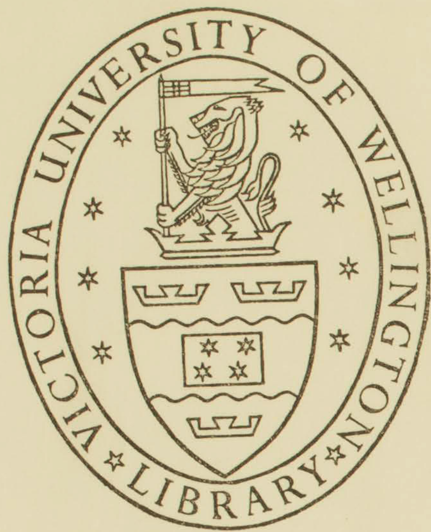
rxPA PARISH, A. V. A plea for clinical legal aid in N.Z.


VICTORIA UNIVERSITY OF WELLINGTON
LIBRARY

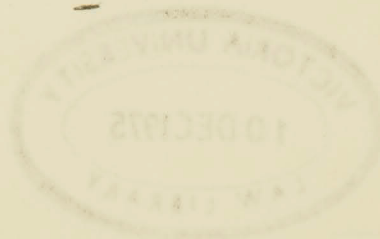
A PLEA FOR CLINICAL LEGAL AID

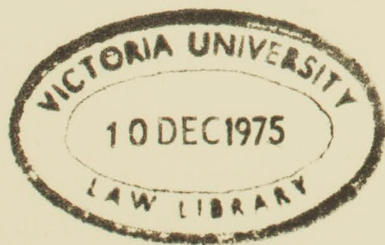
IN NEW ZEALAND

Research paper in Criminology
for the LL.M. degree

Victoria University of Wellington,
Wellington, New Zealand,
1975

ALAN V. PARISH





333,992

"It is almost impossible for a rich man to get into the Kingdom of Heaven. I say again — it is easier for a camel to go through the eye of a needle than for a rich man to enter the Kingdom of God!"

— Matthew 20:23

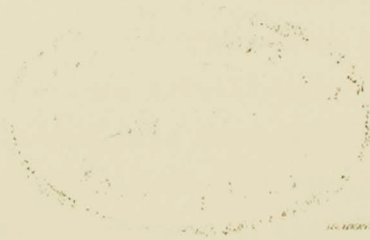


TABLE OF CONTENTS

I INTRODUCTION 1

II SPECIAL LEGAL NEEDS OF THE POOR 3

III ATTEMPTS IN NEW ZEALAND TO MEET THE
SPECIAL NEEDS OF THE POOR

(i) THE LEGAL AID PROGRAMS 8

(ii) OTHER ATTEMPTS 15

IV DIFFERENT TYPES OF LEGAL AID SCHEMES
AND THEIR MERITS 19

V A MODEL LEGAL AID PROGRAM FOR NEW ZEALAND 26

(i) ELIGIBILITY 27

(ii) COVERAGE 32

(iii) COST 35

(iv) QUALITY OF REPRESENTATION 38

(v) ADVERTISING 42

(vi) COMMUNITY INTERACTION 44

(vii) INDEPENDENCE FROM GOVERNMENT 47

(viii) GOVERNING BODY 49

VI CONCLUSION 54

BIBLIOGRAPHY 55

I INTRODUCTION

At the present time, legal aid in New Zealand is dispensed under the auspices of two seperate Acts of Parliament — the Offenders Legal Aid Act 1954 and the Legal Aid Act 1969, dealing with criminal and civil cases respectively. Both of these legal aid schemes are variations of the judicare model of legal aid — a system where an eligible applicant for legal aid receives advice and assisitance from a private practitioner with the state paying all or a part of the bill. As a result, no depository for an accumulation of expertise in "poverty law" is created. The talents and skills relied on to service legal aid clients remain limited to those possessed by the private profession.

In the late sixties, the United States government set up a network of "neighbourhood law firms" in needy areas staffed by salaried lawyers to aid the poor, mainly in civil cases. This was a new approach to providing legal services to the poor, and is discussed in more detail in chapter III. Public defender programs, (which defend "indigent" accused in criminal cases) long a part of the legal scene in some states, flourished as well. In other developments, the Province of Nova Scotia in Canada devised (in 1972) a clinical legal aid program to cover all legal matters, and in 1975 Australia implemented a national legal aid office, staffed by salaried lawyers, to aid the poor in matters of federal jurisdiction.

The thesis of this paper is that the developments in the United States, Nova Scotia and Australia, in establishing a network of legal aid clinics to service the legal needs of the poor, is a superior method of dispensing legal services than the judicare system — and more particularly, superior to the legal aid system presently in existence in New Zealand. I hope to show that the poor in New Zealand would be better aided in legal matters if a clinical legal aid system were established.

The paper is divided into four main parts. The first outlines the legal needs of the poor that should be satisfied by an adequate legal aid system. The second attempts to show the inadequacies of the present New Zealand legal aid scheme in serving these needs. The inherent advantages of a clinical legal

Victoria University of
Wellington
Law Library

aid program are outlined in the third part and in the fourth, I attempt to devise a guideline for a model clinical legal aid plan for New Zealand.

II SPECIAL LEGAL NEEDS OF THE POOR

To justify the creation of any kind of legal aid program, it is necessary first to examine the need that is to be satisfied. Only once the need has been discovered and enumerated, can the worth of the antidote — the legal aid system — be evaluated. Ostensibly, the purpose of a legal aid program is to provide legal services to the poor. If the need was as simplistic as that, then a "judicare" system, such as the one that exists in New Zealand, would satisfy that basic need. However, poor people are not rich people without money. The poor, as a group or class in New Zealand society, have special social and environmental problems that will dictate which type of legal aid program is best adapted to solve these problems. In the words of the Report of the Australian Legal Aid Review Committee:

> To provide these people with legal assistance, not only must a legal service program be developed to supplement the existing schemes but the type of scheme developed must reflect the particular needs of the group to be serviced.[1]

Consequently, to properly evaluate the merits of the different legal aid schemes in a New Zealand context, the needs of the poor as a group must first be enumerated. The remainder of this chapter will discuss these needs.

1. The poor are often not aware that their problems are legal in nature, or that a lawyer might help them. They are often unaware of their rights of appeal or review. For example, if there has been an abuse of discretion by an administrative official, to the detriment of the socially disadvantaged person, he often accepts that decision as binding. One reason for this legal naivety is that (unfortunately) a low level of academic achievement is the norm in pockets of poor areas. This fact often inhibits these people from identifying their problems as having a legal solution and seeking assistance from legal aid. Some authors[2] feel that this is one reason why matrimonial cases are such a large percentage of legal aid work — they are obviously a legal problem.[3] Whereas

---

1. Australian Legal Aid Review Committee Report, p. 11.
2. Cranston and Adams, Legal Aid in Australia, (1972) 46 Aust. L.J. 508 at p. 517.
3. In the 1974-75 fiscal year in New Zealand, 96% of the applications granted for civil legal aid were for domestic actions. — Annual Report of the Legal Aid Board (31 March 1975)

purchasers of shoddy goods, tenants illegally evicted[4] and accident victims[5] often do not realize that they have a legal remedy.

2. It is safe to say that the majority of lawyers practice in the downtown areas of the urban centres in New Zealand. The affluent suburbs also have adequate legal counsel in their localities. However, the poor usually have to leave their geographical area in order to seek legal advice. In Wellington, there are no lawyers practising in Newtown and only two firms — both branch offices — in Porirua.[6] It is understandable that most lawyers will prefer to locate in the core of the urban centres, in order that they can be in close proximity to the government departments, courts, banks and other lawyers. However, this means that the poor, who seldom work in this urban core, are forced to leave the area in which they live and venture into a part of the city where they may feel alien and insecure. This leads to certain psychological barriers (which are mentioned below) and often is the determining factor when deciding whether or not to make first contact with a lawyer. It is my experience (although I have no statistics to substantiate it) that in both Canada and the United States the legal profession is more equally distributed geographically around a city. True, the concentration is in the urban core, but each distinct area usually has at least one small firm located there to serve that suburb. Lawyers have found that a market can be created if they move to the clients. I cannot explain why there is such a disproportionate concentration in the urban core of New Zealand cities, except that perhaps the rigidity of the legal profession encourages this, as well as the fact that a lawyer may not practise on his own immediately after being called to the Bar, as is allowed in North America. But whatever the reason for this concentration of lawyers, it forces the poor to leave their familiar surroundings when seeking legal advice.

3. Many poor people are reluctant to go to a lawyer's office because of the psychological barriers which they often encounter. These can

---

4. The Milner-Holland Report showed that in two-thirds of cases of illegal eviction in England, no legal advice was sought.
   — Ludbrook, The Lawyer and the Community, (1974) N.Z.L.J. 396.
5. Studies in Canada and the United States have shown that up to one-half of persons with personal accident claims never take legal advice and as a result forfeit the damages to which they are legally entitled.
   — Ludbrook, op. cit., p. 396.
6. according to the 1975/76 Wellington area telephone book.

be feelings of social inadequacy or embarrassment in going to a pre-conceived idea of a lawyer's office. The whole environment of a modern legal office is quite foreign to the socially disadvantaged. First of all, more likely than not an elevator ride in a middle-class office building is required, where the client is deposited in front of a busy receptionist. The continuous percussion of typewriters sets a mood in the office as efficiently as any "muzak" might and an aura of importance eminates from the solicitors as they seriously go about their business. This environment is worlds apart from that familiar to the socially disadvantaged person. When the prospective client enters the lawyer's office, this environmental gap is accentuated by the obvious social and cultural gap which exists between him and the lawyer. The educational requirements, plus the fact that work with an established firm is required before full practising powers are granted, serve to preserve the legal profession as mainly middle-class in composition. Thus, a poor person in a foreign environment and speaking to a representative of a different social class feels shy, inhibited and often embarrassed in discussing his legal problems. This psychological barrier not only impedes the lawyer-client relationship but also might be enough to persuade the poor person not to contact a lawyer at all.

4. To see a lawyer usually involves making an appointment during office hours. Some lawyers guard their working hours very preciously, while others do make allowances and see clients in the evening. For poor people, however, it is often quite difficult to get permission to leave work to see a lawyer. If they do manage to obtain permission, it is usually time off without pay, which is another disincentive for seeing a lawyer. The geographical aspect comes in here as well, for a trip from an industrialized area of a city to the commercial core is often quite lengthy, adding to the time lost. Middle-class workers not only work in the urban core, but their jobs are geared to different appointments in one day.

5. By definition, the disputes of poor people revolve around small amounts of money. Historically, these people have not sought legal counsel in recovering these amounts because the lawyer's fees would have absorbed the money returned. Now, with legal aid, poor people have an opportunity to recover these debts, but the distrust and aversion to lawyers — and the belief that they will be

expensive — lives on. Small claims are still discouraged because the Legal Aid Act 1969 requires contribution from the aided person, unless the making of that contribution would cause undue hardship.[7] But a small claim to a poor person is worth more, proportionally, than a larger claim to a wealthier person.[8] For example, a claim of $100.00 to a person with an income of $2000.00 a year is worth more to him than $300.00 is to a person with an income of $6000.00 a year. To demand a contribution from a poor person in this regard is not only unfair, but does nothing to destroy the myth of the expense of lawyers that still exists among the poor.

6. The poor often present awkward problems to their lawyers in that their approach to the law is almost always at the point of urgency. Most ordinary legal offices are just not geared to dealing with this type of client. The poor person who has had his car repossessed or his gas cut off presents a real problem in a busy law office where someone has to drop all his scheduled work and rush out to try to seek an injunction for the client.[9] Needless to say, this urgency will be compounded if an application for legal aid has to be processed by an adminstrative body before legal aid can be granted.

7. The poor have legal problems that are characteristic to them as a group, just as middle-class people have problems (taxes, mortgages) that are characteristic to them as a group. However, the market forces of supply and demand have created a legal profession that caters to and specializes in, the problems of the middle-class. Until state subsidization of lawyers in legal aid cases came about, the legal profession had spawned no lawyers who developed an expertise in the problems of the poor, such as debt repayment, marriage breakups, welfare payments and so on. Although a pure legal expertise in this field may not be necessary, an expertise in knowing the language, people and shortcuts in this type of work is a valuable asset. The poor suffer because they have to deal with lawyers who possess skills with respect to the non-poor — special skills are required for the poor as well.

---

7. sections 17 & 18.
8. In other words, "disposable" income increases exponentially with an increase in income.
9. Hersey, A., Helping the Poor is a Challenge, The Bulletin, Dec. 7, 1974, p. 17.

8. Besides representation on the individual level, an essential need of the poor is representation for those interests which they share as a class. The middle classes have businessman's associations and professional and commercial interest groups (the Law Society, the Chamber of Commerce, etc.). The working class have unions to speak for them, although they have a narrow focus as far as interests are concerned and do not cover the majority of poor people. Thus the poor are unable to present a coherent voice when necessary.

These are the special circumstances that create a special legal need among the poor in New Zealand. For a legal aid plan to be qualified as successful, it must attempt to meet these peculiar needs. The next chapter will deal with the attempts that have been made in New Zealand to meet these needs.

III ATTEMPTS IN NEW ZEALAND TO MEET THE SPECIAL NEEDS OF THE POOR

(i) THE LEGAL AID PROGRAMS:

New Zealand presently operates two legal aid programs. The Offenders Legal Aid Act 1954 covers criminal cases and the Legal Aid Act 1969 covers civil cases. These both operate on a sort of "judicare" system — that is, a person submits an application for legal aid, and if approved, he then consults private counsel, whose fee is paid by the government or some other body. The province of Ontario in Canada also operates a judicare legal aid program. This section of the paper will concern itself with an investigation of the ability of these schemes in New Zealand to meet the special legal needs of the poor.

Looking first at the criminal legal aid scheme, a number of deficiencies become apparent. First, the application is granted or disallowed by "any Court having jurisdiction in criminal proceedings"[1] — which in practice means the magistrate who is to hear the case. The obvious problem is that different magistrates (or judges in the Supreme Court) will apply different standards when granting legal aid. Some grant legal aid sparingly, others as a matter of course. Some want a statement of the accused's defence from his lawyer while others want all statements made on a statutory declaration.[2] In some instances, the defendant may be forced to expose his defence to the magistrate to prove that it is "in the interests of justice" to grant legal aid. This obviously places an undue hardship on the legal aid defendant.[3] The Justice Department alluded to this problem in their latest annual report when they said that "the simplicity of the present provisions for criminal legal aid leaves much more room for divergent approaches in different places and for different abuses".[4] It seems apparent that stricter guidelines for eligibility for criminal legal aid — probably along financial qualifications — are required to prevent inequities of the granting of aid in different parts of the country.

---

1. s. 2(1) of the Offenders Legal Aid Act 1954.
2. Chong, Criminal Legal Aid in New Zealand, p. 40.
3. see Caldwell, Legal Aid - The Pattern, 1974 N.Z.L.J. 63, at p. 66
4. Report of the Department of Justice, March 1975, p. 7.

Another defect of the present system is that the lawyers who are providing the legal aid service are the more junior ones who often perform little other criminal work. Once permission for legal aid has been granted by the magistrate or judge, a court officer[5] determines the next lawyer on the legal aid list and calls him to see if he will take the case. The accused does not state a preference, except in exceptional circumstances. If the lawyer consulted is unable to take the case, because of prior commitments or such like, then the next name on the list is called until a lawyer is found who will take the case. The Law Society tries to ensure a certain minimum quality to the representation by demanding that a lawyer be practising for six months before his name is placed on the list.

The legal aid list in Wellington contained ninety-five names as of September 1, 1975, many of whom were experienced counsel — such as Mr. A.A.T. Ellis, Mr. M. Hardie-Boys, and Mr. M.A. Bungay. However, in practice it is the more experienced counsel that are often pre-disposed when their name is called, resulting in junior counsel handling most of the cases.[6] Of the 95 names on the Wellington list, 45 had been called to the Bar after January 1, 1969 (i.e. had been in practice for six and a half years). This does not seem to be an over-representation of junior counsel, but as mentioned, they do in fact handle most of the cases.[7] Not only are most of the lawyers young, but quite often they handle no other criminal work except legal aid cases. Consequently, they have developed very little expertise in this area of the law which definitely reduces the effectiveness of the representation. This lack of a development of expertise in criminal work is one of the inherent weaknesses of the judicare system.

There are also a great number of complaints about the pay scale that applies to work under the Offenders Legal Aid Act. Under that plan, the magistrate is under an obligation to award the defence counsel either scale I, II or III, depending on the seriousness of the offence, the complexities of law and fact and the skill, labour and responsibilities of the practitioner in the

---

5. who is usually the Registrar of the Court.
— see s. 8(1) Offenders Legal Aid Act Regulations (1972) c. 176.
6. Chong, op. cit., p. 104.
7. This fact was affirmed by the deputy-registrar of the Wellington Supreme Court.

conduct of the case.[8] As a matter of practice, scale II is usually awarded.[9] Not only is it embarrassing for counsel to be "graded" by the magistrate, but the fees awarded are too low to encourage a top effort. Charity is still the underlying incentive for good work by the lawyers. Mr. Jeremy Pope, the editor of the New Zealand Law Journal, outlined a case where a lawyer (with overheads of $7.50 an hour) received $8.00 an hour for a three day rape trial in the Supreme Court in Wellington. He concluded rather bitterly, saying that "until the rates (increase), criminal trials will continue to be treated by some as a training ground for the young and newly qualified. After all, they can cut their teeth on people. It's property that really counts — and that's where the legal aid rates are reasonable."[10]

Another shortcoming of the criminal legal aid scheme is the imbalance in prescribed fees in favour of defended cases as opposed to pleas of guilty. There are allowances for the preparation of a case, and fees are payable per half day for the actual conduct of a defended case.[11] Consequently there is more reward for the lawyer if the client pleads not guilty. But a guilty plea can involve just as much work for the lawyer. There is the interview(s) with the client and then often a great deal of time-consuming work to speak to sentence. Doctors may have to be consulted, a psychiatric report may have to be arranged and studied and the probation report should be examined. Often there may be a number of appearances in court for remands before the case is concluded. None of this oft-necessary work is reflected in the pay scale for a guilty plea — often resulting in a less than perfect attempt at mitigation of sentence. As a consequence, the guilty pleas are usually handled

---

8. s. 12(2) Offenders Legal Aid Regulations (1972) c. 176.
9. Grant, The Future of Legal Aid, 1974 N.Z.L.J. 49.
10. 1975 N.Z.L.J. 282.
11. In the Schedule to the Offenders Legal Aid Act Regulations (1972) c. 176 (Part II) for appearances in the Supreme Court for indictable offences under the Crimes Act, the pay scale varies from $28.50 to $57.00 per half day for defended cases. The fee allowed for appearing on arraignment, where for any reason the trial does not proceed further, is $7.00 to $14.00. Under Part I for summary proceedings in Magistrate's Court, the fee for representation on a guilty plea is $3.00 to $6.00 (flat rate), while the fee on a not guilty plea is $4.50 to $9.00 per hour.

by inexperienced lawyers not yet too valuable to their firms to be kept off the legal aid list. If senior counsel do indulge in such work it is out of a sense of charity. This is definitely the wrong approach, for the "criminal legal aid system should not have to depend upon the inexperience of junior practitioners and the charity of senior ones".[12]

An obvious defect in the criminal scheme is that the awarding of legal aid to an accused is completely in the magistrate's discretion — consequently there is no right of appeal. There has been one case, however, where the magistrate's refusal to grant legal aid to two defendants was sufficient to induce the Supreme Court to order a new trial. In McIntosh and Another v. Police,[13] the magistrate had refused to grant the defendants legal aid because "the man could not satisfactorily explain why they had no ready money saved". This reasoning was flatly declared to be wrong by MacArthur J. in whose opinion "if in fact a person charged has no means, that should immediately be put into the scales in his favour towards the grant of legal aid".[14] However, the lack of an appeal mechanism from a refusal of a legal aid application in criminal cases is not a weakness inherent in a judicare or assigned counsel legal aid system — it could easily be rectified. Consequently it requires no further discussion here.

Another shortcoming of the Offenders Legal Aid Act is that it does not take adequate measures to provide legal aid to those already incarcerated in an institution. For example, when the girls are first admitted to Arohata Borstal in Tawa, they are given a form outlining their rights of appeal. This form is first explained to them by one of the staff, after which they have to sign another form stating that they understand their rights. If the girl wishes to appeal, she must lodge her notice within ten days — a very short time period. She is given a form to submit for appeal purposes (which includes a requirement of grounds of the appeal) and another to apply for legal aid if she so desires. Although the staff at the Borstal are not supposed to aid the girl in filling out her appeal form, obviously someone has to — so the educational officer or someone else not formally in the

12. Grant, op. cit.
13. [1963] N.Z.L.R. 83.
14. ibid, p. 87.

employ of the institution takes on that duty.

If there was a clinical legal aid program in Wellington or Porirua, a staff solicitor could be assigned to each institution and visit there once a week (at least) to counsel in regard to any legal problems. Nova Scotia Legal Aid, a clinical program, supplies this service very successfully. A similar result could be achieved if the Law Society engaged a private solicitor to visit each institution each week — very similar to the duty counsel program. If one of these services were instituted, a lot of the court's time would be saved, because many of the girls now appeal with little hope of success. The legal aid lawyer could counsel the girl on the advisability of an appeal and also assist the girl in filling out the appeal form. As a consequence of such a program, the time for submission of notice of appeal would have to be increased from ten to twenty-one days, but this would be more in line with other western countries.

A visiting lawyer could aid the inmates in other ways. Many inmates have debt problems and/or domestic problems and their period of incarceration is often a good time to solve them because they have the time (and often the inclination) to consider them. Moreover, in any institution there are a number of instances when an inmate or a staff member requires a prompt answer to a legal question (such as the ramifications of admitting to further crimes). As it is now, there is no central organisation or person that the inmate or his advisor could contact, assuming he has not the finances to retain a lawyer. The only possibility is the Justice Department lawyers — and they hardly qualify as independent counsel. At the present time, the institutions have to rely on volunteer organisations (such as Prisoners Aid) to supply these much-needed services. A regular visiting solicitor, either from a legal aid clinic or employed by the Law Society, would relieve the present reliance on charity and supply a need that should be fulfilled as a right.

There is yet another instance where legal aid could assist institutions. Under the present regulations, if a girl in a borstal commits an offence while an inmate of that institution (such as assault) the superintendent has the option of dealing with the incident himself, asking a magistrate to come to the institution, or send the girl to court. If a magistrate visits the institution, a hearing takes place, but the girl has no counsel.

As well, the institution, which should play a neutral role, is forced into the role of prosecutor because the superintendent has to produce the facts. Obviously, neither the girl nor the staff feel comfortable in their roles. A much better solution would be to have a legal aid lawyer speak for the girl and perhaps send a policeman out to present the facts. After all, a further deprivation of liberty for the girl could result.

The civil legal aid program in New Zealand has some faults as well. Perhaps the most glaring is that it does not cover divorce proceedings.[15] The ostensible reason for this is that the cost of providing such a scheme would be prohibitive.[16] It may well be true that providing divorce services would be very costly in a judicare sysytem, as exists in New Zealand, but I will show below that divorce is an area that every legal aid plan should cover and that a clinical legal aid program would go a long way in reducing the cost of providing such a service.[17]

Another fault of the Legal Aid Act 1969 is that it is geared for contentious or litigious matters. It does not adequately provide legal advice for the poor. Section 15 of the Act, which outlines the "scope" of legal aid, covers only "proceedings" in different courts. The legal profession realized this inadequacy in the legislation, and this was one facter in establishing the Legal Advice and Referral Clinics mentioned in the next section of the paper. However, as will be shown,[18] these advisory clinics are grossly inadequate to properly dispense legal advice — a very important commodity in any legal aid scheme. The importance of providing legal advice in a legal aid program is further discussed in Part V below.

The applications for civil legal aid are available to the public at the Registrar's Office at the Supreme Court in Wellington. However, the media have not properly brought this fact to the public. The plan has not been properly advertised — a necessary pre-requisite, especially when dealing with the poor.

---

15. Legal Aid Act 1969, s. 15(2)(f).
16. The Legal Aid Board estimated that to extend coverage to divorce proceedings would cost an estimated $450,000.00 annually — almost as much as the present expenditure for the entire program.
— Annual Report of the Legal Aid Board, 31 March 1973, p. 5.
17. see infra, p. 36
18. see infra, p. 16

To a lesser degree, this criticism applies to the criminal legal aid program as well. The administrators of the legal aid schemes seem to assume that it is public knowledge that these forms are available and leave the duty on the individual to find out about the program and make an application. A judicare legal aid system assumes both initiative on the part of the client and an ability to identify legal problems in a timely fashion. "Preventive law", as administered in clinical programs, makes contrary assumptions, and uses advertising as a means to reach the client — both to disperse information about the clinic and about the law. The possible uses of advertising in a legal aid program will be outlined in Part V.

As well as these defects, the civil legal aid system, simply because of its structure, fails to break down any of the psychological barriers that exist between lawyers and the poor, as mentioned above; nor does it create a place for itself in the community or act as a spokesman for the poor as a class. Moreover, it does not create a depository of expertise for handling the legal problems of the poor — it simply provides legal counsel for the poor if they are forced to go to court. This is a very small part of a comprehensive legal aid program for the socially disadvantaged in any community. Any comprehensive legal aid program will have to adapt to these needs. Something more is required in New Zealand.

(ii) OTHER ATTEMPTS:

The two legal aid programs in New Zealand are geared merely to provide strictly legal services for the poor — mainly counsel in courts of law. The growth of Legal Referral Centres, Citizens Advice Bureaux, and so on, is concrete evidence of the fact that the legal aid schemes are not satisfying all of the special needs of the poor. The question then remains of whether these additional institutions sufficiently satisfy the needs of the poor that they service. My contention is that they do not — and that instead of relying on an essentially volunteer staff to cover these needs, the services that these institutions provide should be incorporated into a state-financed legal aid program.

A number of legal referral centres, staffed by volunteer lawyers and law students and operated by the District Law Societies have sprung up in the major centres of New Zealand. These are now located in Auckland, Wellington, Christchurch, Hamilton, and Rotorua. Modelled after the Citizens Advice Bureaux in England, they are basically legal advice centres located in poorer geographical areas of the urban population. As well as dispensing basic legal advice, they act as a referral service to practising lawyers and also as a form-filling service. There are eight such centres in Auckland (with three more due to open), two in Wellington (Porirua and Newtown) and six in Christchurch.

It is obvious from the attendance figures that these referral centres are fulfilling a need not properly serviced by the existing legal aid programs. In Auckland, an average of one hundred people receive legal advice from these centres each week.[19] In the suburb of Aranui, in Christchurch, 244 persons were seen in the first year (1972-73)[20] and in Wellington the two centres at Newtown and Porirua serviced 395 clients in the first year and a half of operations[21] — moreover, these are centres that operate usually one night a week and a Saturday morning. These centres will help break down the geographical barriers that exist between the poor and the legal profession, but they are inadequate in many ways of fulfilling the other needs of the poor.

---

19. Ludbrook, op. cit., 1975 N.Z.L.J. 65.
20. Williamson, Legal Referral Centres, 1974 N.Z.L.J. 128.
21. Figures curtesy of Mr. J.L. Marshall, Wellington.

Perhaps their greatest weakness is the fact that they have to refer clients to other lawyers and are unable to act for the person themselves. Quite a few of the clients that make the effort to contact the legal referral clinics never make the further contact with the lawyer to whom they are referred. Other weaknesses stem from the voluntary, part-time nature of these centres: no expertise in the problems of the poor is built up, no place in the community is created, and the psychological barriers remain essentially intact. For example, the lawyers lack the time to devote to such important ancillary activities as public education, publicizing the service and forming pressure groups to press for law reform. They have only a limited opportunity to build a close association with and win the confidence of the community.[22] The fact that the centres operate "after-hours" is a double handicap. Not only do they not establish a place in the community, but when it comes to clearing up a minor problem with a phone call on the client's behalf, the lawyer is helpless. He must wait until office hours or refer the client to another lawyer.

The referral centres serve as an input into the legal system for the poor, but do not change the system itself in any way. Regardless of the noble intent of the lawyers who staff these clinics, it is not a comprehensive enough measure. The poor should not be treated as charity, but have a right to legal services tailored to their needs.

In South Auckland, another problem has developed in that many firms are unwilling or unable to accept new legal aid clients. The reason for this is two-fold. First, there are not sufficient law firms in that area to handle all of the referred cases, leading to an over-taxed profession that is just too busy (so they say) to take more cases. Secondly, they are dissatisfied with the costs allowed for legal aid work granted by the Auckland Legal Aid Committee.[23]

While the attendance figures quoted above prove that there is a need for legal aid centres in poorer areas, they also show that they are not being utilised to a very great extent, especially in the Wellington area.[24] The deficiencies mentioned

---

22. Ludbrook, op. cit., 1975 N.Z.L.J. 127.
23. ibid.
24. In the Halifax office of Nova Scotia Legal Aid, which

above no doubt account for this. The referral centres are a half-way measure. They allow the legal profession (and the government) to say that they are taking steps to meet a very obvious need, yet the part-time, after-hours, referral nature of the clinics obviously hampers the program to near ineffectiveness.

A number of socially-conscious young lawyers in Auckland realized this deficiency in the referral clinics and approached the Law Society with plans to operate Neighbourhood Law Office schemes, which would have one or two full time lawyers working out of an office in South Auckland. Plans for a similar scheme are now underway in Wellington (Community Law Workshop). These programs, while servicing the needs of the poor more adequately than the referral clinics, are still (I feel) doomed to failure. First, they are operating in competition with the two existing legal aid programs. This means that they will again be restricted to a type of social welfare-referral program rather than the sole outlet for legal aid in the community. Secondly, the Law Society, in approving financing for these clinics, has restricted their scope very widely.[25] Unless these clinics operate as the only source of legal aid — both for advice and assistance — they have no hope of succeeding. The enthusiasm for these clinics that exists when they are inaugurated will no doubt wane once the staff lawyers find out how restricted their activities are. I agree with the sentiments of Mr. I.A. Muir, lecturer in law at the University of Otago, when he said:

> ... If anything ever does come of (the proposed amendments to the Law Practitioners Act to allow District Law Socieies to set up and operate Neighbourhood Law

---

services a metropolitan area slightly smaller than the greater Wellington area, there were 1,513 applicants in the 1973-74 fiscal year, 435 of whom were for advice only.
— Nova Scotia Legal Aid, Annual Report, (1973-74) Appendix D

25. The Law Practitioners Amendment Bill (not yet passed by the House at the date of publication) would give the New Zealand Law Society power to facilitate the provisions of adequate legal services in particular localities by subsidizing law offices or legal advice bureaux. However, negotiations are still going on between the Auckland group (led by Mr. Ludbrook) who hope to set up the first such centre, and the Law Society. There appears to be a disagreement over the allowed "scope" of the clinic, with the Auckland group charging that the restrictions imposed by the Law Society will relegate the clinic to merely debt and matrimonial work. The Auckland group envisages a program to cover all facets of the law.

> Office schemes) it will necessarily be in the nature of a minimal ad hoc concession to the idealism of a few younger members of the profession. The function of the staff of these offices will be surrounded with unjustifiable restrictions and the whole service offered very much in the spirit of upper-class charity, having little practical effect upon the lives of those for whom it is to be established — the residents of the working class communities.[26]

A number of other organisations have sprung up to try and satisfy these special needs of the poor, in lieu of the legal profession properly attending to them. Truth magazine operates a legal advice column in each edition, which deals mainly with problems of the poor. The Tenants Protection Bureau in Wellington deals with problems of a landlord-tenant nature on behalf of tenants. As well, there are a number of Citizens Advice Bureaux, designed after the English model. At the Bureau in Lower Hutt, the legal advice branch had a total of 276 interviews in the last year.[27] All of these organisations fill a need in the community that is being neglected by the provision of ordinary legal services. However, they can act only as a referral service or give informal legal advice, which is obviously inadequate. As I will argue below, a clinical legal aid program, funded by the government and operated throughout New Zealand would be the best solution to this problem.

---

26. Muir, A White Paper for Legal Services?, The New Zealand Listener, August 9, 1975, p. 19.
27. The Evening Post, August 16, 1975.

IV DIFFERENT TYPES OF LEGAL AID SCHEMES AND THEIR MERITS

Having enumerated the special legal needs of the poor and pointed out the inadequacies of the New Zealand schemes in satisfying these needs, I will now describe other attempts at providing legal aid for the poor. The purpose of this paper is to make out a case for a clinical legal aid scheme in New Zealand which will be developed in the following chapter. This part will involve a short and cursory description of other methods of supplying legal aid. There are basically two types of schemes — one is "judicare", where legal aid is made available to all eligible under a means test, by means of the government or profession subsidising the cost of any legal action taken on behalf of a client by a private practitioner; and the other is "clinical", where the state opens a legal aid office in socially deprived areas staffed by salaried lawyers. Most states have a combination of the two, but one plan usually dominates.

Judicare is best exemplified by the legal aid schemes implemented in Britain, New Zealand and the province of Ontario in Canada. In a study of the Ontario plan (by the Law Society themselves) published in 1972, it was noted that the Ontario plan (although obviously of a superior overall quality in the eyes of the Society) had experienced underachievement in the areas of legal counselling and matters requiring summary legal assistance.[1] These deficiencies were due in part to the lack of public knowledge concerning the plan and in part to its inherent structure. Not only is the structure of a judicare program inappropriate to satisfy those needs, but it is inherently unable to provide facilities for "preventive law". When confronted with this inadequacy, the Report admitted that clinical or related functional facilities would be required and that the existing judicare program has neither the facilities nor the legislative authority for formal initiatives in preventive law.

Other problems mentioned in the Ontario plan were (1) a frequent inability to make a meaningful choice of counsel from the legal aid list, and (2) a high dropout rate in advice and referrals for non-litigious assistance. The ability of the client to choose his own counsel is supposed to be one of the advantages of the

1. The law Society of Upper Canada, Community Legal Services Report, p. 8.

judicare system. However, if the client cannot distinguish between lawyers this benefit is nullified. Not only that, but what often happens is that the "lawyer of their choice" refers judicare clients to his junior partner.[2]

If the government is committed to a judicare sysytem and they want to move lawyers into needy areas, then it has to use either the profit motive, subsidies, or other incentives. This, no doubt, will be very expensive for the taxpayers. In addition, the young lawyers who move out to these areas will probably move back to the urban core of a city in a year or two for a number of reasons. They may desire superior financial rewards, they may tire of the frustrations of working in poor areas or they may want to further their ambition in the profession.[3]

In the United States, legal aid is primarily a state matter. However, in 1964, President Johnson created the Office of Economic Opportunity as part of his "war on poverty". Under the Economic Opportunity Act of 1964 almost a thousand neighbourhood law firms were set up, mainly in poverty and ghetto areas. These offices, staffed by salaried lawyers, were not created merely to advise and represent clients on their legal problems but also to assist groups within the community to articulate their grievances and to work for positive objectives through legal means. The staff lawyers were encouraged to develop an expertise in "poverty law" and to contribute to law reform by arguing test cases before the courts. Another interesting aspect of the neighbourhood law offices was that there was to be "maximum feasible participation" of the poor in the control of these offices — a guarantee that the poor would not only be serviced but have a direct input into the program.

One of the last official acts of Richard Nixon as President of the United States was to sign the Legal Services Corporation Act of 1974,[4] which created an independent corporation within the Economic Opportunity Act as a new title X. This new corporation is to take over the administration of the neighbourhood law offices under the guidelines listed in that act. The interesting points in this bill will be discussed in the next chapter when a model legal aid program is outlined.

---

2. Graham, Legal Aid Hearings, The Fourth Estate, Halifax, Canada, July 9, 1975.
3. Ludbrook, op. cit., 1975 N.Z.L.J. 260.
4. July 25, 1974.

In many of the states of the United States and Australia there are public defender offices.[5] These are offices of state-salaried lawyers who handle exclusively criminal cases in defence of clients who satisfy a means test. In a way, they are a counter-point to the Crown Prosecutor's Office. The advantages of such a system are many: a competent store of defence counsel is created, it costs less than judicare, it can hire para-legal staff and it is better-equipped to handle cases in the early stages of the criminal process, where legal advice is often crucial. These advantages will be explored in greater detail in the next chapter.

The only legal aid program that I have come across that combines most of the advantages of all these different schemes is that set up in the province of Nova Scotia in Canada. On October 13, 1971, the province of Nova Scotia agreed to finance a legal aid plan run by the Nova Scotia Barristers' Society. This plan involved the creation of ten offices around the province staffed by two or more lawyers (with one exception) who were paid on a scale equal to that of the Justice Department. The one office handles all legal matters — both civil and criminal — unlike those in the United States or Australia which have rigidly defined areas of responsibility. This type of legal aid program not only creates an expertise in "poverty law" matters in the staff, but it costs less, allows for community interaction and breaks down many of the psychological barriers between the lawyers and the poor because it creates a place for itself in the community. The model legal aid plan which is devised below will be based mainly on this example.

At this point it is interesting to note what different writers on this topic have said about the respective merits of judicare and clinical legal aid programs. As can be expected, the Law Society of Upper Canada (Ontario) were adamently in favour of a judicare scheme.

> Maximum participation by and co-operation from the Practising Bar, in our view, remains of critical importance to the success of any legal aid program purporting to comprehensively service the legal needs of assisted persons throughout any given jurisdiction. Clinical

---

5. Eleven states in the United States have statewide defender offices and 23 other states have defender offices in major urban areas. New South Wales, Victoria and Queensland have public defender or similar programs in Australia.

> programs alone are gravely unequal to this task. Where they pursue such undertakings, underprivileged persons within those constituencies tend to become the captive clientele of overworked, frequently inexperienced and transitory young lawyers employed in clinical facilities.[6]

Also mentioned in the report were the views of the English Law Society when that body was discussing the possibility of setting up local legal aid centres. The English profession stated that it was concerned about the institutionalization of legal aid -- that it was an unhealthy development for a profession committed to serving, within its ability, the entire spectrum of legal need. The obvious answer to this concern is that the profession has not properly served the legal needs of the poor to this date. In the words of Mr. I.A. Muir -- "it is clear that the legal profession as such has done little to contribute to the development of a full range of legal sevices available to all members of the public as of right, on the basis of need rather than ability to pay a fee to the persons dispensing those services."[7]

The hypocracy of the views of this very conservative professional body (the Law Society of Upper Canada) were highlighted when they said that "clinical or related facilities, if and where necessary, should not be established so as to operate as a disincentive to a progressive redistribution of the private bar into geographic areas of unmet need for assisted legal services".[8] The Law Society of Upper Canada has had over one hundred years to meet this need. Surely the poor can wait no longer.

Another report unfavourable to clinical legal aid systems originated in the Justice Department in New Zealand. In 1961, the Department studied the possibility of instituting a public defender program in New Zealand but dismissed it on the basis that the lack of population and the distance between centres make such a system impracticable for New Zealand. This may be true for a pure public defender program that deals only in criminal matters, but an integrated legal aid clinic that covers all legal needs has been shown to be viable in Nova Scotia in towns with just over 3,000 in population.

---

6. Law Society of Upper Canada, Community Legal Services Report, p. 8.
7. Muir, op. cit., p. 18.
8. Law Society of Upper Canada, op. cit., p. 43.

In 1964 the Minister of Justice announced that there would be "some difficulties" associated with the public defender program in New Zealand.[9] His reason was that he was "by no means sure that it would be welcomed by the legal profession which might see it as an undesirable and improper extension of government activity". No doubt the legal profession would not welcome a public defender system. They enjoy a state-approved monopoly of legal services and any intrusion on that control would definitely be a threat to that position.

However, most authors on this subject favour a clinical legal aid scheme. The Attorney-General of Australia, the Honourable L.K. Murphy, in a ministerial statement on legal aid[10] stated that it is the view of the Government that legal assistance to socially disadvantaged persons can most efficiently be provided through a salaried legal service. This led to the establishment of the Australian Legal Aid Office which is staffed by salaried lawyers who work in close co-operation with community welfare organisations, established (state) legal aid schemes, referral centres and the private legal profession.

Robert Ludbrook, in his series of articles on The Lawyer and the Community in the New Zealand Law Journal (ten parts), comes out very strongly in favour of the neighbourhood law office scheme.[11] In a quote from Michael Zander in Lawyers and the Public Interest, he outlines some of the advantages of this type of program:

> The chief advantage of the neighbourhood law firm is that by going positively into the community and by holding itself out to be the champion of the poor it seems to offer a hope of breaking down the apathy and ignorance which may be largely responsible for the fact that most ordinary people fail to use lawyers. Whereas solicitors tend too often to congregate in affluent areas, these firms can be put where they are needed. By handling cases from start to finish, they can avoid the danger that clients will get lost in the process of being referred. The prestige of the service can attract a higher calibre lawyer than is normally found in the slums. Indeed, the work of the NLO's is likely to improve the image of the whole legal profession and thereby also attract more young people to become lawyers.

Other benefits listed to be gained from setting up a neighbourhood law office are:

---

9. Chong, op. cit., p. 101.
10. Parliamentary Debates, 13 December 1973.
11. 1975 N.Z.L.J. 260; 1975 N.Z.L.J. 204.

(a) Procedures and documentation can be standardized giving advantages in time and efficiency and consequently lower cost per matter;

(b) Para-legal personnel and trained volunteers can undertake a good deal of the routine work. Social workers can be employed to assist with interviewing, budget advice, completing legal aid forms, marriage counselling, advising as to social security benefits — whereas the lawyers can concentrate on specifically legal matters and court appearances;

(c) A neighbourhood law office will quickly build up a fund of experience in dealing with the rights of the disadvantaged;

(d) A neighbourhood law office can embark upon an active public education program — going out into the community, sheets, running articles in local papers, speaking to groups, devising information;

(e) A neighbourhood law office can work in close liason with social agencies such as the Department of Social Welfare, Marriage Guidance Councils, Citizens Advice Bureaux, etc.

These advantages will be further explored in the succeeding chapter.

Evans and Ross, in an article on Legal Aid in New Zealand and Abroad,[12] arrive at the conclusion that "neighbourhood law offices constitute the most effective method yet developed of providing civil legal aid services to the poor". Terrence Purcell, an Australian lawyer who studied legal aid in the United States, Canada and Britain came to a similar conclusion and recommended that decentralised law offices should be set up throughout low income suburban areas of the cities and in selected country towns, providing a wide range of lawyer services for the very low income group in the community.[13]

At the present time a committee has been set up in Nova Scotia to hear submissions on legal aid and to make such recommendations as they feel are necessary.[14] However, of the fifteen presentations made to the committee in one week, all of them called for a continuation of storefront legal aid clinics

---

12. 5 N.Z.U.L.R. 1 (1972), at p. 15.
13. Purcell, Legal Needs in Today's Society, (1973).
14. Under the chairmanship of Judge W.A.D. Gunn, due to report in the late fall of 1975.

as the best method of delivering legal services to low income groups.[15]

The success of the Nova Scotia type scheme — combining criminal and civil legal aid services in one clinic — seems quite evident. The next chapter will involve an attempt to investigate the pros and cons of this system and to adapt such a scheme to the New Zealand situation —hopefully with the result that the superiority of such a plan will be demonstrated.

15. The Fourth Estate, July 9, 1975, p. 11.

V A MODEL LEGAL AID PROGRAM FOR NEW ZEALAND

In the paper to this point I have attempted to show that the legal aid provisions now existant in New Zealand do not adequately satisfy the needs of the poor. It is my opinion that only through the establishment of a network of legal aid clinics providing a complete array of legal services can this need be met. In this chapter I will outline the type of scheme that I feel should be implemented in New Zealand and point out in greater detail its inherent advantages.

(i) ELIGIBILITY:

It is implicit in the concept of legal aid services that only a specified part of the community are to be allowed free legal services. Legal aid is to complement the existing legal services and assist those people who are not adequately serviced by the private legal profession. The basic criterion for admission to the program will be financial need -- consequently the eligibility requirements will be set in the most part by the government accountant, depending on the amount of money available for the scheme. However, there are a number of policy decisions that have to be considered.

First of all, the eligibility test should be simple and it should be administered by the staff lawyer in the legal aid office, for both civil and criminal matters. To have each application processed by a committee (as in Ontario and the New Zealand civil plan) is too time-consuming and frustrates the dispensing of simple legal advice by the legal aid clinic.[1] As in the referral plans, many potential clients may be lost between the first contact with the authorities and the eventual consultation with the lawyer. In criminal matters, the New Zealand practice of forcing the magistrate to grant or deny legal aid is unsatisfactory for reasons mentioned earlier -- different standards may be applied, it doesn't allow for legal aid in the early stages of the criminal process and the accused may feel that the magistrate was prejudiced by other factors. By allowing the staff lawyers to grant legal aid, all that is involved for the client is one visit to the community office where he can be accepted and advised all in one meeting.[2] This has obvious advantages for a socially disadvantaged

---

1. A pilot project in legal aid in Peterborough in the province of Ontario envisages that a citizen wishing summary legal advice is to go to the lawyer of his choice who will be identified by a logo or symbol and the lawyer will use a simple financial form to determine whether or not the citizen is entitled to legal aid.
   -- Ontario Legal Aid Plan, Annual Report, (1974)
2. In fact the legal aid solicitors in Nova Scotia often visit the city jail or detention centre where potential clients will have asked to see a legal aid lawyer. An application form can be processed on the spot and counsel retained immediately.

clientelle who may be hardened to distrust government bureaucracy. This system is used with success in Nova Scotia, with an appeal to the Executive Directer provided for in case of dispute.

The present eligibility requirements under the Offenders Legal Aid Act (interests of justice, means, gravity of offence, other circumstances)[3] have been criticized as not allowing a lawyer to advise a client beforehand whether or not he will qualify for legal aid unless he is in custody or unemployed.[4] I feel that the main criterion of legal aid should be financial need and the required level should be clearly delineated. There are a number of factors that should be applied in determining if a person qualifies for legal aid and in my opinion they should apply equally to civil and criminal cases.

Virtually all legal aid schemes consider the income level of the applicant, but this should be measured in monthly and not yearly salaries, to allow for seasonal fluctuations. Fixed debts, medical expenses and number of dependents should also be considered. Most schemes also look at what is termed "liquid assets" although this term is defined in different ways in different jurisdictions. Most plans acknowledge the fact that assets such as housing, automobiles and household goods should not have to be converted into cash to retain counsel. However, Nova Scotia will allow an automobile only if "the model and year are suitable for the purpose" while New Zealand allows only an interest not exceeding one thousand dollars.[5] I prefer the New Zealand test for two reasons. One is that it is easier on the lawyer evaluating the application to explain his actions to the client if he has an exact rule to follow, and secondly, any interest over one thousand dollars should be sufficient collateral for a short-term loan. Similar reasoning applies to a person's equity in a house. New Zealand allows an eight thousand dollar equity,[6] while New South Wales allows only six thousand dollars.[7] Nova Scotia would force the client to mortgage his house to pay for legal services so long as he could still maintain himself and his

---

3. Offenders Legal Aid Act, s. 2.
4. Grant, The Future of Legal Aid, 1974 N.Z.L.J. 49.
5. Legal Aid Act 1969, s. 19(3)(b).
6. ibid, s. 19(3)(a).
7. Legal Assistance Act 1943 (N.S.W.).

dependents.[8] The New Zealand approach is to be preferred in this regard.

The levels of income and assets used in calculating eligibility for legal aid should be tied to the cost-of-living index and re-adjusted twice yearly. As well, there should be flexibility to allow for the variations in the cost of living in different localities in New Zealand. The required income levels for clients in Auckland, Wellington and other cities should be slightly higher than those in provincial cities and rural areas. Nova Scotia does not have a differentiation for different localities which caused quite a bit of resentment with the local bar in rural areas, who thought there should be a different eligiblity level in their areas, geared to the cost of living in that area.

Most legal aid schemes require some sort of a contribution from the client unless it will cause "undue hardship". The New Zealand, Ontario, Nova Scotia and Australian plans all list this obligation. However, there is no such requirement in the Legal Services Corporation Act in the United States and the Public Defender program in New South Wales makes no such stipulation. It was my experience, as a solicitor for Nova Scotia Legal Aid, that contributions were asked for rarely, if at all. I would recommend that contributions from the client not be provided for in legal aid cases. Surely a person charged with a criminal offence will be in no position to make a contribution, considering the very low income levels that prevail for eligibility for most legal aid schemes, and the amounts recovered in civil cases are usually relatively small — and often desperately needed (e.g. repayment of a debt). If there is a chance of a large recovery, the client should be able to retain private counsel to act for him on a contingency fee basis.[9] Consequently, I would make no provision for clients to make contributions to the program.[10] I

---

8. s. 2(c) of the Eligibility Rules.
9. In Nova Scotia, a client will be rendered ineligible if a contingency fee arrangement is available.
10. In 1974, only four cents out of every dollar paid out in expenses of the Ontario Legal Aid plan came from contributions from clients. In New Zealand in the 1974/75 fiscal year, 9.25 percent of the expenses of the civil legal aid plan came from contributions from clients.
—Annual Report (31 March 1975)

feel that legal services are a right and the prospect of being forced to pay even a part of the lawyer's fee by those who qualify is an unecessary deterrent.

The American plan would disqualify an applicant if there was evidence that the individual's lack of income resulted from a failure, without good cause, of seeking or accepting an employment situation.[11] I would not incorporate such a clause in a legal aid plan, because I feel that legal services, like medical services, are a right to be enjoyed by all the community.

Not many legal aid programs mention the eligibility of groups applying for legal aid. The Handbook of Standards for Legal Aid and Defender Offices published by the National Legal Aid and Defender Association in Chicago would allow groups to retain legal aid counsel if more than half of the members would individually qualify for legal aid. I would retain this requirement for groups in general; however I would make special concessions to charitable, community, environmental, or similar groups that can demonstrate a financial need, if the purpose of the application was in "the public interest". The individual legal aid lawyer would be able to make this evaluation himself. I should add here that I disagree generally with such requirements as "in the interests of justice",[12] or "in the public interest"[13] as they can often be used to exclude individuals who otherwise would qualify financially for legal aid.[14] However, such a criterion is necessary, I feel, in relation to the groups mentioned above.

The proposed Australian Legal Aid Bill[15] would take into account the probable cost of the legal action when considering eligibility.[16] This would mean that a person who has a slightly larger income may qualify for legal aid if he has an expensive problem as opposed to a poorer person with a less expensive problem who may not qualify. I feel this may be unfair; I would recommend that only the financial condition of the applicant be considered — not his problem.

---

11. Legal Services Corporation Act 1974, s. 1007(a)(2)(B)(iv).
12. see Vinson, Why Money Buys Justice, Australian Financial Review, March 13, 1975.
13. found in some Australian state Legal Aid programs.
14. such a requirement is in the Offenders Legal Aid Act, s. 2.
15. first reading in the House, June 6, 1975.
16. s. 29(1)(a)(ii).

In the Public Defender program in New South Wales, the "antecedents" of the accused are taken into account (i.e. his criminal record). This is obviously unfair and should not be allowed. In New Zealand, one of the factors that determines eligibility for appeals is the grounds of the appeal.[17] I feel that this is unfair as well. A discretion should remain with the staff legal aid lawyer to not accept claims that are frivolous or vexatious. This would guard against irresponsible applicants — both for appeals and other matters.[18]

There are some instances where legal aid should be granted even though the applicant does not satisfy the financial requirements. These would be (1) if the applicant has been charged with a serious criminal offence and is unable to retain counsel after a diligent effort, (2) if an applicant requires legal services for debt consolidation and can prove that he is unable to retain counsel and that further indebtedness will ensue if he cannot get a lawyer, and (3) if it is in the public interest and the applicant is unable to retain counsel after a diligent effort.

As far as the method of confirming the information required to determine eligibility is concerned, I feel that the simplest and most effective method is to have the applicant fill out (with the aid of the secretary if necessary) a statutory declaration detailing his circumstances. This information would be confidential, on a solicitor-client basis, and if discrepencies were suspected, the necessary steps and remedies could be pursued in due course.

---

17. Offenders Legal Aid Act, s. 2(2)(c).
18. see Legal Aid Act 1969, s. 23(2)(c).

(ii) COVERAGE:

The basic principle of any legal aid scheme should be that it will provide all the legal work required by any case, regardless of its nature or the forum. One of the main detriments of the present New Zealand legal aid program is that it covers only "proceedings" in civil cases — i.e. it is geared only to litigation. Ontario, which also has a judicare system, extends its coverage to a number of proceedings and to " the drawing of documents, negotiating settlements or giving legal advice wherever the subject-matter or nature thereof is properly or customarily within the scope of the professional duties of a barrister and solicitor."[19] This would be an improvement on the New Zealand plan, but still not entirely acceptible.

The Nova Scotia Legal Aid plan had no restrictions at all at its commencement. Because of the exigencies of staff work-load, however, summary criminal matters had to be excluded, unless the accused's livelihood was threatened. Under a new act in New Zealand, I would give all eligible applicants the right to counsel in charges under the Crimes Act but not to those under the Police Offences Act or other statutes, unless a possibility of imprisonment or loss of livelihood was threatened. This is simply for budgetary reasons.

On the civil side, there are a few situations that should be excluded. In Nova Scotia, where there were no written exclusions, the staff lawyers found it difficult to turn down clients without a written regulation to rely on. Defamation is one action which had to be excluded because it often was motivated by revenge rather than financial need. The action may in fact succeed, but only nominal damages would be awarded in most instances. Such actions simply do not justify state expenditures, although they may be important to the individual. The Ontario plan excludes defamation, breach of promise of marriage, loss of service of a female in consequence of rape or seduction, alienation of affections and criminal conversion, as well as a few other actions.[20] I would exclude these actions by statute for the reasons mentioned above

---

19. Legal Aid Act, (Ontario), s. 13(c).
20. ibid, s. 15; see also s. 15(2)(e) of the Legal Aid Act 1969 which excludes actions for seduction and inticement as well.

from a New Zealand legal aid plan, but allow all others. Experience showed that because of the financial restrictions on persons applying for legal aid in Nova Scotia, there were very few cases dealing with property or estates. If a set of circumstances did arise where such action was necessary (for example a widow inheriting a very small estate) then the legal aid office should have the power to handle the case.

In Australia, the federal legal aid plan is restricted to matters under the jurisdiction of the federal government, and to a general problem solving service of advice and assistance short of litigation.[21] Since New Zealand is a unitary state, no such restrictions of a constitutional origin need apply but the provision of advice is a glaring inadequacy.[22] As mentioned earlier, the dearth of facilities for dispensing legal advice to the poor under the present legal aid set-up is one of its main faults — this is one of the inherent problems of the judicare system.

In Ontario there is a provision for the supplying of advice under the scheme[23] but the experience has been that this service has been under-utilized.[24] They found that the certificate procedure (necessary in a judicare system) is too cumbersome with respect to minor advice and assistance matters and that it operated to discourage both the applicant in need of the advice and the practitioner in giving it.[25] In England, they have tried to get around this inherent difficulty by instituting the "25 pound scheme" for advice. Under this plan, a legal aid solicitor is empowered, without the area secretary's approval, to render advice or legal assistance to eligible applicants up to the sum of 25 pounds. In Ontario they also considered the possibility of opening Avisory Liason offices to refer clients to solicitors and to dispense legal advice, much like the legal referral clinics in existence in New Zealand. However, a clinical legal aid system is ideally suited for the dispensing of advice to the poor. Special programs to service this need, as were necessary in Ontario, New Zealand,

---

21. Legal Aid Bill (Australia), s. 6(3).
22. The Legal Aid Board has asked an ad hoc committee of its representatives and representatives of the Law Society to frame an uncomplicated and easily administered scheme for legal aid for advice. (1975 Annual Report of L.A.B.)
23. s. 13(c).
24. Upper Canada Law Society, op. cit., p. 15.
25. see supra, footnote V-1.

and England are not necessary. The prospective client simply fills out an application form and either sees the lawyer immediately or makes an appointment. If his application is successful he can be advised on the spot, along with any minor telephone calls or such like which may be required to clear up a problem. Moreover, studies show that many poor people are reluctant to go to private lawyers for advice. One study of 1650 people in the London boroughs of Islington, Southwark and Tower Hamlet who were asked, "Where is the best place for the ordinary citizen to go for legal advice?" showed that only 14 percent gave a solicitor as their first preference, whereas 43 percent opted for their local Citizens' Advice Bureau or Legal Advice Centre.[26] Clinical legal aid schemes, because of their ability to dispense advice without undue bureaucratic manoeuvres, provide the poor with a service of preventive law (measures which can avoid legal problems before they occur) which is a service conspicuously absent in judicare programs.

Any viable legal aid program ought to handle divorce cases if only because it is one of the most common legal problems of the socially disadvantaged. Nova Scotia, Ontario, and now Australia, all cover divorces — whereas New Zealand is alone in not providing this service. The accepted reason for this inadequacy is the supposedly prohibitive cost of providing legal assistance for divorces. However, I will attempt to show below[27] that if a clinical legal aid system was implemented in New Zealand, the cost per case of divorces would be greatly reduced. The present view of the Justice Department is that it may be easier to simplify the divorce law and procedures[28] and change the forum to the Magistrates Court rather than attempt to pay for it through legal aid in its present form.[29] Perhaps both goals could be accomplished.

---

26. Ludbrook, op. cit., (1974) N.Z.L.J. 374 at p. 376.
27. see infra, p. 36.
28. The Minister of Justice of Australia has announced that he will be introducing legislation to change the basis of divorce from the adversary system to a single ground of permanent breakdown of marriage for more than twelve months.
— Parliamentary Debates, December 17, 1973.
29. Annual Report of the Department of Justice, 31 March 1975, p. 7.

(iii) COST:

One of the major advantages of a clinical legal aid plan is that it costs less than a corresponding judicare plan. If such a system were implemented in New Zealand, the government would probably be able to include divorces in the scope of its program.

Very few people realize how little money New Zealand as a society allocates to the provision of legal aid for the poor. The government of Ontario (a province with a population of six million) spent $12,937,300.00 in 1974 on its legal aid program.[30] Australia, with a population of thirteen million spent 12.4 million dollars,[31] and Nova Scotia, population 800,000, allocated $900,000.00.[32] New Zealand, with a population of just over three million people spent only $819,233.61 over the last year.[33] That works out to figures of $2.16 per capita in Ontario, $1.13 in Nova Scotia, $.95 in Australia and $.27 in New Zealand.[34] The Justice Department should not be afraid of an increase in costs if divorce were added — they should advocate an increase in expenditure and services to keep up with the rest of the world.

Studies have shown that a clinical legal aid system is cheaper, per case, than judicare. There are a number of factors leading to this. The lawyers who work in neighbourhood law centres become specialists and tend to become more efficient than their counterparts in private practice in dealing with the legal problems of the poor. In doing so, they are able to effect considerable economies of scale.[35] It has been estimated by the Office of

---

30. Ontario Legal Aid Plan, Annual Report, 1974
31. Allocation in the 1974/75 budget. This figure excludes state government expenditures for state legal aid programs, which are quite substantial.
32. 1974/75 budget figure.
33. This figure was arrived at by adding:(1) the deficit on civil legal aid for 1974/75 ($517,589.00), (2) the expenditure on criminal legal aid for 1974 ($178,340.61), and (3) extrapolating the figure of $92,384.00 as duty solicitor costs for its first nine months of operation to a twelve month figure ($123,384.00).
34. It should be remembered that these are pre-devaluation figures, where $1.00 NZ = $.72 Canadian.
35. through standardization of documentation, routinisation of function, etc.

Economic Opportunity in the United States that the cost for individual client representation of a system based on private practitioners would be two to three times as high as that based on full-time salaried lawyers.[36]

In criminal cases, fewer lawyers need to waste valuable time waiting in the vicinity of the courtroom for their client's case to come up and a centralised office with a staff well-versed in the preactice of criminal law can more efficiently dispose of criminal matters. A study in North Carolina found that the cost per defendant was nearly twice as much in the assigned counsel districts as in the public defender districts.[37] Another study in Colorado showed that the average cost for each felony case was $108.00 under the public defender system but $486.00 under the assigned counsel system.[38] It has been estimated that a public defender's office in British Columbia would cost each resident only four cents a year.[39] And Denver, with a public defender program, has an average cost per case of $55.00 while Alberta with an assigned counsel system had an average of $138.00 per case.[40]

Another cost-saving facet of clinical legal aid programs is that they can employ para-legal personnel to handle those parts of the work that can be standardized. In the Halifax office of Nova Scotia Legal Aid, one person is hired to interview prospective divorce clients after they have seen a lawyer, and to help the client fill out the divorce petition. This one person handles most of the paperwork for the divorce cases, allowing the lawyer free time to appear in court at divorce hearings. This system allowed Nova Scotia Legal Aid to issue approximately 682 divorce petitions in the 1973/74 fiscal year; whereas prior to the establishment of the legal aid program the number of divorce decrees granted annually in the province was in the area of 800.[41] In criminal matters, the Halifax Criminal office employs one person to assist

---

36. Evans and Ross, op. cit., p. 15.
37. Grier, Analysis and Comparison of the Assigned Counsel and Public Defender Systems, (1971), 49 North Carolina Law Rev. 705 at p. 714.
38. Anderson, Defence of Indigents, (1973) 25 Maine Law Rev. 1, at p. 14.
39. Phenix, Systems of Representation of Indigent Defendants, (1964), 30 Sask. Bar Rev. 112, at p. 121.
40. Evans, The Legal Aid Trade, (1973), 11 Alta. Law Rev. 65, at p. 77.
41. Annual Report (1973/74), p.5.

VUW Law Research Papers:

There is no PAGE 37 in this document

(iv) QUALITY OF REPRESENTATION:

One of the oft-quoted myths mouthed about clinical legal aid systems is that they employ inferior counsel and that the only way to ensure adequate representation in court for the poor is to draw on the private profession through the judicare method.[42] Not only is this view erroneous, I feel that it is completely reversed in its values — clinical legal aid systems usually produce expert counsel for handling the legal problems of the poor.

In Nova Scotia, one of the most encouraging accomplishments was the engagement of a highly competent staff of qualified lawyers. It was originally thought that only persons very recently admitted to the Bar would be prepared to serve in the legal aid program. However, a nucleus of younger, but experienced, lawyers were engaged and these lawyers quickly established and developed effective regional offices.[43] With this base of experience, it was possible to engage lawyers with lesser degrees of experience who rapidly developed the skills and acquired the knowledge necessary to function effectively.[44]

The Australian government expected to staff its legal aid offices with "the young lawyer with a social conscience and, in particular, the woman lawyer who has a talent for this kind of work".[45] They anticipated retaining these lawyers by providing an internal career structure to encourage continuity in staffing and a body of expertise in the field of legal aid.[46]

In a number of ways, a clinical legal aid program, much like a public defender,can protect the interests of the defendant better than assigned counsel. First, and most importantly, he is a specialist — an experienced criminal lawyer whose constant practice ensures that he develops and maintains his expertise.[47]

---

42. This view is expoused by Mr. R.A. Moodie, Victoria University; See also law Society of Upper Canada, op. cit., p. 95.
43. In fact, one of the top criminal lawyers in Halifax, Mr. William MacDonald, who lectures in criminal law at Dalhousie University, is a legal aid lawyer.
44. Nova Scotia Legal Aid, Annual Report, (1973/74), p. 3.
45. Ministerial Statement, Parliamentary Debates, December 13, 1973.
46. Australian Legal Aid Review Committee Report, p. 13.
47. It would be feasible in (at least) Auckland, Wellington, and Christchurch to open a legal aid office dealing only with criminal cases and located near the courthouse. Other offices

Secondly, he is in a position to assist the defendant at an early stage in the proceedings. He can begin representing the defendant during in-custody interrogation or almost immediately after arrest — before the defendant makes any statement or admission. Under the assigned counsel system, the defendant must wait until he is formally before the court before he gets representation. Thirdly, the legal aid office could have investigation facilities which would reduce the inequities between the prosecution and the accused.[48] Normally, the defence is at a great disadvantage in not having available to it the various sources of information available to the prosecution.

Research has recently been conducted in North Carolina to test the argument that a public defender obtains results more favourable to the accused than does the assigned counsel. Two judicial districts with public defender systems were compared with other judicial districts where the assigned counsel system operated. The study showed that the Public Defenders had a much higher rate of cases dismissed, and also a higher proportion of clients given probation or suspended sentence after conviction. In addition, the proportion of aquittals after trial was about four times higher in the cases handled by the Public Defenders than in those handled by assigned counsel.[49]

On the civil side, the lawyers that handled the bulk of the divorce cases in Halifax quickly became top experts in family law, often giving lectures to law students, professional meetings and community organisations on this branch of the law. A good deal of civil "poverty" law does not involve the application of pure legal principles, but rather contacting government officials, welfare agents, marriage counsellors, debt counsellors, and so on. After a period of time working for this type of client, the legal aid lawyer becomes an integral part of this network of services, not only being able to refer his client to the right person quickly and directly, but also able to advise in minor legal matters for these other agencies. Without a central legal

---

in those cities dealing mainly in civil work would be located in proximity to the need.

48. Such services would probably be economical only in the

aid office in a community, this type of expertise is not created.

The duty solicitor scheme, which already exists in New Zealand, could very easily be assimilated into a clinical legal aid system. One of the staff lawyers, who in most cases would be in Magistrates Court most mornings, could easily take on that duty. This would result in a great deal of savings which could be channelled into other areas of the program. As well, a sort of duty solicitor for prisons could be created, operating out of the legal aid office closest to each institution. A specified legal aid lawyer would visit the institution each week to aid in appeals, advise in regard to marital, debt or other matters and answer any other legal questions of the inmates or staff. Such a program is carried out very successfully in Nova Scotia, where one lawyer makes weekly visits to Dorchester Penitentiary.

There is a place for private counsel to act in some specified legal cases in Nova Scotia and I would argue that this be retained.[50] The Criminal Legal Aid Agreement[51] requires that a person charged with an offence involving life imprisonment "shall be entitled to retain and instruct any member of the Bar of the province who is prepared to act for him ..." Private counsel are also retained with legal aid funds where services cannot be supplied by Nova Scotia Legal Aid because of a conflict or other reason.[52] In the 1973/74 fiscal year, 42 cases were completed by private counsel for legal aid at an average cost of $824.82 per case.[53]

In remote areas of New Zealand, it would be necessary to retain private counsel for legal aid work on a sort of judicare system. There is current speculation that such a system will be

---

centres where an exclusively criminal legal aid office was located. In Nova Scotia, the only criminal para-legal worker was in Halifax.

49. Grier, op. cit., p. 714.
50. Such a provision exists in the Australian Legal Aid Bill as well — s. 32.
51. A Canadian federal-provincial agreement.
52. this often arises in family matters
53. Annual Report, p. 11.

introduced into Nova Scotia following the report of the Gunn Committee.[54] In Australia, the legal aid plan has commenced a flying lawyer service in remote areas of Queensland. This service, operating an informal means and needs test for assistance and litigation, will be introduced in other parts of Australia if successful.[55] However, the geographical considerations which exist in Australia are not necessarily applicable in New Zealand. I believe that a judicare system in remote areas, where often lawyers are not worlds apart from their clientelle socially, would service these communities adequately.

As demonstrated above,[56] the legal aid counsel in criminal matters in New Zealand are mostly junior solicitors who often handle little other criminal work.[57] A clinical legal aid system would supply legal aid clients with experts in criminal law and experts in "poverty law" in civil cases. Surely the belief that clinical legal aid programs provide inadequate counsel is a straw man that has been set up by those with a vested interest in the judicare system. The figures, studies, and experience outlined above show that the capability of the staff is one of the main advantages of a clinical system.

---

54. Monthly Report of the Nova Scotia Barristers' Society, July 9, 1975, p. 5.
55. The Dominion, August 5, 1975.
56. see supra, p. 9.
57. Much the same phenomenon was experienced in Ontario, as is evidenced by the following table.

Years of Experience	Percentage Participation by Receipt of Fees
1	76.4
2-3	74.8
4-6	65.9
7-12	54.9
13-18	43.7
19-24	41.6
25-30	31.5
31-36	26.9
37 or more	16.9

Percentage participation is defined as those lawyers which participated in the legal aid plan expressed as a percentage of all those in that experience group.

— Ontario Legal Aid Plan, Annual Report, 1974, p. 27.

(v) ADVERTISING:

The success and efficability of any legal aid scheme depends to a great deal on the familiarity, trust and visibility which it enjoys in the community that it serves — these goals are achieved through advertising. The problem which exists in this regard is that traditionally, lawyers have been forbidden by their canons of ethics to advertise their services — except by publishing their cards in various publications. Most legal aid programs feel that they are not bound by these restrictions, as they are not advertising specific firms or practitioners, but rather dissemenating information about a welfare-type scheme administered by the government.

The Legal Aid Board acknowledged the fact that many people in New Zealand were unaware not only of the civil legal aid plan — but also the criminal one, which had been in existence in one form or another since 1912. They stated that they would attempt to remedy this situation by placing posters in such places as post offices, courts, prisons, social security offices and other public places.[58] These measures are obviously inadequate to reach the majority of the poor.

The Ontario Legal Aid plan recognized the importance of advertising when they began their legal aid program. They used a "spot saturation" method as opposed to a "drop-feed" campaign, which is generally thought more suitable for a program continuously dealing with legal problems of a recurring nature. They spent $54,600.00 on a single advertisement inserted once in virtually every newspaper of every type in the province. Plus they spent $27,000.00 on brochures and posters which were distributed in area directers' offices, solicitors and clerks' offices, jails and ethnic centres.[59] However, the average annual expenditure on advertising for the four following years was $3,500.00, and a noticeable drop-off in interest in the program was noted.[60]

58. Annual Report of the Legal Aid Board, 31 March 1974.
59. Upper Canada Law Society, Community Legal Services Report, p. 46
60. Mr. John D. Bowlby, Q.C., Chairman of the Legal Aid Committee (Ontario) in a brief to a Task Force appointed in 1974 to review the operation of the Legal Aid Plan said that his Committee "believes money must be spent advertising Legal Aid more extensively. If Legal Aid service is to be helpful to the poor then the poor must know of the Plan's existence and the scope of the aid offered." — O.L.A. Annual Report, 1974, p.5.

The English Law Society conducted an experiment in one area on the effect of advertising on the response to their legal aid program. They put a 30 second television film in 19 spots, published a newspaper ad with a clip-out coupon and created a legal aid symbol which appeared in the film, the advertisements and participating solicitors' office windows — all at a cost of $15,000.00. The response to this program was quite overwhelming, with an increase in public awareness of the program increasing from one to twenty-eight percent.[61]

Not only do the public need to be made aware of the legal aid facilities, but doctors, social workers, school teachers, welfare and probation officers — and all others who have contact with the poor — should be familiar with the resources the program has to offer. In Manitoba, the legal assistance program advertises quite aggresively. They use radio, television and newspapers, as well as pamphlets and flyers which are distributed door to door. It sends people into inner-city schools in Winnipeg and starts teaching children that they have legal rights and obligations.[62] Evans and Ross argue that in New Zealand information about legal aid services ought to be available at places of employment, local clubs, women's institutes and similar organisations.[63]

I am stressing this point in this paper because I sincerely believe that an advertising network is very important — at least at the beginning — to a successful legal aid program. Clinical legal aid programs lend themselves to advertising in that because they are a seperate entity they do not offend the lawyers' over-sensitivity to advertising. Also, they are a concrete entity which can be seen and heard in the community — a physical monument that people can identify with, rather than a nebulous scheme of administration which exists only on paper.

---

61. Upper Canada Law Society, op. cit., p. 50.
62. Beaufoy, Legal Aid with a Huckster's Flair, The Globe and Mail, Toronto, June 13, 1975.
63. Evans and Ross, op. cit., p. 17.

(vi) COMMUNITY INTERACTION:

Clinical legal aid systems are ideally suited to undertake programs which will enhance the quality of life of the people that make up the community which they serve. The Australian Legal Aid Review Committee recognised the importance of this facet of legal aid and agreed that the "goal of legal aid services in Australia should not be limited to the provision of assistance to individuals experiencing legal problems, although this is a primary function".[64] They agreed with the conclusion reached by Professor R. Sackville in his discussion paper on Legal Aid in Australia where he said:

> One of the fundamental choices to be made in establishing or reorganising a system of legal aid is to determine whether the services provided should be confined solely to meeting the needs of individual clients or should extend to the use of the legal process to attempt to change the political, economic and social status of the poor. In Australia the more limited approach has been taken, but if the law is to play a significant role in improving the position of large numbers of disadvantaged people the broader view should be accepted. This approach involves the use of such techniques as test cases brought to develop principles in areas not previously judicially explored or designed to stimulate changes in legislation or administrative practices. In addition, legal aid agencies should be prepared to press for the introduction of reforms in the interests of disadvantaged groups, by the formulation and presentation of draft legislation and other proposals for change. A further function of legal aid should be participation in activities designed to overcome the 'powerlessness of the poor'; their inability to resist or shape the forces that impose inequities and hardship upon them.[65]

The approach advocated by Professor Sackville should not only improve the normal day-to-day conditions of the poor through law reform, but also prevent litigation from arising — both in civil and criminal matters. This point of view has been adopted in the proposed Australian Legal Aid Bill, which says that legal assistance may be granted in cases involving "the institution of proceedings for the purpose of obtaining a decision by a court, where it is in the public interest to obtain such a decision",[66] and that the Office shall "endeavour to secure the services of language interpreters, marriage counsellors, welfare officers and other appropriate

64. Australian Legal Aid Review Committee, Second Report, March 1975, p. 1.
65. Sackville, Legal Aid in Australia, para 1.7.
66. Australian Legal Aid Bill, s. 29(4)(a).

persons to assist legally assisted persons in connexion with matters in respect of which they are provided with legal assistance".[67]

The Australian government has also made a forceful entry into the environmental field by making legal aid available to conservationists.[68] Section 29(4)(b) of the Legal Aid Bill grants assistance in cases involving:

> the institution of proceedings relating to the protection, maintenance and preservation of the natural or cultural environment of Australia (including those places, being components of that environment, that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the community).

This is a very progressive step in legal aid developments — one ideally suited to a clinical program — and should be adopted by a New Zealand legal aid plan.

The neighbourhood law offices that were set up in the United States under the Office of Economic Opportunity concentrated to a great extent on preventive law and public education. In fact, they were designed more to combat poverty through the law than to assist individuals with legal problems. I would not recommend a legal aid scheme with such a focus, but neither would I accept a legal aid program which neglected this very worthwhile quality of active preventive law. Legal aid lawyers could involve themselves with the local community by television interviews and debates, film programs, public lectures, talks at local schools, sessions with existing social organisations and consultations with legislators to bring about progressive law reform.

The absence of forces working for law reform for the poor is one of the inherent inadequacies in the New Zealand legal profession. Law reform is often instigated by lawyers who encounter certain difficulties or problems in their day-to-day caseload. However, since most lawyers work for the rich, it is these problems which are resolved. There is a need to create a phalanx of lawyers who work for the poor in order that they might attack the defects of the law as it affects the poor. In fact, the Australian Legal

---

67. Australian Legal Aid Bill 1975, s. 29(4)(a).
68. see Legal Aid, An introduction to the services of the "shop-front" lawyers of the Australian Legal Aid Office, An Australian Women's Weekly Publication, p. 9.

Aid Bill includes a section which says that the Office shall "make recommendations to the Attorney-General with respect to any reforms of the law, the desirability for which has come to its attention in the course of the performance of its function".[69] Such areas of the law as welfare benefits, standard form contracts, petty criminal matters, debt collection, and consumer law could all benefit from an increased practitioner interest. As it stands now, most reform in these areas originate in the universities.

As has been experienced in Nova Scotia, the work involved in legal aid places the staff in touch with the community leaders and social service personnel.[70] In New Haven, Connecticut, a mechanism for co-operation between lawyers and social workers was formalized by means of a neighbourhood social/legal team consisting of a social worker, a lawyer, a neighbourhood worker and a social investigator.[71] These welfare teams were able to deal with the entire spectrum of the needs of the community. Obviously a clinical legal aid program lends itself to the establishment of such a comprehensive social welfare unit.[72] In any legal aid program to be instituted in New Zealand, these preventive and educational aspects should be emphasized.

69. Australian Legal Aid Bill, 1975, s. 8(2)(a).
70. Nova Scotia Legal Aid, Annual Report, 1973/74, p. 8.
71. United States Department of Health, Education and Welfare, The Extension of Legal Services to the Poor, (1964)
72. Section 7(b) of the British Columbia Legal Services Commission Bill reads: It is the function of the commission to consult with local and regional governments, educational institutions, community, neighbourhood, professional and other groups having an interest in any aspect of the provision of legal services.

(vii) INDEPENDENCE FROM GOVERNMENT:

One of the most frequently voiced arguments against clinical legal aid systems is that they cannot provide the sort of independent advice and representation that a lawyer in private practice can supposedly give. Because they are paid by the state and because they develop a close working relationship with the police, it is said they cannot possibly retain their independence — that the traditional safeguards of the adversary system are lost if the state represents both opposing parties. Those who make this argument, however, do not explain why a public defender should not be as conscientious a public official as a judge. What evidence there is suggests that public defenders zealously guard their independence, realizing that this is essential if their standing and prestige are to remain high. In one study, 71 out of 79 judges stated a belief that public defenders keep their independence, and 34 out of 40 prosecutors thought that public defenders (or clinical legal aid staff lawyers handling criminal cases) do not lose their effectiveness as advocates.[73] Public officials of the stature of Senator Sam Ervin have reinforced this viewpoint.[74]

My experience in Nova Scotia was that there was no conflict at all for those legal aid lawyers handling mainly criminal cases. The belief is that a conflict will arise more readily in criminal rather than civil cases. However, much of the civil work consists of dealing with government administrative bodies. In neither case has an occurrence arisen, to my knowledge, where the government interfered with the running of the program or the actions of any lawyer. Nor did the staff lawyers feel any hesitancy in dealing with government agencies on behalf of a client. The tradition of the legal profession of stoutly defending the interests of the client was entirely preserved. The lawyer-client relationship need not be interfered with by the governing body of the scheme and the lawyer-client communications should remain privileged. In fact, Australia went so far as to incorporate a section into their Bill guaranteeing that legal services will be provided to any eligible person in relation to any proceeding or matter, notwithstanding

---

73. Grier, op. cit., p. 716.
74. Ibid, n. 48.

that the interests of that person may be adverse to the interests of the government or any public body.[75] Such a provision should be incorporated into a New Zealand clinical legal aid act as well as a section guaranteeing the solicitor-client privileges in legal aid cases. However, such legislation would simply act as a statement of intention and act as an insurance policy against possible breaches, for experience has shown that the independence of the legal aid staff is not in jeapordy under clinical legal aid systems.

---

75. Australian Legal Aid Bill 1975, s. 30.

(viii) GOVERNING BODY:

Having devised a model legal aid plan for New Zealand, the last (but very important) matter to consider is the composition of the body created to administer the program. At the present time, the Offenders Legal Aid scheme is administered by the New Zealand Law Society and the civil legal aid program is supervised by the Legal Aid Board — a body consisting of a person who is engaged in practice as a barrister or solicitor on his own account, appointed chairman by the Minister of Justice after consultation with the Council of the New Zealand Law Society, the Secretary to the Treasury, the Secretary for Justice, the Chairman of the Social Security Commission, and two other members (each being a barrister or solicitor) appointed by the Minister on the nomination of the New Zealand Law Society.[76] At the present time the three lawyers on the Board are Mr. R.K. Davison Q.C. (Chairman), Mr. M. Hardie-Boys and Mr. P.C. Macnabb. As can be observed, both legal aid schemes in New Zealand are administered by either lawyers or senior civil servants. The other branches of the community — businessmen, social workers, community representatives, sociologists, etc. — have all been excluded. This is a very unhealthy situation which should quickly be remedied.[77]

The Australian Legal Aid Review Committee addressed itself to this issue in its Second Report. A majority of the Committee considered that there was no need for private practitioners to constitute a majority on the proposed Legal Services Commission.[78] They noted that the primary goal of legal aid services is to assist people in the community who have previously been excluded from the benefits of legal advice and representation; and that the range of individuals and organisations able to contribute to this goal is very broad and deserves adequate representation.

---

76. Legal Aid Act 1969, s. 4(2).
77. Mr. Bowlby (see note V-60 above) also advised the Task Force that in March 1974, Convocation (of the Upper Canada Law Society) had adopted the important principle that lay representation be added to the Legal Aid Committee.
— Ontario Legal Aid Plan, Annual Report, 1974, p. 5.
78. Australian Legal Aid Review Committee, Second Report, March 1975, p. 12.

The first attempt at defining the composition of such a Commission was ventured by Professor Sackville in his discussion paper. His Legal Services Commission would have been constituted as follows:

> The Attorney-General or his nominee (to be an ex officio member of the Commission). Other members to be appointed in their personal capacity and chosen from —
> (a) the legal profession and existing legal aid schemes;
> (b) consumers of legal services;
> (c) other groups or organisations with experience or interest in areas relevant to legal aid and the delivery of legal services;
> (d) other persons with special knowledge or skills.[79]

Under this plan, lawyers in private practice or employed by Law Society schemes were not to constitute a majority on the Commission and non-lawyers were to constitute at least one quarter of the membership of the Commission.

The Committee endorsed Professor Sackville's guidelines, and, after investigating the composition of the Lord Chancellor's Advisory Committee in the United Kingdom,[80] made the following recommendations:

> ... the Commission should consist of the full-time Chairman together with eleven part-time Commissioners chosen from the following —
> (a) One from a Law Society Legal Aid Scheme;
> One from a State salaried legal aid service;
> One from the Australian Legal Aid Office;
> Two lawyers from private practice,
> (b) Two from consumers of legal aid services,
> (c) Two from organisations with experience in the provision of aid to poor persons, such as the Australian Council of Social Service and organisations representing Citizens Advice Bureaux;
> (d) Two other persons: one with expertise in law reform and one an economist or statistician.[81]

The Composition of the Commission, as it eventually appeared in the draft Bill was as follows:

> 15(1) The Commission shall consist of —
> (a) a Chairman;
> (b) a Commissioner to represent the Attorney-General; and
> (c) not less than 6 nor more than 11 other Commissioners.

---

79. Sackville, Legal Aid in Australia, para. 6.21.
80. Australian Legal Aid Review Committee, Second Report, March 1975, p. 15.
81. ibid, p. 16.

(2) The Chairman and the Commissioners referred to in paragraph (1)(c) shall be appointed by the Governor-General, the Chairman being appointed to hold office on a full-time basis and the other Commissioners being appointed to hold office on a part-time basis.

(3) ...

(4) ...

16(1) A person is not eligible for appointment as the Chairman of the Commission unless he is or has been a Judge or he is enrolled as a barrister, as a solicitor, or as a barrister and solicitor, of the High Court, of another federal court of the Supreme Court of a State or Territory and has been so enrolled for not less than 5 years.

(2) ...

(3) Subject to subsection (4), the part-time Commissioners shall be chosen from the following classes of persons: —

(a) private legal practitioners;

(b) persons (including members of the Office) concerned in the administration of schemes in Australia relating to the provision of legal assistance;

(c) persons who have experience or knowledge in, or have, or are members of an organisation or body of persons that has, an interest in, any field relevant to the provision of legal assistance or the provision of legal services; and

(d) persons who have experience or knowledge in any other field relevant to the duties of a Commissioner.

(4) In making appointments of part-time Commissioners, the Governor-General shall endeavour to ensure that the persons appointed have, among themselves, a wide range of experience in all fields relevant to the provision of legal assistance and, in particular, include at least one person from each of the classes of persons referred to in subsection (3).

In contrast to this reasoned approach to constituting a governing body, the Law Societies alone administer the legal aid plans in Ontario[82] and Nova Scotia.[83] Experience has shown that such bodies are overly-conservative in their approach to legal aid services (as can well be expected) since their main responsibility is to the private practitioners in their respective provinces. For example, the Nova Scotia Barristers' Society constantly refused to raise the eligibility limits for qualification for legal aid — even

---

82. The Legal Aid Act, R.S.O. 1970, c. 239, s. 2.

83. The Legal Aid Planning Act, Statutes of Nova Scotia, (1970-71), c. 14, s. 3.

in the face of rampant inflation — in the fear that the clientelle of practising lawyers may be affected. In fact, the Attorney-General of Nova Scotia, Allen Sullivan in the autumn of 1974 charged the legal profession with a general lack of social conscience and stated that he personally would like to see legal aid taken out of the Law Society's hands.[84]

The National Legal Aid and Defender Association in the United States maintains that a legal aid organisation should have a responsible, informed, and active governing body — broadly representative of the community as a whole — a majority of whose members should be lawyers. At least one third of the governing body should be residents of the areas or members of the groups eligible to be served by the organisation, or their representatives.[85]

In suggesting a body to administer a clinical legal aid scheme in New Zealand, I would follow in the most part the attitudes and principles as evidenced in the Australian scheme. However, the Australians created a Board of Management[86] charged with the general direction of the Office, while the Commission was mainly an advisory body. This would have reduced the impact of placing varied members of the community on the Commission. I would recommend that New Zealand have only one body to administer and direct the entire program. I imagine it to be a part-time body in order to attract people of high quality; yet I envisage the responsibilities of the office to require at least two full days out of a week.

I would make this body a five man body[87] — both to make it more efficient and to make the members more personally accountable for their actions. Of the five people making up the Committee, I would allow the New Zealand Law Society the privilege of appointing one person to the body. This person would obviously be a barrister or solicitor. I would allow the Social Workers Association of New Zealand to appoint one of the remaining four members. This person would more than likely be a trained social worker and would give the Committee an insight into the other community programs

---

84. The Fourth Estate, Halifax, July 9, 1975.
85. National Legal Aid and Defender Association, Handbook of Standards for legal aid and Defender Offices, p. 2.
86. Australian Legal Aid Bill 1975, s. 10.
87. The British Columbia Legal Services Commission is a five man body. — Legal Services Commission Bill, s. 4.

that would be co-ordinated with the legal aid plan, as well as maintaining a social welfare orientation to the program in order to emphasize preventive law. This leaves three positions which would be filled by nominees from the Governor-General. I think it just that the government should have the right of nominating a majority of members to the body. However, of these three members, it should be stipulated that no more than two of those three be barristers or solicitors currently holding a practising certificate. If two were in fact appointed, this would still leave the committee with a majority of lawyers, since it can be expected that the Law Society will nominate a lawyer. I have purposely excluded any _ex officio_ members who, I feel, would tend to administer their charge out of duty rather than interest.

I also feel that to restrict the non-lawyer position(s) to any one type of person (e.g. academic, member of community organisation, economist, statistician, consumer of legal services, etc.) as was done in the Australian plans, would be too restrictive in a country with New Zealand's population. Such a requirement would probably have little consequence in any event, as the most important quality of the appointee is his views toward legal aid and these are not guaranteed to be of a high quality simply because of the person's formal training or occupation. I feel it is more important to carefully select the bodies to nominate the members rather than to qualify eligible members, for a conservative body will always select conservative members, regardless of the categories that they are restricted to choose from. Nonetheless, the main danger to guard against is a board composed entirely of lawyers, because of the obvious conflict of interests that would arise.

Victoria University of
Wellington
Law Library

VI CONCLUSION

In this paper, I have attempted to show not only the advantages of a clinical legal aid system, but also the defects inherent in a judicare system. Undeniably, a judicare plan is the best for the lawyers — both through financial reward and valuable experience. However it is my contention that a clinical legal aid system best satisfies the special legal needs of the poor.

It will be difficult politically to establish a clinical legal aid program in New Zealand, not only because of the opposition of the legal profession, but also because the country has become accustomed to a judicare system — despite its faults (inertia is a powerful force). Nonetheless, I maintain that clinical legal aid is the system of the future and urge the New Zealand government to begin the transfer to such a scheme, before the cost of dismantling an anachronistic program becomes prohibitive.

BIBLIOGRAPHY

Abel-Smith, B., Stevens, R., Lawyers and the Courts, Heinemann, (1967)

Abel-Smith, B., Zander, M., Brooke, R., Legal Problems and the Citizen, Heinemann, (1973).

Advice Bureau Busy; More Male Helpers Are Needed, The Evening Post, Wellington, August 16, 1975.

Advisory Commission on Intergovernmental Relations, State-Local Relations in the Criminal Justice System, United States Government Printing Office, (1971).

An Act Respecting Planning for Legal Aid, Statutes of Nova Scotia, (1970-71) c. 14.

Anderson, P.A., Defence of Indigents, (1973) 25 Maine Law Rev. 1.

Annual Report of the Legal Aid Board on Operations of the Legal Aid Act 1969 for the Year Ended 31 March 1975, Government Printer, Wellington, (1975).
also: 1974
1973
1972
1971

Anorymous, Legal Aid Act 1969 and Alternative Concepts, (unpublished)

Australian Legal Aid Bill 1975, (introduced into the House of Representatives on June 6, 1975).

Australian Legal Aid Review Committee, Report, February 1974, Australian Government Publishing Service, Canberra, (1974).

Australian Legal Aid Review Committee, Second Report, March 1975, Australian Government Publishing Service, Canberra, (1975).

Beaufoy, J., Legal Aid with a Huckster's Flair, The Globe and Mail, Toronto, June 13, 1975.

British Columbia Legal Services Commission Bill, No. 96, 1975.

Bush Lawyer, The Dominion, Wellington, August 5, 1975.

Caldwell, R.A., Legal Aid — The Pattern, 1974 N.Z.L.J. 63.

Chong, T.V., Criminal Legal Aid in New Zealand, unpublished, 1971.

Clad, J.C., The Law Next Door, The New Zealand Listener, May 31, 1975.

Clad, J.C., Ponsonby Legal Referral Service, 1975 N.Z.L.J. 232.

Clark, J., The Public Defender System, (unpublished) 1974.

Cranston, R., and Adams, D., Legal Aid in Australia, (1972) 46 Aust. L.J. 508.

Evans, C.D., The Legal Aid Trade, (1973) 11 Alta. Law Rev. 65.

Evans, P.J., and Ross, S.D., Legal Aid in New Zealand and Abroad, (1972) 5 N.Z.U.L.R. 1.

Graham, A., Legal Aid Hearings: Strong Support for Extension of Storefront Services, The Fourth Estate, Halifax, July 9, 1975.

Graham-Greene, G.J., Criminal Costs Including Legal Aid, Butterworths, (1965)

Grant, A.K., The Future of Legal Aid, 1974 N.Z.L.J. 49.

Grier, Analysis and Comparison of the Assigned Counsel and Public Defender Systems, (1971) 49 North Carolina Law Rev. 705.

Hampton, K.N., The Duty Solicitor, 1974 N.Z.L.J. 78.

Hersey, A., Helping the Poor is a Challenge, The Bulletin, Nov. 2, 1974.

Lassow, D., The Legal Services Corporation Act: A Guide to the Legislative History, (publisher unlisted)

The Law Society of Upper Canada, Ontario Legal Aid Plan, Annual Report 1974, (publisher not listed).

Law Society of Upper Canada, Community Legal Services Report, (publisher not listed), 1972.

Legal Aid, 1970 Regulations of Ontario, Reg. 557.

The Legal Aid Act, 1970 R.S O., c. 239.

Legal Aid Act 1969, 1969, No. 47 (and amendments)

Legal Aid, Departmental Paper (Australia), (unpublished).

Legal Aid: An Introduction to the Services of the Shop-front Lawyers of the Australian legal Aid Office, An Australian Women's Weekly Publication.

Lowry, D.R., A Plea for Clinical Law, (1972) 50 C.B.R. 183.

Ludbrook, R., The Lawyer and the Community, 1974-75 N.Z.L.J. (10 parts).

MacDonald, M., Legal Giant's Teething Troubles, The Bulletin, November 2, 1974.

Morris, P., White, R., and Lewis, P., Social Needs and Legal Action, Martin Robertson, (1973)

Muir, I.A., A White Paper for Legal Services, The New Zealand Listener, August 9, 1975.

National Legal Aid and Defender Association, Handbook of Standards for Legal Aid and Defender Offices, American Bar Center, Chicago, (1970).

Nichols, B.P., Neighbourhood Law Firms: Legal Referral Centers, (unpublished), 1974.

Nova Scotia Legal Aid, Annual Report, 1973/74 (publisher not listed).

The Offenders Legal Aid Act 1954, 1954, No. 62.

The Parliamentary Debates, 13 December 1973, (Australia)

Phenix, M.A., Systems of Representation of Indigent Defendants, (1965) 30 Sask. Bar Rev. 112.

Pope, J.D., At Last the Duty Solicitor, 1974 N.Z.L.J. 311.

Pope, J.D., Crime Doesn't Pay, 1975 N.Z.L.J. 282.

Report of the Department of Justice for the Year Ended 31 March 1975, Government Printer, Wellington, 1975.
also: 1974

Smith, J., A National Legal Service, The New Law Journal, Nov. 29, 1973.

United States Department of Health, Education and Welfare, The Extension of Legal Services to the Poor, Government Printing Office, Washington D.C., (1964).

Vinson, T., The Law Under Pressure ... Why Money Buys Justice, The Australian Financial Review, March 13, 1975.

Williamson, N.W., Legal Referral Centres, 1974 N.Z.L.J. 128.

Leary, D.R., A Plea for Clinical Law, (1972) 50 C.B.R. 193.

Lachmack, R., The Lawyer and the Community, 1974-75 N.Z.L.J. (10 parts).

MacDonald, N., Legal Clinic's Teething Troubles, The Bulletin, November 2, 1974.

Morris, P., White, R., and Lewis, P., Social Needs and Legal Action, Martin Robertson, (1973)

Nutt, T.A., A White Paper for Legal Services, The New Zealand Listener, August 9, 1975.

National Legal Aid and Defender Association, Handbook of Standards for Legal Aid and Defender Offices, American Bar Center, Chicago, (1970).

Nichols, R.P., Neighbourhood Law Firms: Legal Referral Centres, (unpublished), 1974.

Nova Scotia Legal Aid, Annual Report, 1973/74 (publisher not listed).

The Offenders Legal Aid Act 1954, 1954, No. 62.

The Parliamentary Debates, 13 December 1973, (Australia)

Pearce, R.A., Systems of Representation of Indigent Defendants, (1965) 30 Sask. Bar Rev. 112.

Pope, J.D., At Last the Duty Solicitor, 1976 N.Z.L.J. 311.

Pope, J.D., Crime Doesn't Pay, 1975 N.Z.L.J. 282.

Report of the Department of Justice for the Year Ended 31 March 1975, Government Printer, Wellington, 1975.
also: 1976

Smith, J., A National Legal Service, The New Law Journal, Nov. 29, 1973.

United States Department of Health, Education and Welfare, The Extension of Legal Services to the Poor, Government Printing Office, Washington D.C., (1964).

Vines, T., The Law Under Pressure ... Why Money Buys Justice, The Australian Financial Review, March 13, 1975.

Williamson, R.M., Legal Referral Centres, 1974 N.Z.L.J. 108.

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY
3 7212 00443249 6

VICTORIA UNIVERSITY OF WELLINGTON
LIBRARY

r
Folder
Pa

PARISH A.V.
A plea for clinical legal aid in New Zealand.
333,992

LAW LIBRARY
77/480 WJ.
PLEASE RETURN BY
21 APR 1977
TO W.U. INTERLOANS

A fine of 10c per day is charged on overdue books

r
Folder
Pa

PARISH, A.V.
A plea for clinical legal aid in N.Z.
333,992

Due	Borrower's Name
	IL Cranstoun
22-4-85	G Phyps
7/5/90	R Daglish