contract is to cover all legal services in a particular area, then difficulties will arise when, in a time of sudden demand, it is impossible for all legal needs to be met by the individual law firm. It is possible that people who miss out on being serviced might thus have to travel elsewhere and this could have repercussions for the geographical accessibility of legal services. In the Netherlands, this very problem was determinative in the Ministry of Justices' overall decision to abandon plans for bulk funding.¹⁴⁷ Obviously, it is essential that the government's tender offers are realistically set or that they allow for accessible back-up services.

Perhaps the greatest criticism of block contracting has however been the lack of 'choice' when requiring legal representation. Poor litigants would have no personal choice in the selection of their civil representation but would instead be serviced by the district's legal service provider. The importance of the right to choice of counsel, as highlighted by the discussion of public defender systems above, would suggest that its absence is a significant deterrent to the wholesale introduction of block contracting in New Zealand. Indeed, this was a significant concern in Australia where block contracts have already been tried and failed to be widely utilised.¹⁴⁸

3 Conclusion

Block contracting obviously raises many of the concerns seen with the public defender scheme. While there is definitely potential to save money, there is also a danger that the government tenders will be accepted by low quality law firms or individually inexperienced lawyers. Furthermore, there is a clear loss of the right to counsel of choice, which is important in enabling the efficiency of counsel and that of the adversarial system. Consequently, the current level of access to justice provided by the *judicare* scheme may well be undermined.

VIII CURRENT GOVERNMENT REVIEWS

¹⁴⁷ Paterson above n 40, 258.

¹⁴⁸ Paterson above n 40, 2598.

As part of the government's determination to keep legal aid's expenses contained, the previous Justice Minister, Tony Ryall, stated that particular aspects of the legal aid scheme would be under review. Specifically, this review would look at changes to the current eligibility criterion for legal aid, increases in the contributions required from users of the scheme, and an investigation of the necessity for community law centres. In terms of access to justice, it is necessary to examine the desirability of such changes.

A The Eligibility Review

The eligibility criterion is obviously essential to the objectives of legal aid in New Zealand. Purely by reason of its formulaic means test, it is decided who is entitled to receive state-assistance for obtaining legal representation, and who must rely on their own means in the private market. As discussed earlier, it is thus essential for the means-test to be accurately set so that assistance can be supplied to the right people and universal access to justice achieved.

However, over the years, government's inaction with respect to the financial test has been its primary means of keeping a lid on the costs of legal aid. Since the \$2000 means test was introduced in 1969, the government has refused to alter it to match inflation and thus the same test is used today.¹⁴⁹ Effectively, this has meant that eligibility for legal aid has gradually eroded since its introduction and consequently, with each passing year, fewer people have been able to claim legal assistance for criminal or civil proceedings. There is thus an increasing gap between those who are eligible for legal aid and those who can afford private legal services.

The Law Commission's paper thus highlights some of these gaps which have arisen even since the passing of the Legal Services Act 1991.¹⁵⁰ At the time of the Act, all people with an annual income a third higher than the base levels of the Domestic Purposes Benefit were eligible for legal aid. Since then however, increases in benefit levels to match inflation have meant that many beneficiaries are now unable to claim

¹⁴⁹ Some changes were made in 1987 when the government updated the deductible allowances for disposable income and capital, yet these changes have not matched the effects of inflation. Morris above n 23, 134.

legal aid. For example, as at 1 February 1999, the base benefit rate for a sole parent with two children was \$14 472.25. Under legal aid's current deduction allowances, this parent will now have \$2400 of disposable income and be thus ineligible for legal aid.

The legal aid eligibility criterion is thus clearly out of step with other forms of state assistance. This is also demonstrated by the eligibility for Community Service Cards. Since 1995-1996, the qualifying income for these Cards has been raised to keep them in line with benefit levels.¹⁵¹ These levels have consistently been higher than that for Legal Aid and this shows that the scheme is clearly out of step with other forms of government assistance and thus needs to be upgraded in the near future.

It is therefore strongly recommended that the financial criteria not be lowered to save costs. The current inconsistencies with other state assistance services demonstrates that the eligibility criterion for Legal Aid is inadequate in providing people of insufficient means with state funded legal representation. Certainly, the government's continued unwillingness to update the \$2000 financial threshold means that there is already a significant and increasing gap between those who can afford legal services and those who can obtain government assistance. Further erosion of this amount would pose a serious threat to access to justice in our society.

B Increased Financial Contributions

Contribution levels are also an essential part of the legal aid scheme. Essentially, they ensure that the scheme recovers enough revenue to continue the supply of legal services to the poor and thus the fulfilment of its objectives. The amount of contributions may however have an undesirable effect. If levels are too high, eligible citizens will be deterred by the financial consequences of using the scheme and will thus be unwilling, or unable, to achieve their own access to justice in society. It is therefore crucial for contribution levels to be set at an appropriate level.

¹⁵⁰ Morris above n 23, 136.

¹⁵¹ Morris above n 23, 136.

1 The \$50 initial contribution

Under the current structure of legal aid, applicants are required to make a mandatory \$50 initial contribution to the Legal Services Board.¹⁵² The rationale for imposing this requirement upon applicants seems to be to deter trivial actions and to bring in more revenue.¹⁵³ However, questions can be asked of the necessity of such a demand upon legal aid users.

For example, the Law Commission reports that the average weekly income of civil legal aid recipients in the 1998-1999 year was \$258.¹⁵⁴ The \$50 contribution thus constitutes a significant proportion of the average applicant's weekly income and can therefore act as an undesirable deterrent to applications for civil and criminal aid. This same deterrent has been noticed in criminal legal aid. The 1997 report *In the Interests of Justice* noted that proportionately fewer applications were made for legal aid in areas where the \$50 contribution was routinely imposed.¹⁵⁵ Arguably, the 'hardship' proviso should arguably exclude cases where \$50 would have a detrimental effect yet the figures show that only 18% of applicants were relieved through this mechanism.¹⁵⁶

Clearly then, the necessity of the \$50 contribution must be questioned. The Legal Services Board has stated that it is necessary as a deterrent to trivial actions yet surely enough checks and balances exist to ensure the scheme is not abused. For example, Registrars and sub-committees possess the discretion to refuse applications for legal aid on a variety of reasons, which include unreasonable causes of actions.¹⁵⁷ Furthermore, the relevance of the initial contribution to gathering revenue is doubted when the 1997-98 year saw only \$1.17m brought in on this account.¹⁵⁸

If revenue is to be a justification for the \$50 initial contribution, then surely there must be alternative avenues for raising funds. One option could be to change the

¹⁵² Sections 8 and 37 Legal Services Act 1991.

¹⁵³ J Rowan "Legal Aid in New Zealand" [1993] NZLJ 396, 401.

¹⁵⁴ Morris above n 23, 134.

¹⁵⁵ *Interests of Justice* above n 72, 35.

¹⁵⁶ Morris above n 23, 135.

¹⁵⁷ Sections 7 and 28 Legal Services Act 1991.

¹⁵⁸ Morris above n 23, 134.

costs rules for criminal proceedings. Currently, the Costs in Criminal Cases Act 1967 provides the general rule that where a defendant in criminal cases is successful, that defendant is entitled to costs from the Crown.¹⁵⁹ The reason for this is because the accused did not choose to be prosecuted, and so it is unfair to require the defendant to experience the considerable expense of defending themselves when their liberty, reputation and pocket are at stake.¹⁶⁰

However, where the defendant is legally aided, the courts have held that the defendant, and effectively the Legal Services Board, is not able to recoup its costs. This is because section 2 of the Act defines 'costs' as "any expenses incurred by a party" and thus, since the Board is not a party, it cannot recover costs.¹⁶¹ In *Harrington v R* the Court of Appeal stated that the Board's wish to have the ability to recover costs was understandable given that income it derives from other sources goes into its accounts and would be available to maintain or enhance legal aid services elsewhere.¹⁶² However, the court saw no real point in allowing this as the income it does gain comes from the same public funds that support its statutory obligations. The court did finish though by saying that costs awards *may* be justified considering the desirability of the Board's autonomous status and transparency in public accounts. However they said that this was not a matter for the courts and made their decision on the legislation at hand.

It is submitted that costs become recoverable. At these times, legal aid is under immense pressure to keep a lid on costs and seems to be restrained by the limited government resources allocated it. As an autonomous entity it should be allowed to recover costs awards, thereby allowing it to make more grants where there are reasonable chances of a favourable outcome. The small amount of income this generates could easily remove the need for the unnecessary \$50 initial contribution imposed on legally aided applicants.

2 Further Contributions

¹⁵⁹ Costs in Criminal Cases Act 1967

¹⁶⁰ *Acuthan v Coates* (1986) 6 NSWLR 472, 480.

¹⁶¹ Section 2 Costs in Criminal Cases Act 1967.

Even more criticism has been directed at the further financial contributions imposed by Registrars and District Sub-committees. On the face of it, there is not any opposition to the idea that where someone has the means to repay the legal services which have been rendered, then they should do so. This fits with the aim of social policy to shift the time at which people have to pay for services they need from periods when they cannot pay, to times when they can.¹⁶³

However, discomfort has arisen with the Board's ability to ensure its repayment by placing a charge over property "preserved or recovered" in the course of proceedings.¹⁶⁴ The Board maintains that this charging arrangement is only used in 8% of cases, yet this belies the significant part that it plays as a deterrent to obtaining justice.¹⁶⁵ For example, women are the majority users of civil legal aid and most of these cases involve matrimonial property disputes where the family assets are split - the woman often retaining the home and control of the children. Yet the woman is typically left on a low income and thus the possibility of a charge on the only real asset, the matrimonial home, can serve as a significant deterrent to bringing a civil action.

In some ways the Legal Services Act has addressed the undesirability of financial contributions in several cases. For example, protection orders under the Domestic Violence Act 1995 are exempt from contribution requirements.¹⁶⁶ The rationale is clearly that an action for the prevention and protection from violence needs an uninhibited path to the courtroom. Yet in the interests of justice, it could be argued that there are many proceedings which are necessary to prevent violence, for example, the custody of children and division of matrimonial property. If it is recognised that financial contributions are unnecessary in certain situations, why is it only domestic violence cases? As the Law Commission says, the Act's reaction to a social problem covers only "the narrowest range of meritorious situations".¹⁶⁷

¹⁶² *Harrington v R* [1994] 3 NZLR 272 (CA).

¹⁶³ Healy above n 81, 86.

¹⁶⁴ Section 40 Legal Services Act 1991.

¹⁶⁵ Morris above n 23, 140.

¹⁶⁶ Section 49A Legal Services Act 1991.

¹⁶⁷ Morris above n 23, 140.

C Funding for Community Law Centres

As stated earlier, legal information and advice is essential for enabling the client to identify and choose a legal solution before they actually pursue it. In many respects legal advice is thus a prerequisite to access to justice through legal representation. However, in contrast to England's system of legal aid, New Zealand makes no allowance for the provision of information and advice to the poor. Through its neglect, the New Zealand government has thus effectively stated that the responsibility for legal information and education is upon the community.

The Ministry of Justice reinforced this in its submission to the Law Commission, highlighting the need for community initiatives and responsibility concerning the provision of legal information.¹⁶⁸ Further, Becroft states that "community law centres are operated for a community, by a community, to bring about change in or benefit to a community... Ideally the establishment of community legal services arises from the initiative of the community itself and on-going community control is paramount."¹⁶⁹

Undoubtedly, there are thus grounds for saying that the responsibility for legal advice and information is clearly the community's. This emphasises the importance of community law centres in society. Since their introduction in the early 1980s, 24 centres around the country have emerged to address the public's need for legal information and advice.¹⁷⁰ However, the growth of these centres raises questions of funding.

Currently, the Law Society's Special Fund is used to fund these centres yet this is thought to soon become inadequate because of fluctuating interest rates on the trust accounts, and a greater demand for funding.¹⁷¹ Pressure has also come from the Law Society who submit that the interest on trust accounts to meet social objectives "is an

¹⁶⁸ Ministry of Justice *Briefing Paper* (October, 1996) in Morris above n 23, 110.

¹⁶⁹ Becroft "Community Law Centres Here to Stay" (1992) 22 Northern Law News 4.

¹⁷⁰ "Lawyer's Levy Saves Law Centres" *The Evening Post* Wellington, New Zealand, 19 November 1999.

¹⁷¹ *Evening Post* above n 170. Already, because interest rates have fallen, there has been a shortfall in funding for Wellington's three community law centres. Wellington lawyers have met this by paying \$40 each to meet the \$70 000 shortfall.

expropriation for which there is no justification".¹⁷² The Law Society contends that the money should instead be used for the legal profession's fidelity fund. The funding for community law centres is therefore on shaky ground and it is unlikely that funds will come from the legal aid budget. It may thus be necessary to call for more government funding or a greater input from the legal profession.

This however raises the question again of the commitment that the legal profession should be expected to make to the access to justice debate. It is possible that more can be expected. Lawyers have in fact accepted responsibility for legal information. It is a function of district law societies, for example, to publish legal information pamphlets for the benefit of public, and to operate community law centres.¹⁷³ Indeed, the Auckland District Law Society currently levies each of its members \$50 to support law centres around the country, while in Wellington, lawyers have contributed \$40 each to meet a \$70,000 shortfall in funding for its three law centres.¹⁷⁴ Perhaps more commitment from the government is however needed to meet its own responsibilities for filling gaps in the access to justice debate.

IX CONCLUSION

At the present time, the funding of the legal aid scheme is a serious concern for politicians and the public in New Zealand. While adequate access to justice was once the primary objective, there now seems to be an overriding determination to stem the flow from the taxpayer purse and rein in the costs of the legal aid scheme. Unfortunately, while such intentions are entirely reasonable in today's decline from the welfare state, the fundamental need for equal access to justice in society cannot become a secondary consideration.

This essay has shown that the government's current measures for reducing the costs of legal aid may have undesirable side effects for access to justice. Cuts to lawyers' remuneration rates threaten to undermine the quality of legal services for the poor while public defenders and block contracting also endanger the quality of legal

¹⁷² New Zealand Law Society submission in Morris above n 23, 109.

¹⁷³ Sections 5 and 6 Law Practitioners Act 1982.

¹⁷⁴ 'Lawyer's Levy' above n 170.

counsel and remove a litigant's right to choice of counsel. The current reviews of eligibility and contribution levels are also troublesome. Evidence suggests eligibility criteria and contribution levels should not be utilised to save costs as they already act to exclude many needy citizens from the scheme's coverage. Lastly, in order to ensure appropriate levels of access to justice in New Zealand, it will be necessary to ensure the further funding of community law centres, and thus the provision of legal advice.

While the government's present measures thus appear undesirable, other alternatives need to be considered. Contingency fees and legal expenses insurance are ideas currently being considered by the Law Society and wider business world. These options may assist in providing free services for poor litigants at no cost to the current legal aid scheme. Similarly, others are considering changes to the nature of court proceedings, so that justice might be delivered in a quick and cheaper way. Whatever the case, constant attention to the level of access to justice in society can only be healthy for the community. Answers must be found to rein in the current costs of the scheme without disturbing access to justice. As the President of the Legal Services Board has recently noted: "Certainly the costs of legal aid must be contained. But any changes eventually put in place should not hobble legal aid's benefits. They are too valuable to lose."¹⁷⁵

¹⁷⁵ Ian Haynes in Zindel above n 2, 2.

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