

**CHALLENGES IN THE INCREASE OF ACCESS TO JUSTICE
IN THE NEXT DECADE**

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By

**George Bizos SC
Constitutional Litigation Unit
Legal Resources Centre
Tel: (011) 836-9831
Fax: (011) 834-4273
Email: zanu@lrc.org.za**

Today I wish to speak about the importance of legal aid in the fight for increased access to justice in South Africa. Mr. Justice Didcott of the Constitutional Court described the state of affairs prevailing in South Africa in a 1997 decision as follows: South Africa, he wrote, is “a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce these, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons.”¹ We, as members of the legal profession, as well as the government, jointly bear the responsibility for addressing and overcoming these obstacles. Around the world, democracies like our own – the United Kingdom, Canada and Australia -- are struggling to meet this challenge. We, too, strive to improve access to justice in South Africa. For, ultimately, greater access to justice leads to a fairer and more prosperous society.

¹ *Mohlomi v. Minister of Defence*, 1997 (1) SA 124 (CC).

The rights of access to the courts and to legal representation are protected in sections 34 and 35 of the Constitution. Section 34 states, “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.” And section 35 enshrines the right of an accused to legal consultation and representation, and the right to a fair trial. This includes the right “to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.”² The Legal Aid Board was rendered to give content to this right and given broadened powers in the 1996 *Legal Aid Amendment Act*³.

The Board’s work in improving access to justice is to be commended. With limited funds, its establishment of cooperative agreements with NGOs and universities, which provide legal services, is making a significant difference. So is the Board’s commitment to the development and strengthening of its relationship with salaried legal practitioners. But much more can and should be done, with the leadership of the government and support of the legal community, to ensure that the less fortunate in our society have equal access to our courts.

Since the end of the apartheid, South African courts have repeatedly faced the question of access to justice. In regard to section 34 of the Constitution, Ms Justice Mokgoro of the Constitutional Court stated at para. 22 of *Chief Lesapo v North West Agricultural Bank and Another*:

“The right of access to Court is indeed foundational to stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to

² Section 35(3)(g)

³ *Legal Aid Amendment Act*, Act 20 of 1996

resolve disputes without resorting to self-help. The right of access to Court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to Court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.”⁴ Indeed, without equal access to justice, we undermine the rule of law and our commitment to fundamental equality and human rights.

But how are we fairing on the issue of access to justice in South Africa compared with the rest of the world? Recent reports suggest that, while South Africa is significantly ahead of many other developing countries with respect to the provision of legal aid, it trails the developed countries in this respect.⁵ Still, the United Kingdom, Canada and Australia, are also struggling to balance the ever-growing demand for legal aid with limited public resources. Various potential solutions to this dilemma have been proposed which may help inform our path forward in South Africa.

In the United Kingdom, Lord Carter was commissioned to head a review of legal aid procurement entitled, “Legal Aid: A market-based approach to reform.” Released in July 2007, the report contains dozens of recommendations emanating from the *Access to Justice Act 1999* which made major changes to the legal aid scheme in the UK, including the replacement of the Legal Aid Board with the Legal Services Commission which acts as the procurer of legal aid services. The report

⁴ *Chief Lesapo v North West Agricultural Bank and Another*, 2000 (1) SA 409 (CC) (1999 (12) BCLR 1420), para 22.

⁵ Ernest Mabuza, “Legal Aid Lags Developed Countries” *Business Day* (25 October 2006: Johannesburg).

found that “the scale of the continued rise in spending is not the result of individual or collective wastefulness. It is the result of systemic weaknesses in the way legal aid services are procured and therefore inefficiencies in the way those services are delivered.”⁶ Some of the proposed recommendations for improvement include the establishment of a “peer review assessment for all firms seeking a place in the new market so that the introduction of best value tendering can take place.”⁷ The report also recommends the development of services provided by law firms and not-for-profits across a wider area of categories of civil and family law.

Despite the depth of analysis and comprehensiveness of the Carter report, a group of legal activists, including the Legal Aid Practitioners’ Group, the Criminal Law Solicitors’ Association and the London Criminal Courts Solicitors’ Association, have launched a campaign to ensure that the proposed reforms do not actually hinder access to justice. Just last month, UK Law Society Chief Executive, Desmond Hudson, stated that “[W]ithout extra funding, these plans could force twice as many legal aid firms out of business as Lord Carter envisaged. Successful transition to the new system depends on the government investing now to make fee levels viable and then setting a more realistic timetable for implementation.”⁸ The UK Law Society has also urged caution in the implementation of competitive price tendering, especially in rural areas, given that such a system is previously untested.⁹

⁶ Carter Review, p.3

⁷ *Ibid*, p. 8

⁸ “UK Professional Associations Campaign to Protect Legal Aid” Globe Business Publishing (12 October, 2006), <www.internationallawoffice.com>.

⁹ Letter from the Law Society to Lord Falconer, Secretary of State and Lord Chancellor in the Department for Constitutional Affairs, (1 November 2006).

In Canada, a different approach to legal aid reform was tried. Last year, the Canadian Bar Association (CBA) initiated an action against the government of British Columbia, the Attorney General of Canada, and the Legal Services Society (LSS), seeking declarations that the defendants were providing inadequate civil legal aid services and that the failure to provide such services put them in breach of the *Charter*, the *Constitution Act*, and international human rights provisions guaranteeing meaningful, equal access to justice for all. But the British Columbia Supreme Court held that the remedies sought by the plaintiff were too broad for it to be granted a hearing. The action also failed to meet the "no other reasonable and effective manner" requirement to achieve public interest standing, as the court held that other avenues existed other than this systemic claim approach. Further, the court found that unwritten constitutional principles did not equate with free standing rights that could be breached, and that *Charter* challenges could only be established in the context of individual cases.¹⁰

Despite the outcome of this case, the Canadian Bar Association recently announced that it will appeal the decision. The past president of the Canadian Bar Association, Susan McGrath stated publicly, "...[O]ur profound frustration about government indifference to the plight of litigants who cannot afford legal representation in British Columbia following dramatic cuts to most legal aid in that province, does not deter our continuing commitment to ensuring poor people's access to justice."¹¹

¹⁰ *Canadian Bar Assn. v. British Columbia*, [2006] B.C.J. No. 2015 (Sup.Ct.).

¹¹ CBA Reaffirms Commitment to Constitutional Right to Civil Legal Aid, 2006, <www.cba.org>.

Some commentators in Canada have suggested that one possible answer to the access to justice question may be the adoption of a mandatory *pro bono* obligation by the Canadian legal profession, as is becoming common practise in many large U.S. firms.¹² Canadian law professor, Richard Devlin, argued in a paper that “while the new economy paints a grim picture for access to justice, there is still space for the legal profession to mobilize within the discourses and practices of the social investment state. But political engagement will not be cost free. Nor will it fully resolve the problem of access to justice where there is clearly a vitally important role for the state to increase its contributions.”¹³

The magnitude of the funding challenge for legal aid in Canada was perhaps best summarized by the Chief Justice of the Ontario Court of Appeal, Roy McMurtry. He stated, “I . . . believe that the major challenge facing the justice system in the next millennium will be the absence of adequate legal advice and legal representation to our society's increasing numbers of disadvantaged.”¹⁴

Similarly, the legal aid system in Australia is also facing substantial challenges. Legal assistance in Australia is secured through a variety of *pro bono*, litigation lending and insurance schemes, via legal aid and indirectly through tax deductible legal expenses. The Australian Law Reform Commission stated in its most recent report that public funds for legal aid in Australia have been “steadily, some would say significantly reduced. Legal aid is undergoing a profound change around the globe. State funded and organised schemes are in a process of dramatic

¹² See Richard Devlin, *Breach of Contract?: The New Economy, Access To Justice and the Ethical Responsibilities of The Legal Profession*, (Fall, 2002) 25 Dalhousie L.J. 335.

¹³ Richard Devlin, *Breach of Contract?: The New Economy, Access To Justice and the Ethical Responsibilities of The Legal Profession*, (Fall, 2002) 25 Dalhousie L.J. 335.

¹⁴ As quoted in Richard Devlin, *Breach of Contract?: The New Economy, Access To Justice and the Ethical Responsibilities of The Legal Profession*, (Fall, 2002) 25 Dalhousie L.J. 335.

decline...The professions in Sweden, the USA, England, Australia and other societies are reinventing schemes to assist citizens with free or heavily discounted legal services.”¹⁵

According to the Australian Law Commission Report, anecdotal evidence and some recent qualitative research suggests that cuts to legal aid funding have led to an increase in the number of unrepresented parties before federal courts and tribunals and a diminution in the numbers of skilled and specialised lawyers undertaking legal aid work. The Chief Justice of Australia has commented that the cost to governments of providing legal aid cannot be assessed without considering the costs incurred by not providing legal aid.¹⁶ As the Law Reform Commission of Western Australia expressed it, “[t]he presence of self-represented litigants in the civil justice system has the potential to increase costs for all court users...from ..more pre-trial procedures; poor issue definition and clarification; greater time and expense in responding to unclear or irrelevant evidence; and excessive time spent in hearings.”¹⁷ However, some suggest that where the other party is wholly unrepresented, lawyers engage in less activity on their file than if the other party is represented. Whatever the case may be, unequal representation most certainly leads to a higher risk of error and, ultimately, perhaps even injustice.

As we navigate the most effective means of improving access to justice in South

¹⁵ Australian Law Reform Commission Report 89: Managing Justice: A review of the federal civil justice system, <

¹⁶ Australian Law Reform Commission Report 89: Managing Justice: A review of the federal civil justice system, <

¹⁷ Law Reform Commission of Western Australia *Review of the criminal and civil justice system in Western Australia* Project 92 LRCWA Perth September 1999, para 18.3 (LRCWA report). Also R Sackville *Submission 388*.

Africa, we must be guided by our Constitution and the principles of equality within it. We cannot allow the growing disparity between the rich and poor be perpetuated by a system of justice that is only selectively accessible. In the words of Harvard President Emeritus, Derek Bok, "There is far too much law for those who can afford it and far too little for those who cannot."¹⁸ We, the members of the legal profession, the policy-makers and members of the public at large, must work together, swiftly and effectively, to promote and harness a system of justice that is accessible to all – one that truly has the potential to be the envy of the world.

¹⁸ As quoted in Roger C. Cramton, "Delivery of Legal Services to Ordinary Americans" (1994) 44 Case W Res. L. Rev. 531 at 533-534 [Cramton, "Ordinary Americans"]