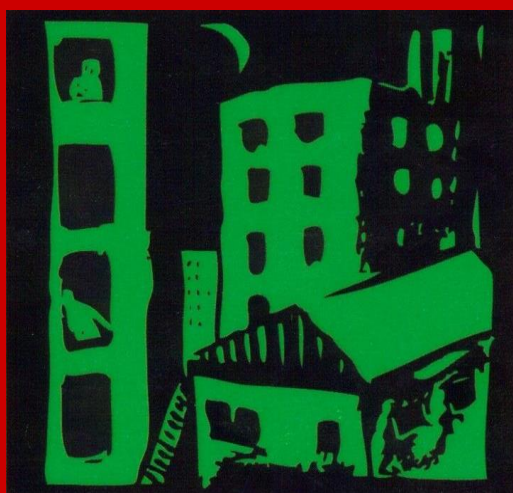
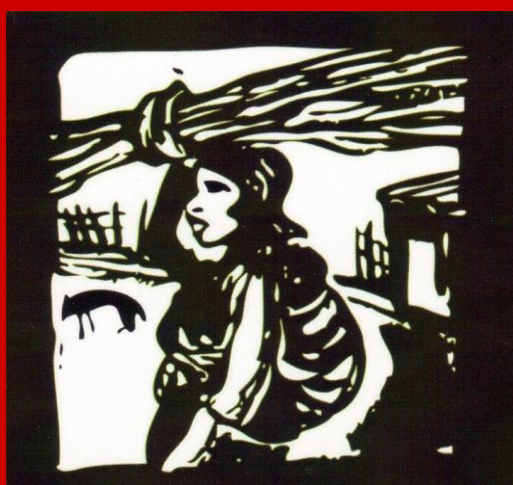


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Promoting the quality of legal aid in South Africa through better co- ordination of service provision

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ABSTRACT

Socio-economically, South Africa is a grossly unequal country. For the indigent there is a clear need for legal aid services to enable meaningful access to the legal system as a mechanism to promote greater social justice. This article proposes mechanisms to meet two aims: to promote high-level free legal service provision through much improved co-ordination between legal service providers; and to inculcate a co-operative and integrated approach to legal aid services for satisfactory standards of legal aid provision. This research has a qualitative focus in contrast to almost all research on legal aid in South Africa, which has concentrated on the expansion of legal aid services quantitatively- ie in terms of increasing the number of clients

being assisted. If legal aid service provision is not of an adequate standard, it puts into serious question the value of the service delivery. A high quality and co-ordinated legal aid network is well positioned to act as a conduit for the realisation of legal rights and entitlements for a better standard of living for all. This article proposes various means for a more cohesive legal aid system in South Africa as well as the advantages which such cohesion would inevitably have for both legal service providers and those whom they serve.

Keywords: South Africa; legal aid; civil legal matters; holistic; co-ordination; social justice; quality work; qualitative.

1 INTRODUCTION

Justice should be provided to all, not only to those with the means to pay for it.¹ Promotion of justice via some form of legal assistance is illusionary for the majority of indigent South Africans when representation cannot be afforded and “legal aid” (broadly interpreted as set out below) is not provided.² This is in accordance with Vawda’s statement:

“access to social justice entails a holistic approach to the socio-economic problems faced by the country’s poor, within which may be located the right of access to legal representation.”³

This article attempts to delve deeper into the concept of the quality of legal aid service provision in South Africa in considering the questionable value of legal aid services operating in a fashion which is not co-ordinated, integrated and multi-faceted. This article covers the need for a co-ordinated approach to a multi-faceted provision of legal aid services. This research has a qualitative focus insofar as almost all research on legal

¹ Thomas M “Access to justice for all, not just those who can pay” 21 November 2011 available at <http://centrallobby.politicshome.com/latestnews/article-detail/newsarticle/access-to-justice-for-all-not-just-thosewho-can-pay/> (accessed 30 November 2018).

² This article uses the term “legal aid” service delivery broadly to mean free legal services for the indigent by and through means, such as, registered law clinics which may be Non-Profit Organisations or University Law Clinics, other legal services providers like the State’s Legal Aid South Africa, as well as other means, such as, private lawyers acting *pro bono*, and community based paralegals. All free legal services which contribute in different ways to greater access to justice which go beyond “legal aid” in a narrow sense by legal aid practitioners are considered important and necessary elements of a co-ordinated approach to legal aid as advocated in this article along with traditionally understood forms of legal aid. For analyses of some specific studies of forms of free legal services in South Africa in a broad sense in South Africa see, for example: Holness D “Recent developments in the provision of *pro bono* legal services by attorneys in South Africa” (2013) 16(1) *Potchefstroom Electronic Law Journal* 128 at 128-164, and Holness D “Improving access to justice through compulsory student work at university law clinics” (2013) 16(4) *Potchefstroom Electronic Law Journal* 328 at 328-349.

³ See Vawda YA “Access to justice: from legal representation to promotion of equality and social justice - addressing the legal isolation of the poor” (2005) 26(2) *Obiter* 234 at 241.

aid in South Africa has concentrated on the expansion of legal aid services quantitatively, ie in terms of increasing the number of clients being assisted.⁴

The article uses some specific South African legal aid providers or categories of such service providers as examples of the types of services offered by similar organisations. Whilst some categories of free legal service providers have individually been the subject of academic analysis,⁵ the co-ordination of such services in South Africa is a unique area of analysis.

Holistic suggestions for a co-ordinated and multi-faceted model for quality legal aid using existing legal aid role-players and focusing on the quality of service provision will be made. It is necessary to have a multifarious approach to legal aid in South Africa due to the magnitude of the problem faced. However, to have various service providers all pulling in different directions regarding the work being done,⁶ means that the work is unco-ordinated and will inevitably be of a lesser quality. This could possibly lead to less people being assisted from a quantitative perspective.

This article examines the key elements of legal aid service provision in South Africa. It largely highlights an existing lack of co-ordination due to a lack of an overarching legal aid body. It further shows why harmonisation of such services is advantageous and necessary, and how better co-ordination of such services might occur. This article deals with the co-ordination element of such a model. The specific means of quality monitoring and evaluation are worthy of a separate study and therefore not the focus of this article.

2 LEGAL AID IN SOUTH AFRICA'S SOCIO-ECONOMIC CONTEXT AND THE SERVICE PROVISION STATUS QUO

2.1 South Africa's existing socio-economic context for legal aid provision including funding challenges

De Klerk states: "Social justice has been defined as referring to the fair distribution of health, housing, welfare, education and legal resources in society."⁷ In the context of a country with gross inequality,⁸ huge swathes of the population living in deep poverty,

⁴ Examples are Vawda (2005) at 234 and Van As H "Legal aid in South Africa: making justice reality" (2005) 49(1) *Journal of African Law* 54 at 54.

⁵ See for example Holness (2013) at 154 and Holness D "The need for recognition and regulation of paralegals: an analysis of the roles, training, remuneration and impact of community-based paralegals in South Africa" (2013) 38(2) *Journal for Juridical Science* 78 at 78.

⁶ Part 2.2 below illustrates the rationale behind the need for co-ordination.

⁷ Quoted by McQuoid-Mason D "Access to Justice in South Africa" 17 *Windsor Yearbook of Access to Justice* 230 (1999) 1 at 15.

⁸ The degree of inequality in South Africa is shown in stark reality by its recognition by the World Bank per its latest Gini Index as significantly the most unequal country socio-economically in the world. The Gini Index measures the extent to which the distribution of income or consumption expenditure among individuals or households within an economy deviates from a perfectly equal distribution. World Bank "Gini Index" available at <https://data.worldbank.org/indicator/SI.POV.GINI?locations=ZA> (accessed 14 June 2019).

and very high levels of unemployment,⁹ it is imperative to improve the quality of legal aid provision via appropriately co-ordinating such services and ensuring quality of service provision. This is called for to create the conduit that would drive us toward improved social justice. There is thus a clear need for all legal aid service providers to work towards an overall common goal of using law as a tool for promoting social justice. The goal should be the co-ordination of work amongst all service providers which would ultimately lead to satisfactory quality and service.

A further study should be dedicated to funding challenges for legal aid parastatal Legal Aid South Africa (LASA) and legal aid Non-Profit Organisations (NPOs).¹⁰ These points are listed for contextual purposes only as this article instead concentrates on improving legal aid quality by promoting the co-ordination of existing legal aid services which are largely independent and experiencing budgetary constraints.

Nonetheless, the two paragraphs immediately below set out some legal aid funding challenges in South Africa. Clearly, better State funding would facilitate quantitative expansion and qualitative evaluation or assessment of legal services. This article will not dwell on State funding allocation as it falls within the ambit of the executive arm of government.¹¹

The South African government's genuine commitment to (or at the very least prioritisation of) legal aid related access to justice could be questioned in terms of major cutbacks made to LASA's budget flowing from a decrease in the Department of Justice and Constitutional Development's allocation from the national fiscus. In the 2018/19 financial year, LASA's government funding was cut by 5 per cent and it was indicated that it would be cut further by R503 million over the next three years.¹² Such drastic funding cuts for legal aid spending makes service provision all the more challenging. A call for greater State allocation of funds for legal aid, especially for LASA, does not form a focal area of this article.

⁹ Albeit changing quarter by quarter, Stats SA provides a reliable indicator of just how extensive unemployment is in South Africa. According to this source, the official unemployment rate is calculated using the number of persons who are employed and unemployed, and does not include discouraged work seekers. On the above basis the official unemployment rate was 30,1% in quarter 1 of 2020, 23.3% in the second quarter of 2020 and 30.8% in quarter 3. Available at <http://www.statssa.gov.za/?p=13765#:~:text=The%20unemployment%20rate%20according%20to,compared%20to%20quarter%202%202020.&text=Compared%20to%20quarter%203%202019,unchanged%20in%20quarter%203%202020>. (accessed 12 November 2020). These figures will probably worsen in the wake of the economic crisis caused by the Covid-19 pandemic.

¹⁰ In this article the terms "NPOs" and "Non-Governmental Organisations (NGOs)" will be used interchangeably.

¹¹ It can be said that the terms "evaluation" and "assessment" differ (for example, a student evaluation of a university module versus a lecturer's assessment of student performance in that module through marking of student work). However, for ease of use, in this article these related terms will be used interchangeably to mean measuring compliance or degrees of compliance with set deliverables.

¹² See Mabuza E "Legal Aid SA budget cuts bad news for poor and vulnerable seeking justice" 17 October 2018 *Times Live* available at <https://www.timeslive.co.za/news/south-africa/2018-10-17-legal-aid-sa-budget-cuts-bad-news-for-poor-and-vulnerable-seeking-justice/> (accessed 1 May 2019).

However, it is normatively argued that State funding for legal aid, particularly civil legal aid, needs instead to be increased and not reduced. This is especially so if it is intended that everyone in South Africa should have reasonable access to civil legal aid.¹³ An increase in State funding of legal aid generally and particularly civil legal aid will ensure greater sustainability of legal aid programmes. It is safe to say that LASA will play a prominent role in legal aid provision if sufficient resources are allocated to its work. LASA remains an obvious focal point for a more harmonised approach to legal aid if for no other reason than its massive scale of operations in comparison with other South African legal aid service providers.¹⁴

Legal aid provision outside of LASA, for example by service providers, such as, the Legal Resources Centre (LRC) and community based paralegals (both of which will be touched on below), also face significant funding challenges. Studies have shown that donor funding from outside South Africa has become increasingly hard to procure.¹⁵ Furthermore, donors seem to prefer to deal directly with governments rather than with large numbers of NGOs, whilst many donors indicate that the State has the responsibility of providing legal aid.¹⁶ In the context of major government legal aid funding cuts noted above, legal NPOs will most certainly be underfunded and will not have the resources to operate efficiently. As previously mentioned, this study focuses on co-ordinating legal aid services in their current situation of financial constraints and with their existing service providers.

2.2 Legal aid services in South Africa

Legal aid service provision in South Africa is characterised by silo thinking and predominant provision for criminal legal aid. Both characteristics are discussed below.

2.2.1 Legal aid service providers operating within their own silos

In South Africa, it is common that legal aid organisations operate independently with almost no regular and meaningful links with other legal aid service providers or even adequate awareness of each other's work; hence the subheading above referring to operating in "silos".¹⁷ It is submitted that this is apparent from and aggravated by a lack of any national legal aid body or regional legal aid bodies, allied with most legal aid

¹³ McQuoid-Mason D "Access to justice in South Africa: are there enough lawyers?" (2013) 3(3) *Oñati Socio-Legal Series* 561 at 561-579. LASA does provide quite a broad criminal legal aid net- to which the statistics in part 2.2.2 below attest .

¹⁴ See part 2.2.2 below.

¹⁵ Southern African NGO Network Pulse available at <http://www.ngopulse.org/article/emerging-funding-crisis-south-african-civil-society> (accessed 11 June 2019).

¹⁶ See McQuoid-Mason (1999) at 11.

¹⁷ This is supported by a large empirical study in this regard by Holness. See generally Holness D *Coordinating free legal services in civil matters for indigent people in eThekweni: a model for improved access to justice* (unpublished LLD thesis, Nelson Mandela University, 2015). ProBono.Org, discussed below, can be said to be one understandable exception to this criticism of legal aid organisations operating too individualistically. This is understandable because it exists chiefly as a legal aid "clearing house" which necessitates close ties with private lawyers in particular.

providers not working in some way with other service providers in matters of common interest.¹⁸

2.2.2 *A greatly skewed provision of criminal over civil legal aid*

LASA is by far the largest provider of free legal services or legal aid in South Africa (ie in comparison with all legal NPOs, university law clinics and the like combined).¹⁹ The huge scale of LASA's operations is shown in its annual budget for the 2017/2018 financial year of R1,754 billion²⁰ - this dwarfs funding of all other legal aid service providers in South Africa combined many times over. However, LASA allocated most of its budget to and work on (approximately 87 per cent of both of these facets over the last number of years) criminal legal aid.²¹ It is not surprising that case output at LASA mirrors closely its budget allocation of criminal versus civil work, for example, due to the staff allocation to these different legal service categories.

Separate studies and statistics have shown that there is a major need for better access to justice in civil matters in South Africa and that, therefore, the current priority must be an expansion of civil (over criminal) legal aid.²² The key rationale for this change in prioritisation, which is apparent from the previous paragraph, is that there is incomparably greater provision of "legal aid" or free legal services in criminal as opposed to civil matters due to LASA's significant criminal work focus combined with the massive scale of LASA's operations.²³ Thus, any significant strides in co-ordinating the roll-out of legal aid in South Africa must as a corollary relate mainly to civil legal aid provision.²⁴ Civil legal aid provision, outside of LASA, is provided through NGOs, such as, law clinics at universities, public interest law clinics, as well as paralegals.

¹⁸ See generally Holness (2015).

¹⁹ Legal Aid South Africa Annual Report 2016/2017 (2017) available at <https://legal-aid.co.za/annual-reports/> (accessed 13 November 2018).

²⁰ Legal Aid South Africa "Legal Aid South Africa Annual Report 2017/2018 (2018) available at <http://legal-aid.co.za/wp-content/uploads/2019/01/Legal-Aid-SA-ANR-2017-2018-PART-1.pdf> (accessed 17 November 2018).

²¹ LASA provides extensive legal aid to criminal accused in South Africa unable to afford their own legal representation and is virtually the sole supplier of such services in the country. In LASA's annual reports each year from 2012/2013 to 2017/2018 almost exactly 87% of their cases were criminal compared with 13% being civil. See for example p 2 of the 2017/2018 annual report, available at <https://legal-aid.co.za/annual-reports/> (accessed 22 November 2018). Unfortunately, LASA's statistics do not measure their case output against the existing need for such legal aid services in civil matters.

²² See, for example, Holness (2015) at 287.

²³ In LASA's annual report for 2017/2018, the organisation had 371 202 new criminal cases and 55 415 new civil matters. See p 2 of the 2017/2018 annual report available at <https://legal-aid.co.za/annual-reports/> (accessed 11 November 2020).

²⁴ An argument has also been made that there exists a constitutional imperative applicable to the provision of civil legal aid in certain matters as contained most strongly in s 34 of the Constitution of the Republic of South Africa, 1996. Holness D "The constitutional justification for free legal services in civil matters in South Africa" (2013) 27(2) *Speculum Juris* 1 at 1-21.

3 WHAT CO-ORDINATION AIMS TO ACHIEVE

This article conceives a model for legal aid service delivery in South Africa that brings together in its operations the providers and provision of legal aid services in response to existing legal needs which would thereby improve the quality of legal aid rendered to indigent clients. There could be a more harmonised model of legal aid in South Africa if the various possible components are adopted, with the following proposed two main elements and characteristics of how legal aid service providers can: (a) improve their offerings through a far more co-ordinated approach to existing challenges currently faced; and (b) identify measures to adequately monitor and gauge the quality of civil legal aid services provided.

a) A co-ordinated approach

To achieve this goal, we would have to introduce a designated representative and a fully functional legal aid association (and/or regional associations) which would primarily co-ordinate the efforts between the various legal aid providers.²⁵ Such co-ordination would determine where existing civil legal aid needs are being adequately catered for and where gaps (or unnecessary overlap) in the service provision “net” persist and how best collectively to tackle existing challenges and new challenges as they arise. Similar organisations abroad could be used as examples for South Africa to follow. For example, the Coordination Centre for Legal Aid Provision in Ukraine.²⁶

b) Monitoring and evaluation measures for quality civil legal aid services

As noted in the introduction, this article deals with the co-ordination element of such a model; the quality monitoring and evaluation aspect would be worthy of a separate study.²⁷ Proposed elements of a co-ordinated approach are set out under the sub-headings to follow.

4 SPECIFIC PROPOSALS AS TO BETTER CO-ORDINATION OF SOUTH AFRICAN LEGAL AID

The proposals listed and discussed below cover:

- A multi-faceted approach to co-ordinated legal aid which includes a needs analysis;
- Rights awareness as a precursor to meaningful legal aid service provision;
- Co-ordination via South African Legal Aid Association(s);
- Value-added referrals between legal aid providers;
- Clustering and legal aid clearing house(s); and

²⁵ See part 4.3. below which (further) discusses co-ordination via South African Legal Aid Association(s).

²⁶ “(T)he Coordination Centre for Legal Aid Provision ... was established within the system of the Ministry of Justice to implement ... free legal aid and more specifically, to develop and implement an effective system of free (primary and secondary) legal aid in Ukraine, and to ensure its accessibility and quality” available at <https://namati.org/network/organization/coordination-centre-for-legal-aid-provision/#:~:text=It%20was%20established%20within%20the.ensure%20its%20accessibility%20and%20quality> (accessed 11 November 2020).

²⁷ Nonetheless, because of the link between coordination and monitoring and evaluation, a brief commentary on this is given in part 4.6 below.

- Evaluation of the quality of legal services within a co-ordinated system.

4.1 A multi-faceted approach to co-ordinated legal aid including a needs analysis

Paterson refers to “joined up legal services” which focuses on the related issues of legal aid service delivery being co-ordinated and comprehensive.²⁸ These are considered key ingredients of the model proposed in this article for improved legal aid service delivery in South Africa. The above traits of a legal aid system for South Africa would also most likely lead to greater efficiency in the services on offer. It is submitted that the comprehensiveness alluded to by Patterson, would also include elements of legal aid service quality monitoring and evaluation. A co-ordinated model for free legal service delivery is most necessary for civil legal aid. In essence, it is in this sector that there is the least service delivery and co-ordination. The idea of “joined up legal services” flows effortlessly into sub-section 4.3 below on the need for the establishment of a legal aid association or associations in South Africa.

Currie highlights the need for any legal aid model to comprehensively establish what pressing, unmet legal aid needs of the indigent are not being catered for by the existing legal aid system.²⁹ Empirical research is necessary to establish the full extent of the need for legal aid and the nature of the need. One such study did such empirical research in a South African metro by considering the number and nature of requests for civil legal aid compared with those assisted by civil legal aid providers.³⁰ Such studies would have to be undertaken throughout South Africa and its regions, in order to establish what the main legal aid needs are and how a co-ordinated approach by legal aid providers could then best confront these challenges.

4.2 Rights awareness as a precursor to meaningful legal aid service provision

The value of the legal rights awareness programmes provided by a number of civil legal aid providers in South Africa, such as, the Black Sash and Equal Education Law Centre, must be praised. This is for raising awareness of community and people’s legal rights via workshops and rights awareness material. In addition to this, they also raise awareness of organisations that can assist indigent people at no cost for specific types of legal problems.³¹

²⁸ Paterson A “Community Legal Services: An Inter-Jurisdictional Comparison” (2001: *ILAG Conference*) available at <http://216.92.68.58/conference/ilag2001.htm> (accessed 18 June 2019). Various aspects and examples of a multi-faceted approach to the provision of free legal services for the indigent have been provided by the International Legal Aid Group (ILAG).

²⁹ Currie I “The Emergence of Unmet Needs as an Issue in Canadian Legal Aid Policy Research” (2001: *ILAG Conference*) available at <http://216.92.68.58/conference/ilag2001.htm> (accessed 2 July 2019) [1].

³⁰ See Holness (2015) at 70.

³¹ The Black Sash (undated) “About us” available at <https://www.blacksash.org.za/index.php/about-us/about-the-black-sash> (accessed 28 July 2019). Equal Education Law Centre (Undated) “Our work” available at <https://eelawcentre.org.za/our-work/> (accessed 2 September 2019).

In the model proposed in this article for better co-ordinated legal aid and services of a better quality, it is thus important that efforts of legal aid providers extend beyond the delivery of legal services per se to the provision of community rights awareness. Other research has shown how it is ideal for street law programmes using law students and paralegals to do this kind of rights awareness campaigns. Using paralegals and street law programmes to promote legal rights awareness reduces the burden on dedicated legal aid service providers to achieve their core mandates for clients.³² Such community rights awareness must be focused on areas of obvious and greatest relevance, such as, when a new law which particularly affects the poor comes into force. The rights awareness training should be delivered in an interactive and relevant fashion, such that the audience may more easily relate to it, and maximum comprehension should be sought through avoiding the use of unnecessary legal jargon and making use, where possible, of the main local language spoken.

The main local language may be used as the primary language of instruction where the instructors have that linguistic proficiency. Alternatively, the presence of translators fluent in the main local language allows for complex and/or key concepts (which are likely to be initially explained in English) to be translated to ensure that the correct message is likely to get across and for questions from participants to be asked and answered in their mother tongue. Finally, even if community rights awareness workshops are largely or entirely run in English, the use of written rights awareness material in the local language is likely to aid participants' comprehension and be a useful future reference guide for them in practical situations.

4.3 Co-ordination via South African Legal Aid Association(s)

The silo-like operation of legal aid providers in South Africa has been noted above. It is thus not surprising that there have been calls for a “national legal aid forum” of the entire spectrum of legal aid service providers (including community based paralegals) so as to promote cohesion and co-operation between such service providers towards a co-ordinated strategy to legal aid.³³ Such a forum or fora should include all existing legal aid service providers, representatives of the needy clients whom they serve, and other stakeholders like government's Department of Justice and Constitutional

³² See Holness “Improving access to justice” (2013) 328 at 328-349 and Holness “The need for recognition” (2013) at 78.

³³ Bodenstein J “Access to legal aid in rural South Africa”: in seeking a coordinated approach” (2005) 26(2) *Obiter* 304 at 320. LASA has made some strides towards a more integrated network. In this regard Judge Mlambo, Chairperson of LASA, noted as follows: “At Legal Aid South Africa, we've realized that we can't meet all the legal aid needs on our own. So we enter into partnerships with legal NGOs who specialize in particular areas, such as those who deal with children, with farming communities, or with women [...] We do the same with university law clinics [...] We are able, through a mixed- model approach, to deal with almost all cases. We've also encouraged professional legal bodies to set up pro bono structures.” In the United Nations Development Programme's Global Study on Legal Aid Global Report of October 2016 at page 39 available at https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global_Study_on_Legal_Aid_-_FINAL.pdf (accessed 11 November 2020).

Development.³⁴ There are decidedly likely advantages of having such a consultative legal aid body or bodies meeting regularly regionally and nationally. The meetings of such bodies would promote the sharing of best practices, discussion of issues of common concern, and, most crucially, work towards co-ordinating responses to better meet the main and pressing legal needs of indigent clients.

The need for co-ordination in legal aid service provision becomes more apparent when one considers the nature of most legal aid operations in South Africa. Legal NPOs that are registered as law clinics, such as the LRC, and university law clinics, as well as community based paralegals and *pro bono* work by private legal practitioners, can all contribute to legal aid service provision in South Africa. However, the impact that such NPOs can make is limited by various factors like those faced by the LRC (the LRC being used as illustrative of the type of challenges faced by other legal aid providers). The LRC is an independent, non-profit, public interest law firm. It is South Africa's largest public interest and human rights law clinic.³⁵ The LRC concentrates its work on strategic impact litigation, often on behalf of groups of affected people. It has litigated high profile human rights cases like the prohibition of the death penalty case (*Makwanyane*)³⁶ and the prohibition of corporal punishment in schools case (*Christian Education South Africa*).³⁷

However, the LRC's offices are almost entirely limited to large urban centres and their work (often due to funding limitations) focuses on assisting people in those geographical areas and within their often narrow niche areas of focus and expertise.³⁸ Such NPO work output limitations (which may also be linked with unreliable and reduced donor funding, noted already) can also be said to be typical of other legal NPOs in the country.³⁹ The same can be said of LASA's civil legal work which largely operates as an island of service delivery outside of the operations of the aforementioned legal aid service providers and with its very significant focus on criminal over civil legal aid.

³⁴ There is an association of university law clinics called the South African University Law Clinic Association (SAULCA). However, this association provides a network for university law clinics only and not other legal aid service providers. "SAULCA is a voluntary association for all South African university law clinics to promote and protect the interests, values and goals of its members." SAULCA "Services" (undated) available at <https://www.saulca.co.za/services> (accessed 4 November 2018).

³⁵ Legal Resources Centre "Welcome to the Legal Resources Centre" (undated) available at <http://www.lrc.org.za/> (accessed 20 February 2019).

³⁶ See *S v Makwanyane & another* 1995 (6) BCLR 665; 1995 (3) SA 39 1 (CC).

³⁷ See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

³⁸ The LRC has centres in Cape Town, Makhanda (formerly called Grahamstown), Durban and Johannesburg, with two satellite offices in Louis Trichardt and Nelspruit; and limits its focus to specific strategic litigation. Legal Resources Centre "Contact" (undated) available at <http://lrc.org.za/contact/> (accessed 1 August 2018).

³⁹ For example, due to funding limitations, whilst continuing to run as an advice office, as of 2012 the Durban office of the Black Sash stopped operating as a fully-fledged law clinic. The Black Sash "About" (May 2014) available at <http://www.blacksash.org.za/> (accessed 10 November 2020).

A South African legal aid association is not only necessary for a more co-ordinated and thereby effective approach to legal service provision, but would be advantageous to the individual service provider elements of such an association (or associations).

4.4 Value-added referrals between legal aid providers

It is submitted that any organisation referring a prospective client whom they are unable to assist to another free legal service provider should do so in an appropriate manner. Such a referred person needs to be placed in a better position than they were in before their contact with the referring body. It is important that someone is only referred to another organisation which both deals with the type of legal matter faced by that prospective client and has the staffing and other capacity to actually accept that client's mandate; there should be no purposeless "passing the buck". The capacity of the organisation to which a prospective client is being referred is crucial because organisations that provide legal services free of charge often do not have the capacity to accept any new cases. However, there remains pressure on funded legal aid entities to reach certain case output thresholds and thus the possibility of referrals should not be ignored.

The establishment and fostering of good communication channels, and having regular meetings between the various legal aid providers, should facilitate more suitable and efficient referrals of appropriate types of matters to the best placed free legal service provider to assist an indigent client facing a particular legal challenge.⁴⁰ The value of a referral is enhanced when the initial service rendered is taken to an elevated level through the referring party's assistance in doing things like phoning ahead to the referral body to confirm such prerequisites (like staffing capacity) and potentially even setting up an appointment with that organisation for the client being referred. "Value-added" and appropriate referrals are especially necessary to avoid a situation where indigent clients are pointlessly and aimlessly sent from pillar to post by one organisation to the next in search of legal assistance. Such persons should not have their time, energy and preciously limited funds (if they in fact have any money whatsoever) needlessly wasted on public transport costs or lengthy travel on foot to reach a subsequent civil legal aid provider to which they have been referred by another organisation, only then to be told that they have been sent there in vain.

Part of a co-ordinated, streamlined and more efficient approach to legal aid provision, would be the development and use of appropriate social media and portals, including and especially applications on cellular phones, for the referral of matters and initial approaches to legal aid providers. By utilising such electronic mechanisms, prospective legal aid clients would be able to establish which service provider to approach to prevent the occurrence of wasted time and resources. However, there would also have to be provision for "traditional" referrals (for example, by way of a telephone call) for urgent matters.

⁴⁰ Close cooperation between different legal aid organisations is also encouraged by the creation of legal aid "clusters" discussed below.

4.5 Clustering and legal aid clearing house(s)

4.5.1 Clustering

Another method of encouraging more co-ordinated work between different legal aid providers is the establishment of “clusters” of legal aid service providers.⁴¹ Separate research has proposed such clustering in eThekweni by means of a co-operation agreement similar to that entered into between the (now closed) community based paralegal organisation, the Community Law and Rural Development Centre (CLRDC) and the University of KwaZulu-Natal (UKZN) Law Clinic.⁴² This proposal was based on a similar clustering arrangement having been successfully established between the Rhodes University Law Clinic and a wide network of community based paralegal advice offices in the Eastern Cape.⁴³ The above research outlined various ways how the establishment of a cluster between these two organisations would likely be to their mutual benefit. For example, the CLRDC was well placed geographically with its rural community based paralegal advice offices for clients to have far easier access to the advice offices than to the urban situated UKZN Law Clinic.

The UKZN Law Clinic was then able to assist the CLRDC with legal matters beyond their scope, such as court representation, whilst the CLRDC continued to have direct contact with such clients and act as a conduit between the client and the Law Clinic. Both the law clinic and the paralegal advice office would also be able to refer appropriate matters to the other organisation, as there are many types of matters (such as, assisting clients with applications for social grants or with alternative dispute resolution) that community based paralegals can do without assistance from any admitted legal practitioners.⁴⁴

Clustering may even be taken wider geographically. A consortium of NGOs across five countries in the sub-region, including the NPO Lawyers for Human Rights, have formed the “Southern Africa Legal Cluster Assistance Project” to lobby and advocate for the legal recognition of paralegals in Southern Africa.⁴⁵ South Africa has thus sometimes used paralegal networks as a means through which NGOs seek to provide legal services.⁴⁶

Also dealing with a fragmented approach to legal aid provision with different institutions operating highly independently of one another in Turkey, Elveris has

⁴¹ Moorhead R “Coping with Clusters? Legal Problems Clusters in Solicitors’ and Advice Agencies” (May 2007: ILAG Conference) available at <http://www.ua.ac.be/main.aspx?c=ILAG2007&n=39311> (accessed 26 June 2019).

⁴² See Holness “The need for recognition” (2013) at 79.

⁴³ See Rhodes University Law Clinic “Advice Office Programme” (undated) available at <http://www.ru.ac.za/lawclinic/adviceoffices/> (accessed 9 June 2018).

⁴⁴ See generally Rhodes University Law Clinic (2018).

⁴⁵ Penal Reform International and Bluhm Legal Clinic of the North-West University Law School “Access to justice in Africa and beyond” (2007) available at <http://www.penalreform.org/files/rep-2007-access-africa-and-beyond-en.pdf> (accessed 2 February 2013).

⁴⁶ Muralidhar S “Legal aid practices: comparative perspectives” (2005) 26(2) *Obiter* 261 at 282.

instead called for a “user-friendly, one-stop-shop structure”.⁴⁷ In terms of such a structure a client approaching any legal aid provider should ordinarily be able to be assisted by them or at the very least appropriately and efficiently referred on to another service provider. Japan’s *Legal Support Center* provides a particular access point for the resolution of all legal aid issues along the lines suggested by Elveris.⁴⁸

Whilst the varied functions performed by the different legal aid organisations in South Africa might make the creation of such a one-stop-shop structure difficult to achieve, there is no doubt that better co-ordination between different legal aid providers and appropriate and efficient referrals would be a positive move in that direction. Hungary appears to have reached such a compromise type situation whereby, whilst it has not been able to achieve the one-stop-shop provision of legal aid, it has created a co-ordinated legal aid infrastructure made up of private lawyers and law firms acting *pro bono*, university law clinics and other legal NGOs. An applicant for legal aid in Hungary may make their initial application for legal aid to any of these bodies within the legal aid infrastructure.⁴⁹ Similarly, it is proposed that a prospective legal aid client in South Africa should be able to make their initial application for legal aid, and have an initial consultation to assess their problem, at any legal aid organisation. After the initial application and consultation, such prospective client could be referred elsewhere if that were called for.

The co-ordinated and multi-faceted approach to legal aid proposed by this author accords with Noone’s call for an integrated approach to the delivery of legal aid services beyond just legal service delivery.⁵⁰ This integrated approach requires a client’s particular legal problem to not be dealt with in isolation, but rather within the context of related legal as well as non-legal issues. The research of Clarke and Forell found that:

“... to assist disadvantaged people to receive more appropriate and timely legal assistance ... particularly [clients with] complex and interrelated legal and non-legal needs, a case managed, holistic or ‘co-ordinated response’ was needed. This may involve a team of legal and non-legal services ... [a] ‘service hub’ or ‘one-stop-shop’ where services are located near one another to improve client

⁴⁷ Elveris I “The State of Legal Aid in Turkey” (2005): *International Legal Aid Group Conference in Killarney, Ireland* available at http://216.92.68.58/conference/ILAG_2005/downloads/conference_papers/turkey-elveris.pdf (accessed 27 October 2014).

⁴⁸ Ikenaga T “Legal Aid in Japan: Recent Reform and Emerging Themes (May 2007: International Legal Aid Group Conference in Antwerp, Belgium) available at <http://www.ua.ac.be/main.aspx?c=.ILAG2007&n=39311> (accessed 24 October 2014).

⁴⁹ Kádár A “The Legal Aid Reform in Hungary” (May 2007: International Legal Aid Group Conference in Antwerp, Belgium) available at <http://www.ua.ac.be/main.aspx?c=.ILAG2007&n=39311> (accessed 25 October 2014).

⁵⁰ Noone M “Towards Integrated Legal Service Delivery” (April 2009: International Legal Aid Group Conference in Wellington, New Zealand) available at [http://216.92.68.58/conf_2009/papers/Towards%20Integrated%20Legal%20Service%20Delivery%20\(MAN\).pdf](http://216.92.68.58/conf_2009/papers/Towards%20Integrated%20Legal%20Service%20Delivery%20(MAN).pdf) (accessed 19 October 2014) [1].

convenience and facilitate better referrals and co-ordination between the services.”⁵¹

A more recent study analogous to that of Noone referred to above is that of McQuoid-Mason which was presented at the International Legal Aid Group Conference in 2017. He proposed co-ordinated legal aid services as a mechanism for improved access to justice.⁵² It is submitted that integrating the services provided by different legal aid providers and services available from non-legal entities (like social workers and health clinics) would similarly provide a more appropriate response to the legal problems of indigent clients. These problems may be multi-faceted and indeed be “interrelated [with other] legal and non-legal needs” and hence best dealt with holistically.”⁵³ Noone notes that

“... the beneficial aspects for the client of providing legal services as part of integrated services are related to the recognition that access to other services and support can assist the client in respect of the legal process as well as other facets of their problem”⁵⁴.

Related to both the multi-faceted and integrated approaches to legal aid discussed above, four Asian countries have introduced reforms which “involve replacing piecemeal ... legal aid schemes with ... organised schemes”⁵⁵. Insofar as it is apparent that South Africa’s existing legal aid provision- especially in civil matters- is piecemeal,⁵⁶ these developments in Asia are worthy of consideration.

Regan identified several common weaknesses with the piecemeal approach to legal aid in these Asian countries before reforms were introduced. For example, the legal aid was usually extremely limited in scope and focused very much on criminal cases to the detriment of civil work. The piecemeal nature of the erstwhile schemes also meant that there were often considerable variations in the availability of legal aid services between different service providers. Finally, there was an absence of sufficient government support and very weak linkage between the legal aid providers and government insofar as reform in the sector was required.⁵⁷ It is argued that each

⁵¹ See Noone (2009) at 6.

⁵² McQuoid-Mason D “Challenges when drafting legal aid legislation to ensure access to justice in developing countries with small numbers of lawyers: Thinking outside the box” (2017) [International Legal Aid Group Conference in South Africa] available at <http://internationallegalaidgroup.org/index.php/conferenecs/south-africa/conference-papers>. (accessed 9 November 2020).

⁵³ See Noone (2009) at 6.

⁵⁴ See Noone (2009) at 9.

⁵⁵ Regan F “The remarkable rise of publicly funded and organised legal aid in Asia: A new but different ‘wave of access to justice?’” (2007) (International Legal Aid Group Conference in Antwerp, Belgium) available at <http://www.ua.ac.be/main.aspx?c=.ILAG2007&n=39311> (accessed 25 November 2014) [1]. The four Asian countries identified as having made these significant shifts in their legal aid systems are Taiwan, Japan, China and Indonesia.

⁵⁶ Note the above-stated broad interpretation which this research gives to “legal aid”; for example, community-based paralegals’ work is included as part of this basket of services.

⁵⁷ See Regan (2007) at 2-3.

of these weaknesses in the piecemeal approach to legal aid in these Asian countries before reform was introduced is present in the (especially civil) legal aid system operating in South Africa : for example, the absence of a national legal aid body. Encouragingly from a best practice perspective, Regan argues that

“... the current legal aid reforms in these four countries [away from a piecemeal approach to legal aid] represent a new Asian wave of access to justice reforms that promises to significantly improve access to justice for the poor and disadvantaged “⁵⁸.

It is submitted that the co-ordinated and integrated approaches to legal aid proposed in this article incorporate a move away from the existing piecemeal approach with its inherent pitfalls. In doing so, it is suggested that a shift in South Africa from a piecemeal approach to one which is more co-ordinated and integrated, as was the case in the Asian countries referred to above, similarly offers the promise of significantly better access to justice.

4.5.2 *Legal aid clearing house(s)*

Pro bono legal work done for free by private legal practitioners as part of their social engagement obligations. In South Africa the one existing *pro bono* clearing house, ProBono.Org (see below), allocates specific *pro bono* work to be done by particular private lawyers by way of a referral.⁵⁹ Clearing houses provide an invaluable vehicle for harnessing the *pro bono* potential of private law firms in a far more co-ordinated manner, with private lawyers acting *pro bono* being key ingredients in a model for improved free legal service delivery in civil cases for the indigent.

In adopting a *pro bono* clearing house system, lawyers can be forwarded only matters which match their field of expertise with the clearing house itself providing initial legal assistance and screening. South Africa’s only clearing house, NGO ProBono.Org, for example, provides what it terms “law clinics” periodically at certain magistrates’ courts, where legal practitioners volunteer their time to assist clients directly with legal advice along with staff of ProBono.Org , and sometimes supervised senior law students . These include, in different places, a refugee clinic, a maintenance clinic, a divorce clinic, a small claims court clinic, and others. The legal practitioners receive the requisite training in that field and access the clients directly at these morning clinics. Thereafter matters which require more than just legal advice are referred to specific lawyers, who have made themselves available to run *pro bono* matters, to handle such a qualifying client’s matter themselves.⁶⁰ Initial consultations are held with prospective clients at these “clinics” in order to screen which of these

⁵⁸ See Regan (2007) at 8. Regan notes that even after just a few years of implementation: “The new schemes have significantly expanded the scope of legal aid”

⁵⁹ See Holness (2013) at 141. However, outside South Africa, clearing houses are not generally limited to private law firms. See for example the “Pro Bono Clearinghouse Manual” (2013) of The Global Network for Public Interest Law and Advocates for International Development available at <http://probonomanual.org/doku.php> (accessed 10 November 2020).

⁶⁰ ProBono.org “About our services” (undated) available at <http://www.probono.org.za/services/about-our-services/> (accessed 2 June 2019).

people qualify for assistance, and if they do, to determine which of the *pro bono* lawyers on ProBono.Org's panel of volunteer lawyers would be most appropriate to take on that particular case.

ProBono.Org also provides legal education to members of the public as well as offering mediation services to promote access to justice by potentially resolving some issues before they crystallise into legal problems requiring the services of a legal practitioner. The establishment is moreover involved with strategic impact litigation and enters into focused cooperative agreements with other organisations.⁶¹ These different facets of ProBono.Org's operations appear to be well aligned with this study's stated objectives of improving access to justice, particularly in civil matters, via a much more co-ordinated system. The organisation sources, on the one hand, worthy clients (in terms of indigence assessed via a financial means test) allied with a valid and sufficiently strong civil case, and on the other, volunteer legal service providers in private practice with the requisite expertise and availability to accept a particular *pro bono* mandate. ProBono.Org does this by at the outset screening potential clients – as set out above- and then matching them with appropriate private lawyers to whom a particular case is referred, for the latter to act without charging a professional fee for their work.⁶²

ProBono.Org also facilitates free training of lawyers by other legal practitioners in matters specifically related to *pro bono* legal work.⁶³ This should be applauded insofar as it may well encourage a positive cycle for the delivery of *pro bono* services. In particular, such focused training may expand the capacity and willingness of private lawyers to provide free legal services in areas of law that they have not previously worked in - thereby widening the net of *pro bono* services and the pool of *pro bono* service providers potentially on offer to the indigent.

The value of a clearing house in coordinating *pro bono* legal services has been set out in the previous paragraph. However, ProBono.Org has various impediments to its current ability to operate as effectively as possible. First, it has offices only in Johannesburg, eThekweni and Cape Town.⁶⁴ This considerable geographical limitation is quite significant when it comes to ProBono.Org's narrow network of private *pro bono* lawyers and these concomitantly and understandably being closely limited to these metropolitan areas- with such areas often already having at least some form of legal aid potentially available. Thus, an expansion of ProBono.Org into other areas would be greatly advantageous in promoting access to justice through its co-ordination of services by private legal practitioners. Alternatively, the establishment of another or

⁶¹ See generally ProBono.Org (2019).

⁶² See generally ProBono.Org (2019).

⁶³ The trainers are given this task due to their particular skills and experience. See generally ProBono.Org (2019).

⁶⁴ ProBono.Org has been well-established for a number of years, having opened its doors in Johannesburg in late 2006. A Durban office was only officially opened at the start of 2011 and a Cape Town office thereafter. See generally ProBono.Org (2014).

other clearing house/s for NGOs outside of those areas where ProBono.Org is operating is likely to have a similarly positive result.

Secondly, empirical research into *pro bono* work in South Africa showed that ProBono.Org was not able to provide any indication of assessment measures in place to verify the accuracy of its recorded statistics or the quality of the work produced.⁶⁵ Such a quality assessment would relate to work produced by its own staff in their screening process and by its *pro bono* partners in private practice in the performance of matters assigned by ProBono.Org. As to qualitative assessment, this should be reasonably easy to do with regard to the initial screening and referral work of ProBono.Org's staff. Quality assessing the *pro bono* work "farmed out" to private lawyers will be a more challenging proposition, in terms of how this should best be done and in a way that does not discourage private practitioners from making themselves available to do *pro bono* work.

However, it is argued that qualitative assessment techniques to be employed should not merely be seen and used as a "stick" to ensure minimum quality standards of *pro bono* work performed. Such qualitative assessment would also ideally be both a developmental tool to assist legal practitioners in improving their knowledge and skills and a means to recognise and reward outstanding *pro bono* work. The challenges of how such qualitative assessment should be done are not inconsiderable.⁶⁶ This article does not attempt to delve into the complexities of the detail of how such assessment should be done. But as noted throughout this article, to simply focus on quantitative measures of legal aid assistance without sufficient focus on its quality must be avoided notwithstanding the challenges of the latter.

ProBono.Org is also trying to incentivise service work by South African lawyers through annual awards.⁶⁷ Separate research, which goes beyond the scope of this article, has identified other significant hurdles for ProBono.Org. These relate to the costs or disbursements payable by impecunious clients even where a matter is taken on *pro bono*, the absence of correspondent lawyers available to act *pro bono* and the current lack of *pro bono* services in conveyancing and notarial work.⁶⁸

Another clustering type arrangement with a clearing house type element, for mutual benefit, already exists via a Joint Venture Agreement concluded between LASA in Johannesburg and the Johannesburg Society of Advocates.⁶⁹ Such a cluster between

⁶⁵ See Holness (2013) at 143.

⁶⁶ Prescott J "The challenges of calculating the benefits of providing access to legal services" (2010) 37(1) *Fordham Urban Law Journal* 303 at 303-346.

⁶⁷ At its 2014 Annual Pro Bono Awards Ceremony (the first of its sort in the country and held annually since), prizes were awarded, amongst others, for "Law Firm Awards for 2013" (with different categories for different practice sizes), "Advocate Award for 2013" and "Attorney Awards for 2013". ProBono.Org "[ProBono.Org Awards Ceremony " \(31 July 2014\) available at <http://www.probono.org.za/?s=2014+awards> \(accessed 22 August 2014\).](http://www.probono.org.za/?s=2014+awards)

⁶⁸ See Holness (2015) at 98.

⁶⁹ Joint Venture Agreement (JVA) between Legal Aid South Africa and the Johannesburg Society of Advocates (the Johannesburg Bar). This JVA was signed on 10 June 2014. In terms of s 3 of the JVA,

LASA and Societies of Advocates (“Bars”) could create an effective clearing house arrangement for *pro bono* work to be effectively passed on to members of the Bar.

Similarly, there would be no reason why such a cluster should not also incorporate ProBono.Org, and its existing network of *pro bono* legal practitioners. In this way an effective *pro bono* cluster could be established involving bodies like LASA and ProBono.Org primarily screening and referring clients to legal practitioners practising as attorneys or advocates to act *pro bono*.⁷⁰ Such clusters could productively be established between any legal aid providers which would benefit from a close working relationship with one another. Thus, in addition to the overall coordination provided by an overarching legal aid association, such civil legal aid clusters would add an additional layer of cooperation and coordination between civil legal aid providers with aligned service goals. Whilst very largely falling beyond the scope of this article, it is worth suggesting that such a clustering relationship would lend itself very well towards means for the monitoring and evaluation of work done by fellow organisations within the cluster.

4.6 Evaluation of the quality of legal services within a coordinated system

As already noted, actual mechanisms for vetting the quality of free legal services in South Africa through evaluation or assessment tools fall beyond the focus of this article. However, it should be stressed that an analysis of means for legal service quality evaluation is worthy of separate study insofar as it must be ensured that the quality of legal aid is of a standard which is satisfactory or better and not merely a “tick box” of services having been rendered. A link between the contents of this article and such a possible study is worth considering in part because once a coordinated system is in place it will facilitate quality of service vetting via monitoring and evaluation/assessment of legal assistance provided to the indigent. Measures to ensure the quality of free legal services and the coordination of legal aid mechanisms are inter-related because a better coordinated form of free legal service delivery should have as central elements measures to promote, monitor, evaluate and safeguard the quality of services provided to the indigent. Concomitantly, a high quality of legal aid service would facilitate a better co-ordinated approach to legal aid service delivery. Thus, a separate study could valuably suggest measures for monitoring and evaluation/assessment of the quality of free legal services to the indigent in South Africa as a means of quality assurance. However, this research restricts its focus to stressing that the proper implementation of appropriate means of quality assurance, whatever form that may take (albeit always based upon established criteria) is non-negotiable.

subject to neither party withdrawing, the agreement is to operate indefinitely. (Copy on file with the author).

⁷⁰ In terms of the Legal Practice Act 28 of 2014 (LPA), all attorneys and advocates are regulated under this one piece of legislation as “legal practitioners”. See the LPA’s preamble, s 1 and s 30.

5 CONCLUSION

This article acknowledges the challenges of providing a comprehensive and high-quality legal aid system with limited funds available to do so [in South Africa]. The provision of legal aid services, especially in civil matters which have extremely limited support from the State fiscus, must be multi-faceted. The crux of this article is, that notwithstanding this and other challenges, different elements of a legal aid network must work as part of an appropriate system as opposed to working as islands of service provision. Such a system would have as its central elements coordination which would provide for comprehensive legal aid for the indigent in a manner that improves access to justice for all by way of a high quality of legal assistance. This is a move away from the status quo of service providers tending to operate in silos. The coordinated approach to legal aid service delivery would of necessity need an appropriate monitoring and evaluation element to ensure that the quality of the service provision is satisfactory or better.

Better synchronised legal aid would be more sustainable (for example, by way of networking and clustering) and of greater value to indigent clients, for example, via value-added referrals, for greater access to justice in South Africa. A harmonised legal aid system must respond to the particular legal aid needs and existing legal aid provision which empirical research would have to establish. As is the case in a quality sports team, the cooperation between the elements of the legal aid network and co-ordination of inputs brought together will result in the whole being greater than the sum of its individual parts.

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