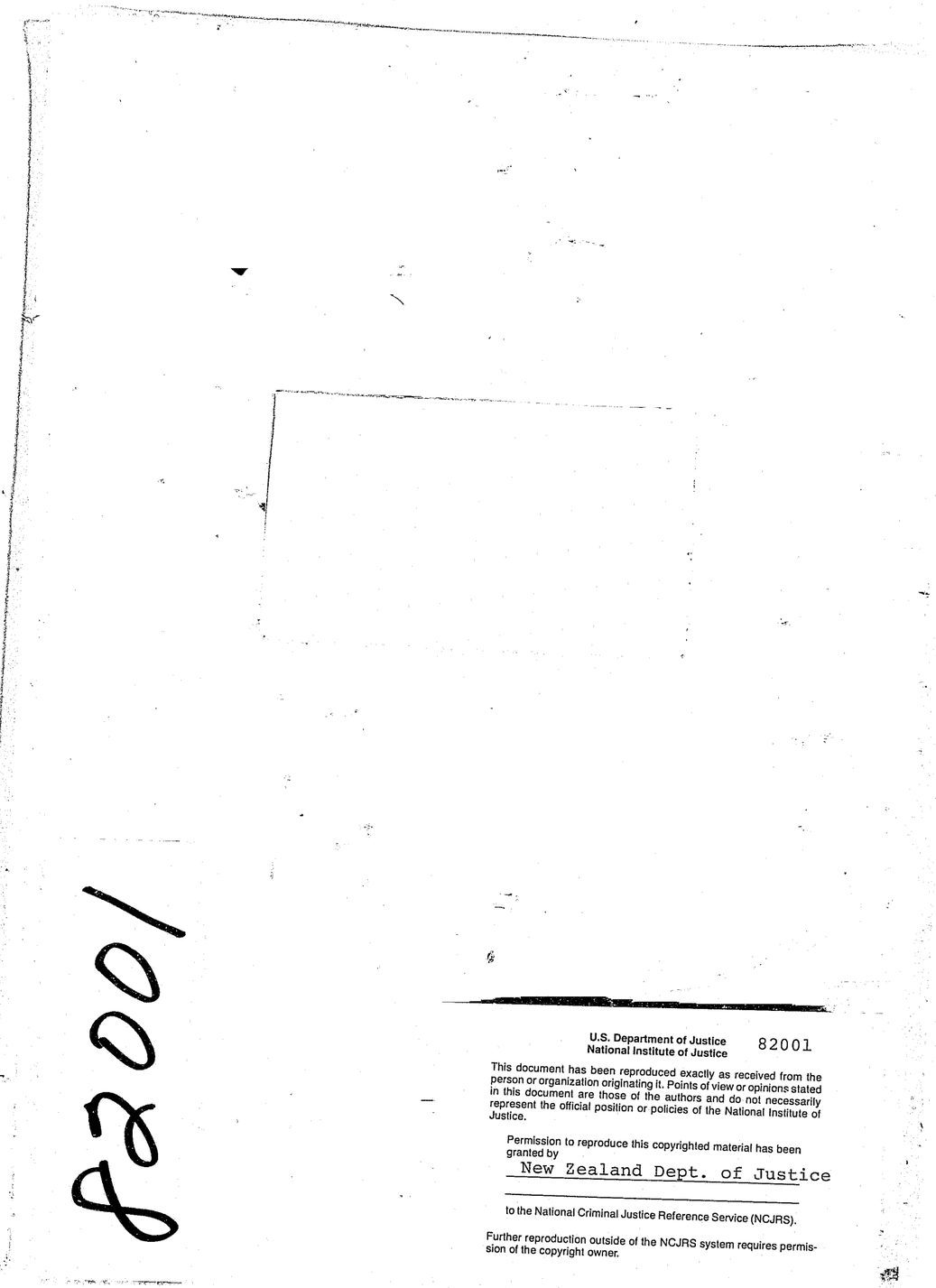

ACCESS TO THE LAW :

A Research

and Discussion Paper

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Foreword

Winston Churchill, in one of his many perspicacious statements, said that the moral state of a nation could be judged by the way it treated its prisoners.

It could equally be said that the social health of a nation can be judged by the way it provides access to the law to enable people to exercise the rights that every citizen has. Indeed, unless the law is to be seen solely as an agent of control to see that citizens meet their responsibilities, one might question the very purpose of the law and the institutions established to manage the law, e.g. the courts, if these are not readily accessible to those who need them. The achievement of social, economic, and political rights of individuals and groups is significantly dependent upon access to the law, access to the institutions of the law, and effective legal representation.

This discussion paper and the research that has contributed to it opens up the issues involved in both access to the law and the representation of those who either wish to use the facilities of the law or become involved as an offender or defendant. It is concerned not merely with reviewing the existing legal aid schemes and testing their effectiveness but also with examining the problems of access to justice and developing for discussion promising solutions to the problems that have been identified.

Some of the proposals will evoke controversy - but that after all is the catalyst of change and evolutionary ideas. I believe that some of the ideas, if accepted, will require an experimental approach in that the best way of implementing them and their consequences cannot be precisely forecast. Some ideas call for the abandonment of the almost cherished belief that traditional mechanisms for providing legal services are meeting all of the needs of our heterogeneous and complex society in a substantially satisfactory way.

It is necessary to face the reality that it is unlikely that more funds will become available in the next few years to substantially improve legal services. Indeed this study has demonstrated that in New Zealand (as has already been recognised in other countries), simply injecting more money into existing schemes and institutions will not remedy all problems of access to the law nor enable all people to satisfactorily resolve their dispute situations. A realistic examination must involve the whole spectrum of unmet needs and the whole range of legal services to determine how available funds can best be used to meet the responsibilities of the State in helping its citizens gain access to the law. Lack of money should not be a justification for inaction but a stimulus to innovation.

In discussing the question of access to the law and unmet need the New Law Journal of 18 March 1976 said "The greatest unmet need of all is for a plan of action and it is needed now". This research and discussion paper is presented as a stimulus to such a plan for New Zealand. The paper, being a discussion document, does not though necessarily reflect the policy of the Department of Justice.

The study and its associated research has been a substantial project. Valuable contributions to the information set out and analysed in the 14 research reports attached as appendices to the discussion paper are much appreciated. The research contracted by the department with Link Consultants Limited provided knowledge and ideas from a wide range of people including Judges, lawyers, court registrars, probation officers, police and social welfare officers as well as many groups and individuals. I note also the valuable contribution made by people who have received legal aid under the various schemes.

Ms P.C. Oxley, Senior Research Officer, has directed and controlled the project.

M.P. SMITH

Director, Planning and Development Division,
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Introduction

Dissatisfactions about the provision of legal services generally and legal aid in particular have become more insistent and from increasingly varied quarters over recent years. The substance of the discontent is likewise diverse. It ranges from complaints about administrative hiccups to claims for greater remuneration for lawyers to pleas for extending the scope of present legal aid schemes to movements for an entirely new basis for the delivery of legal services.

The disenchantment has been such that quite radical alternatives, in New Zealand terms, have been initiated. I refer particularly to the Grey Lynn Neighbourhood Law Office and community law centres. By 1980 even the established groups were acknowledging that legal services and consequently justice are not as readily available as they should be. For example, the New Zealand Law Society is actively supporting the Neighbourhood Law Office concept as well as stating that "ordinary people do not have adequate access to law services. Such a situation ... is intolerable in a society based on the rule of law and committed to equal justice for all its people" (Annual Report, 1980, p.3). The Legal Aid Board in its 1980 Report said "there is very clearly a need for legal help that is not being met by traditional legal services, including legal aid in its generally recognised form "(p.4) and "[it is] most likely that a great many in the community are not aware that [civil legal aid] is available to them. As a consequence, they may be deprived of their legal rights or remedies, and be subjected to injustice or even oppression" (p.4). Whatever the motives behind these statements, they reflect a very real concern.

With this background, the more specific complaints can quite properly be translated into fundamental questions about the need for, availability of and access to legal services. Having identified these questions, and although legal aid cannot be discussed in isolation from legal services generally, it was beyond our resources to do justice to an examination of legal services provided privately by the legal profession or by voluntary or interest groups. Consequently this discussion concentrates on legal aid and refers to other legal services as our knowledge permits. The basic questions which guided this review are:

- what are the purposes of the current legal aid schemes in New Zealand?
- are these purposes being achieved?
- what should be the purposes and role of legal assistance in New Zealand?
- how can these be achieved?
- what should be the state's role on the one hand and the community's role on the other in providing legal assistance?

The purpose of this document is to establish how legal aid is working in effect today, to discuss its shortcomings in terms of its stated or perceived objectives and to reassess those objectives in the light of the experience of the many participants. Once this has been done, the paper re-examines objectives for legal assistance and presents for discussion a number of proposals for the delivery of legal assistance.

Chapters 1 to 3 describe current legal aid schemes in some detail. Civil legal aid, offenders legal aid and the duty solicitor are introduced with a formal description of their objectives, scope, nature and administration. The bulk of each chapter then describes how the various legal aid schemes function in practice and reports on the assessment of the services by the various groups of people involved in giving or receiving them. A number of research strategies and resources were used to collate this material. Link Consultants were contracted to establish the views of the participants and these are used extensively in the following report. Link's full report is reproduced in appendix 12. As well as this, national surveys of 1979 civil legal aid files and of defendants charged with imprisonable offences in 1979 were

undertaken to give a systematic and empirical basis to the research. These are referred to as "file surveys" in the text. The research reports are in appendices 5 & 6. We also make use of various returns from courts and documentation held within the Department of Justice to analyze specific questions. Two other forms of government funded legal assistance are briefly discussed in chapter 4 - costs in criminal cases and the appointment of counsel to assist the court in custody and guardianship cases.

An assessment of legal assistance is not complete without mention of the many services provided by voluntary and non-governmental agencies. Unfortunately our information in these arenas is not sufficiently complete to given an authorative evaluation of their effectiveness. However it is essential that their role is acknowledged and we discuss them in chapter 5 as best we can given the lack of information.

The concepts of legal need and access to legal services are discussed and related to the New Zealand setting in chapter 6. Chapter 7 describes alternative delivery systems as developed overseas. Finally, in chapter 8 our proposals for New Zealand's future legal assistance programme are set out.

Associated research reports are published as appendices to this paper in a separate volume. They are available on request from the Planning & Development Division, Department of Justice, Private Bag, Wellington.

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Civil Legal Aid

HISTORY

As with most of New Zealand's legal system, the origins of our legal aid schemes are British. In England various forms of free legal representation have been in existence from as early as the ninth century. There the procedure known as 'in forma pauperis' was the first statutory provision for legal aid. It entitled a poor person to court-appointed counsel, attorneys and others to pursue civil litigation free of charge. 'In forma pauperis' was enacted during Henry VII's reign in 1495 and introduced into New Zealand by the British colonisers.

The relevance of this earlier history is that for several centuries, during which many legal principles that we now regard as sacred were non-existent, the notion of civil legal aid was becoming firmly established as an important social service in England, if an inconsistently applied one. However, in time there was some erosion of the service. By the mid-eighteenth century the plaintiff had to pay for counsel's opinion as to the merits of his case, an effective barrier to poor, potential litigants.

In the nineteenth and early twentieth centuries, considerable changes took place in the form of legal aid in England. In 1883 the statutory base was changed, though the procedure was not. In 1914 the Poor Persons' Department was established to administer legal aid, but it was not a success. In 1926 the legal profession took over the organisation and administration of civil legal aid. These changes were forerunners of the major policy changes of the mid-twentieth century.

New Zealand inherited England's legal aid law and we take up our own efforts in 1939 when legislation was enacted to set up a civil legal aid scheme. World War Two prevented its implementation, and the scheme was never put into operation. Interest revived in the 1960's and the government introduced a Legal Aid Bill in 1966. This was later withdrawn, but in 1969 the Legal Aid Act was passed in New Zealand. It came into operation on 1 April 1970. Its content was similar to England's 1949 Legal Aid and Advice Act, with two major differences - the New Zealand act does not cover criminal legal aid, and has no provision for general legal advice not related to court proceedings.

THE ACT

The Legal Aid Act 1969 governs legal aid available to litigants in civil proceedings in New Zealand. Except for the advice aspect it is based substantially on the English Legal Aid and Advice Act of 1949.

When the Bill was introduced in 1969 little was said about its purpose. It seems the purpose is to be inferred from a reference to the 1966 Bill which did not proceed. The then Minister of Justice (the Hon. J.R. Hannan) introduced that Bill saying "the foundation of this Bill is the principle that no citizen should be prevented by lack of means from having his legitimate grievances heard and determined by the courts of the land" and "it establishes a scheme by means of which people of small or moderate means will be entitled to assistance in civil proceedings provided they have reasonable ground for bringing the action" (N.Z.P.D., Vol. 348, 1966, p.2576). The Minister's peroration when the 1969 Bill was introduced, was "this long overdue social measure will ensure justice for a section of the people who up to the present may well have been denied it" (N.Z.P.D, Vol. 360, 1969, P.46)

During committee stages the role of the state in ensuring that justice is a reality for its citizens was announced more explicitly by the then Minister, the Rt Hon. J.R. Marshall:

> The essence of the case for State-supported aid in civil cases can be simply stated. It arises from the basic responsibility of every State to ensure justice for its citizens, and this responsibility is not truly fulfilled so long as any citizen is prevented by lack of means from having his grievances aired and determined fairly and adequately by the courts. The same concept is behind Article 7 of the Universal Declaration of Human Rights, which provides that all shall be entitled, without any discrimination, to the equal protection of the law. This requires that the balance of justice should not be loaded in favour of the man with means, the large corporation, or the State itself.
>
> (N.Z.P.D., Vol.363, 1969, P.2680).

All these ideals were finally translated into the Legal Aid Act 1969, the purpose of which, as stated in its long title, is "to make legal aid more readily available for persons of small or moderate means".

The Scope and Nature of Civil Legal Aid

The provision of legal aid is to permit successful applicants to bring or defend civil cases in a court or tribunal, or reach a satisfactory out-of-court settlement, where otherwise they would not have been able to, for lack of money. The Act allows for representation by both barristers and solicitors where necessary as set out in s.16. Section 15 sets out which courts and tribunals and types of proceedings civil legal aid is available for. The proceedings for which civil legal aid is not available are set out in s.16(2), and include relator actions and election petitions, but clearly the major exception concerns proceedings under the Family Proceedings Act 1980 (other than those for ancillary relief)i.e. dissolution of marriage (divorce).

Eligibility

The eligibility criteria and the reasons for refusing legal aid are interrelated. The financial conditions of legal aid are that aid shall be available for any person whose disposable income does not exceed $2000 a year or such greater amount as the District Committee approves, provided that a person may be refused aid if he has a disposable capital of more than $2000 and it appears he can afford to proceed without legal aid. In determining disposable income set allowances are made for the applicant and for his dependants. Disposable capital excludes secured debts, interest in a home, a motor vehicle, household furniture, clothing, tools of trade, contingent liabilities, actual debts, and $500 if the applicant has a dependent relative. Resources subject to the dispute are not included except a proportion of matrimonial property or maintenance considered fair and reasonable by the District Committee.

If the applicant has disposable income he is liable to contribute to the proceedings: $1 for each complete $2 for the first $1000, $2 for each complete $3 for disposable income in excess of $1000 to $2000, all disposable income in excess of $2000. Similarly with disposable capital, he contributes $2 for each complete $3 not in excess of $2000 and all his disposable capital in excess of $2000.

If an applicant's disposable finances exceed the limits, he can be granted aid subject to contributions, again with specified upper limits. The Committee can waive these contributions if it considers it would cause substantial hardship.

The Social Security Commission is responsible for assessing disposable income and disposable capital in relevant cases. No assessment is generally required for applications for limited legal aid (limit of $200) or for income tested social welfare beneficiaries.

The section which sets out the circumstances in which legal aid may be refused refers to excess disposable income or disposable capital. But overriding this is a more general injunction that aid shall not be granted unless reasonable grounds for taking or defending the proceedings or being a party thereto are shown.

Other reasons for refusing aid are that the proceedings are outside the scope of legal aid; the applicant does not provide the committee with full financial information; the contribution required is greater than the likely cost; prospects of success or the applicant's interest or the appeal do not justify a grant; for any other cause it appears unreasonable or undesirable to receive aid. Where a grant of aid is refused or withdrawn the applicant is given a reasonable opportunity to refute the reasons for refusal or withdrawal, and may appeal to the Appeal Authority.

Administration

The Act also sets up the machinery necessary for the administration of the scheme. Applications are made to the nearest of the nineteen District Legal Aid committees, each of which comprises at least five lawyers appointed by the District Law Society, a Registrar of the High Court (or person nominated by him), and a

officer of the Social Welfare Department. The District Committee's basic function is to grant or refuse legal aid applications. It is also responsible for day-to-day administration arising from this function, such as approving and authorizing payment to solicitors.

The district committee's decisions can be appealed against to the Legal Aid Appeal Authority. It consists of seven lawyers, each with at least seven years' practice in the High Court. All its proceedings are held in private.

Overall control of the scheme is in the hands of the Legal Aid Board. Professor Caldwell (1974) summarizes its functions as provided by s.5 of the Act as:

> administering the scheme as a whole; supervising and co-ordinating the work of District Legal Aid committees; ensuring that the scheme operates as inexpensively, expeditiously and efficiently as is consistent with the spirit of the Act; and making recommendations to the Minister of Justice about the working of the scheme and the amendment of the Act and any Regulations made thereunder.

Membership of the Board consists of a lawyer appointed by the Minister of Justice as Chairman, the Secretary of the Treasury, the Secretary for Justice, the Chairman of the Social Security Commission, and two other lawyers.

Basically and subject to the contributions discussed in the following sections, civil legal aid is funded by government through the Consolidated Revenue Account.

The Applicant's Contribution

Assessed contributions arising from excess disposable income or disposable capital have already been mentioned.

A person granted legal aid is required to contribute $25 towards the grant unless he has no disposable income and the contribution would cause him substantial hardship in which case the Committee can exempt him. This amount was originally $30, changed to $15 in 1974 and to $25 in 1980. The reasons for this initial contribution are not clearly enunciated, but would appear to be an inhibitor to unmeritorious claims and a revenue matter. It was found that the original $30 contribution

was being waived more than expected so the contribution was reduced with the intention of it being obligatory in all but the poorest cases. It was increased in 1980 in recognition of the reduced monetary value of the $15 since 1974 due to inflation.

One of the principles associated with the scheme is that a legally aided person should not be in a better position financially than an unaided litigant by virtue of his legal aid. This reflects on payment of costs and Crown charges. Any property recovered or preserved for the legally aided person in the proceedings will be charged to the benefit of the Crown for the outstanding sums. The successful litigant may apply for exemption from the charge. In respect of costs awarded against a legally aided person, the legal aid fund will pay these costs up to the amount of aid granted. However the successful party may apply to the committee for the balance. Conversely costs awarded to the legally aided person are payable to the Crown.

The Profession's Contribution

Proposals to introduce a legal aid scheme prior to the 1966 and 1969 Bills were opposed by the legal profession. Rather than support an organized scheme the Law Society gave an undertaking to ensure that no person with a reasonable cause would be prevented from bringing or defending legal proceedings because he could not afford to pay for them (N.Z.P.D, Vol.363 1969, p.2680). By 1969 this developed into a "partnership between the Government and the legal profession". The government bears the major cost, while members of the profession make a significant contribution to the administration. The profession also contributes in that it receives all its disbursements but can claim only 85% of its profit costs and counsel's fees. Another justification given for this reduction in fees is that the accounts are guaranteed and therefore some discount is justified.

Conclusion

The Legal Aid Act in theory provides for what it was intended. These intentions are however well circumscribed. Legal aid is for:

- people of small or moderate means;
- civil grievances (with exceptions) with reasonable grounds for proceeding;
- for court proceedings and assistance preliminary to proceedings or effecting a compromise to avoid proceedings.

There has been of course much discussion and criticism of the Act since it came into force. There have been improvements too. The most prevalent criticisms revolve around its lack of scope, i.e. that it does not include divorce nor aid for advice, the eligibility criteria, and the mechanics of providing aid and remunerating lawyers for it.

The next section examines how civil legal aid performs in practice, particularly with reference to it objectives as outlined above. This assessment will also include evidence and discussion in relation to the topical criticisms and issues associated with civil legal aid.

CIVIL LEGAL AID IN PRACTICE

Usage and Cost

The data in this section are derived from the Legal Aid Board's Annual Reports and are summarized in table 1. More detailed data are given in appendix 4. The number of applications for civil legal aid has increased from 3973 in 1971 to 15,132 in 1981, representing a 281% increase. The first five years saw the most dramatic increase (200%) as the scheme became known and accepted, whereas over the last five years the number of applications has fluctuated around the 15,000 mark.

The bulk of the applications relate to domestic proceedings matters. In 1971 they were 84% of all applications, they were 94% in 1976 and 94% in 1981. It is estimated that 80% of domestic proceedings applications filed in court have legal aid associated with them.

Domestic proceedings matters are responsible for the increase in applications. The number of applications in relation to actions has remained steady and applications in other areas increased with a leap between 1976 and 1977 and have been declining since.

Concomitant with the domestic proceedings preponderance is the fact that most legal aid applications are for proceedings instituted in the district court. Indeed this trend has been increasing in strength. 1971 was an atypical year with 81% of applications being for district court proceedings, but this aside, the proportion has steadily grown from 90% in 1972 to 96% in 1981. The analogous figure for high court applications are 18% in 1971, 9% in 1972 and 3% in 1981.

The costs of legal aid have also increased, and in these inflationary times at a far greater rate than the number of applications has. The following discussion relates to a net cost which is the amount left once contributions and costs received are deducted from the amount of bills certified for payment. It is worth noting that in 1980/81 26% of expenditure was recouped in contributions and costs. In a scheme devised to aid in a financial way those of small and moderate means, this would seem a satisfactory rate of return. On top of this, the Crown has financial interest in the form of charges on property.

There are a number of indicators of these increased costs. First, the basic figures.

The total cost of civil legal aid has increased phenomenally since 1971 by over 100-fold. 1971 and 1972 costs however are considered artificially low as they relate to the first year of operation and some bills were not submitted at the time of the financial report. The increase over the last five years has been 197%. The 1980/81 net cost was $2,488,233.

In terms of the cost of legal aid per head of population, this has increased 193% from 27c per person in 1975/76 to 79c per person in 1980/81. For comparison, the cost of civil legal aid per head in U.K. in 1979/80 was 52 pence ($NZ 1.18) and the New Zealand cost was 74c per head. (See appendix 3).

TABLE 1

The Use and Cost of Civil Legal Aid, 1971-1981

Year ending 31 March	No. of applications	No. of grants	Total expenditure	Net cost	No. of d.p. applications	Net cost of d.p. grants
			$	$		$
1971	3,973	2,753	48,610	20,867	3,318	29,189
1972	5,996	4,684	207,045	138,783	5,430	127,284
1973	8,269	7,075	416,334	254,473	7,506	243,549
1974	8,579	7,170	601,027	524,919	7,985	380,683
1975	10,584	8,329	740,647	512,274	9,925	477,808
1976	13,163	10,637	1,065,954	836,811	12,399	756,292
1977	15,021	11,035	1,360,100	1,095,754	14,084	1,009,189
1978	14,777	10,397	1,677,688	992,203	13,939	895,631
1979	15,564	13,570	2,215,143	1,750,736	14,627	1,630,421
1980	14,522	12,272	2,718,170	2,315,088	13,679	2,033,205
1981	15,132	12,062	3,216,059	2,488,233	14,207	2,286,363

As domestic proceeding applications are responsible for most of the cost (In 1981, domestic proceedings cases were responsible for 94% of applications and for 92% of the cost) these cases are given as an example of the cost per application. From 1976-1981, the costs of domestic proceedings applications have increased 202% compared with 15% in the number of applications. The cost per application increased by 165% from $75 per grant in 1976 to $199 in 1981. The rate of inflation, over that period as indicated by the consumer price index was 110% (Deptartment of Statistics, Monthly Abstracts, April 1981).

Although domestic proceedings cases incur the greatest cost for legal aid it must be recognized that they are in terms of legal aid the cheapest type of proceedings to pursue. In 1981 grants in respect of domestic proceedings cost on average $199 per case, whereas grants for civil actions cost $392 per case and other grants were $275 per case.

The Scope and Nature of Civil Legal Aid

As the Legal Aid Board's Annual Reports have shown, the bulk of civil legal aid applications and expenditure are in relation to domestic proceedings matters and most of these are pursued in the district court.

The Department's survey of 1979 civil legal aid applications (appendix 5) describes more fully the type of problem legal aid is used for. In this survey the 95% of applications which were in relation to family matters were further broken down: 44% of these were in connection with separation orders and related matters; 24% were for maintenance applications or variations per se (not parternity); and 25% were paternity applications. Table 2 shows the range of problems covered by the remaining 5% - not a very wide range and the incidence is negligible. For example, it is estimated that there were only 48 applications in relation to Children & Young Persons complaints and 197 actions relating to contracts or negligence in the first half of 1979. It is noted however that in some centres aid has been granted under the Offenders Legal Aid Act 1954 (quite wrongly) for complaints under the Children and Young Persons Act.

Although we have no empirically assessed measure of the public's legal needs, it seems reasonable to suggest that the needs are not as lopsided as the actual demand indicates.

TABLE 2

NATURE OF CLAIM BY DECISION

	Granted		Refused		Other		Total	
	n	%	n	%	n	%	n	%
FAMILY & RELATED MATTERS								
separation and related matters	2984	44.5	240	28.1	60	25.6	3284	42.1
maintenance only	706	10.5	115	13.5	22	9.4	843	10.8
maintenance variation	687	10.2	194	22.7	50	21.4	931	11.9
custody, guardianship only	128	1.9	25	2.9	0	-	153	2.0
access only	2	0.0	11	1.3	0	-	13	0.2
non-molestation only	40	0.6	0	-	0	-	40	0.5
matrimonial property only	127	1.9	66	7.7	11	4.7	204	2.6
paternity and maintenance	1756	26.2	82	9.6	41	17.5	1879	24.1
adoption	31	0.5	21	2.5	0	-	52	0.7
divorce	0	-	1	0.0	0	-	1	0.0
CHILDREN & YOUNG PERSONS								
s.27 complaint	43	0.6	5	0.6	0	-	48	0.6
permission to minors	5	0.1	0	-	0	-	5	0.1
FAMILY PROTECTION ESTATE, TESTAMENTARY, PROBATE	17	0.3	5	0.6	3	1.3	25	0.3
ACTION	112	1.7	66	7.7	19	8.1	197	2.5
BANKRUPTCY, INSOLVENCY, LIQUIDATION	5	0.1	0	-	0	-	5	0.1
ADMINISTRATIVE								
immigration	3	0.0	2	0.2	0	-	5	0.1
town and country planning	4	0.1	2	0.2	0	-	6	0.1
accident compensation	13	0.2	5	0.6	4	1.7	22	0.3
Social Welfare	2	0.0	3	0.4	0	-	5	0.1
other	1	0.0	0	-	0	-	1	0.0
LEGAL AID APPEAL	4	0.1	1	0.1	0	-	5	0.1
TENANCY, EVICTION	6	0.1	1	0.1	0	-	7	0.1
DISMISSAL FROM WORK	0	-	1	0.1	1	0.4	2	0.0
JUDICIAL REVIEW	3	0.0	2	0.2	0	-	5	0.1
BOUND OVER TO KEEP PEACE	0	-	1	0.1	0	-	1	0.0
HABEAS CORPUS	1	0.0	1	0.1	0	-	2	0.0
MONEYLENDERS ACT	0	-	1	0.1	0	-	1	0.0
MENTAL HEALTH ACT	0	-	0	-	1	0.4	1	0.0
d.k.	32	0.5	2	0.2	22	9.4	56	0.7
total	6712	100.0	853	100.0	234	100.0	7799	100.0

The impact of the Social Welfare Department in determining the nature and cost of legal aid is well recognized. As the Legal Aid Board reported in 1979 "... a very substantial proportion of all grants are in respect of domestic proceedings which are brought wholly or in part for the benefit of the Department of Social Welfare" (p.4). This sentiment was echoed in the Link survey by respondents with quite varied interests in legal aid. District legal aid committees were concerned that over 70% of domestic proceedings applications are instituted as a requirement of the Social Welfare Department as a condition of the granting of a benefit; that the scheme is in reality the Department of Social Welfare legal aid scheme. Lawyers went a step further and felt legal aid is being used principally by the Department of Social Welfare to recover benefits, that the department should design its own recovery methods so legal aid money could be better allocated.

The "liable parent contribution" scheme was brought into force on 1 April 1981, in the Social Security Amendment Act 1980. Under this scheme a parent liable to maintain the child of a domestic purposes beneficiary contributes to the cost of the benefit according to calculations in the Act. This is an administrative procedure and unless the liable parent objects there is no recourse to the courts. The effect of this scheme on the demand for civil legal aid cannot be quantified with any certainty as yet but it is hoped, given the accepted wisdom that most legal aid applications have been instigated at Social Welfare insistence, that it will obviate many court applications. The indications to date are hopeful. During the first 5 months of the liable parent scheme's operation, the number of domestic proceedings applications to district courts had decreased by 37% from the same period in 1980 (compared with a 4% decrease 1979 to 1980) and legal aid applications (all, not just domestic proceedings ones) decreased by 17% from 1980 (the 1979-1980 decrease was 7%). Two factors that may influence the desired effect are first the incidence of objections and of objectors eligible for aid and secondly whether parties will still want their separation and custody arrangements dealt with by the court, if only to meet the costs of an agreement.

Although we can account for the large number of legal aid applications in relation to domestic proceedings matters, the question why legal aid is not used in other areas remains unexplained.

Divorce

That divorce is excluded from the benefits of legal aid has always been contentious. It is almost a perennial concern of the Legal Aid Board, it has the habit of emerging in debates in the House at the slightest excuse, and it was mentioned by all the respondent groups in Link's survey.

Divorce was initially excluded from the scope of legal aid because of the cost factor. In 1975 the Legal Aid Board set out the arguments for including divorce:-

> The board feels that, setting aside this not unimportant question of cost, there is a case for extending legal aid to divorce. The first ground is practical. Legal aid is already available for ancillary relief (maintenance, custody, and property) in divorce proceedings and it is often far from easy to separate the cost of the divorce proper from the cost of the ancillary proceedings. The second ground is one of principle. Divorce is one of the few areas where the law requires persons to resort to court proceedings to achieve a result, even if both parties want it. Other civil claims and disputes can be settled by agreement. There is something illogical in denying the possibility of aid in an important case where the law insists on the parties incurring the expense of court proceedings.
>
> (Annual Report, 1973 p.5)

More recent comments revolve around the possibility of reducing the costs of pursuing a divorce and so making it viable for legal aid. Again in the words of the Legal Aid Board:

> There are several reasons why legal aid has not been extended to divorce. Some are philosophical. Certainly in recent times, a major one has been the likely cost. Experience in the United Kingdom has confirmed concern in that regard. However, the proposed establishment of a family court division of the District Court, with full jurisdiction in all matrimonial causes, and with greatly simplified procedures, may result in a substantial reduction in the cost of divorce proceedings. Moreover, the procedures adopted by the family court may make it very difficult to differentiate between the divorce itself, for which aid may not be granted, and ancillary matters such as custody and maintenance for which it is available. Therefore, when the Domestic Proceedings Act is amended to provide for the introduction of the family courts, it may be opportune to reconsider whether legal aid for divorce should not be made available.
>
> (Annual Report, 1980, p.4)

And from the Minister of Justice (the Hon. J.K. McLay), "I prefer to concentrate any attention on reducing the cost of divorce to those people who have to go to court and I have suggested there is no reason why those matters need to be in the hands of lawyers, thus costing the general public money" (N.Z.P.D., Vol 432, 1980, p. 2303).

The Link report demonstrates that Legal Aid Committees, lawyers involved with civil legal aid, clients and community groups all call for the inclusion of divorce. Some clients pointed to continual financial difficulties which prevented them from obtaining a divorce, and felt divorce should be covered by the scheme.

Complaints in the Children & Young Persons Court

Another family area where one is eligible to apply for civil legal aid but which is rarely used in complaints under the Children and Young Persons Act. Johnston (1981, p.213) reports that in Christchurch the majority of parents who admit complaints have not had legal advice. The criticism here is not one of exclusion, but that the legal aid procedure is inappropriate, that it is too cumbersome and approvals take too long in the circumstances. As was shown previously, very few cases availed themselves of legal aid in the first six months of 1979. The unsuitability of civil legal aid was recognized by respondents to the Link survey and suggestions for expediting approvals ranged from using the limited legal aid provisions to changing procedures altogether and applying offenders legal aid in such cases. We are aware of instances where the latter has already been used, quite incorrectly.

Legal Aid for Advice

One reason posited for the narrow scope of legal aid is that aid is not available for advice except as incidental to court proceedings.

As with divorce, advice has been a constant concern of the Legal Aid Board since at least 1973 and this was echoed throughout the Link survey, particularly by community groups involved with legal aid.

In the early years of the Legal Aid Act there was some question whether there was a need for aid for legal advice as opposed to representation. Since then it has been

accepted theoretically and from experience that advice is as important a part of asserting legal rights as representing them in court. It has been suggested that legal advice encourages litigation but it can also be argued that it prevents or circumvents this costly procedure. Another concern is that aid for advice would lead to a proliferation of small claims.

In 1976 the Legal Aid Board presented to the Minister of Justice a draft bill and regulations for extending legal aid to advice based on the English legal advice and assistance scheme. It was rejected for economic reasons and deferred for consideration in a review of legal aid.

The need for aid for advice remains and the responsibility has been partially accepted by Citizens Advice Bureaux, Grey Lynn Neighbourhood Law Office, Community Law Centres, the Law Society's "LawHelp" scheme and other informal organizations. The efforts of these groups are discussed more fully in chapter 5.

Public Awareness of Legal Aid

It is suggested that lack of awareness and accessibility are other conditions inhibiting the use of legal aid. Public unawareness of legal aid, its availability, its scope and how it works was mentioned frequently by Link respondents (appendix 12). It was particularly highlighted by clients and community groups who, from their own experiences know of people who could have been assisted had they but known of legal aid. Most clients learnt of legal aid only when Social Welfare required them to consult a solicitor, demonstrating again the strong ties between the awareness of legal aid and domestic proceedings matters.

The question of awareness of legal services and legal aid is discussed in more depth in the context of access to legal services in chapter 6. In the meantime it should be noted here that awareness is not just a matter of knowledge of legal aid's existence. A person may not perceive a problem as one having a possible legal resolution, but if so a lack of confidence and lack of knowledge of the scope and mechanics of aid can act as strong inhibitors.

In conclusion to this assessment of the scope of civil legal aid, it is evident that within the restricted formal limits of the Legal Aid Act, legal aid is exercised in a still narrower manner. It is difficult to gain an overall impression because of the undue impact of domestic proceedings cases. However, it is evident that aid is only used in areas of traditional lawyer/client contact. An associated argument to be considered here is that it is not until people cannot avoid litigation that they approach or are referred to a lawyer and may then learn of legal aid. The domestic purposes benefit situation is a good example of this. In areas where people can put up with infringements to their rights, they may never seek to remedy this through the law, particularly if aid for advice is not available.

Another matter to be considered, which we do in more detail later, when discussing the narrow application of legal aid is the clause that the applicant must have "reasonable grounds for taking or defending" the proceedings. This sort of consideration may well be a disincentive to using legal aid in non-traditional, non-property oriented causes.

The Legal Aid Client

As we would expect, the dominance of domestic proceedings matters predetermines the description of legal aid recipients. The survey of legal aid files shows that in 1979 88% were women, 78% were houseworkers and only 13% were employed. 79% were in receipt of a social welfare benefit, mostly the domestic purposes benefit or a related one.

76% of all applicants had a total annual income of $5000 or less, and 88.5% were assessed to have no disposable income according to the terms of the Act. This proportion was increased to 94% when looking at people granted aid rather than all applicants. Similarly with capital, almost 70% of applicants had total capital worth $100 or less and 90% of applicants and 95% of recipients had no disposable capital. It was found that applicants associated with domestic proceedings matters, as opposed to other applicants, were younger, were less likely to be married and more likely to be separated from their spouse, and were more likely to have dependent children.

This profile describes a very circumscribed section of the community, and it would be unwise in an exercise such as this to work from the assumption that the balance of the population do not have a need for legal services some of which could be provided through legal aid.

The Legal Aid Act stipulates that a person (including a trustee corporation) can apply for legal aid. Small businesses (such as a corner dairy), corporations, and groups of individuals cannot be granted legal aid. All these from time to time have been mooted by interested groups, e.g. the Legal Aid Board, the Royal Commission on Courts, as possible extensions to those eligible for aid. In our survey one organisation applied for costs against a legally aided person and was granted costs.

The Legal Aid Decision

Legal Aid Board Annual Reports show the number of applications which eventuate in a grant. This fluctuates around the 90% mark each year. The Reports also show that this changes according to type of proceedings.

This is demonstrated in more detail in the 1979 survey of legal aid files. For example, 87% of the applications related to family matters were granted aid, 92% in respect of ancillary relief proceedings and 89% related to Children and Young Persons Court complaints. At the other end of the scale 59% of applications in relation to administrative tribunals and 61% of action applications were granted aid. Applications were refused more in relation to tribunal (28%), court of appeal (60%) and high court (22%) proceedings than district court proceedings (10%).

Grounds for refusal

The survey disclosed that by far the most prevalent reason for refusing aid (63.1%) was that the contribution required would exceed the likely costs of the proceedings. The next most frequent reasons were that the applicant did not disclose full financial information (10.3%) and the amount of disposable income or assets precluded a grant (8.6%). Financial considerations were the main reasons for refusing aid. The details are shown in table 3. Refusals on non-financial grounds were more evident in applications relating to civil actions (18%) and administrative cases (31%) than in domestic proceedings cases (8%).

In nearly all cases where the Social Welfare report assessed and recommended that the applicant be refused aid, this recommendation was put into effect.

TABLE 3 GROUNDS FOR REFUSING LEGAL AID

	n	%
no reasonable grounds for taking or defending (s.23(1))	14	1.6
not authorised under s.15 (s.23(2)(a) and s.15)	6	0.7
amount of disposable income or assets (s.23(2)(b))	73	8.6
not disclose full financial information (s.23(2)(c))	88	10.3
contribution exceed costs (s.23(2)(d))	538	63.1
s.23(2)(b) and s.23(2)(d)	39	4.6
prospects of success (s.23(2)(e)(i))	24	2.8
interest in proceedings (s.23(2)(e)(ii)	11	1.3
unreasonable, undesirable (s.23(2)(e)(iii)	1	0.1
aid not justified for appeal (s.23(2)(f)	4	0.5
out of time	23	2.7
more than 1 person proceeding (s.31)	1	0.1
combination of grounds	31	3.6
TOTAL	853	100.0

Reviews and Appeals

7.5% of applicants granted legal aid asked the committee to review the terms. In nearly all cases this was granted. The most prevalent variations were extensions to other proceedings, extending or waiving maximum limits, waiving or changing contributions. 18% of refused applicants asked for a review, 58% of whom were granted aid and 9% receiving an ex-gratia payment for services rendered before the refusal.

5% of refusals lodged an appeal most of which were not proceeded with. Of the 14 appeals heard, 3 were allowed and 11 were not.

The total number of appeals to the Legal Aid Appeal Authority is reported in the Legal Aid Board's Annual Report. The number fluctuates from year to year, as do the proportion granted and refused. In the year ending 31 March 1981 there were 89 appeals received, 29 were allowed and 26 dismissed.

The Financial Eligibility Criteria

One of the purposes of the Legal Aid Act 1969 is to make aid available for persons of small or moderate means. In practice "small or moderate means" is given specific monetary value with reference to the amount of income and the value of capital that the applicant has at his disposal.

The $2000 limit was set in the 1969 Act and has not altered. Other than $2000 being very roughly comparable to the limit in the U.K. Act of the day, the only explanation given for it was in a departmental memo: "disposable income and capital is the amount in excess of that reasonably required to provide for the necessities of decent living according to the standard of the New Zealand community today".

Given this uncertain basis, it is difficult to assess to what extent eligibility for legal aid has eroded since 1969. External benchmarks may provide some comparison, but information on these is also inadequate to make conclusive comparisons. The most appropriate indicator, i.e. the proportion of the population who have less than $2000 disposable income per year, cannot be readily calculated because of the variability in tax and allowances for dependants. It seems reasonable to assume that the proportion of the population qualifying would be considerably smaller than 12 years ago even though the set allowances have been adjusted regularly. It is interesting to note that the average New Zealand weekly wage has increased from $41.90 in 1969 to $259.89 in 1981 (Department of Labour, Employment Information Survey). The cost of "providing for the necessities of decent living" have probably risen accordingly.

Another instructive comparison would be to compare how many hours of lawyer's time $2000 would have bought in 1969 compared with 1981. Once again basic data are not readily available but a brief survey of Wellington cases of legal aid for domestic proceedings gives an indication. In 1970 the average lawyer's fee in those

cases was $11.80 an hour. In early 1981 it was $40.50 an hour. In 1970 therefore, $2000 disposable income bought 170 hours of lawyer's time compared with 49 hours in 1981. Not that that is the only unforseeable contingency on which to spend the "excess" income

As early as 1971 the Legal Aid Board considered the income allowances "to be low in terms of present day living costs" and proposed that they be equated to the rates of social security benefits. (Annual Report p.10). After considerable negotiation this suggestion was incorporated into the 1974 Amendment and the allowances were reviewed at that time and have been regularly reviewed seven times since in line with the domestic purpose benefit allowances. Domestic Purposes Benefits are reviewed in accordance with changes in the cost of living. Before this provision for nearly automatic adjustment, the district legal aid committees had been making their own allowances by exercising their discretion as to what contributions were to be paid by legal aid recipients.

The $500 capital allowance applicable if the applicant has a dependant, has remained unchanged since the 1969 Act.

The Link survey of people and groups involved with legal aid came up with the same comments as regards eligibility time and again. The most persistent view was that the criteria should be reviewed more regularly to keep up with the movement in incomes and cost of living. As we have seen some aspects are reviewed in this manner. It was felt that present levels and allowances discriminate unfairly against lower-middle income families, and the contribution system prejudices the thrifty. In particular the standard capital exemption of $500 for a dependant regardless of the number of children was considered inadequate. Associated with these comments was the idea that social welfare beneficiaries should automatically qualify for aid without further financial enquiry. Since this survey this proposal has in the main part been adopted in s.9A Legal Aid Act which states that no Social Security Commission assessment or report is required where the sole source of the applicant's income is an income tested benefit.

Another specific criticism mentioned regularly was the distinction between married and de facto relationships, the latter being unmarried for legal aid purposes and therefore in a better financial position than the married applicant.

The conclusion of involved community groups was that there should be a means test, but that the current levels are too low, and exclude many needy families. Clients themselves felt that their day-to-day commitments were ignored and that one had to be destitute to qualify. Clients in the survey who had been refused aid mostly were unable to pursue the legal action privately.

An associated aspect demonstrated in the file research was the obvious difficulty involved in reporting and assessing total income.

The legal aid application form asks for total income for "12 months ended.....". Because of the predominance of beneficiaries and the difficulty of estimating previous income, this request is interpreted variously as invited by the Act from one district to another and even within districts. The main versions, that were subject to combination depending whether the applicant was in receipt of a benefit or not, were: actual income received during the past year; present income applied to previous 12 months; present income applied to next 12 months ("prospective").

The results demonstrated the difficulties inherent in estimating actual income and capital when income as reported by the applicant was compared with total income assessed by Social Welfare. In only 13.3% did they agree. In 65% Social Welfare assessed the income to be more than the applicant's own report and in 21.6% it was assessed to be less. Social Welfare's assessments ranged from $11,825 less than the applicant's to $69,722 greater. Recognising that there was this extreme variation, the median difference fell in the group assessed at $501-$1000 greater than reported.

A similar analysis compares the difference between total assets as given by the applicant and total capital as assessed by Social Welfare. In contrast with the income comparison, there was no difference in reported and assessed amounts in 71.5% of the cases. In 24% Social Welfare assessed total capital to be less than that reported by the applicant and in 4.4% they assessed it to be more. Social Welfare's assessments ranged from $1000 less to $800 more. The median case fell in the category of no difference and the mean difference was $72 less than reported.

That beneficiaries are now not required to have a financial assessment and by raising the limited legal aid level to $200, hopefully most of these difficulties will be avoided in the future.

The Client's Contribution

The Initial Contribution

The file survey showed that 80% of legal aid recipients paid the then $15 initial contribution, approximately two-thirds at the time of application, and the rest were granted aid contingent on the $15 being paid. This overall rate is deflated by the low rates of two courts. If these are excluded the rate increases to 97%. Legal Aid Board documents show that in 1980, 7% of grants were exempted the initial contribution and that this has decreased to 3.4% in 1981, when, interestingly, the contribution is at the increased level of $25.

Most respondents in the Link Survey, including clients, felt the initial contribution was a fair concept and if anything should be increased (it was then $15).

Further Assessed Contributions

The upper financial limit for legal aid is extended by means of contributions by the legal aid recipient in proportion to his resources.

From returns made to the Legal Aid Board it was found that in 1981 contributions were assessed in 8% of applications and ordered in 7%. 41% of the assessed amount was actually ordered.

The file survey was another source of information about the use of assessed contributions. This source showed a higher rate - in 1979, as opposed to 1980 above, 15% of social welfare reports suggested that a contribution be paid. It was found that as the amount of recommended contributions increased so the proportion of applicants refused aid did too.

The current formula for assessing contributions has been criticized on the grounds that it penalizes the thrifty. Comments from clients were interesting - some felt it was too high while others saw it in terms of a loan.

Costs

Because of the inconsistent notation in legal aid files we were not able to reliably establish the incidence of orders for costs to be paid by the legal aid applicant or opponent. However the total amount of costs recovered each year is given in the Legal Aid Board Annual Report:

Year ending March	Costs recovered	% of expenditure
1971	7,405	15.2
1972	27,597	13.3
1973	72,182	17.3
1974	92,118	15.3
1975	127,639	17.2
1976	71,806	6.7
1977	95,581	7.0
1978	80,242	4.8
1979	179,649	8.1
1980	300,926	11.1
1981	207,897	6.5

Crown Charges

Since 1976, the Board's Annual Reports show the number and amount of statutory land changes preserved each year.

Year ending March	No	Amount	Average amount per charge
		$	$
1976	73	24,003	329
1977	132	46,571	352
1978	99	51,687	522
1979	238	101,265	425
1980	366	189,958	519

The Lawyers' Contribution

The professions main contribution to the legal aid scheme is the 15% deduction from their fee. The following quote from the Link survey summarizes lawyers' views as regards the 15% deduction:

> Most lawyers favoured a system of standardised fees for legal aid work, although a significant majority were satisifed with the present time-spent basis operating in most centres. The only major criticism emerging was that either the 15% reduction of costs be abolished or committees adopt a more flexible approach to bills submitted (e.g. to take account of additional time spent with clients who spoke little English). Some felt committees unfairly reduced bills without apparent reason in some instances....
>
> Overwhelmingly lawyers felt that requirement of 15% reduction of fee was no longer appropriate in the context of practitioner's real income from legal aid work. Many felt their bills were already liable to reduction by the committee and, the additional standard deduction was regarded as further disincentive. Many lawyers expressed the view that the practitioner's contribution to the scheme in real terms was in the vicinity of 25% or even higher.

The file survey showed that 30% of bills were not accepted as presented by the district committee. It was the practice in some districts for the committee to deduct the 15% itself, but besides this, 22% of the deductions were to reduce items, sometimes to the terms of the grant, 21% made an offer of a reduced amount, 10% asked for details and in 9% calculations and additions needing correction.

Lawyer Participation & Remuneration

From an analysis of 1979 court abstract books 67% of N.Z. firms participated in civil legal aid and were paid for a total of 11,939 civil legal aid cases. The number of legal aid cases per firm ranged from 1 to 291 with a median case load of 11 per firm for that year. (See appendix 13).

The 1978 Heylen survey of the legal profession (prepared for the New Zealand Law Society) gives an indication of the effort of individual lawyers as opposed to firms. It showed that 37.5% of respondents had been involved in civil legal aid work in the past 12 months and on average spent 2.8 hours a week on this type of work.

The Legal Aid Boards Annual Report is the regular source for information for civil legal aid work. For the year ending March 1980, 12,344 bills were certified at a total cost of $2,748,952, i.e. an average of $223 each.

The analysis of abstract books also provided information about income from civil legal aid, this time from the point of view of income per firm. The total income as

recorded from this source was $2,275,311 ranging from $31 to $48,884 per firm. The median income per firm was $326, showing that the civil legal aid income for most firms is very small. Only 45 firms earned over $10,000 from this source in 1979.

Turning to the area of administration but still relevant to remuneration is the complaint from lawyers that payment of bills is too slow. The file survey showed that the average time taken to approve payment from when the bill was received was 6 weeks. The time taken from approval to actual payment is not known. The survey also disclosed that almost 30% of bills were not accepted by the committee as presented. In most cases the bills either needed correcting or items reduced. The eventual outcome was that 73% of payments were for the amount billed in the first instance and 25% were for a lesser amount. The number of taxations pursuant to the proviso to s32(1) Legal Aid Act 1969 varies from year to year. For the purposes of illustration, there were 168 in 1980.

CONCLUSION

The strict purpose of civil legal aid as stipulated in the Legal Aid Act 1969 is to give monetary assistance to people of small or moderate means in order to pursue or defend certain types of litigation. How effective is the civil legal aid scheme in fulfilling its specific functions?

There is no doubt that a large number of people benefit from civil legal aid. After a rapid increase in the initial years, the number of grants has fluctuated between 10,500 and 13,500 for the last 6 years. Nor is there any doubt that aid in relation to domestic proceedings cases dominates the scene - over 90% of grants and approximately 90% of costs are for domestic proceedings matters. The fluctuation in legal aid grants is a reflection of the plateau in the number of grants for domestic proceedings cases. We can only speculate whether this is because the need has levelled off, or whether saturation point as regards court proceedings, lawyers or benefits has been reached. Although the number of domestic purposes benefits has been steadily increasing since 1978 (Department of Social Welfare Annual Reports), we note that the estimated proportion of domestic cases that have legal aid has fluctuated from 80% to 75% and back to 77% since then.

Why is legal aid used so sparingly in other areas of legal problems? The most obvious subsequent question is whether there is a need or are most people coping adequately with their problems. The complex concept of need and unmet need is discussed more fully in chapter 6. but we can anticipate some salient points here. For all the talk on the subject of unmet needs, it is difficult to make conclusive and empirical statements as to their nature and extent. However developments in New Zealand such as community law endeavours and circumstantial evidence suggest that it is foolish to assume that there are not people who do not have access to legal assistance which would be of benefit.

The next question relates to the structure of the scheme itself. Do its parameters act to limit its outreach and effectiveness? The specific limitation in mind is, of course, that legal aid is retricted to court proceedings and is not available for advice or other legal processes. It is well recongized today that many legal rights can be pursued outside the courts, that this may even be preferable, and that the current legal aid legislation does not allow, let alone encourage this. The corollary of this situation is that when one is forced to court, e.g. through Social Welfare insistence, one encounters legal aid. There are few equivalent civil examples, where litigation is in effect inevitable. Divorce is the obvious example but it is specifically excluded anyway. It is also belatedly realized that the Legal Aid Act presumes that people know their legal position and the appropriate legal procedure, and, if litigation is not necessary, that they have the resources to deal with the problem themselves. If access to preliminary advice was more readily available, not necessarily through legal aid as we now know it, it is reasonable to expect some cases would result in litigation and hopefully that more diversity than at present finds its way to legal aid for assistance. It will be interesting to see what effect the Law Society's LawHelp service has in this respect.

Do the eligibility criteria possibly have the effect of limiting the scope of legal aid? Most legal aid recipients in domestic cases are also domestic purposes beneficiaries. An income from this source generally qualifies one for aid on financial grounds, a fact recognized in the 1980 Amendment which obviates the need for a financial assessment. Legal aid applicants in non-domestic matters are more likely to be employed and to have limited savings at their disposal. A recurring comment has been that one must be destitute to qualify for aid. In terms of the

Act, aid should be readily available for persons of small or moderate means. In 1969 "moderate" equated with $2000 disposable income, in 1981 $2000 is still the benchmark. As demonstrated previously, one certainly has to be poorer to qualify today than in 1969, especially, as clients commented, when commitments are calculated on a hypothetical basis of allowances rather than real expenses. The application form stresses income and assets, but has only a begrudging mention of foreseeable liabilities.

Legal aid may be refused if the nature of the proceedings do not justify the cost or if the proceedings are unreasonable or undesirable. It has long been accepted that domestic proceedings matters are acceptable on these grounds and the survey showed that non-domestic proceedings matters were refused on non-financial grounds more than domestic proceedings cases. We consider in more detail when we present our proposal for the future the possibility of these "reasonable" provisions stifling the development of legal aid into non-traditional areas of litigation or for grievances that have no economic equivalence and cannot justify expensive legal representation. Areas of work which lawyers concentrate on now are of necessity economic from the lawyer's and client's points of view.

The restriction of legal aid to court proceedings, the absence of aid for advice, the fact that the scheme functions within the existing private practice legal framework all discourage if not prevent its wider application to help redress a multitude of grievances. But on top of this, the concentration of legal aid on domestic proceedings leaves the impression that these cases have usurped the original intention of the scheme and that all the time, effort and money have been diverted to help recoup the costs of domestic purposes benefits.

We have two figures indicating the level of lawyer participation in civil legal aid : 38% of [illegible]yers in 1978 and 67% of firms in 1979 were involved in legal aid work. Except for a few firms at the upper extreme, firms' incomes from this in 1979 were minimal, the median income being $326.

Although suggestions are made about alternative methods of remuneration and complaints are voiced about district committees' bill paring and the appropriateness of the 15% deduction, there is an overall acceptance of the level of remuneration stemming from civil legal aid, no doubt a reflection of the fact that the increase in payments per grant has bettered the inflation rate of recent years.

Most of legal aid's costs are, as noted before, associated with domestic proceedings cases. It is important to make a distinction here between expenditure and net costs as most commentary refers to the former, when the latter is a more relevant indicator when assessing the effectiveness of the service and planning for future actual resource needs. For example, the year ending March 1981, 26% of total expenditure was recovered in contributions and other recoveries, giving a net cost of $2,383,604 or $198 per grant.

In terms of the Legal Aid Act itself we can conclude that the scheme has not achieved what might have been hoped of it on two main counts. First, access to the courts. In effect, due to the dominance of domestic proceedings matters, legal aid helps access to the courts in a very restricted range of cases. We note there is a similar concern in Britian in respect of family matters and legal advice and assistance, (Lord Chancellor's Advisory Committee on Legal Aid, 1977-78, p.83; The Law Society, 1978-79, p.10 and 1979-80, p.6). Secondly, providing aid for persons of small or moderate means. The erosion of some of the eligibility criteria means that people of moderate means are no longer eligible for aid.

Having looked at civil legal aid on its own terms, the next question is obviously whether its objectives are adequate. It is evident from respondents to the Link Survey as well as from commentary over the years that the Act's purview is too restricted if our real concern is to ensure that citizens have equal protection before the law. Not only are certain types of problems excluded, e.g. divorce, but more importantly aid is provided only in relation to court proceedings, and the only need for aid that is acknowledgd is lack of means. Extensions to the Legal Aid Act may not necessarily be the most appropriate methods for improving the effectiveness of legal aid but before discussing possible modifications and alternatives, we feel it is necessary to introduce more thoroughly the concepts of legal need and access to legal services as well as explore possible alternatives as experienced overseas. We do this in chapters 6 and 7 after surveying the other legal aid schemes in New Zealand.

2

Offenders Legal Aid

HISTORY

Criminal legal aid was first provided for in New Zealand in the Justices of the Peace Amendment Act 1912, which was virtually duplicated in the Justices of the Peace Act 1927. This was very similar in scope to England's Poor Prisoners Defence Act of 1903 providing legal aid in trials on indictment. The next important change in criminal legal aid in New Zealand was the 1933 Poor Prisoners Defence Act, which stipulated that the prisoner's defence need not be disclosed in advance, and extended legal aid to poor defendants charged with serious summary offences, or whose exceptional circumstances justified a grant of aid.

The 1954 Offenders Legal Aid Act replaced the Poor Prisoners Defence Act and was introduced mainly to rectify omissions in court practice arising from the 1933 Act. The scope of the 1933 Act was limited to granting legal aid for trials and appeals against conviction. Consequently, it excluded grants for defendants who had pleaded guilty and were appearing for sentence, and also for defendants coming up for sentence as a result of a breach of a probation order. The Offenders Legal Aid Act, being basically a broad statement of principles, provided the flexibility necessary to overcome these omissions.

THE ACT

The Offenders' Legal Aid Act 1954, and the Offenders Legal Aid Regulations 1972 govern legal aid available to defendants in criminal proceedings in New Zealand. The Act itself has only been amended by s.5 of the Geneva Conventions Act 1958, which provides for legal aid for prisoners of war.

The Act is brief, setting down principles and guidelines, but leaving procedure to the Regulations. The purpose of the Act, as stated in the long title, is to 'make better provision for the grant of legal aid in criminal proceedings; a singularly obtuse and uninformative statement. One obviously has to refer to the previous Acts. Parliamentary Debates at the time of the 1912 Amendment, the 1933 and 1954 Acts are only slightly more helpful: when the interests of justice demand and a person is not in the financial position to obtain a lawyer, aid may be granted.

The important role of legal representation in criminal proceedings is explicitly acknowledged in s13A Criminal Justice Act 1954, introduced in 1975. This stipulates that no person shall be sentenced to custody unless he has been legally represented in court except if the defendant does not want representation. Although it goes so far as to say a person who has been refused legal aid and still does not engage his own legal representation satisfies the requirement, the relationship is not always so clear-cut in practice.

Scope and Eligibility

The Act is so brief it is difficult to separate the scheme into component parts. In essence it says that at any stage of any criminal proceedings in any court, the court may grant aid for all or part of the expenses to a person charged with or convicted of any offence, if it is desirable in the interests of justice to do so. In considering the grant the court shall have regard to the means of the person, the gravity of the offence, the grounds of the appeal and any other relevant circumstances. In the case of a person charged with murder, the court shall have regard only to the means of the applicant. There is no provision for appeal or review of any decision to refuse aid.

Administration

The defendant applies to the court on a prescribed form giving details of the proceedings and his personal and financial situation. The decision to grant aid or not is made by the judicial officer of the court. If granted, a lawyer is assigned from a roster. The applicant does not choose his lawyer unless he is charged with murder. Lawyer participation is voluntary, the list of "fit and proper" and "willing"

practitioners being compiled by the District Law Societies. The lawyer is paid a fixed fee, prescribed in the Regulations, according to type of work done. There are three scales of fees and the court decides which is appropriate, although it can order that these be exceeded in exceptional cases. The administration is provided by court staff.

Conclusion

As it stands, the scope for legal aid in criminal proceedings is very wide and flexible. Most commentary and criticism of the scheme revolve around issues of the quality of the aid and procedural difficulties claiming that they are such that justice is not effected. From the opposite viewpoint come criticisms that aid is too readily available, is abused and is a waste of money. The level of remuneration of lawyers is a continuing cause of discontent. The next section explores these contentions.

OFFENDERS LEGAL AID IN PRACTICE

Usage and Costs

It is difficult to get any meaningful figures on the use of offenders legal aid. We have a combined annual figure of the number of applications and grants in the district court and children and young persons court and similar figures for the high court. The increase in number of grants since 1976 has been substantial : 50% in district and child ren and young persons courts giving a total of 13,615 in 1980 and 46% in the high court, making 733 grants in 1980.

The difficulty arises when relating these increases in legal aid to increases in eligible business because we have no reliable, recent figures representing the number of persons charged with an offence in the district court and the chidren and young persons court. Explaining the increase is therefore impossible from the existing data.

The situation is not quite so lamentable for the high court where annual returns record figures for the number of persons appearing for criminal trial or sentence. However when the number of grants are related to the number of accused, no consistent pattern emerges. Although legal aid grants increased, the number of accused decreased in 1977 and 1978 and then rose again to a high in 1980. Consequently the proportion of accused with legal aid went from 48% in 1976 to 80% in 1978 and decreased to 59% in 1979 and to 53% in 1980.

Our survey of defendants and their use of representation offers a new dimension on the incidence of offenders legal aid. The survey was restricted to persons charged with an imprisonable offence in 1979. Of these it was found that 16% of district court defendants, 17% of children and young persons court defendants and 56% of high court accused were on legal aid. The impression gained from critics of legal aid as it functions today is that it has got away on us and that too many people are granted aid. The proportion of eligible defendants who actually receive aid should curb this impression to some extent though questions about whether the right people are getting aid in the right circumstances remain to be answered.

The feeling that offenders legal aid is increasing rapidly and has a life of its own is engendered largely by cost considerations. Over the same four years we were considering previously, expenditure on offenders legal aid in all courts has increased 115% to a total of $974,431 in 1980/81. The average cost per grant has increased from $50 each to $72, an increase of 44%.

Yet another statistic is expenditure per head of population. This has increased from 14 cents per person in 1975/76 to 31 cents in 1980/81. It should be noted though that new scale fees were introduced in 1978. Another interesting statistic which we cannot supply would be the increase in cost per eligible defendant.

Scope & Nature of Offenders Legal Aid

Most of the information we have on the scope of offenders legal aid derives from the file survey of criminal prosecutions (full report in appendix 6). Even though the Act refers to "any offence", the survey pre-determined the scope of legal aid to the

extent that we surveyed, only people charged with imprisonable offences. This was mainly because of practical research considerations but it is generally accepted that legal aid is seldom applied for in minor, non-imprisonable offences.

Jurisdiction

The proportions of defendants with legal aid in the children and young persons court and the district court were virtually the same - 18% and 16% respectively.

The children and young persons court deserves some discussion. The impression given by many of the respondents to the Link survey (lawyers, court staff, police, social welfare officers and community groups) is that offenders legal aid is not working satisfactorily in this court. It is perhaps, therefore, unexpected to find that it is used to a similar extent as in the district court. The administration and quality of the service may, however, still compare unfavourably. More to the point, is that offenders legal aid is not applicable to people before the court by way of complaint. Civil legal aid is the proper procedure. However from the point of view of the circumstances generating the complaint and the assistance required, complaints are not so very different from offence proceedings. The cumbersome civil legal aid procedures are considered inappropriate and we are aware that offenders legal aid has been used improperly for complaints in the past. The unsatisfactory nature of legal aid for complaints was commented on by Social Welfare officers in the Link Survey.

In contrast to these two lower courts, 56% of high court accused were on legal aid.

We have basic information about the use of legal aid in criminal appeals. Overall 17% of appeals to the high court in 1979 applied for legal aid and 14% received aid. This is similar to the proportion of district court defendants with aid (16%). There was considerable regional variation in the rate of legal aid. Leaving aside the smaller high courts, Auckland, Hamilton, Palmerston North and Nelson had low rates whereas Wellington, Christchurch, Timaru and Invercargill had high rates. A greater proportion of appeals on legal aid were allowed than those not on legal aid.

Over the past four years the proportion of appeals to the court of appeal with offenders legal aid has steadily decreased - from 33% in 1977 to 19% in 1980.

The table below summarizes the cost of legal aid in these cases:

	Total Bill	Average Bill	Minimum Bill	Maximum Bill
1977	$53,896	$998	$13.50	$12,126
1977 minus JBL	$12,899	$263	$13.50	$ 9,817
1978	$16,336	$308	$13.50	$ 2,616
1979	$24,267	$458	$30.00	$ 7,205
1980	$17,499	$365	$30.00	$ 3,263

(Source: payments as recorded in Court of Appeal register)

The offenders legal aid application and decision operates differently in the court of appeal than in other courts. In preference to the ordinary legal aid application form, the form on which an appeal is lodged includes a question which asks the appellant if he wants to apply for legal aid. If so indicated, the decision is made on the merits of the appeal regardless of the applicant's financial position. If there is no merit in the appeal, legal aid is refused, consequently most refusals relate to cases that end up as ex parte applications.

Type of Offence

Table 4 shows how legal aid was used for different types of offence in the district court. For a more complete picture, cases with private representation and cases without any representation are included. The offence types are ranked in decreasing seriousness as determined by a combination of maximum prescribed penalty and the extent of injury to persons. Whereas 55.5% of all defendants were charged with one of the four most serious types of offence, 79.4% of legal aid recipients were charged with these most serious offences. Compared with this, 61.3% of privately represented and 43.8% of unrepresented defendants had the most serious charges. The point here is that although legal aid is used across all types of offence, it is more concentrated amongst the most serious offences and is particularly under-represented in public order offences, as is representation generally.

TABLE 4 TYPE OF OFFENCE BY REPRESENTATION

Offence	Legal aid	Private Representation	Not Represented	Total
	%	%	%	%
against the person	20.6	18.8	5.7	12.4
sexual offence	0.9	0.9	-	0.6
misuse of drugs	0.6	3.9	6.8	4.9
property offence	57.3	37.7	31.3	37.6
traffic offence	0.9	12.0	5.5	7.2
admin. of justice	8.0	7.1	9.4	8.5
public order	6.0	11.4	37.3	23.9
other	3.3	7.8	3.7	5.0
total	100.0	100.0	100.0	100.0

The situation was somewhat different in the high court where legal aid was associated less with the most serious offences including property ones but was used to great extent for offences against public order.

Nature of Legal Aid

By "nature" of legal aid, we refer to the aspects of work done by assigned lawyers for their clients. This is dealt with in two sections. First, procedural aspects of the charge, which when compared with cases that proceeded privately or without representation will show how, if at all, legal aid operates differently. Certain tentative conclusions on the abuse and quality of legal aid can be made from this analysis. Second, respondents to the Link survey were able to comment on their assessment of the nature of offenders legal aid providing a qualitative assessment of the procedural aspects.

In order to examine the effect legal aid has on a hearing or the contrary proposition of how a hearing influences the use of legal aid, we present results from the file survey in the sequence of a hearing - starting with the laying of charges to the final disposition and appeals. Results from district court cases are the main examples supplemented by children and young person court and high court results where any substantial differences in practice occurred.

At the very earliest stages legal aid cases were distinguished from privately represented cases in that the former (along with unrepresented defendants) were arrested significantly more than the latter who were summonsed to court more often.

Seriousness of Offending

The seriousness of the offending was alluded to when we discussed type of offence. This was but one indicator of seriousness. Others used were whether the defendant was arrested or summonsed, number of charges, maximum prescribed penalty and whether the offence was summary only, carried the right to elect trial by jury or was indictable only. In the district court, in all five respects, there was a trend where defendants on legal aid scored more seriously than those with private representation who in turn were generally more seriously implicated than the unrepresented defendants.

The situation in the children and young persons court was not so consistent. There were no significant differences in type of offence between the three groups, but in other respects legal aid cases tended to be more serious.

Whereas there was a general trend in the district and children and young persons courts for the represented to be more serious cases than the unrepresented, and legal aid cases to be more serious than privately represented cases, this was not continued in the high court. The comparison of represented with unrepresented is not applicable as only two high court accused did not have a lawyer. Different patterns from the district court emerge as to type of offence and maximum penalties. Whereas privately represented in the high court were overrepresented in property offences, legal aid accused had relatively large numbers of public order offences. Consequently privately represented accused fell heavily into offences carrying more than one year's imprisonment compared with those on legal aid.

Seriousness of offence is a pervasive and important factor in criminal proceedings and may have an impact at various stages e.g. length of proceedings, type of remand, sentence. If legal aid cases are more serious ones to start with, and if legal aid cases are associated with certain outcomes, it is necessary to unravel the situation before claiming that legal aid is responsible for the outcome.

Plea and Election of Jury Trials

Once a defendant has been charged and brought to court, the next two major issues are election of jurisdiction if appropriate and plea. As the Link survey and our own questionnaire to court registrars indicated there is considerable criticism that legal aid defendants and/or lawyers abuse these aspects of a hearing because neither the defendant nor the lawyer are constrained by the question of costs. This view was expressed recurringly by the judiciary, court staff, probation officers and police prosecutors. The specific allegations are that legal aid encourages defendants to elect trial by jury when it is not merited and to plead not guilty in indefensible cases. The alleged motives are to postpone the inevitable results on the part of the defendant and to gain trial experience or boost earnings on the part of the lawyer. Our file survey allowed us to examine empirically these two contentions which have acquired a status that demands serious attention.

On the question of electing trial by jury for trivial charges, we reconstructed from the district court and high court samples the population of people charged with an offence where they had a right of electing summary hearing or trial by jury. People charged with purely summary or purely indictable offences were of course precluded. It is interesting to note however as an aside that 42% of legally aided persons in the total high court sample were charged with an offence triable summarily but which had been laid indictably compared with 19% of those with private representation. These were also excluded.

Returning to the main issue, the results showed very conclusively that legally aided defendants did not behave any differently from privately represented defendants in this respect. Whereas 2.9% of the former elected jury trial, 2.6% of the latter did. Unless there is some intrinsic difference in the content of cases which could not be fathomed in our type of survey, it seems that the contention that legal aid cases are irresponsible in this respect is unfounded. It is also worth commenting that the fact that these offences have the right of jury trial attached is one that the defendant must have unfettered power to exercise and that one purpose of legal aid is to see that lack of finances does not act as an impediment.

The second controversial topic is that legal aid encourages defendants to plead not guilty when this is not warranted by the facts of the case.

Our survey showed not unexpectedly that the proportion of unrepresented defendants pleading not guilty was relatively small. The comparison however is between defendants on legal aid and defendants privately represented. Privately represented defendants pleaded not guilty more than those on legal aid. The respective proportions were 34% and 23%.

Once again the intrinsic quality of the cases cannot be taken into account in this type of survey, but it should be remembered that on the whole legally aided defendants were charged with more serious offences and liable to harsher penalties.

In the children and young persons court legal aid defendants did not plead not guilty significantly more than those with private representation. In the high court the proportion of accused committed for trial and pleading guilty was high but there was no significant difference between the legally aided and privately represented in this respect.

Our final conclusion is that the data do not support the contentions that legal aid defendants elect trial by jury and plead not guilty unduly. They show that legal aid practice in this regard is very similar to private practice; if we assume that privately represented defendants and their lawyers exercise these rights responsibly then the criticisms of legal aid in this regard are unfounded.

Still on the question of plea, the opposite allegation has also come to our notice that defendants who do not qualify for offenders legal aid because of their means (it is not stipulated whether this is an assumption on their and their lawyer's part or the result of an application) actually plead guilty when they should defend their case because they cannot afford the lawyer's costs of a defended hearing. The court files research was an inappropriate means of substantiating or refuting this question.

Adjournments

One contention that the survey data did support is that legal aid involves extra court appearances. The most startling result was the comparative proportions of cases which were dealt with and completed at the first court appearance: 4% of legal aid, 20.1% of privately represented and 63.7% of unrepresented cases. The respective average numbers of court appearance were 3.6, 2.7 and 1.6. These differences

must be appreciated in the context of court dynamics. Unrepresented defendants do not have the same reason for seeking adjournments as represented ones do, e.g. getting representation or preparing pleas of mitigation; legally aided defendants, in practice, have one crucial reasons for an adjournment over the rest, that is making the legal aid application and being subsequently assigned a lawyer. Despite the fact that legal aid defendants had more court appearances, their cases were heard and completed within a similar time period as the privately represented. 37% and 41% respectively were completed in 2 weeks or less. Unrepresented defendants however were dealt with much more expeditiously - 83% had their case disposed of within 2 weeks.

Final Disposition and Sentence

This brings us to the important question of "outcomes" for legal aid defendants compared with defendants with their own lawyer and defendants without a lawyer at all. Without making implications at this stage as to the quality of the service given, the survey compared the three groups in respect of remand decisions, dispositions and sentences.

In all three jurisdictions it was found that defendants on legal aid were remanded in custody more often than defendants without a lawyer who were in custody more than privately represented defendants.

Regarding the disposition of cases in the district court, it was found that amongst defendants who pleaded not guilty, legally aided defendants were convicted significantly more than defendants with private representation who were convicted more than unrepresented defendants. Legally aided defendants also had their charges withdrawn (regardless of plea) less than the other two groups. This differentiation was perpetuated in the children and young persons court with defendants on legal aid being convicted significantly more often than the other two groups. In the high court however, privately represented accused were convicted more often and legal aid accused were discharged more often.

In the sentencing arena, legally aided defendants again fare worse. In the district and children and young persons courts they received relatively more custodial sentences than either the privately or unrepresented defendants. In the high court, however, there was no difference in the proportions sentenced to custody. In all three jurisdictions defendants with their own lawyer were fined more than the other groups.

Sentencing does not happen in a vacuum and two relevant aspects were incorporated in the analysis. Firstly, it was particularly important to account for the effect seriousness of offence has on the sentence since legal aid defendants tended to be charged with more serious offending. Having done this, the primary conclusion was reinforced. In the district court it was found that defendants on legal aid were sentenced to custody more than other defendents even when the seriousness of their offence was taken into account. In the children and young persons court and in the high court, custodial sentences really only featured in the two most serious offence categories and again legally aided defendants scored relatively highly in the custodial sentences.

The second factor to be accounted for is previous offending. As an indication of the effect previous offending has on the present sentence, the sentencing was controlled according to the most severe penalty received in the past. In the district court the general situation prevailed - legally aided defendants still received relatively more custodial sentences even when restricting the comparison to defendants who had previously been in custody or on supervision.

Previous penalties were too infrequent in the children and young persons court to justify comment. The high court pattern was not consistent with the district court and it appears that once previous offending is taken into account the conclusion that legal aid cases fare worse no longer stands.

As regards appeals from the district court, unrepresented defendants appeal less than the represented ones, but type of representation appeared to have no bearing on the incidence of appeals. The total proportion appealing was very small.

In many respects the conclusions arising from these surveys are tentative. Particularly, it must be appreciated that at many stages in the criminal judicial process qualitative factors pertaining to the offence and offender influence, quite properly, the decisions and these cannot be examined in a survey such as this. The other general qualification that must be recognized is the effect of the interrelationship of factors and possible intervening factors, only some of which have been assessed in the analysis.

Generally, it can be concluded that legal aid defendants are remanded in custody, convicted and sentenced to custody more than privately and unrepresented defendants are. The last result remained the case when seriousness of offence and previous penalties were taken into account. High court results were not so definite, only in some respects did legal aid defendants fare worse. What needs examining further is whether these outcomes are a result of being on legal aid or whether as a class, legal aid defendants differ in a relevant way in respect of their offending or their social characteristics.

The Quality of Offenders Legal Aid

The question of the quality of the legal assistance given to legal aid defendants is essential but extremely difficult to evaluate. The statistical survey of criminal files has indicated that legal aid and privately represented defendants and/or lawyers behave similarly as regards electing jury trial, and pleading not guilty. In other respects differences were apparent e.g. legal aid defendants fared worse as regards remands in custody, guilty verdicts and custodial sentences. The Link survey (appendix 12) approached people who are involved in the legal aid system from a number of perspectives to ascertain their views about offenders legal aid including an assessment of the quality of the service provided. In conjunction with the file survey this gives a more complete, though not absolutely conclusive, indication of quality. As already discussed, views about the abuse of legal aid in terms of defended hearings and jury trials are not substantiated by the empirical results. Quality of service is not so amenable to empirical investigation, but the differential treatment as shown by the survey results is reinforced by implication in the majority views expressed by all the different groups of Link respondents.

The general conclusion from the Link survey is that the majority of legal aid lawyers are inexperienced and therefore the legal aid service suffers accordingly. Unfortunately we have no practical way of empirically testing the inexperience allegation. Link's report (p.412) of probation officers' responses is typical, covering most of the points raised by most respondents in connection with quality of service and it is quoted here in detail:

VIEWS OF PROBATION SERVICE

A significant majority of probation officers had many reservations about the scheme. The concern most frequently mentioned was the highly variable quality of representation given by assigned practitioners. Most staff felt this was due to the inexperience and lack of commitment of many solicitors involved. Many probation officers had little confidence in the administration of the scheme and particularly in the selection of solicitors for assignment work. The overwhelming concern of probation officers was whether defendants received adequate legal assistance. Many felt that the administration of the present scheme, especially in the District Courts in the larger centres, was deficient. The general concern was that while this was an area of great need many lawyers had little interest in the work.

Solicitors involved appeared to lack time and patience. Many probation officers suggested that the low level of remuneration might be a factor but that the problems went deeper than this. Many lawyers tended to use the scheme to obtain trial experience irrespective of the defendant's best interests. A large number of probation officers in all centres were disconcerted at the general lack of thoroughness in preparation by lawyers assigned to defendants. Many solicitors appeared to rely only on a probation report where it was available, and few made efforts to examine independently and in a professional way defendants' circumstances and relevant financial background. Many probation officers reported that a large number of assigned solicitors fail to make contact with the defendant at all before court appearances. Circumstances of this kind and various accounts of service from probationers under supervision have lead many probation officers to question the effectiveness and value of the scheme. Other comments frequently conveyed by a range of probation officers about the scheme were as follows:

1. need for more experienced lawyers to become involved in the scheme
2. need for earlier client/solicitor contact
3. better pay for lawyers
4. need for more resources allocated to it
5. counsel should be assigned to defendant earlier
6. service too rushed
7. need for administrative overhaul
8. should be merged with duty solicitor scheme...

A significant number of probation officers reported their probationers as feeling they had received an inferior service on legal aid. It seemed to depend to a considerable extent on the calibre of the individual solicitor involved. Many probation officers reported that people under their supervision who had used the scheme had no faith in it.

Many probation officers echoed the sentiment that lawyers generally, and legal aid lawyers especially, placed far too much reliance on the probation report and insufficient reliance on their own resources to discover the background and details from the defendant or from other sources. Many probation staff also pointed to the apparent disorganisation of the scheme, and the lack of liaison among involved personnel in criminal proceedings. There was a need for greater communication in the court to find the best solution for the defendant.

Concern at the inexperience of legal aid lawyers was endorsed by the judiciary, police, community groups and by lawyers themselves. The majority of lawyers even went so far as to express their concern that legally aided defendants received a lower quality of service than privately represented defendants. A specific shortcoming mentioned by the police, social welfare officers, and community groups was the lack of communication between lawyer and legal aid client. Not only are difficulties experienced in contacting each other, but if they do make contact, little effort, patience or understanding goes into preparing the client's case.

The defendant's assessment of the service must also be considered (Link, p.420). It is interesting to note that it is consistent with much of the reports from people who are part of "the system":

DEFENDANTS

Of the defendants interviewed respect for the offenders legal aid scheme was considerably less than it was for the duty solicitor scheme. The overwhelming concern of defendants who had used the scheme in all courts was the variable quality of representation and service provided. It greatly depended on the individual solicitor assigned. This alone had lead many regular offenders to lose confidence within the scheme. A significant number of defendants indicated that they either would not use the service again or recommend it to friends.

A resounding complaint of many defendants about the scheme was the inability to choose a solicitor on legal aid. Lawyers who participate in the assigned list generally have a low reputation among defendants; many are regarded as inexperienced, young, unsympathetic and many defendants reported that they attempted wherever possible to raise funds to pay for their own solicitor. Most defendants stressed the importance of obtaining good legal advice for serious charges and High Court cases. Many defendants had encountered inexperienced and incompetent assigned counsel in all courts. They felt that competent lawyers would not be prepared to do the work because the pay was low. Generally the service given was, with few exceptions, rated overwhemingly by defendants as inferior to service given by privately-paid lawyers. Some defendants reported very satisfactory experiences with assigned solicitors, and yet on other occasions, they had received poor

service. A significant majority of defendants pointed to a lack of interest or concern on the part of many solicitors assigned to them. Most defendants detected a reluctance of most solicitors to take legal aid cases, and a general unwillingness to go out of their way....

A significant number of defendants felt that the scheme should provide the same solicitor to represent them from their first appearance onwards. Many defendants complained of delays and maladministration in assigning solicitors to them. This meant in many cases they did not have adequate opportunity to consult their assigned lawyer before their next appearance...

Confidence in the present scheme as a whole, however, was not high among the great majority of defendants although some commented that it was better than nothing....

Other Issues

The following comments were frequently raised by many defendants interviewed:

1. good lawyers do not participate in legal aid work because it damages their reputation
2. feeling of reticence about visiting lawyers assigned in "flash" city offices
3. not many assigned lawyers visit prisons to interview defendants unless very serious offence involved
4. lack of money by defendants real problem; otherwise they would pay for lawyers
5. private lawyers with best reputations too expensive
6. when judge knows a defendent is legally aided this prejudices outcome
7. "lawyers don't care or take time if you don't pay them"
8. need for pool of experienced criminal lawyers to choose from
9. "money talks"

...

11. should have same judge and lawyer throughout

It was claimed by some respondents that the legal aid deficiencies are exacerbated in the children and young persons court. Link's report of the social welfare officers' responses summarize their experience (p.414):

SOCIAL WELFARE SERVICE

Social workers employed by the Department of Social Welfare were familiar with the operation of the scheme through their responsibilities and involvement in the Children and Young Persons Courts. A significant majority of social workers were dissatisfied with the operation of the scheme in these courts.

The view most frequently cited was the lack of skill and knowledge of many solicitors assigned to cases. A lack of sensitivity and experience was often mentioned. There appeared to be considerable lack of cooperation between departmental officers and legal aid solicitors in most centres. Many social workers questioned the need for grants of legal aid where defendants pleaded guilty or admitted offences.

A frequent comment by many social workers was the impersonal nature and variable quality of the service. Inexperience of assigned solicitors and lack of care or understanding of the nature of Children and Young Persons Court work was also consistently mentioned. Some social workers pointed out that few legal aid solicitors made a real attempt to get to know and understand the young offenders and their problems and that their presence in court added little assistance to judges. Many personnel called for greater training for solicitors involved in the work of the aims of the legislation and the roles played by involved personnel. Some social workers felt that the solcitor's adversary approach in the court was inappropriate. Many young offenders who were guilty were encouraged to think in terms of getting away with it rather than mending their ways. A number of social workers speculated whether the scheme was needed at all in the Children and Young Persons Court setting but others saw the need for a watchdog role on their own involvement.

A significant number of social workers felt that assigned solicitors has not made contact with offenders and placed excessive reliance on social welfare reports. Many felt that the court was not really getting realistic independent judgement about cases from a number of legal aid counsel. Several social workers stated that they actively discouraged the involvement of solicitors in all but the most serious cases.

Another group who warranted special attention in this survey was Maori, Polynesian and other ethnic minority defendants. The main response was from Maori Affairs community officers (p.417):

MAORI AFFAIRS

Many community workers and honorary community officers experienced the operation of the legal aid scheme in criminal courts in most centres. In the larger centres and particularly Auckland, Maori Affairs officers were disillusioned with the scheme. Many felt even more strongly about the appropriateness of the courts to deal with some of the problems faced by Maori and Polynesian defendants. A consistent comment from all quarters was the lack of dedication and sympathetic understanding of many lawyers involved in legal aid work. Most Maori and Polynesian defendants appearing before the courts were financially and otherwise disadvantaged, and needed help from people with whom they could relate. Uppermost was the need for their language and cultural background to be understood and to ensure that their point of view was adequately communicated to the court and involved agencies.

Strong doubts were held about whether there was effective communication. This led the great majority of Maori officials and community workers to question the worth of the offender's legal aid scheme for Maori and Polynesian defendants. Many feel that solicitors involved in the work require special qualities, over and above experience, in order to gain the respect of disadvantaged minority defendants.

Many community workers felt that defendants did not know how to use legal aid services and there was a need for greater involvement of court social workers or liaison officers to act as intermediaries between users, people at risk, the court legal aid personnel and solicitors. Some referred to the assignment system itself as haphazard. It was said that Maori defendants especially, were usually reluctant to make contact with people not known to them because of their reticence. As a result, the defendant and solicitor often did not have the opportunity to communicate fully about the case. On the other hand, many felt that assigned solicitors did not go out of their way to make contact with legal aid clients especially if some inconvenience was involved such as a visit to prison.

Comments and suggestions frequently offered by people in this group were as follows:

1. more extensive interpreter services needed
2. need for greater involvement of Maori and Polynesians
3. need to expose legal aid lawyers to cross-cultural experience
4. need for less formal procedure
5. overwhelming support for permanent community workers to cater for special needs of Maori and Polynesian defendants.
6. status in court for community based court advocates or helpers.

There was a common call by many Maori Affairs personnel for greater liaison among involved people and resource groups in the courts. There was a special need to increase mutual understanding of all involved people. There were suggestions that assigned counsel receive special training and exposure to groups working directly or indirectly with defendants. There was also a need to train and educate the groups themselves and for involved personnel to take a more positive and active role in the administration of legal aid schemes. Many saw the need to engender a community approach to community responsibility for problems faced by defendants.

Probation officers felt there are insufficient interpreting facilities and that the lack of concern on the part of legal aid lawyers is pronounced when faced with the special needs of minority group offenders - particularly the language and cultural barriers.

Community groups favoured lay participation in a legal aid scheme by including Maori and Polynesian people and others who are able to relate to people appearing in court.

Link reports that

> Many Maori and Polynesian defendants felt that assigned lawyers seemed particularly unsympathetic to their points of view. They had insufficient time to tell their story and there was little real communication between client and lawyer.

No particular mention of special needs for Maori or Polynesian offenders was reported from the judiciary, lawyers, court staff, enforcement agencies or social welfare officers.

There is a general acceptance in the Link Survey that many legal aid lawyers are inexperienced and consequently the services rendered are less competent than is desirable. Reading Link's report, it seems that most of the comments were made purely in the legal aid context and rarely made comparisons either explicitly or implicitly with the non-legal aid performance. However the results of the file survey render the comparison explicit.

Who Gets Offenders Legal Aid

The relatively simple answer to this question is to give a superficial description of legal aid defendants and to compare this with privately and unrepresented defendants. We do this first and then tackle the more substantial issues raised by this question.

In the district court women were represented by a lawyer more than men but there was no significant difference in the relative use of legal aid by males and females.

Legally aided and unrepresented defendants were slightly younger than those with their own lawyer.

European, Maori and Pacific Island defendants were all represented to a similar extent. Where race had a distinguishing effect was in the proportions on legal aid. Maoris were represented through legal aid to a much greater extent than Europeans or Pacific Islanders.

Ascertaining the employment status of defendants is a hazardous business because in so many cases this information is not given. However where it was explicitly mentioned, legal aid defendants were unemployed much more than unrepresented defendants who in turn were unemployed more than privately represented ones. Occupational status showed a similar trend. Whereas nearly all defendants were clustered in the lower occupational statuses, this was more exaggerated for the legal aid defendants and least for the privately represented.

The more substantial issues arising from the question "who gets legal aid?" are eligibility and the adequacy and accuracy of the legal aid application.

Eligibility

The two main grounds for eligibility as stated in the Act are the gravity of the offence and the means of the person charged or convicted.

In order to examine the legal aid decision in relation to the gravity of the offence, we looked at the number of offences with which the applicant was charged, the type of offence involved and the maximum penalty prescribed.

In the district court it was found that applicants refused and applicants granted aid had a similar number of charges each. There were differences in the type of offence however. Applicants charged with an offence against public order were refused aid significantly more than those charged with other offences. Consequently offenders facing charges with three months imprisonment or less also had a relatively low rate of legal aid.

A similar situation obtained in the children and young persons court, but not in the high court. All eight refusals there fell into the most serious category of offences against the persons carrying a possible penalty of over seven years imprisonment.

Except for the high court which almost by definition deals with serious cases, the gravity of the offence appears to be an issue taken into account to the extent that the least serious offences are granted aid less than other offences.

The means of the legal aid defendant prompted many comments from Link respondents. The overall complaint is that legal aid is too easily available for some defendants and not readily available for others. It was claimed by the judiciary, court staff, enforcement agencies, community groups and defendants themselves that people are granted legal aid who can afford to pay for a lawyer and that applicants either give false information or omit to give relevant financial information in order to be granted aid. There was a general call for a review of eligiblity guidelines and/or some means of verifying applications.

On the other hand, court staff and community groups commented that the present scheme disadvantages the thrifty, low or middle-income earner whose circumstances and commitments preclude him from affording a lawyer. It was frequently observed that lawyers fees are becoming prohibitive for a wide sector of the community. In this context the call was for more flexible eligibility criteria.

Before discussing the charges of abuse further, we examine how financial eligibility criteria are defined in practice from the survey of legal aid applications and relating these to the legal aid decision, using the district court as the main example.

An essential consideration in assessing financial position is the applicants employment situation. 82.7% of applicants stated whether they were employed or not and 62% of these were unemployed plus another 1.9% who were self-employed but out of work. Employed persons were granted legal aid significantly less than unemployed defendants, 58.4% compared with 96.8%. All applicants who recorded the fact that they were a beneficiary were granted legal aid.

Weekly net income is only relevant for persons who were employed, only 30% of all applicants. All but a few gave this information. The results showed that once the applicant's income reached the $101-150 per week range his chances of receiving aid were reduced to less than 30%.

Income from other sources was not very readily identifiable. The opportunity to state this is given to the applicant at the bottom of the largely irrelevant table of assets. 1% of applicants mentioned income from DPB, 13% from unemployment benefit and 12% from other sources. In summary only 26% of the possible 70% without income from wages specified any income.

Very few of the other listed assets were endorsed by many applicants. The most substantial were 17% owned a car, 24% had money in a bank account, 13% were receiving the unemployment benefit and 12% had other income. Liabilities registered more positive responses: 65% were paying rent or board, 24% had hire purchase commitments, 31% had other debts and 11% owed fines. The incidence of assets and liabilities is too sparse to correlate with the decision.

The other question relevant to finances is the number of dependants the applicant supports. 31% claimed to have dependent children, 21% a dependent spouse and 1% a dependent parent. Those with dependants were granted legal aid less than those without. It may be that those with dependants were also the people with jobs and regular income.

The situation in the children and young persons court was similar. Only 14% of applicants were known to be employed and they were granted aid to a lesser extent than other applicants. At least 41% were unemployed. Given this composition and their age, the information on income, assets and liabilities was accordingly very sparse.

None of the applicants to the high court stated their occupation though 71% indicated whether they were employed or not. At least 48% were unemployed. All employed applicants gave their net income but only 8 cases of "other income", e.g. benefits, were noted. The assets and liabilities were again sparse and irregular. Only eight persons were refused aid which is too few for making generalizations about the criteria for granting or refusing aid. For the record, however, 6 of the 8 persons refused were employed and all 8 were married with children. It was evident from the survey that the information as regards the applicant's means provided in the application is inconsistent and inadequate.

Because of this lack of information, it is difficult to arrive at conclusions as to critical factors in the decision and a working definition of what means qualify a person for aid or not. The district and children and young persons courts surveys show that unemployed people get aid more than the employed applicants. In the district court where there were sufficient cases, it also showed that as income increased, fewer people were granted aid. None of this is surprising. But the overall impression gained was that the fact per se that the applicant was unemployed or a beneficiary, without supporting information, was the deciding factor. Perhaps in practice this is sufficient.

Unfortunately because of the inadequacy of information we are not in a position to comment on how the eligibility criteria of means is interpreted in practice and whether more precise criteria would be an advantage. What this exercise has confirmed is the inadequacy and irrelevance of the application form. An associated and strong allegation made by all sections of the Link survey is that people are being granted legal aid who should not get it on financial grounds because of the ease with which they can and do falsify their application. Some defendants themselves admitted to this strategy.

Although we are not in the position to evaluate the accuracy of applications, it is evident that often sufficient and relevant information is lacking. Two reasons are suggested for this. One, the financial information is irrelevant or difficult to provide if employment situations are unstable, and two, the application form itself is organized in a way which suits people who are employed and not the bulk of unemployed applicants. In particular the place for recording income from sources other than work is at the bottom of an irrelevant, cluttered table on the second page. Two specific omissions from the form mentioned in discussions on this topic are that no specific record of daily living expenses is required and that income from benefits should be explicitly requested. Other comments made in this connection are that the application should be checked and verified; that it should be an offence to give false information and the consequence of this should be stated boldly; that the form is unnecessarily complex; that the form should specifically ask for income, assets and liabilities of parents in children and young person court cases.

On the question of verification the survey showed that all applicants in the district court who were employed gave the name of their employer but only 54% gave their employer's address. However only 29% were employed. 87% of the unemployed stated how long they had been unemployed. In these cases opportunities for verification were present. In 1976 the prescribed application form was introduced and is in the form of a statutory declaration. It is an offence to make a false declaration.

The Defendant's Contribution

No mandatory contribution is required from the offender on legal aid. However, we believe a practice is growing where aid is granted on the condition of a contribution. The statutory provision cited as authority is s.2(4) Offenders Legal Aid Act 1954:

> Any direction given under this section [i.e. whether to grant legal aid or not] may be in respect of the whole of the expenses of the person charged or convicted or in respect of such part of those expenses as the Court thinks fit.

A preliminary incursion into this area in early 1980 asked court registrars if defendants in this court were ever ordered to pay a contribution towards legal aid and of the 57 responses, 34 said never, 13 rarely and 10 occasionally. A more systematic exercise examined court registers and noted any entries where contributions had been ordered. Assuming perhaps unrealistically the notation was thorough, this showed the incidence of contribution less widespread than reported. 8 courts out of 73 (11%) ordered contributions in 1979, accounting for 0.1% of legal aid grants in one court to 15.7% in another. The average amount ordered was $25 and the average amount paid was $23. 61% of the contributions were paid. It is not known whether those who did not pay, hired their own lawyer or went without a lawyer.

The questionnaire to registrars also asked a couple of questions about the mechanics of enforcement when contributions are ordered. Nine courts did not allocate a lawyer until after a contribution was paid. Other responses covered the following methods of enforcement: as for a fine; waive contribution at hearing; counsel deducts it from voucher; judge advised; can't be enforced.

Respondents to the Link survey were asked their opinion of contributions in offenders legal aid. All but the defendants themselves saw some merit in a contribution. Two main reasons were given. First, it was felt that an initial application fee or standard contribution would help prevent the abuses outlined in the previous section. The second purpose was to make the eligibility criteria more flexible so that deserving people with lower-middle incomes would qualify for aid. A means tested, assessed contribution was seen as appropriate for this function. A distinction mentioned by several of the respondent groups was between defendants who successfully defended a charge and those convicted. It was felt that the former should not have to pay towards their aid.

Most defendants were opposed to a monetary contribution, principally because of the standard of service provided. They frequently commented that if they could afford to pay for a lawyer they would.

Lawyers' Participation

Lawyers' participation in offenders legal aid is voluntary. In 1979 21% of New Zealand firms were involved in offenders legal aid cases in the high court, and 41% in the district court. The regulations state that a list of willing lawyers shall be kept and that the registrar will assign one of these to the case. Only when a person is charged with murder or treason does he have a choice of lawyers.

To avoid the possibility of touting, the theoretical position is that lawyers will be assigned in rotation. As the Link survey and our questionnaire to registrars showed, not all areas can operate in this way. We asked registrars three questions about assigning lawyers to cases. Half the courts assign a lawyer from the list in order. The remaining courts either singly or in combination used the following criteria: defendant permitted to choose or allocated the duty solicitor; whoever is willing or available to take the case; any available solicitor except the duty solicitor. In most courts if a defendant turned up in court with a solicitor and was granted aid, he would usually be assigned this solicitor. Only occassionally did the judge name a lawyer in court. The local variability was evident in this survey and for smaller towns it was a matter of using the few lawyers available.

Link respondents were asked for their views on the defendant having the right to choose his solicitor rather than being assigned one. The judiciary and court staff on the whole thought the defendant should not have this right.

The reason given by the judiciary was that it would lead to further abuses of the system. Both groups qualified their response with the thought that a defendant should have the right to choose if he had had previous dealings with the solicitor or was charged with a serious offence.

All other groups thought the defendant should choose, though most qualified this by saying it should be from an approved list of experienced lawyers who would be appropriately rewarded or a lawyer with whom they have dealt before. The reasons given by lawyers, defendants and community groups all revolved around the quality of the service provided. Lawyers said they were aware of defendants who had no confidence in solicitors assigned to them; defendants said that lawyers on the list have a low reputation amongst defendants and are regarded as inexperienced, young and unsympathetic; community groups also spoke in terms of inexperience and lack of sympathy. The right to object to an assigned lawyer was mentioned by some lawyers.

Lawyers Remuneration

The method of paying lawyers for an assignment is set out in the Offenders Legal Aid Regulations 1972. The current levels of remuneration were stipulated in the 1978 Amendment. Fees are determined by the court at one of the three fixed rates - scales I,II, and III. The bases on which a scale is awarded are the seriousness of the offence, the complexity of the case and the lawyer's conduct of it. Disbursements, reasonably and properly incurred, are paid subject to approval. In exceptional circumstances the judge may set aside the scale fees and approve costs.

Prior to the 1972 scales, there was one set of fees set down in 1956. The original criterion for setting the fees was to make them analogous to those paid to crown solicitors. This had been the position under the original legislation of 1912 and it was the general position following the 1954 Act. This comparability has since been eroded to the disadvantage of offenders legal aid.

A comparison in the movement of offenders legal aid and crown solicitor fees over the years, is interesting. Whereas offenders legal aid fees have been reviewed twice since its inception, in 1972 and 1978, crown solicitor fees were increased in 1959, 1963, 1969, 1974, 1977, 1980 and 1981. For the purposes of comparison, we take the case of receiving instructions and appearing on a guilty plea for one information in the district court.

Scale II is used for comparison as it is by far the most usual scale. In 1956 when offenders legal aid fees were first regulated, the legal aid and crown solicitor fees were the same. After the 1972 regulations, legal aid had fallen behind to 87% of crown solicitors fees, this decreased to 49% in 1978 and to 26% today. Similarly with a not guilty plea involving 2 hours preparation and half a days appearance, the fees were the same in 1956, but by 1972 legal aid was 85% of crown solicitors fees, 46% in 1978 and only 25% today.

Apart from differences in the actual fees, additional differences emerge because of the criteria for payment. Crown solicitors receive additional fees for receiving instructions and preparation on each additional information. Offenders legal aid had this from 1956 to 1972 for two or more additional changes but lost this in the 1972 amendment. Crown solicitors also receive additional fees for appearance on each extra guilty information which offenders legal aid does not. As from 1977 crown solicitors' fees have one further advantage over offenders legal aid fees. The former may charge for their first hour of preparation for a not guilty plea whereas the latter cannot.

Another comparison that should be made is offenders legal aid fees with lawyers' income from private cases. We do not have the data to do this directly, but an average hourly rate of self-employed legal practitioners has been estimated by dividing their average assessed annual income for taxation purposes (Department of Statistics, Monthly Abstracts of Statistics) by 1300 work hours per year. This has increased 6-fold since 1956 from $3.92 per hour to $23.53 per hour in 1980. In comparison with this, offenders legal aid offered in 1980 and still in 1981 $10.12 per hour for preparation and approximately $13 per hour for a defended hearing in the district court.

Discontent with remuneration for offenders legal aid has two aspects. One is the method of remuneration and the second is the level of the fees. The judiciary, the lawyers and the court staff all had something to say about remuneration in the Link survey. The report on lawyers' responses shows the main points:

Remuneration

An overwhelming majority of lawyers felt that the present level and method of remuneration was inadequate. This point was raised by almost all lawyers surveyed in discussions and questionnaires. A significant majority felt that the level of remuneration should reflect an hourly rate of between $30-40. A minority felt the rate should be considerably higher. Many lawyers felt that a rate of less than $30 per hour represented a substantial subsidy to the scheme by their firms.

The general view of most lawyers was that the three fixed scales were inappropriate and should be replaced by either a regularly reviewed single scale or an hourly rate. Many lawyers referred to the inflexibility of the scale because it could not accommodate the variables of time and complexity associated with each case. Some lawyers felt that remuneration should be sufficiently flexible to allow higher rates for more complex cases or where senior or experienced counsel are involved.

Many lawyers felt that allowances for disbursement and other expenses should be reviewed. Specific provisions were frequently mentioned such as mileage allowances. Other lawyers felt disbursements should include postage, photocopying and typing. A significant number of lawyers however, felt no adjustment to disbursements was required. Some lawyers felt expert and witness expenses should receive upward adjustment whereas a significant number again were satisfied with the present levels. Some lawyers pointed to an inflexible attitude on the part of court staff about the level of disbursements approved.

In addition to this, judges commented that on the one hand an increase in fees was not justified for the inexperienced solicitors, but on the other an increase is the only way to attract experienced counsel. Some judges felt the assessment of the lawyer's performance inherent in the scale system is repugnant. Along with court staff they thought the three scales should be abolished.

We do not have much in the way of empirical data to discuss the issue of the method of remuneration except that in our file survey 86% of grants in the district court were approved at Scale II, 12% Scale III and 2% Scale I. The children and young persons court proportions were 83% at scale II and 17% at Scale III. The situation was slightly different in the high court where in 11% of the cases actual bills were submitted and approved, 75% were at Scale II and 13% at Scale III.

As to the level of remuneration the discussion concerning the original rationale for offenders legal aid fees and how this has been eroded over the years demonstrates the complaint. The Law Society and individual lawyers have been claiming they can no longer afford to subsidise this operation, as the fees do not even cover their overheads.

From an examination of offenders legal aid payments in 1979, income from this source in district court cases ranged from $13 to $11,320 per firm with an average income of $255 per firm. The analogous figures for high court legal aid work ranged from $7 to $8,911 with an average of $222 per firm.

CONCLUSION

The origins of offenders legal aid are so deeply rooted in English history that it is difficult to formulate from the Act or from the discussion surrounding its introduction the pupose of offenders legal aid. Consequently, we have had to infer the objectives of the scheme from its history and by applying principles of natural justice. Based on the premise that all defendants should have equal protection before the law and that they should not be disadvantaged because they cannot afford a lawyer, the Offenders Legal Aid Act provides financial assistance to people charged with an offence if the gravity of the offence and their means warrant it. In lieu of objectives, we concentrated on examining two elements of the scheme: eligibility and the quality of the service rendered under legal aid.

Offenders legal aid was granted to over 13,000 people in 1980. A large number, but it is estimated that only 16% of district court defendants charged with an imprisonable offence received aid compared with 33% who have their own lawyer and 51% of who are not represented at all. Unfortunately we do not have 1979 or 1980 figures for the total number of defendants in the district and children and young persons court to check the sampled proportion with the actual 13,000 plus grants. In this context offenders legal aid is not as profuse as critics suggest. Legal aid is more frequent in the high court (as is representation generally) where 56% of accused had aid. We can but speculate whether the change in jurisdiction with jury trials in district courts will affect the use of legal aid in these cases.

What attributes distinguish defendants on legal aid from other defendants? The aspect of eligibility that is causing concern is the financial one. The Act says that the court, when considering whether to grant legal aid, shall have "regard to the means of the person". Unlike civil legal aid, this is given no specific value, but leaves it entirely to the courts discretion.

Unfortunately an examination of application forms and decisions could not provide satisfactory answers as to how this is interpreted in practice because of the inadequacy of the applications - information was sparse, irregular and inconsistent.

Three reasons for this were identified. First, at least 51% of applicants were unemployed and another 18% did not stipulate whether employed or not. Consequently income information as asked for on the form is irrelevant or difficult to provide. Secondly, and associated with the first point, the application form is designed with an emphasis on income from wages and tangible and recognized assets, particularly forms of savings. As contended before, income from benefits or sources other than wages, a situation which seems to apply to most applicants, is tucked away at the bottom of largely irrelevant and wordy page. A better designed form would undoubtely help rectify this point and may assist with the third point, that is, that applicants deliberately falsify or omit relevant information from their application, a practice admitted by some defendants. How widespread this is, we do not know.

Because of this lack of information, conclusions about who receives aid, particularly in relation to their financial situation are tentative. Unemployed people received aid more than those employed, and as one would expect, chances of receiving aid diminished as wages increased. In late 1979, if you earned $50-$100 per week your chances were 60:40 to be granted; over $100 per week your chances decreased to 50:50. We had insufficient information to establish a cut-off point.

The second eligibility criteria, gravity of the offence, has not been subject to much criticism, but the research showed that applicants charged with offences against public order, assumed to be less serious offences were refused aid significantly more than those with other types of offence.

If the principle of equal access to the law is to have any validity, it is essential that services rendered through the auspices of legal aid should not be inferior to those provided by privately retained lawyers. Because of the relative homogeneity of need amongst defendants and the comparatively few aspects of representation in criminal proceedings when compared with civil problems, it is not an improbable aim to strive for this equality and to evaluate offenders legal aid performance with

reference to it. What substance is there, therefore, to the criticisms, which have reached almost mythical proportions, that the quality of representation provided through legal aid is unsatisfactory and by implication inferior to that given by privately retained lawyers?

Link's survey of participants in the criminal system showed a widespread concern for the variable quality of service provided by legal aid lawyers. The judiciary, police, community groups, probation officers, lawyers themselves and defendants all commented on the inexperience and lack of commitment of assigned lawyers. Although we could not directly test the allegations about inexperience, there was some support for the arguments of varying quality in the results of the file survey. We could not rule out absolutely the possibility that legally aided defendants are a qualitatively different group from other defendants but the survey concluded that generally legal aid defendants are remanded in custody, convicted and sentenced to a custodial penalty more that privately and unrepresented defendants are, even when controlled for seriousness of offence and severity of previous penalties. It seems reasonable with the experience and knowledge we have at present to conclude that offenders legal aid is failing to provide the equal protection in the district courts as originally intended. The same cannot be said of the high court where it is generally accepted that legal aid assignments go to more experienced lawyers.

A first reaction to the question of inferior service, a plight acknowledged by some lawyers, is to advocate increased fees for assignment. There is no guarantee that this alone would have the desired effect, but one can certainly understand, if not condone, that the present eroded levels of remuneration would not encourage a lawyer to spend time and effort on his assigned cases.

Finally, associated with the question of quality are the allegations that legal aid is abusing the system: first in respect of unwarranted not guilty pleas and secondly in the unjustifiable elections of jury trials.

Despite the strong contentions held by the judiciary, court staff, probation officers and police prosecutors that legal aid is abused in these respects and the consequential blame attached to legal aid for court delays and difficulties in programming, the empirical results categorically deny this effect by demonstrating that privately represented defendants elect trial by jury and plead not guilty to the same extent as defendents on the legal aid.

3

Duty Solicitor Scheme

INTRODUCTION

"Our criminal procedure is founded on the premise that justice will best be achieved through a contest between two parties standing on an equal footing." A statement from the Secretary for Justice in 1972 when the duty solicitor scheme was first mooted. It is from this premise that the arguments for legal aid and the duty solicitor scheme flow. Given the knowledge, expertise and resources of the prosecution it is argued that expert representation is required for the defendant and that a defendant should not be denied this because he cannot afford it. Offenders legal aid fulfills this function to a certain extent but more often than not it cannot cater for the preliminary requirements of the defendant, leading up to and including the first court appearance. The rationale of a duty solicitor scheme is to help overcome the ignorance, resignation or cynicism of defendants in the face of the system, to explain and advise the defendant on the charge, his plea and legal representation, to make access to legal aid a reality.

After considerable debate and negotiation, a nationwide duty solicitor scheme was introduced in 1974. Prior to this, experimental schemes had been initiated by various organisations in Nelson, Whangarei, Christchurch and Hamilton. The nature and scope of the national scheme was outlined in an annexure to the cabinet's approval for the scheme:

Application and Principles

1. The scheme will cover -

   (a) All persons in custody prior to their initial appearance in the Magistrate's Court.

   (b) Persons appearing on summons charged with an imprisonable offence, should they wish a duty solicitor's assistance. It is, however, an integral part of the proposals that persons served with a summons should be given written advice of their right to representation, its advantages and how to secure it.

   (c) Children or other persons appearing before the Children's Court subject to any provisions of the Children and Young Persons Bill.

2. The principles of the scheme are -

   (a) The duty solicitor scheme is an addition to and not a substitute for the present criminal legal aid scheme.

   (b) Its purpose is to provide advice and assistance to defendants charged with imprisonable offences before they appear in Court.

   (c) It does not force legal representation upon defendants who do not want it.

   (d) The duty solicitor will be a solicitor in private practice drawn from a roster of legal practitioners.

   (e) He will not act as counsel to defend a charge. This will continue to be done by a solicitor engaged by the defendant if he has the means, or appointed under the Offenders Legal Aid Act.

   (f) The precise form of the arrangements should be flexible, room being left to adapt it to local circumstances. An informal committee is proposed for each court centre comprising the Registrar of the Court, a senior Police Officer and a representative of the legal profession, together with representatives of other interested departments and of community groups. Maori and other Polynesian participation is to be sought wherever there is a significant non-European population.

The New Zealand Law Society Manual for Duty Solicitors (1980) set out their duties as follows:

1. to interview defendants held in custody and those appearing on bail summons:
2. to complete an instruction sheet for each defendant seen:
3. to advise any defendant who has not arranged representation by private counsel of the availability and advantages of private legal representation or legal aid and assist the defendant with the necessary arrangements:

4. to explain to the defendant that he can plead guilty, not guilty or obtain a remand without plea and discuss with the defendant the nature of the charge and the facts of the case in order to advise the defendant as to what plea should be entered:

5. to advise the defendant as to bail, where appropriate, and record sufficient information as to the defendant's accommodation, employment situation, domestic status and the availability of sureties to be in a position to support a bail application:

6. in appropriate cases to advise the client of the right to apply for suppression of name, for remand for psychiatric report or for the case to be stood down for an interpreter to be obtained.

7. to make all necessary applications or submissions on the client's behalf including an application for bail or plea in mitigation where appropriate.

The scheme was introduced without legislation on an administrative basis and was heralded as yet another example of a partnership between the government and the legal profession. Once again the government was to be responsible for finance and the Law Society for recruitment and supervision. One of the reasons for its administrative basis was to enable maximum informality and flexibility to suit local needs. The rate of remuneration was settled in 1974 as $7 for the first half hour and $6 per half hour thereafter. At the time it was understood in the discussions with the Law Society that this level of remuneration would be adequate to ensure that middle range lawyers provide the duty solicitor service. These rates remained unchanged until August 1981.

Not surprisingly these "hopelessly inadequate" and "ruinously low" fees caused increasing dissatisfaction amongst practitioners over the years. By early 1981 it was evident that lawyer participation in the scheme was diminishing and the Law Society indicated that they could not continue to encourage support for the scheme. In 1981, duty solicitor fees were doubled to $14 for the first half hour and $12 for each half hour thereafter.

However the total duty solicitor allocation increased by only 43% to a total of $430,000 in 1981/82. It was therefore necessary to redefine the duty solicitor's role. From August 1981 the scope of the scheme extends only to persons in custody or on police bail who are charged with an imprisonable offence. This respread of funds is considered justifiable as local practice had circumvented the original

"first-aid" intention of the scheme for those charged with imprisonable offences, to the extent that duty solicitor expenditure represented more than 50% of total criminal court sitting time, including summonses and traffic offences.

THE DUTY SOLICITOR IN PRACTICE

Just how effective the duty solicitor scheme is, is difficult to assess empirically because of the lack of documentation involved in the scheme. However, with the little data gleaned in our survey of criminal files and from the experiences expressed in the Link survey and the questionnaire to court registrars, we are able to give some appreciation of the scheme in practice.

Usage and Costs

We do not have any direct data on the number or proportion of defendants who consult a duty solicitor. Even our survey of court files was not a sufficiently reliable source of information as only some courts noted in a consistent manner duty solicitor attendance on the file. However it was noted that 37% of defendants charged with an imprisonable offence in the district court in 1979 definitely saw the duty solicitor and that 19% definitely did not. This must be regarded as the minimum possible proportions as we did not know the situation for the remaining 44% of defendants. It is unfortunate that in this very important and controversial area it is virtually impossible to obtain empirical and concrete data on the use and implications of the duty solicitor scheme. All remaining results from this survey which are reported here must be appreciated within the limitations that we do not really know the situation for almost half the defendants and we cannot assume they would behave similarly to the half we do know about.

Indirectly we can gain an impression of the extent of use of the duty solicitor by analyzing the cost of the scheme and estimates of time spent by lawyers in the capacity of duty solicitor.

The cost of the duty solicitor scheme since 1975 (first full year of operation) has increased 65%. On the basis of $13 hours, duty solicitor expenditure is converted into the number of hours duty solicitors attended court:

	$	hours
1974/75	92,384	7,106
1975/76	155,275	11,944
1976/77	182,473	14,036
1977/78	187,851	14,450
1978/79	210,907	16,223
1979/80	228,048	17,542
1980/81	255,627	19,663

Some 1980 indicators of court workload put the $255,627 in context. In 1980 the court spent 32,362 hours hearing criminal business excluding minor offences. The duty solicitors' 19,663 hours therefore represent 61% of court sitting time. Also in 1980, the district court sat to hear criminal matters on 13,863 occasions. If, for the sake of illustration, a duty solicitor had been present at each of these, the costs would average out at $18 per occasion, i.e. in 1980 terms an average of one and a half hours for every court sitting.

From an analysis of certified duty solicitor sheets, we showed that in 1979, 51% of law firms participated in the scheme. A Law Society survey showed that in 1977 35% of the sampled lawyers had spent some time on duty solicitor or offenders legal aid in the preceding 12 months.

In yet another exercise we examined the deployment of the duty solicitor in relation to court sitting times and workloads for six centres: Auckland, Otahuhu, Hamilton, Palmerston North, Wellington and Christchurch.

The following table shows the number of weekdays, Saturdays and public holidays a duty solicitor was present at court. In the case of weekdays, the number of days the court sat is also indicated.

	weekdays	Saturdays	public holidays
Auckland	247/247	52	6
Otahuhu	237/247	51	8
Hamilton	229/247	0	1
Palmerston North	153/200	2	1
Wellington	241/247	40	9
Christchurch	241/247	39	10

The next analysis resulted in the average number of lawyers acting as duty solicitor on any one day and the average number of hours spent by a solicitor on duty each spell. Obviously to be meaningful these figures need to be related to the amount of potential work. For the preliminary work for our file survey, Wanganui computer supplied the figure for each court of the number of persons charged in the district or children and young person courts with an imprisonable offence in 1979. We used these figures to derive an index of the number of eligible cases per duty solicitor.

	average no. duty solicitors per day	average no. of hours per duty	No. of eligible cases per duty solicitor
Auckland	4.6	3h 09m	9.6
Otahuhu	2.0	2h 43m	7.8
Hamilton	1.5	2h 41m	9.3
Palmerston North	1.3	1h 32m	7.1
Wellington	2.8	2h 16m	6.7
Christchurch	2.0	2h 22m	8.9

Scope and Nature

Although the duty solicitor quickly developed into an accepted and substantial part of the criminal defence system, there has been much criticism in its wake. This revolves around questions of exactly what is the duty solicitor meant to do, in relation to whom, and the quality of the service provided.

Two issues come under the general heading of scope. First, what is the role of the duty solicitor in the children and young persons court? The original outline of the scheme explicitly included people appearing in this court under the duty solicitor's ambit. It was acknowledged in the Department's circular to court registrars (1973) however, that this would depend on the attitude of particular magistrates as some had indicated that they discouraged legal representation in the children's court. This lack of consensus was still evident in some of the responses to the Link survey. The social welfare officers' views were summarized as "some social workers questioned the value and appropriateness of the scheme in the Children and Young Persons Court" and "A strongly felt view was that duty solicitors often add an

unnecessary formality to the Children's Court and unless more specialist and experienced solicitors become involved, it was felt the present service provided little assistance and was of little value". From the lawyer's perspective "there appeared to be, on a number of occasions, a misunderstanding of the duty solicitor's role by social welfare officers". Lawyers, court staff, prosecuting agencies and community groups all felt that the problems associated with the duty solicitor scheme were exacerbated in the chidren and young persons court.

The second matter associated with scope is the extent of the duty solicitor's services. Until the recent redefinition there had been a continuing misunderstanding about whether the duty solicitor services were provided for defendants summonsed to court. The original description of "application and principles" of the scheme said that it will cover "all persons in custody" and "persons appearing on summons charged with an imprisonable offence" though these latter would be encouraged to obtain legal advice before they come to court. The Law Society manual described the duty as "to interview defendants held in custody and those appearing on bail summons".

The current notice to defendants on the back of the summons reads "You should only avail yourself of this scheme if you have been unable to contact a lawyer" and "you can get free help from a duty solicitor if you have been charged with any offence, including a traffic offence, for which you could be imprisoned". It would seem from these statements that the critical eligibility criteria was an imprisonable offence, regardless of whether in custody or bail or summonsed. Although no confusion in this area was particularly apparent from the Link survey, it was alluded to on a number of occasions in the questionnaire put to court registrars, a few of whom said the service should only be for police prisoners. When asked directly, the replies indicated in all but a few courts that the duty solicitor's duties extended to bailed and summonsed defendants. However a difference did emerge as regards availability according to whether the defendant was in police custody or on bail. In most courts the duty solicitor saw all of those in custody whereas it was more usual for him to see only those who asked to see him or directed by the judge to be seen from amongst the bailed group. The files survey does not provide conclusive results but it can be stated that at least 22% of summonsed defendants saw the duty solicitor compared with at least 40% of arrested ones. The recent changes have clearly stated the duty solicitor's scope from now on.

A related issue that emerged from both the questionnaire and the Link survey is the position as regards access to arrested persons at the police station. The Judges Rules say that private consultation with a solicitor should be available at this stage and attempts were made to incorporate this in the original duty solicitor scheme. The police however were not receptive to this unless the prisoner positively expressed the desire to see a solicitor. This question was left to local initiatives. The registrars' questionnaire showed that in most courts it was an occasional, rare or non-existent practice. In the Link survey this lack of access was a frequent complaint from lawyers but many police pointed to their willingness to allow earlier access to defendants in custody but the opportunity was seldom taken.

By "nature" of the duty solicitor scheme we refer to what he actually does, what services are performed and how satisfactorily. Referring back to the original list of duties, the duty solicitor's function is generally to advise and assist defendants before their first court appearance but not to act as counsel to defend a charge. The Law Society instructions elaborated this to taking instructions, advising on legal representation, legal aid, plea, remands and bail and other interim matters and to make applications and submissions for bail and pleas of mitigation. The lack of notation or documentation in relation to the duty solicitor has made the task of describing what actually happens virtually impossible. Tentative results are available from the file survey. These are supplemented by the views of participants as gleaned in the Link survey and the questionnaire to court registrars.

As regards advice about legal representation and bearing in mind the large amount of missing information, the file survey showed that considerably more defendants who saw the duty solicitor ended up unrepresented than defendants who did not use the duty solicitor. This may imply that the duty solicitor went to the extent of a plea of mitigation but we were not able to follow up this eventuality. Defendants who had seen the duty solicitor and were represented by another solicitor later were more likely to be on legal aid than represented defendants who had not consulted the duty solicitor. 26% of defendants who saw the duty solicitor did so on a day before they pleaded and 74% consulted him on the same day they made their plea. The pleas of defendants who consulted the duty solicitor were similar to those who did not consult one.

The questionnaire to registrars investigated the mitigation aspect of duty solicitor work by asking how the solicitor was paid if he speaks in mitigation. A very few courts said the duty solicitor did not do this. Of those who did most were paid as part of their duty solicitor time and a very few mentioned combinations of duty solicitor and offenders legal aid payments.

Link respondents did not discuss the nature of the duty solicitor's work but they had a lot to say about the quality of it.

The degree of satisfaction expressed varied with respondents. The judiciary and court staff were generally satisfied, whereas probation officers, social welfare officers, Maori Affairs officers and community groups were generally dissatisfied. That the scheme is essential and useful was explicitly reinforced by lawyers, defendants and community groups. Defendants felt this type of scheme is essential, particularly for first offenders though regular offenders had greater reservations.

Despite this variation all groups commented strongly that the quality of the service is very variable and is a cause for concern. Once again the inexperience of the solicitors was cited as a major contributing factor. In 1980 we asked court registrars for their opinion of the experience of the duty solicitors in their court. Most considered the duty solicitors to be "middle" counsel as opposed to senior or junior and that they were experienced in criminal work. We also asked whether any controls over competence operated. Screening was not a common practice and where it occurred, it was mainly a Law Society function and the registrars were not conversant with any particular procedures in this regard.

Another resounding complaint was that the duty solicitor does not have time to do his job properly, particularly in the bigger courts. The judiciary, lawyers, court staff, community groups and defendants themselves all thought the duty solicitor could not do justice to the client given the lack of time, inappropriate facilities and lack of privacy. The police felt the solicitor had sufficient time if he arrived early enough. The judiciary and court staff also noted that duty solicitors often arrived late. However, except for a few courts, attendance of duty solicitors was not a problem as far as registrars were concerned.

What would seem a simple enough situation, that is getting the duty solicitor and his clients together, in fact is a continuing problem. From the previous discussion it is not clear whether it is police or lawyer reluctance which hinders the duty solicitor contacting arrested persons at the police station. Another perennial problem is the time the police bring their prisoners to the court. However only a few courts reported unsatisfactory performance in this regard. And of course there is the time summonsed or bailed defendants arrive at court which cannot be controlled except by encouragement. Suggestions to remedy the situation made by lawyers and court staff included involving more solicitors on duty at peak hours and busier court days, support staff to facilitate earlier contact between duty solicitor and defendants, rearrange court schedules to call duty solicitor clients later.

As to privacy, the results of the questionnaire to registrars showed that in most courts the interview between solicitor and bailed client could not be overhead by others but the privacy of interviews with clients in custody could not be assured and in a number of courts the interview could be overheard by the police and/or other defendants. The facilities are known to be inadequate in some courts - none or too few interview rooms, sharing of rooms, inadequate soundproofing, distance of rooms from cells or court resulting in lack of police cooperation.

Remuneration

Remuneration was a major issue for lawyers at the time of the research for this exercise. As Link reported "an overwhelming majority of lawyers felt that the present rate of remuneration was totally inadequate and cited this factor as the main reason for experienced solicitors not being involved in the scheme. It was mentioned frequently that existing duty solicitor fees did not sustain current office overheads....Unless the present rate of remuneration was increased substantially, the scheme was in jeopardy". The judiciary supported the claim for better remuneration, but court staff and probation officers were divided on this issue. A recurring comment elicited from court registrars was that the scheme depended on the goodwill of the lawyers and fees should be increased.

At that time the level and method of remuneration had not changed since the scheme's inception: $7 for the first 1/2 hour of duty and $6 for each following 1/2 hour. It compares with the estimated hourly net income of self-employed lawyers at the time: $12.76 in 1973 and $15.53 in 1974. The 1980 equivalent is $23.53 and the new rate is more than in line with this at $25. However the duty solicitor fee is subject to tax, and lawyers claim that a gross figure of at least double the net rate is required to allow for overheads. According to a Law Society survey the average expenses per hour for a partner in a law firm were $21.50 in 1980, and the Society suggests they may now be approaching $25 per hour.

Administration

One of the features of the duty solicitor scheme is the informal nature of its organisation, thus permitting flexibility in meeting local needs and conditions. The local duty solicitor committees are an example of this informal structure resulting in much local variety. It has been an advantage in small towns where too formal a structure would have been inappropriate to the small caseload, infrequent court sittings and limited number of practitioners. Some of the larger cities have made more conscientious use of committees, incorporating local and voluntary organisations, finding it a useful institution on the liaison side of the scheme. The absence of committees in most of the larger towns probably results from a laissez-faire attitude where existing channels of communication with the police and Law Society are considered effective and easy, and the potential of community involvement is not considered, whether rightly or not, worth tapping. Another example is the duty solicitor roster, its operation and effectiveness. It was evident from the questionnaire to registrars that in smaller courts the notion of a roster is a fairly fictional one in that there are only one or two lawyers and few court days when their services are required. Similar considerations apply with regard to the separation of duty solicitor work and legal aid clients. These results provide a timely reminder that New Zealand is not an homogeneous whole: needs will differ and services should respond to these local differences.

CONCLUSION

The purpose of the duty solicitor scheme can be stated as providing a link between the defendants and the court hearing, by giving pre-trial advice on such things as plea, bail and legal representation, thus recognising that a fair trial can be frustrated at these preliminary and procedural stages. Compared with the other two "official" legal aid schemes, the duty solicitor scheme is a conscious acknowledgement of the importance of advice per se, even though this is still associated with a court context.

Although there is no doubt that the duty solicitor is used extensively in New Zealand, it is difficult to evaluate how effectively because of the dearth of documentation. Our conclusions, therefore, rely on the experiences of various participants, who give a similar response with regard to quality of service as they did for offenders legal aid.

Inexperience of rostered lawyers was cited as a major reason for inferior service, an allegation we have not been able to investigate. The other contributing factor is said to be the lack of time and privacy needed to do justice to their client's case.

The other topical issue that reflects on the effectiveness of the duty solicitor, is how wide should these services be offered. From the various statements describing the scheme, including the original cabinet decision, it seems the critical eligibility criteria until recently was persons charged with an imprisonable offence, regardless of whether they were held in custody, released on bail or summonsed. People summonsed to court are now explicity excluded. People in custody of course have priority and those bailed are encouraged to seek legal advice before they come to court. In terms of the perceived needs that led to the introduction of the scheme, the scheme is just as applicable to released defendants as those in custody. Certainly the latter have a physical barrier to a lawyer and therefore to advice, but the lack of motivation caused through ignorance, cynicism or resignation can exist in both settings.

Much of the bitterness about remuneration should now be allayed given the recent doubling of duty solicitor fees. It is now necessary to monitor whether the limited scope of the scheme either ensures duty solicitor clients get a better deal and to keep a watching eye on whether the ineligible defendants are effectively disadvantaged or can cope adequately without this type of service.

4

Other Forms of Statutory Legal Assistance

There are two other forms of statutory legal assistance which have not yet been mentioned. One operates in the civil law area and the other in criminal cases.

COUNSEL APPOINTED TO ASSIST THE COURT

Under s.30 of the Guardianship Act 1968 the Court may appoint a solicitor or counsel to assist it, or to represent any child who is the subject of, or a party to the proceedings. Where a lawyer is appointed in this way, his fees and expenses are to be paid out of the Consolidated Account, but the Court can order that any party to the proceedings refund all or part of these fees or expenses. The number of occasions this provision is used is not known. We do not have exact figures on the expenditure by government in these circumstances as the financial category includes the odd fee paid for other professional services. Bearing this qualification in mind government expenditure over the past five years has been very substantial:

1976/77	$ 45,001
1977/78	$ 54,225
1978/79	$ 96,400
1979/80	$113,400
1980/81	$291,300

We note the substantial increase in expenditure during the last three years.

COSTS IN CRIMINAL CASES

The Costs in Criminal Cases Act 1967 provides that a criminal defendant may be excused all or part of the costs of prosecution, for which he is generally liable. The relevant provision is s.5, which provides that where any defendant is acquitted, or has an information charging him dismissed or withdrawn, or is discharged under s.167 of the Summary Proceedings Act (relating to insufficient evidence being presented against the defendant), the Court may order a just and reasonable sum to be paid towards the costs of defence. The Court is to have regard to all the relevant circumstances, including whether the prosecution acted in good faith, reasonably, and properly; whether a dismissal is on a technical point alone, or on substantial grounds; and whether the defendant's conduct warrants such a payment. No defendant is to be granted costs just because he was acquitted/discharged, or any information against him has been dismissed or withdrawn, but nor is he to be refused costs just because the proceedings were properly brought and continued.

Under s.6, if the defendant is convicted, but the prosecution involved a difficult or important point of law in the case, the Court may order that the defendant be paid a just and reasonable sum towards his costs. Section 7 governs who shall pay or help pay for the defendant's costs, and s.8 is concerned with costs on appeal. A defendant will not automatically receive or be refused costs purely by reason of his success or failure on appeal.

Again we do not know how often applications are made or granted pursuant to this Act. It is believed however, not to be often. This is interesting in light of the views expressed by several groups of Link respondents that persons who successfully defend a charge should not have to pay for it.

The amount government has contributed in fees and expenses over the past five years is:

1976/77	$18,453
1977/78	$18,306
1978/79	$61,970
1979/80	$13,776
1980/81	$17,853

The extraordinary high in 1978/79 is accounted for by an order associated with the JBL trial. Apart from this, expenditure has remained fairly steady in this area.

5

Community and Voluntary Law Services

INTRODUCTION

As the preceding survey shows the scope of government sponsored legal aid is fairly narrowly drawn. In essence 'official" legal aid assists only those with no or small means to obtain legal representation in court proceedings, thus leaving large areas of legal services uncovered by aid. There is increasing recognition that lawyers working in private law firms cannot provide readily accessible advice and representation for all the legal needs in society. The growth of legal referral centres and citizens advice bureaux indicates that traditonal means of imparting advice and providing assistance are not adequate to meet the full range of legal needs required by those of small or modest means, and those placed at a disadvantage by language, cultural or social barriers. This chapter decribes some of the efforts from within the community to fill the gaps, ranging from very informal contacts to highly structured enterprises.

As little research has been undertaken into these initiatives, the tenor of this chapter is descriptive, with discussion as regards effectiveness where we feel competent to comment.

CITIZENS ADVICE BUREAUX; LEGAL ADVICE BUREAUX

In New Zealand, the first Citizens Advice Bureau (CAB) opened in Ponsonby, Auckland in 1970. This bureau occupied a former church hall off Ponsonby Road in an area which then comprised a mix of older European residents and younger

immigrant families from the Pacific Islands and Maori rural communities. The referral service that developed in conjunction with the CAB operated on a limited basis - a mid-week evening and Saturday morning. Volunteer solicitors were assisted by third year law students from the Auckland School of Law. After a slow start the bureau and its legal referral service attracted large numbers of clients from outside the Ponsonby area, from as far away as Brown's Bay to the north and Papakura to the South. (J.C. Clad, 1975)

Throughout the 1970s the number of bureaux increased markedly. By 1980 there were 54 established bureaux throughout New Zealand and some 18 pending establishment. By 1981 there were 60 full members of the New Zealand Association of Citizens Advice Bureaux and a further 6 preliminary members. Thirty of these are in the Auckland area; eight are administered and funded by the Auckland City Council, four by the Manukau City Council. The enquiries handled by the above eight bureaux totalled 24,028 in the year to July 1979.

Citizens Advice Bureaux (CABx) are spread from Whangarei to Invercargill in four regions - North, Waikato, Bay of Plenty, Central and South. Fourty-four of the sixty established bureaux have a legal advice service.

Functions and Organisation

Davies (1980) describes the basic functions of a CAB as:

> "- The provision of advice to members of the public.
>
> - The availability of specialist services, including legal, by referral and/or by regular on the spot assistance.
>
> In addition, CABx can provide the nucleus for additional community activities. These may be as local as a baby-sitting service, or of a wider influence; for example, a tenants protection society or relief housing project. The collection of information can quickly result in people being motivated to take practical steps to provide local services or correct blatant injustices. Sometimes this can happen spontaneously and sometimes as a result of the enthusiasm of the local community worker in charge of the bureau .... Each CAB is usually under the care of a full time community adviser or social worker supported by a large roster of unpaid volunteer bureau workers".

Legal Services

Most bureaux have developed ancilliary services of various types in response to community request or need. The legal advice service is one of these services organised by the bureaux with the assistance of local lawyers and sometimes of the District Law Society. Forty-four CABx have legal advice services. A statistical analysis of the Auckland City Council records has established that 30 per cent of enquiries are of a legal nature. The legal service is considered to be a valuable adjunct to CABx services.

While the usual legal service is available once during the week, for about one and a half to two hours in the evening, some larger and busy CABx in Queen Street or Otara offer a twice weekly service, e.g. Saturday morning. Where there is less demand, the service is available fortnightly; while among others, co-operation between CABx enables variation in time to suit the demands of those clients who find the usual time inconvenient. Clients usually see the rostered lawyer by appointment.

The rostering of volunteer solicitors is done by the convenor of legal services at each bureau. Legal work resulting from referral is undertaken by solicitors who have agreed to accept CABx referrals. Such work is done on the normal fee paying basis or legal aid if eligible. In the larger Auckland area, 170 solicitors have signified their willingness to accept referrals. A list of these solicitors is distributed to CABx with a breakdown of categories of work within which the solicitors are willing to accept referrals. In smaller towns, where the number of solicitors is limited, work is shared between the volunteer duty solicitor and those prepared to accept referrals.

The involvement of law students enables them to observe legal practitioners at work and to contribute themselves where possible. The Auckland University Law Faculty encourages and gives credit for involvement in the CABx system. Five attendances at a bureau is the minimum requirement for one of the options for Legal Practice III. About 70 students are estimated to be taking part in CABx work. (Davies 1980)

Funding

Apart from the unpaid services of a large number of volunteer workers, CABx have relied upon voluntary fund-raising activities and/or subvention by local authorities and grants from the Golden Kiwi Lottery Fund.

For some time the New Zealand Association of Citizens Advice Bureaux and local authorities have sought permanent government funding. As a result, an advisory committee was set up by government to consider the needs, development and funding requirements of CABx. This committee comprising representatives of the Department of Social Welfare, CABx and local authorities, reported to the Minister of Social Welfare. CABx now receive an annual grant of $15,000 from the Department of Social Welfare to pay for their central administration.

Description of Legal Services

There has been little research done in New Zealand that would provide an operational analysis of the CABx and their legal services throughout the country. There are, however, two pieces of research which are useful in analysing the operational and delivery side of the legal advice service. The findings of these studies may or may not be applicable to CABx elsewhere.

Legal Services at Auckland's CABx

The first of these studies was undertaken for the Auckland City Council by Robert Heeps. The purpose of this study, which covered a period of three months, was to analyse the working of the legal advice services of the eight bureaux funded by the Auckland City Council and the demand for this service.

This required a study of the entire legal workload of the bureaux and how it was handled. The information was obtained by:

- analysis of all legally oriented queries at the eight bureaux over the six month period May to October 1979.
- interviews with bureau workers and legal advisers

- observation of these groups at work
- participation by the writer in the daily operation of the bureaux, especially by providing legal back-up for workers
- participation by the writer by taking legal advice sessions when the volunteer solicitor was unable to attend.

Statistical analysis of the files showed that in the six month period the eight bureaux had received a total of 11,188 enquiries. Of these 3,342, or 30%, were of a legal nature. Those clearly requiring litigation or other legal work - amounting to 220 cases - were referred to a solicitor or other sources such as a court registrar. The remaining 3,122 or 28% of the queries required legal advice.

Heeps notes that legal aid is not available in New Zealand for advice despite, among other interested parties, the recommendations of the Legal Aid Board since 1973. Those who cannot afford a solicitor, are reluctant to consult one, or who feel that their problem does not justify the cost of a legal consultation, turn to CABx. Their problems were dealt with in one of three ways:

1) given advice by the bureau worker on the spot.
2) referred to the volunteer solicitor at the next legal advice session.
3) referred to a third party, e.g. Consumer Advisory Service run by Consumers Institute.

Bureau workers handled 1120 problems themselves. Problems ranged from simple queries - e.g., the required period of notice to quit when there is no tenancy agreement, to complex matrimonial problems involving custody of children and division of matrimonial property.

Analysis showed that as the legal load on the bureau increases so does the percentage of problems handled by the workers - eg the Queen Street Bureau workers handled 35% of their 1275 legal enquiries themselves but Orakei Bureau workers only 4% of their 69. Heeps attributes this to two factors. First, the harder pressed bureau workers have more experience and more confidence, and secondly the more experienced workers were more aware of the difficulties of getting legal advice anywhere short of a solicitor.

Breakdown of Enquiries by Bureau

	Total legal Enquiries	% advised by Bureau Workers
Queen Street	1275	35
Avondale	917	39
Glen Innes	403	30
Ponsonby	281	28
Pt. Chevalier	171	42
Remuera	115	20
Grey Lynn	111	12
Orakei	69	4

Heeps points out the dangers of workers assuming the role of legal adviser. The training course for volunteer workers includes only a few hours of lectures on legal matters which cannot cover all of the high percentage of bureau enquiries that are legal. Training programmes vary in their approach as to how this risk should be handled. Some trainees were told not to handle any legal problems themselves while others were instructed to handle all inquiries themselves and not to bother the volunteer solicitors unless absolutely necessary. The reference materials available are basic, often superficial and difficult to use quickly.

Heeps believes that bureau workers should only help with legal queries where the facts of the problem fit the reference material provided, as long as they explain they are not solicitors and are quoting from a specified text. Should workers do this, however, a large number of queries would remain unactioned. He poses three possible solutions:

1) raise the legal expertise of the bureau worker
2) greatly increase the number of referrals to the legal advice service
3) employ a full time qualified legal adviser.

The first solution he regards as unreasonable given the widely different backgrounds, interest and aptitudes of volunteers and the time and input that would be necessary to undergo a legal training scheme that would virtually turn them into paralawyers.

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The second solution would require a 100-200% increase in the work of volunteer selections. This would also draw attention to the existing limitations of the legal advice service with its limited weekly sessions. Often people with urgent problems cannot wait for the next session. Of the 1120 people advised by bureau workers, he notes that 598 were referred elsewhere for advice because they could not wait for legal advice and the worker did not feel confident enough to handle the problem. Heeps gives an example of an urgent problem needing coherent follow up action.

The third solution - a full time salaried legal adviser - would have been able to handle these and other like problems; would provide continuous back up and education for workers and other bureaux. The salaried adviser would not however displace the need for volunteer legal advisers. Heeps points out that salaried legal advisers have been attached to Advice Bureaux in Britain since 1973.

The Auckland City Council is concerned that the quality of CAB services be maintained and feels that this research demonstrates the need for a full-time legal consultant to be attached to their CABx. Supposedly such an appointment could now be made given Law Society approval pursuant to s114 Law Practitioners Act as amended in 1981.

Legal Advice Bureaux and Professionalism

The second study was undertaken by Peter Suschnigg as part of a M.A. thesis. He presented a report entitled 'The Effect of Legal Advice Bureaux on the Collegiate Professionalism of the New Zealand Bar' to the Department of Justice in March 1981.

In this study, the term Legal Advice Bureaux (LABx) is used whereas in the previous study (and other writing) the terms legal advice service and legal referral service is more commonly used to distinguish the legal from the other referral services which are an integral part of CABx services. The legal services offered are the same and in most cases the organization is the same. As is the case with CABx legal services, LABx offer free legal advice to clients through unpaid legal practitioners who participate as volunteers.

Suschnigg's study is not concerned principally with the nature and operation of LABx but is concerned with the wider issue of the legal profession in New Zealand and is an assessment of the effect of the Legal Advice Bureaux service on the Bar's professionalism. The Department of Justice was interested in those aspects of the study concerned with legal advice services in the area under study.

The study involved undertaking:

1. A stratified random sample of LABx representing one metropolitan area, one large South Island city, and two North Island cities.

2. A comparison of the attitudes, opinions and personal characteristics of

   i) the lawyers (participants) who worked in the sampled LABx
   ii) a randomly drawn sample of lawyers practising in the same geographical areas as the selected LABx who were not involved in this service (non-participants).

The Clients Responses from LABx Supervisors (i.e. the lawyers organizing the services) showed that 4828 clients had been seen in 22 LABx during 1979. Most of these clients, as one would expect, had been referred from CABx. One of CABx' and LABx' specific functions is to refer clients to other agencies if their own advice is inadequate or inappropriate. There is a constant concern as to what proportion of these referrals are actually acted upon by the client to the extent that the original problem is satisfied. Heep's data showed that 30% of CABx clients are referred to LABx. Suschnigg very roughly estimates that only 60% of these clients actually act upon the referral. Once they have attended the LAB, 50% are referred to yet another agency, most of them lawyers. We have no indication how many of these actually consult a lawyer. Suschnigg finally estimates that only 56 of every 1000 legal enquiries at the CAB are eventually referred to a lawyer. It is evident that the attrition rate of clients between first enquiry and satisfactory answer is very high, but Suschnigg's final estimate does not allow for the satisfactory resolution at the various stages along the way.

Most supervisors considered their clients to be on low incomes though no bureau reported a majority of clients in financial difficulties. Unlike the LAB supervisors, individual participants thought that their clients came from a range of income groups (40%). None thought his clients 'well off' and only 2.3% considered them to be 'in financial difficulty', 34.7% saw them as being 'on low incomes' while 21.6% assessed their clients to be 'on average incomes'.

The Participating Laywers: The typical participant was found to be relatively young in age and in the profession compared with lawyers who did not participate in a LAB. He specialized in conveyancing less often and in family law more often than non-participating lawyers. He was likely to be the employee of a legal firm and earned in 1979 between $10,000 and $15,000.

The recruitment of participating lawyers to the LABx seemed to be a mixture of participation as a firm's representative or stand-in; experiences at law school with CABx; or, on the part of longer-serving participants, involvement with CAB establishment in an area and the integration of a legal advice service. It was shown that Law Society support came slowly and partly as a result of the influence of younger men on the Council.

Questionnaires showed that the majority (84%) of lawyer participants were satisfied with LABx service. They thought that both the location from which their LAB operated and the administrative arrangments were satisfactory. They also thought that LABx met the needs for which they were designed.

However, interviews revealed a slightly different perspective. There was a feeling of LABx' services being 'slightly off target" by some participants: 'I don't think you'll hit the people who really need the help. The people I've been advising with real problems are the ones with socio-economic, not legal problems'. Most respondents mentioned clients who use the service to get a second opinion; some had doubts about free legal advice. No participant saw his part in the service as very burdensome.

Clients most common problems were identified by participating lawyers as:

34.7%	matrimonial problems
13.7%	tenancy problems
13.5%	traffic problems
11.9%	neighbourhood problems
11.7%	debt problems
9.5%	consumer problems
3.2%	criminal problems
1.8%	other problems

Suschnigg observes that the preponderance of matrimonial and the distribution of other problems tallies well with the statistics reported by LABx supervisors.

Since the overwhelming majority of clients are women, there are, behind these figures questions which Suschnigg stresses require further research - e.g. are women more aware than men of LAB services? Are women more willing than men to seek advice and assistance? Do these figures reflect the 'true' proportion of legal problems in the population? Would different hours of attendance and location cater for a different clientele and thus change these figures?

Client needs as perceived by the participating lawyers were established in the same manner as were client's problems.

25.3%	need for Small Claims Tribunals
25.1%	need for subsidised first consultations
19.4%	need for NLOs
10.4%	need for a written constitution
8.0%	need for a public defender scheme
4.1%	need for advertising by solicitor
1.8%	need for prisoners rights
5.5%	other needs.

Although they were not listed among client needs, Suschnigg states that 'lawyers' should be added since 66.5% of the participants thought that many people were not aware that there are often legal remedies for many of their needs.

Despite strong agreement amongst lawyers (84%) that there were areas of unmet legal need in the community, it was significant that more non-participating lawyers were uncertain about the existence of unmet legal needs in the community than participating lawyers.

Participants attitudes to financial assistance for Clients.

71% of participants did not think that all people should be entitled to legal aid

80% agreed that people's eligibility for legal aid should always be subjected to means testing

32% did not think that specialisation in legal aid work by some lawyers would help to make this type of work financially more attractive, but

32% thought it possibly would make it more attractive

51% of participants agreed that the quality of representation for legal aid clients was at present limited by the number of practitioners willing to undertake such work, but,

23% did not know whether the quality of representation was, therefore, limited.

37% of participants disagreed more or less strongly with the statement that "People who use legal aid get as good a service as other, fee paying clients".

38% of non-participants disagreed as well, but,

23% of non-participants said they 'did not know' whether legal aid clients got as good a service as others.

62% of participants thought that both central and local governments should give monetary support to voluntary and gratuitous legal services.

Suschnigg concludes his study of the effect of LABx on the New Zealand Bar's Collegiate professionalism by finding that LABx do not weaken the Bar's economic or political control nor do they facilitate encroachment of other occupational groups on its social control.

He makes the following final observations:

1) LABx have become part of the legal establishment. This acceptance has brought some problems. These are:

- that LABx have become staid and stale because of the Bar's strong control over them
- that LABx will become less attractive as a form of service for young practitioners.

2) LABx operate as appendages to CABx. This historical linkage has advantages, as well as disadvantages. The advantages are: a larger 'service package' for CAB clients; 'better' CABx for the volunteers involved in running them; publicity, office space and the arrangement of appointments for LABx. The disadvantages for LABx are: dependence on the ability and good will of CAB volunteers; misassessment of source potential LABx clients by CAB volunteers.

Suschnigg believes that the existing LAB service could be improved at little or no cost to the Bar in that resources now earmarked for general advertising could be redeployed, as advertising at the present level is not likely to have an impact on the "underlawyered" sector of the legal market. This redeployment could take the following form:-

a) The education of community workers, social workers, clergy, CAB volunteers and others who are in contact with potential LAB clients about the existence, functions, advantages and limitations of LABx. Such "intermediaries" are much more likely to have an impact than advertising.

b) Larger population centres could have legal social workers who operate independently from CABx. The establishment cost for such persons could come from money set aside for advertising.

c) Both, the education of "intermediaries" and the establishment of legal social workers should aim to reduce the very high attrition rate of potential LAB clients.

d) Improved record keeping and evaluation is needed if LABx are to function responsively.

e) LAB referrals to private practitioners need to be followed up to determine the effectiveness of LABx at this point. This is something which could be routinised.

f) Law education ought to have a strong component of "human relations" and "group processes" training. The present situation is inadequate and leaves law graduates ill equipped to cope with situations which are often "human" and "social" as well as "legal".

g) Keep some LABx open during shopping hours. Matrimonial problems may make attendance at evening LABx difficult for some potential clients.

h) The present decentralised organisation of LABx should be continued as conditions between areas are bound to differ.

Conclusions

CABx are an established advisory service in New Zealand and it is evident that problems with a legal component are a major aspect of their work.

There are two main issues arising from New Zealand commentaries as regards CAB legal services. The first is whether CABx can give an adequate service without a full-time legal back-up service. Can volunteers identify a legal problem and recognize when to refer a legal problem, and if so, whether to a lawyer or some other more appropriate agency. If referral is not appropriate, are they properly trained in paralegal advice? How can they adequately help clients where, given the nature of the problem, the only course of action open to the CAB/LAB is to refer the client to a lawyer, but this happens to be an uneconomic alternative in the circumstances?

The second problem is inherent in a referral service. How many clients give up and get off the "referral roundabout" before receiving a satisfactory answer to their problem? CABx services are aware of this source of attrition but do not have the facilities for following up cases.

THE GREY LYNN NEIGHBOURHOOD LAW OFFICE

Introduction

The most formal attempt in New Zealand to date to fill the gaps left by private practice and legal aid has been the Grey Lynn Neighbourhood Law Office.

The articulation of the inadequacy of the existing legal services to meet a larger range of legal need, and pressure for alternatives was originally focussed around the Community Law Workshop Inc. (CLAW). It described itself as 'a group of lawyers, law teachers, law students and other interested persons sharing a common interest in learning alternative concepts of law practice in our community'. It was formed in Auckland in late 1973 and was initially concerned with the promotion of legal referral services in Auckland. In 1976 a branch was formed in Wellington. Many CLAW members were members of District Law Societies and were in the forefront of Law Society discussion of the neighbourhood law centre concept.

Largely as a result of this growing awareness and acceptance of the need for alternative services, the Auckland District Law Society was asked by the Council of the New Zealand Law Society (NZLS) to prepare a report on a pilot scheme for a neighbourhood law office. This report, subject to a few amendments made by the Executive Committee, was adopted by the NZLS on 26 September 1975.

The National Party, in its 1975 Election Manifesto, supported the idea of a neighbourhood law centre pilot scheme to ascertain the extent of an unmet need for legal services. The Labour Party undertook in 1975 to investigate and encourage neighbourhood law offices.

On 21 September 1976, the Legal Aid Committee of the NZLS met representatives of the Department of Justice to discuss the proposal. Agreement had not been reached on a number of issues, including the major ones of management and nature of work to be undertaken, when the Law Society decided to proceed with the scheme without financial help from the Government. The Law Practitioners Amendment Act 1975 made provision for the New Zealand Law Society to employ a solicitor to operate a local law office.

Funds were canvassed from various charitable organisations and a grant of $10,000 given by the N.Z.L.S. Rent free premises in Grey Lynn were provided by a member of the profession and the Society advertised for a salaried solicitor, a community worker and a secretary. The office was opened to the public from August 1977. As the first fully structured community law office in New Zealand, the Grey Lynn Neighbourhood Law Office has had problems with its development and acceptance.

Its troubles reflect those encountered by law centres in the United Kingdom. Grey Lynn Neighbourhood Law Office's history divides into two distinct phases: 1977 to 1980 when the original Law Society Structure and control prevailed in varying degrees and when funds were available if not plentiful; late 1980 to the present day when funding is precarious and the office is controlled by an interim committee. In describing the services of the Neighbourhood Law Office, we deal with these two periods separately.

Why Grey Lynn?

The Auckland District Law Society examined a number of venues including Mangere and Otara before deciding upon Grey Lynn. Census figures for 1971 and information available from the Auckland City Council were used as the basis for the report. The following profile emerged.

Grey Lynn is one of the earliest of Auckland's suburbs and is situated to the south west of the city. It is a high density residential area. 45% of the housing is rented - above the Auckland City averge of 38%. The average income of Grey Lynn residents is below the city average. The price of houses in the area is well below average and a number of the homes have been bought by Pacific Islanders. 55% of Pacific Islanders in Auckland are concentrated in the Grey Lynn, Ponsonby and Freemans Bay area. The figures taken from the 1971 census showed that 29% of the residents of Grey Lynn were Pacific Islanders, 11.3% Maori, 3.0% Indian and 1.2% Chinese. Europeans make 55.7% of the population. The percentage of Polynesians in the population is increasing rapidly. Many Pacific Islanders settle in Grey Lynn when they first arrive in New Zealand and before they find permanent accommodation elsewhere. For this reason Grey Lynn tends to have a large number of transients. It is believed that a good deal of tension is created as a result of the different attitudes and life styles of the elderly residents who have lived in the area for some time and the newly arrived migrants. Unlike Ponsonby, Grey Lynn has not attracted a great deal of public attention. The area is badly lacking in community facilities. The Pacific Islands Churches have a strong influence in the Grey Lynn area and it would be important to win and retain the confidence of the Pacific Island groups. The nearest law office was that of Langton and Halford in Ponsonby Road, approximately one and a half miles away. At the time Grey Lynn was studied it had been open for three years and employed six solicitors. It was arranged on open plan lines and was decorated with tapa cloth. The office has attracted a number of idealistic young solicitors who worked for modest remuneration.

Organisation and Control

The NLO pilot scheme was set up under the supervision and control of the Auckland District Law Society on behalf of the NZLS. It was to be run for 12 months when the position would be reviewed. A supervisory committee was appointed by the Auckland District Law Society to oversee the administration of the office. This committee comprised:

(i) two representatives from the District Law Society who should be Chairman and Deputy Chairman respectively;

(ii) One or more other members of the District Society appointed by the District Council;

(iii) A representative from the local authority;

(iv) A representative from the Community Advisory Committee;

(v) One other member appointed by the Minister of Justice;

(vi) The solicitor in charge of the Neighbourhood Law Office and the Community worker.

The role of this Committee was mainly supervisory and advisory. It was expected to receive regular reports on the running of the NLO and lay down guidelines wherever necessary on such matters as the relationship of the NLO and private firms in the area. It was to deal with any complaints, with power to pass these on to the District Society Council where appropriate, and to approve staff appointments.

The solicitor in charge of the NLO was to be responsible for the running and daily administration of the office and to ensure that records be kept of all interviews and attendances. Both he and the community worker would be expected to attend meetings of the Supervisory Committee and make regular reports. The Supervisory Committee was assisted by an Advisory Committee of local residents, mainly from various Polynesian groups, who were to keep the office in touch with the problems and requirements of the neighbourhood community and also to make known the ways in which the office could help them.

The office was staffed originally by an experienced solicitor assisted by another legal practitioner on a voluntary but virtually full-time basis, a community worker and a typist-receptionist. In addition a number of other solicitors and law students gave their services without charge in the evenings and week-ends. In 1979 a second full-time salaried solicitor was appointed. This was necessary as the workload and time spent in court increased.

Scope and type of activity

> "The aim of the NLO is to bridge the gap between the legal referral services already operating and the services offered by private law firms. On the one hand it is intended that the NLO will be much more than a referral service. On the other hand its purpose will be to complement services available through private practitioners. The aim of the NLO is certainly not to direct clients from existing firms, but to provide legal services for people whose needs for such services are not at present being met."
> (Ludbrook, Lynch, Slane, 1975)

The scope and nature of the work undertaken by the NLO was mainly determined by the Supervisory Committee in consultation with the office solicitors. It was envisaged that this would be reviewed after the NLO had been operating for some time. There were however, certain types of work which were excluded from the beginning. These were conveyancing, probate and estate work, commercial work and tribunal work. In addition it was not expected that the office would or should handle criminal matters and traffic matters, commercial debt collecting and certain aspects of matrimonial and family problems - such as separation, paternity and divorce cases except in exceptional instances. Nor was it intended that the NLO would build up a regular clientele.

In practice and according to the NLO itself, an analysis of the available data indicated that approximately 40 per cent of the caseload would not have been the type undertaken by a private law firm.

The following table summarizes the type of work undertaken from the time the office opened (August 1977) to January 1980. It is evident that criminal, matrimonial and paternity cases were not the exception as orginally conceived.

Matrimonial	156
Arrears/Variation Maintenance	40
Paternity	103
Custody	28
Adoption	10
Divorce	8
Criminal	223
Summons	70
Police General	6
Traffic	143
Immigration	72
Tenancy	112
Maori Land	5
Property	4
Housing Corporation	5
Insurance Claims	20
Estate	12
Wills	4
Accident Compensation	14
Deed Poll	5
Miscellaneous	123
Neighbour	17
Contract	50
Negligence	7
Hire Purchase	9
Social Welfare	11
	1,257
Referrals to other lawyers	336

However, the office points out that this is only part of the picture. Ninety-five percent of clients who came to the NLO had never been to any other law office and the majority would not have gone to any solicitor had the services of the NLO not been available.

In addition, the staff of the NLO cope with what might be termed 'social inadequates' - people who for a variety of reasons cannot deal adequately with important aspects of their lives. Their problems may be with family or other relationships or involve budgeting and the more formal requirements of social negotiation such as form filling. Their own inadequacies might eventually require legal attention but preventative and referral work assists a degree of autonomy.

The office also carried out a range of community and educative programmes, including

> Legal education programme in schools in the Grey Lynn area.
> Legal rights course, with topics including paternity, custody, maintenance, landlord/tenant etc; now being taken into hostels, youth clubs etc.
> Developing a video film "R. v Huckleberry Finn" on the functioning of children's courts.
> Taking part in and contributing to various conferences and seminars, including the conferences run by the Human Rights Commission, Continuing Legal Education, W.E.A. and Otago University Continuing Education. Involvement in the Maori Affairs outreach programmes - Tu Tangata/retreat Wangana.
> Involvement with the Social Welfare home scheme.
> Community cross-cultural studies, including courses for legal practitioners.
> Assisting Advisory committee members with an immigration petition.
> Making submissions on the Immigration Amendment Act and other proposed legislation.
> (Nicholson, 1980)

By the end of 1980 the Neighbourhood Law Office had taken 6 appeals to the Court of Appeal and 16 to the High Court. Test cases have been taken on issues of tenancy, immigration, custody (with relation to the relevance of Maori custom and culture), identification of non-Caucasians, the registration of a marae as an incorporated society, the lead content of petrol and its effects on children, and visitors' rights at mental institutions.

The following table shows the total case workload of the Grey Lynn Neighbourhood Law Office during its first three years of operation.

	Substantive calls	Files opened
12 months ended 31/7/1978	2,126	518
12 months ended 31/7/1979	5,703	585
12 months ended 31/7/1980	8,710	634
2 months to 30/9/1980	1,925	125
	18,464	1,862

Funding

Funds totalling $21,000, plus interest, were available to the NLO when it was set up. These comprised donations from charitable organisations and supporters and a grant of $10,000 from the NZLS which was reckoned to be a quarter of the cost of yearly operation.

In the proposal for the establishment and financing of the office, the Auckland District Law Society report estimated the cost of the first year's operations at $40,000. This estimate included a salaries component for five staff of $27,000 plus operating, establishment, contingency and other costs.

The report drew attention to the importance of funding for the pilot scheme - and for a permanent NLO scheme if the pilot scheme were successful. Since neither the NZLS nor the District Societies had sufficient funds, an approach to government was necessary and 'had always been in comtemplation'. The question that had to be determined was whether the NZLS should try to raise some of the cost from a non-government source.

The report suggested that the NZLS be asked to:

- accept responsibility for up to 25 per cent of the cost of the pilot scheme, i.e., approximately $10,000.
- make an immediate approach to the Minister of Justice to see whether he could get some indication from Cabinet that the Government would be prepared to make a grant up to three-quarters of the estimated cost of the pilot scheme for establishment and twelve month's operation i.e approximately $30,000.
- request the Minister to seek Cabinet approval to continue to fund the NLO scheme on the basis of the Law Society meeting $10,000 of the annual cost either itself or through agencies arranged by it, with the Government meeting the rest of the cost.

The NZLS contributed $10,000. The Government was not able to contribute to the first year of operation but, as the pilot scheme progressed beyond the initial one year pilot scheme period, two grants of $20,000 were made for each of the financial years 1978/79 and 1979/80. The terms were $10,000 for immediate payment plus a further $10,000 on a dollar for dollar basis.

When the 1979/80 grant was approved it was made clear to the Law Society by government that the grant was approved for that year only. A decision was therefore made not to fund the NLO for the 1980/81 financial year when this was requested by the NZLS.

The reason for this decision was basically that funding had been provided for assistance with a pilot scheme which was initially to have been tested over a single year's operation. The Government was amenable to some stretching of the experimental period but felt that three years was time enough. In addition, the continuation of arrangements regarding the operation, administration and control of the office which had not been resolved, would have been unacceptable. The Government intended to take the contribution and value of the office into account when it reviewed the totality of existing legal aid services, as it had informed the NZLS.

There was considerable public reaction to the Government's decision not to continue funding. This included a petition, submissions and letters to the Minister of Justice from a large number of organisations and individuals.

Aftermath

The Government's decision had an effect not only upon the funding base of the NLO. This was serious enough, for no alternative had been explored by the sponsors, and the NLO had existed on a hand to mouth basis, despite the grants, user contributions, and legal aid payments. It also had implications, influenced by NZLS reassessment, for the control and administration of the office. The Council of the Law Society met on 27 June 1980 to discuss a study by its members of the NLO and the motivation of the Society for embarking on the venture. A committee was appointed to make recommendations to the Council concerning continuation of the office and the policy that the NZLS should adopt in relation to:

(i) the operation and control of the Grey Lynn Neighbourhood Law Office, and
(ii) the neighbourhood law office concept or any alternative.

In the meantime every effort was to be made to keep the NLO open to consider methods of raising money.

In the public account of the NZLS Council Meeting which discussed the report of the committee convened by Colin Nicholson, the following decisions concerning the Grey Lynn NLO were taken:

- lawyers would relinquish control over the Grey Lynn NLO.
- the NZLS affirmed that it could not be responsible for funding the NLO.
- the existing supervisory and community advisory committees were to be disbanded.
- the NZLS was to ascertain from the Government whether a trust board or other appropriate method of permanent control could be established with appropriate funding and government, community and Law Society representation.
- in the meantime the NLO was to be managed on behalf of the NZLS by an interim committee comprising three nominees of the NZLS, three nominees of the present community advisory committee and, if accepted, one nominee each from the Auckland City Council and Department of Justice.

The Council resolved to "support the NLO concept as one means of providing community legal services in New Zealand". It was, however, divided over this issue and over the issue of control. One member argued that the Grey Lynn NLO without government assistance should be closed or at least limited to being a legal office employing solicitors responsible to the Auckland Society and that their control by non-lawyers would undermine the profession's monopoly. Another felt that many of the NLO's problems stemmed from the Auckland Society passing over too much authority and losing touch with the day to day control of the office. He agreed, however, that the need for the office had been clearly demonstrated and that it had performed a valuable function. According to the Auckland president, only a small segment of the Auckland Law Society Council favoured the closing of the NLO. He said that there was no great risk of the profession losing its independence through not controlling the Grey Lynn NLO, and that if the NZLS did not make a move on the matter, something else could be imposed by the state. What this might have been was not made clear.

The Nicholson Committee said that the Grey Lynn NLO had helped many people who would not otherwise have received legal assistance and the community wished it to continue. He thought that what had not been so successful had been the mechanics of running it. The experience in England had also been that such offices would not be successful if lawyers had control.

The NZLS decisions as regards the Grey Lynn NLO have been implemented, thus issuing the Grey Lynn NLO into its second phase of existence.

The interim committee comprises three nominees of the NZLS, three nominees of the previous advisory committee, and one nominee of the Auckland City Council. The Minister of Justice was invited to nominate a member, but declined on the grounds that it is inappropriate since government was not funding the enterprise and given his belief that control should be with the community. However after repeated submissions by the NZLS the Minister appointed a person to facilitate liaison between the NLO and the courts. He was not, though, to be a full member of the committee. The interim committee is therefore not dominated by lawyers.

While accepting 'full managerial responsibility' for the Grey Lynn NLO, the interim committee is to report monthly to the Auckland District Law Society on the work, activities, finance and other relevant matters concerning the office. Members of the interim committee have undertaken not to intervene in matters concerning the professional relationship between the NLO solicitors and their clients. The committee must also accept any NZLS limitations on matters in which solicitors must not act. The interim committee was to continue to raise funds since a resolution stated that "The NZLS cannot fund NLOs and members should be reassured". (Northern News, No. 47, 1980)

Funding is now a critical concern to the office. Restricted funds have reduced the NLO's operations to the extent that one lawyer has not been replaced. The community worker has been replaced by secondment from the Community Volunteers Organisation. As at August more permanent funding arrangements had not been made, but the NLO was hoping that she could be employed through the PEP scheme. Since the advent of the interim committee, the NLO's major income has been donations from private practitioners, the Auckland City Council, and legal aid and as at October 1981, the NLO had managed to raise from within the community $17,000 of its $30,000 budget. It was apparent that the transition to

full community funding would not be achieved in the 1981/82 financial year and the Minister of Justice announced on 27 October a special once only government grant to help the Grey Lynn NLO survive this transitional period. The grant was $6,500, representing one half of the Grey Lynn NLO's deficit.

The other matter of import is the efforts being made to put community law centres generally on a more formal footing. Until October 1981, legislation did not permit the existence of community law offices independently of direct solicitor or Law Society employment. The NZLS and Department of Justice have been discussing the appropriate structure and control for formalizing law offices. As an interim measure, because of the urgency attached to Grey Lynn and to plans for an office in Otara, the Law Practitioners Act has been amended and gives the Law Society the power to exempt community law offices from the provisions prohibiting their existence. A more detailed discussion of these issues is given in chapter 8.

Assessment of services

Other than NLO records there is little hard information on which to base any evaluation of the office's effectiveness, its impact upon the community or against which to test the concept of unmet legal need.

However, when the Government made known its decision on 29 February 1980 not to make a further grant to the NZLS for the Grey Lynn NLO there was a considerable volume of correspondence on the matter. Submissions were also made to the Minister of Justice when he met a group of concerned organisations and individuals on 11 April 1980 at the NLO. The majority of writers expessed concern at the decision and at the possible implication for the future of the office. Of the 45 letters received at the time only two agreed with the Government's decision. It must be said though that few appeared to understand the background to the setting up of the NLO, particularly that the Law Society had proceeded to set up the office without government commitment to the office and without any continuing commitment to its funding.

Of those who urged continuation of the NLO, all attested to the need for and value of such an office. All the organisations, or their agencies or members had had some kind of contact with the office and detailed the kind of assistance the office had

offered. Some concentrated on areas of special need, for example, the Pacific Islands churches or associations. These confirmed that the service had been of great value in helping their people cope with an unfamiliar legal and bureaucratic system, with housing, immigration and domestic problems. These were people who would have been unable to meet private lawyers fees and who might otherwise not have approached anyone for advice. The point was also made that the NLO's preventative and conciliation work saved the Government more than the grant was worth; that 'while the Government has stopped giving support for this preventative work, it still continues to plan more prisons'.

Others criticised the decision from a moral standpoint; that, in helping the disadvantaged, the existence and success of the NLO was tangible evidence of a caring society. When such a facility was withdrawn 'the victims are those least able to make their case effectively to those in power'. The Maori pastorate also placed much emphasis upon this issue, as well as on the practical assistance offered by the NLO.

All were critical of the grounds for the Government's decision to discontinue funding. Some felt that its very success - and the possibility of a spread of the concept - was the reason for the decision. Others were critical of a logic which seemed to suggest that if an experiment worked, it should be scrapped. The Auckland Star (3 March 1980) was quoted - "it seems odd, when a pilot scheme proves a community need exists, not to go ahead and supply that need".

The only substantial group which did not seem to be represented were Europeans and the aged - except where churches spoke on behalf of their membership. It may, however, have been assumed that the local authority representative spoke for their needs as far as these could be known.

Without a properly conducted survey of an area, it is not possible to speak with any accuracy of its needs and how these are met, or what priorities in terms of need might exist. These may of course be much less legally oriented than is presently assumed. The Grey Lynn NLO does, however, cater for needs other than purely legal ones. It would appear to be a measure of its success that such a range and variety of testament and such evidence of community cohesion should be marshalled in its defence.

It has been apparent that the Grey Lynn NLO has undergone many of the difficulties and problems which similar ventures overseas have experienced. These vary from inter-personal and inter-professional strains, lack of resources, overwork, local difficulties to lack of a consistent funding base and prevailing attitudes to the question of need and how this should be met.

Despite these difficulties, the main advantage of NLOs are that they do in fact assist those who for one reason or another would not have been helped through existing services. The offices do this within the resources at their disposal, in a relaxed and informal atmosphere assisted by a supportive network of agencies, statutory, voluntary and informal. They handle a range of matters and problems that would not be handled easily by any other agency. They are able to act with urgency and to follow cases through to resolution. They thus build up rapport and client confidence. They are staffed by competent people who are committed to the NLO concept and who offer professional service without a narrow legalistic view of the problems they encounter. They are generally people whose own professional self-image is not a barrier to communication or the understanding of local problems, needs and pressures. The Grey Lynn Neighbourhood Law Office, on the evidence of its clients and supporters fits this general pattern of the advantages of the neighbourhood service concept.

On a professional level, the work of the Grey Lynn NLO is such that the office has retained the goodwill of most of the legal profession. It undertakes work that is time-consuming, generally uneconomic and does not encroach upon the more lucrative areas of private legal practice. By having to stress this, as the office felt it needed to in the early years to allay fears of encroachment, the need that existed was thereby underlined. The office caseload subsequently bore out the extent to which that need was unmet. Having to retain goodwill in this way does of course have serious drawbacks for a community which is disadvantaged. Overseas, private law offices have begun to cluster near NLOs. The Grey Lynn NLO is also proving that such offices do in fact generate work for other lawyers by referral.

Experience overseas has shown that the main disadvantages of the NLO concept in practice are: funding and the inadequacies of legal aid schemes; organisation, professional status and rivalry; and political pressure upon offices to avoid work that would have widespread or serious political, social or commercial repercussions. Funds, for example are often withdrawn. There is also pressure on office staff to observe professional objectivity and to distance themselves from some of the more pressing and sensitive problems within some communities. There is a growing debate and unease over this issue. Poverty, inequality and the articulation of its causes, for example, are much more politically explosive than piecemeal attention to symptoms.

In the case of the Grey Lynn NLO, Government and the local authority have supplied grants which are not tied. There has, however, been speculation that the Government's decision not to continue funding the office was connected with a fear that if such offices multiply, it will be pressured to bear the responsibility for funding them. One of the chief obstacles for Grey Lynn NLO which has had obvious repercussions in terms of maximum effectiveness, has been funding.

The initial estimate of expenditure for the establishment of the office was felt to be undercosted and it was obvious that sources of funding other than the Law Society would be necessary in the long term. The fact that this problem was not resolved before the office opened has had the serious implications alluded to previously. It has been compounded by the expectations that were raised within the community.

Another major source of concern for the office, as for CABx, has been the lack of a legal aid scheme which covers legal advice or divorce. Advice-giving clearly represents a major time component of NLO work for which it cannot be adequately reimbursed. The effect of such gaps in legal aid is to place further financial pressures on the resources of agencies such as the NLO. One of the greatest advantages of such an office is that it can, at virtually no cost, act for clients in the greatest need of assistance, yet it cannot be reimbursed for advice given through legal aid, nor can needy clients seeking divorce be assisted directly or financially.

The drawbacks, or disadvantages, of the NLO may, in the final analysis have less to do with the concept and the way the office itself operates, than with the climate of opinion which prevails outside it.

As attested to by its workload and the dedication of its staff and some Auckland legal practitioners, the Grey Lynn NLO has been a successful experiment to date in filling in some of the gaps left by more traditional legal services. Apart from funding, the immediate task for the NLO movement is to find ways of overcoming the organizational problems. Our suggestions in this regard are set out in chapter 8.

COMMUNITY LAW CENTRES

Two community law centres have recently opened; in Dunedin on 9 June 1980 and in Wellington on 3 June 1981.

These community law centres are student operated. They offer part-time advice and referral service similar to but slightly wider than that available from the legal advice service of CABx. The centres enable students to learn basic legal skills and also to provide a community service. The services of the students and supervisors are voluntary.

The idea is not new. New Zealand law students have long been aware of the opportunity their counterparts overseas have of participating in clinical legal education. In North America, Britain and Australia university involvement ranges from casual association to courses fully funded and integrated into the degree structure of the university. New York University has twelve law clinics. In other cases the impetus for establishment of law clinics has come from outside the university by way of charitable organisations, special government grants, law students and the legal profession. The Law Clinic at the University of Minnesota, for example, was originally organised as a legal advice service by law students in the 1950s and was later taken over by the university in the 1960s.

Student involvement varies - from advocacy under statute in the lower courts in the United States, to accompanying and advising clients in court without directly addressing the court, as in Britain. The two law centres in New Zealand have followed the Monash University model where student involvement is limited to advice and referral with the opportunity to follow a case through with a barrister in the later stages.

Prior to the setting up of community law centres, involvement by law students in CAB legal services and the Neighbourhood Law Office in Grey Lynn, has earned course recognition at the University of Auckland Law School.

The Dunedin Community Law Centre

In the third term of 1979 the law students at Otago University held meetings which culminated in a decision to establish a clinic which they would establish and operate themselves. However they decided against the use of the word clinic because of its medical associations. Services would include advice, information and referral with emphasis on landlord, tenant and consumer problems.

Groundwork for the establishment of the centre included:

(i) A survey involving the interview of 200 households in Dunedin according to a random computer sample to determine what unmet legal needs, if any, existed and what attitudes existed about the law and lawyers.

(ii) Consultation with community agencies - including, among others, people associated with Emergency and Citizens Advice Bureaux, Consumer Institute, Tenants Protection Union and the Dunedin Council of Social Services.

(iii) Canvassing as many of the local legal profession as possible for support and reaction. Suggestions were incorporated into a proposed programme and a list of practitioners willing to give time was compiled. Reactions were found to be favourable since it was made clear that the centre would be operating within the Law Practitioners Act 1955 and the Law Society's Code of Ethics.

(iv) Consultation with university departments - since it was apparent that the law centre involved an interdisciplinary exercise. Departments included Psychology, Business Development Centre, Audio-visual centre, University Extension and the Faculty of Law. The University Extension Department whose community outlook accorded with the centre's objectives, also provided a useful extension into the community. In addition it sponsored the group's summer research under the Labour Department work scheme.

The background work they had undertaken convinced the student organisers that:

- an unmet legal need existed
- people were insufficiently informed of the role of law and lawyers
- a community law centre would help to remedy these needs
- such a centre could be run by students
- the centre would fit into the range of social services already offered
- support for the centre existed within the community, the legal profession and the university

A training programme was devised for student participants at the centre. Training involved seminars and workshops in interviewing and counselling, letter writing, pragmatic legal research, negotiation, advocacy and other relevant areas of law. It was planned that later seminars would concentrate on police, court procedures and ethics. Audio-visual equipment and written material would also be prepared.

It was intended that the Centre would open four evenings a week and possibly Saturday mornings. Students conduct interviews, give information and advice and provide a referral service. Considerable emphasis was placed on community education and the promotion of self-help, helping people to write their own letters, and seminars on consumer rights.

Supervision is provided by a volunteer panel of solicitors. A student practice manual prescribes student conduct and file-keeping procedures. Initially, twenty senior law students were enrolled at the Centre and a smaller number of other students serving in an administrative capacity oversee the centre's operations. Other students were to be more casually involved as receptionists, office workers or researchers.

Grants totalling $5,900 ($600 from fund-raising activities) were obtained. Given the voluntary input and the donations of material and equipment, it is expected that this should be sufficient to take the centre beyond its first year of operation.

The Dunedin Law Centre is a charitable trust administered by University of Otago law students. The trust is governed by a committee of students with provision for Law Faculty, Law Society and community representation.

The Centre is housed in a the university building in Great King Street, almost in the centre of the target area - close enough to the university to allow easy student participation and to downtown Dunedin to attract a wide clientele. The physical characteristics of the building provide the facilities needed and accord with the neighbourhood law office concept desired.

The Dunedin Community Law Centre (1981) summarizes its activities thus:

> "Work here specialised in very real legal problems that people regard as too minor to merit a lawyer's attention. Tenancy problems are one example. Matrimonial, criminal and conveyancing work is referred to law firms. Social problems that can be better handled by other agencies are also referred. Everyone who comes to the Law Centre is entitled to at least one interview. Cases that are beyond our means are referred. Others can be dealt with on the spot. In others, students may be required to perform follow up work, such as researching the law or negotiating on the client's behalf. All work is overseen by a supervising solicitor, who is drawn from a roster of volunteers.
>
> People come to the Law Centre for a variety of reasons. They may be afraid to contact a lawyer. They may feel that their problem is too minor to merit a lawyer's attention. They may be seeking advice or information. They may be confused over the nature of their problem. They may just need someone to talk to. Since our June opening, the public has demonstrated faith in our service and regards our abilities most highly. Consequently, we regard ourselves as upholding a public trust and insist on rigorous standards in the maintenance of our service."

Students have also been involved in speaking to groups and uncovering problems concerning the groups' interests.

Wellington Community Law Centre

If Monash provided the model for the Dunedin Centre, Dunedin provided the initial prototype for the Wellington centre. The Wellington Law Centre is of the shop front type and operates from Willis Street to serve the communities of Aro Valley, Mount Cook, Mount Victoria, Lower Brooklyn and Kelburn.

The basic organisation, duties and training are similar to the Dunedin centre. Close ties with the CAB in the area are expected to be maintained. Among the objectives, stress has been laid on student involvement in community issues and on community education; on the acceptance by the university and the legal profession of practically oriented legal education programmes and on sensitising law students to the needs of the community.

The student organisers saw the need for a law centre in these terms:

- Legal services in Wellington do not cater for all the legal needs of the community.
- lawyers fees and the loss of wages while the client is attending the lawyers office are often prohibitive.
- the legal aid schemes, civil and criminal, do go some way to mitigate the expense of legal fees but the scheme is not available for some important areas. Furthermore people are often unaware of the availability of such aid.
- many problems are often not dealt with in traditional legal practice, e.g. neighbourhood disputes and problems which are of a predominantly social rather than strictly legal nature.
- broader community legal programmes are not undertaken by traditional legal services, e.g. informing groups within the community of the legal system.

The centre received a grant of $3,000 from the Youth Initiative Fund. It is hoped that this amount, coupled with other donations and materials, will ensure the operation of the centre for at least two years.

In Wellington, it has been the experience of the centre that their clients are needy people who would not have gone to a lawyer or needed this resort as the first point of contact. During the period 4 June to 8 July, the Wellington Community Law Centre saw 111 clients, opened 104 files and handled two telephone enquiries. A file is opened whenever advice, or advice coupled with a referral, is given.

The emphasis on the tenancy, family and consumer areas was generally expected. The family area involved the highest number of referrals to solicitors. In most cases people were making their first approaches for advice and assistance. Ongoing work has been mainly in the consumer area, a number involving hire purchase agreements. This has required assistance mainly in the form of letters written on behalf of clients. In two cases, one concerning planning, the other incorporation, the centre has been approached by community groups for assistance.

Both centres have made it clear that the work they will be undertaking will not involve them in competition with lawyers in private practice. They have stressed the time-consuming and unprofitable nature of much of the work for which there is a demand and the fact that matrimonial and criminal cases will not be dealt with except by way of referral.

It is as yet too early to assess the impact which these centres have made. Interim reports indicate that the law centres can go further than the CABx in that they can do follow-up work such as writing letters, advising and negotiating and in that they can become specialists in certain areas, e.g. tenancy.

Even though they are more vulnerable than the CABx in their absolute reliance on public generosity and their own enthusiasm, these centres have some advance on the position of an advice and referral service only.

The growth of these centres - and there will probably be more - also draws attention to the concept of unmet need, to the validity of a purely legal perception of this and to a genuine, but nevertheless charitable reaction. Lastly, it draws attention to the onus placed upon the community at large to underpin a concept of justice which is incomprehensible and burdensome to large sections of the population.

LAWHELP AND OTHER COMMUNITY SUPPORT GROUPS

There are many agencies - voluntary, semi-voluntary, and funded - having functions which are directly or indirectly related to legal services. Many provide formal or informal advice or referral services, some give support to those involved in the legal process, some are concerned solely with the victims of violence and the families of prisoners. It is difficult to provide any meaningful breakdown or evaluation of effectiveness and there is some overlap for the purpose of presentation. It is recognised that many people have compound problems in which the legal component may be peripheral or central and pressing.

The following list of agencies indicates the breadth of interest the legal system has within the community. Four groups are distinquished: A, recognized agencies for the redress of grievances; B, support groups with a particular interest arising from the legal system; C, special groups or miscellaneous agencies whose activities include legal matters; D, statutory agencies and government departments.

A. Recognised agencies for the redress of grievances:

1. LawHelp Scheme: LawHelp is a scheme sponsored by the New Zealand Law Society. It was introduced in October 1980.

The payment of $10 in cash on arrival at a law office, entitles a client to 20 minutes of spoken advice from a lawyer on any problem. This applies only to a first interview. Should a lawyer decline to give advice under LawHelp the fee will be refunded. The lawyer consulted under the scheme is not obliged to act for a client after the discussion.

According to Consumer (182, 1981) early reports suggest that the scheme is not being unduly used despite a nationwide publicity campaign designed to reach 90 percent of the population. It speculates that the lack of public response may indicate that the publicity to date has not yet overcome the anxieties many people feel about approaching a formal office. 'After all, the experience of CABs, Neighbourhood Law Office, and Student Advice Centres shows clearly that a large section of society is frequently in need of legal help'. (ibid, p.92).

2. Consumers Institute: In 1973 the Complaints Advisory Service was set up. It provides assistance to members and non-members in the settlement of disputes concerning a service or a product (includes rents). It investigates written complaints and gives advice to people about their rights as consumers. Complaints officers also deal with complaints concerning government departments. They may also advise people to go to the Small Claims Tribunals. In this case they help to prepare forms and submissions and represent people where they cannot represent themselves.

   The service also makes submissions on the form and operation of laws. It has a joint venture with Citizens Advice Bureaux in the training of advisors and the provision of manuals.

3. Tenants Protection Associations/Unions.

B. Support Groups

1. Functions relating directly to the working or consequences of legal action.

Marriage Guidance Council
Friends in Court
Prisoners Aid and Rehabilitation Society
Prison Chaplains
Probation Service
Budget Advisory Services

2. Victim-oriented groups.

Women's Refuges
Rape Crisis Centre
Families under Stress
Otahuhu Victim Support Scheme

C. Special Groups, Miscellaneous Agencies

1. Ethnic

There are various Maori groups who undertake educative and advisory work, provide support or have some input into the judicial system by way of recommendation, e.g.

- Maori Women's Welfare League
- Maori Wardens' Association
- Mana Motuhaka
- N.Z. Maori Council
- John Waititi Marae
- Taputaranga Marae
- Tu tangata scheme
- Kokiri units

Examples of other ethnic groups which aim to cater for the legal welfare of their members are:

- Polynesian Panther Party : an organisation which aids the Polynesian community and which aims to counter all forms of racism. It has a prison programme and social activities for prisoners; aids ex-offenders on release from prison.

- Wellington Regional Pacific Islands Advisory Council. This provides a recognised structure for the expression of a Pacific Islands viewpoint and an avenue of representation to Government, local authorities and other planning bodies.

- Viti Club Incorporated which provides advisory services especially on immigration and educational matters.

- Alofi Matatauafaga, Auckland. Assists Niuean people with problems related to housing, communication.

- Niue Advisory Council for Auckland Inc. Provides a co-ordinating link between the Niuean community and government departments, local bodies, Niue government and other non-government agencies on any issue affecting the Niuean people of Auckland. Also advises and helps Niueans with problems regarding education, health, housing.

- Other Niuean, Samoan, Cook Island and Tokelauan organisations.

Other examples of ethnic associations are the Association of Ukranians in N.Z. Inc., Croation Club, Danish Society, Federation of N.Z. Netherlands Society, N.Z. Chinese Association Inc., Polish Association in N.Z., Yugoslov Club.

2. Other organisations including ACORD, CARE are concerned with discriminatory practices which have a bearing on New Zealand society and have been influential in promotion issues which have led to legal aid developments.

3. Women's Groups, e.g.

- Abortion Law Reform Association of N.Z.
- Women's Electoral Lobby
- Women's National Abortion Action Campaign
- Women's Refuges
- National Council of Women
- Rape Crisis Centres

4. Trade Unions and Associations

- F.O.L. acting on behalf of and for workers, directly on an individual basis, or by referral, or promoting worker benefits by recommendation and proposal for changes in the law.
- other unions including Public Service Association, N.Z. Educational Institute, N.Z. Post-primary Teachers' Association.
- Employers Federation
- New Zealand Law Society
- N.Z. Medical Association
- N.Z. Federated Farmers and others.
- Automobile Association

5. Youth

- National Youth Council of N.Z.
- N.Z. University Students' Assocation

6. General

- Youth Line
- Samaritans
- Society of St Vincent de Paul
- church groups, doctors, community health nurses, community workers, aftercare specialists, members of parliament.
- publications, e.g. Knowhow, by Burnham House Publications, Readers' Digest's Family Guide to New Zealand Law, T. McBride's Handbook of Civil Liberties, The Law and You by Afford, Kos and Napier.
- media legal advice columns and "Fairgo"

D. Statutory agencies and government departments

Although these are not community initiatives in the sense that the preceding services are, they are included as examples of sources of legal advice and redress available to the community, but not regarded strictly as legal aid.

1. Human Rights Commission
2. Race Relations Conciliator
3. Small Claims Tribunals
4. Central government departments
5. Local government departments
6. Interpreters at Auckland District Court
7. Police

CONCLUSION

As the preceding list demonstrates, the informal and/or voluntary agencies offering legal advice to varying degrees are wide-ranging, an indication of the variety of human activity that can have a legal component. Contrary to this the formal legal services from within the community are few and far between: CABx/LABx, the Grey Lynn Neighbourhood Law Office, the Dunedin and the Wellington Community Law Centres, LawHelp and perhaps we can include the complaints advisory service of the Consumers' Institute. Except for CABx/LABx and the Consumers' Institute these are very recent responses to the acknowledged need for assistance in areas not covered by legal aid. All these agencies concentrate their effort through individual casework, though Consumers' Institute, the Grey Lynn NLO and the Community Law Centres recognize the advantages of and have initiated legal services on a group and/or preventive basis. Except for the NLO at its early stages and the Consumers' Institute, these formal community legal services are voluntary efforts.

Very few of the services mentioned have national coverage, the exception being presumbaly LawHelp and some of the specfic interest associations (e.g. Consumers' Institute and Automobile Association). CABx have a wide coverage, but this is dependent on community resources rather than an inherent feature of its organization. It can be generally concluded that these community efforts are spread thinly in terms of geographic coverage and intensity of service and that their establishment and survival depends on available community resources, the instrumental ones being the willingness and effort of concerned individual.

Although we cannot draw conclusions about the effectiveness of community and voluntary legal services from a descriptive summary such as this, the range in the services and the extensive use made of some of them give prima facie justification for their being an indispenable part of New Zealand's legal assistance services. We do not, however, have any systematic qualitative assessment of their effectiveness in meeting the actual need or providing quality of service for individual cases. In the case of CABx/LABx, the community law centres and the Grey Lynn Neighbourhood Law Office, a conscious effort is being made to fill the gaps in legal services left by private practice and legal aid, acknowledging at the same time the limitations inherent in the services of the first two organizations, and the restrictions placed on the NLO because of organizational and funding difficulties.

6

The Need for Legal Assistance

So far we have surveyed the extent and cost of present legal aid and assistance. Before embarking on the possibilities for future legal aid, the current services need putting in perspective and assessed in the light of what we know about the need for legal assistance.

The cost of government funded legal aid is escalating. Because open-ended financing cannot be guaranteed we have to use available funds to the greatest advantage. It is important to realize that the use of legal aid has not been commensurate with these increases in costs. Inflation has been the major contributor, which of course has more impact on civil legal aid than offenders legal aid or duty solicitors because of the respective methods of remuneration. In summary, to illustrate this, total civil legal aid costs increased 177% over the last 5 years and costs per grant increased 133% but the number of grants has remained relatively steady, fluctuating around the 15,000 mark. Total expenditure on offenders legal aid increased 115%, costs per grant 44% and the number of assignments 50%.

Although not much weight can be placed on a comparison of costs between one country to another, we note that in 1979/80 legal aid cost New Zealanders $1.13 per head compared with the equivalent of $4.53 in England/Wales. The Australian cost was $3.25. The 1980/81 New Zealand cost was $1.44 per head.

So although costs have increased considerably, the use of legal aid, particularly civil legal aid, has not. The possible effect of diminishing eligibility limits should be recognized here. It is difficult to assess whether the 50% increase in offenders legal aid is reasonable or not, as we have no up-to-date figures on the increase of the eligible population nor any real appreciation of the growth in awareness or preparedness of defendants to use offenders legal aid.

A more important concern than the increase or otherwise in the use of legal aid is the evident narrowing in the scope of legal aid that has occurred in practice.

When the civil legal aid scheme was introduced, it was claimed that it would ensure justice was available to people who may have been denied it. The statutory translation circumscribed this to making legal aid available for persons of small or moderate means in certain areas of civil litigation. In practice, the scheme has been subjected to a virtual take-over by domestic proceedings cases, negating its effect in other areas.

Offenders legal aid is used more in more serious offences but there is no general claim that its application is not wide enough. The criticisms about the effectiveness of offenders legal aid derive from the quality of the services provided rather than its scope. Scope has not really been at issue since the duty solicitor scheme has been available for preliminary advice.

The duty solicitor scheme differs in conception from offenders legal aid and civil legal aid in that it explicitly recognizes the need for pre-trial contacts, information and advice. It is however, like the others essentially a court oriented scheme. Its scope has recently been redefined and restricted to persons arrested and held in custody or bailed by the police who are charged with an imprisonable offence. The intention is to re-emphasize its "first aid" nature. Whatever its scope, the service is criticized for its variable and unpredictable quality.

The two main inadequacies of government funded and Law Society operated legal aid schemes are first, the restricted statutory scope and even narrower application so that aid is available only for court related actions in matters traditionally handled by lawyers and second, the quality of the service actually rendered.

As opposed to the official government funded legal aid schemes, community and voluntary efforts address themselves mainly to legal advice outside the court arena. This results not only from a conscious effort to fill the gaps left by official schemes but also from the fact that voluntary efforts have insufficient resources to take cases as far as court proceedings. The impact of community efforts is only as great as their limited coverage, funds and willingness of participants can offer.

There is no doubt however, that the types of problem confronting community services are more various than criminal and domestic proceedings, and that they are not confined by strictures that private practice has where the proceedings must be economic or legal aid's where the cause must be reasonable, which in practice keeps it within the bounds of private practice and, some would argue, economic considerations.

The voluntary nature of community services has its advantages and disadvantages. The main advantages are their ability to be directly responsive to needs as perceived at the ground level and the imaginative approach to resolving problems without being unduly hindered by bureaucracy. They also have the potential for resolving problems before they get to the acriminious and costly litigation stage; a position official legal aid really does very little to encourage.

Theoretically, then, the gap left, either to be filled by community services or to go unattended, is a large one - all non-court work and all litigation in effect besides criminal and domestic proceedings.

Having reached this stage of summarizing how current legal aid and assistance schemes work and drawing conclusions about how effective they are in terms of their original intentions, a new set of questions present themselves: What should the purpose of legal aid be in the 1980's and how should this be achieved? What are the present needs for legal aid? In what circumstances and for whom should aid be available? What is the state's role in providing this aid?

These questions immediately raise the issue of "legal needs", the concept around which the modern debate of providing legal services revolves. It has become evident after several attempts of empirically assessing and quantifying the legal needs of a community that this very complex aspect of social, cultural and psychological behaviour is not easily counted. Initial research was oriented towards finding the incidence of problems with a possible legal remedy and asking respondents how they handled the situation. These attempts invariably have a narrow and orthodox definition of "problem" and "legal problem". The legal problems included in these studies tend to be those which lawyers already handle or easily imagined extensions of these. In other words the definitions derive from "legal demand" rather than "legal need" and consequently the results have not been

particularly revealing nor pertinent when it comes to remedying the injustices and unmet needs in the community. Research in New Zealand in this area has been extremely limited. One of the few examples is the Dunedin Community Law Centre's survey of legal needs, the results of which are summarized later.

The frustrations experienced with this type of research suggest that a more rewarding approach is a theoretical discussion of legal need from which general principles for legal aid can be outlined.

The starting position taken by a number of commentaries on legal aid is that the law confers rights and imposes duties on all its citizens and, as the Royal Commission on Legal Services in Scotland reported, "in creating this plethora of rights and obligations the government has a moral responsibility to ensure that, where necessary, people can exercise these rights and are aware of their obligations" (1980, p.9). This requires amongst other things adequate and accessible legal services. The question becomes one of the extent to which people with a need for this protection are not availing themselves of it and the reasons for this.

In order to appreciate this, it is argued that "need" must be socially defined according to the values and perceptions of the people involved. Consequently the need people have for legal services is a relative phenomenon and does not have an absolute quality directed by the legal fraternity. The perceptual element works at various levels. First a person has to perceive that a given set of circumstances is a problem and once this is recognized that it is capable of resolution. British research on attitudes to problem definition and solving found there were feelings of acquiesence and resignation to problems in the sense that respondents felt there was no solution, and it was also frequently expressed that there was nothing to be achieved from seeking help or in some cases that taking action would only aggravate the situation (Morris et al, 1973, p.304-5).

However, once a solution is sought, the person may or may not realise that the problem has a legal content or a potential legal remedy. Even if he does it is another stage again for him to opt for it. Not choosing a legal course may be because there is a preferred solution outside the legal arena or it may be inhibited by the many factors that act as barriers to legal services. As Pauline Morris says

the way a problem is defined may well be a function of the agency to which it is referred rather than any intrinsic property of the problem itself (1973, p.52). The corollary of this position is that the agencies who provide legal advice tend to determine the direction of legal services towards the problems they are willing to attend. Consequently, other matters become uneconomic to pursue through the traditional providers of legal advice.

Once a legal remedy has been identified, the barriers to using it can still be considerable. Equal access to legal services is not just a question of money - whether this is seen in terms of lack of it on the part of the person with the problem or the non-availability of limited funds from the providers of legal aid.

Having said this we cannot, however, underestimate the effect that the lack of knowledge of probable costs and the fear this generates can have on preventing people approaching a lawyer. Lack of knowledge is evident in other aspects as well. Overseas research has shown that people are aware in a general way that there are agencies to overcome the financial burden but their specific knowledge is too scant to be helpful. If they are aware, inhibiting attitudes may come into play, e.g. reluctance to accept charity, the notion that one gets value for money, i.e. "money talks", difficulties attached to and the distaste for means testing. Ignorance as to where to go for a lawyer, which lawyer is the most appropriate in the circumstances, and how to actually approach and contact him all may have an inhibiting effect. Because of this ignorance and strangeness, a person may have to overcome considerable feelings of lack of confidence about approaching a professional man, about how to talk to him and what to expect from him. These feelings could well be heightened if discussing important and personal matters.

Other cultural and psychological barriers also exist. Overseas research has shown distinct differences in the use of and in attitudes to lawyers according to social class which explain to some extent the lack of confidence associated with approaching a lawyer. The Royal Commission on Legal Services in Scotland reported (1980, p.50) that their research showed that the higher social groups used lawyers more than the lower groups and supported this with the following quote from research carried out for the Law Society:

> You will not be surprised to know that our research identified class variations in knowledge of, and attitudes to, lawyers, as well as contact with lawyers. Lower social class groups tended to regard lawyers in curative terms, whereas higher social class groups saw them in preventive terms. Lower class people view the law and lawyers with suspicion and saw lawyers as people they might have to contact if they have problems that need resolving or are "in trouble"; higher-class persons on the other hand relate more easily to lawyers, accept the legal system and its working with approval and use lawyers as helpers and advisers.
> (C.M. Campbell, 1976, p.206-7)

Physical obstacles to access are also possible. The distribution and location of lawyers may be prohibitive or inconvenient. Two aspects of this are, first, lack of lawyers in remote areas so that people either have to travel great distances or that two parties to a dispute or negotiation have only one lawyer available thus causing difficulties for independent advice. The second problem is the opposite where in cities nearly all lawyers are clustered in the commercial centre which may well be inconvenient in relation to where clients live or work. Associated with this are hours of business which may necessitate time off work. Another aspect of lawyer availability is the lack of skills and expertise in certain areas of the law for which there may be potential clients, or the difficulties for potential clients in contacting the most appropriate lawyer.

Obviously the question of ensuring access to justice for all citizens is a complex one and demands a number of mechanisms to help achieve it besides the provision of funds for official legal aid as we know it today.

LEGAL NEEDS IN NEW ZEALAND

What then is the position in New Zealand? The demand for legal assistance was described in the first part of this report. The New Zealand Law Society - Heylen survey (1978) gives two indications of the demand made of the profession generally. As the two tables from the survey show, most of their work relates to property or money matters. First from the point of view of the type of work lawyers do:

TYPE OF WORK	Ever Worked	Worked In Last 12 Months	Most Time Spent At Present
	%	%	%
Conveyancing	96.8	83.9	34.5
Company & Commercial Law	89.4	79.4	8.7
Estate	85.2	62.1	2.6
Family Law	78.2	57.2	10.3
Criminal Law	67.1	39.5	3.7
Other Litigation	79.1	50.6	9.1
Tribunals	72.1	52.6	1.2
Other	18.4	17.7	4.6
No one area where most time spent at present (see Column 3)	NA	NA	25.1

Secondly, from the clients' point of view, the purpose of their visit to a lawyer:

PURPOSE OF VISITS TO LAWYER	Have Ever Visited Lawyer (N=740)
Business Matters	27.4
Property transactions	63.4
Borrow money/Arrange finance	25.2
Invest money	12.7
Matrimonial matters	12.5
Court case, other than offence or crime	9.0
Offence or crime	4.9
Dispute	6.6

The 1978 New Zealand Law Society-Heylen survey of the public showed that 74% of the population had used a lawyer, mostly in connection with a property transaction or arranging finance. Most do not fall within classes of business for which legal aid is available. The results also supported the

conclusion discussed previously about the different use made of lawyers by different socio-economic classes. In this survey 'blue-collar' occupations used lawyers less than the managerial or professional occupations, but when they did it was more likely to be for an offence or crime whereas the latter group used lawyers for business, property or financial transactions. People who had used lawyers tended to think they are expensive but disagreed with the proposition that they were unapproachable or difficult to understand because of long words. Unfortunately no comparison was made with the attitudes of people who had not used a lawyer.

One attempt at assessing the needs that go unmet was recently made under the auspices of the Dunedin Community Law Centre (Law in the Community, 1981, p.20). Their conclusion supports many of the points made earlier:

> People see no bar to seeking out the services of the legal profession in matters concerning their traditional fields of work. The public has a high regard for the work that lawyers perform. However, the public suffers from a basic lack of information, which, coupled with a basic distrust of the legal system may prove bars to seeking out lawyers for their everyday problems. Small matters are not thought of as worth consulting a lawyer.
> (Dunedin Community Law Centre, 1981, p.21)

There were many references in the Link Survey to the lack of awareness of legal aid and one of Link's general assessments was that there is widespread ignorance and bewilderment in the community at large about judicial and court procedures. About civil legal aid they concluded that public awareness of the scheme's existence and knowledge of its scope is very limited.

Analysis of the distribution of law firms and lawyers in 1979 shows that legal services are not spread evenly throughout New Zealand according to population size, but rather are generally associated with population density (appendix 14). Not unexpectedly the most intensive legal services are associated with the areas of highest urban concentration: Takapuna and Auckland Central, Hamilton, Tauranga, Gisborne, Masterton, greater Wellington, Christchurch, Dunedin, Invercargill and Gore. Low ratio legal services are associated with areas with a lack of urban concentrations. Areas particularly badly served are Raglan Coast southwards towards

Taranaki, hinterland of Gisborne, the West Coast and North Canterbury - Kaikoura regions. These are rural areas with declining and thinly spread populations. Isolated communities also suffer from a dearth of facilities, for example Golden Bay, Kaikoura, Chatham and Stewart Islands. Overall the South Island has relatively fewer legal services than the North Island.

The urban/rural distinction cannot explain all the differences in lawyer distribution. Notably the difference between Rodney and Franklin Counties (effectively North and South Auckland with lawyer ratios of 1:602 and 1:2422 respectively) cannot be so easily explained in terms of urban/non-urban differentials; a more realistic explanation could be in terms of the opportunites that North Auckland affords, which South Auckland does not. It is suggested that the city location is more attractive for maximizing income, for availability of space, that it is a well-established area with an infra-structure of services and business, and has greater potential for commercial work. In a similar analysis of the distribution of physicians it was suggested that physicians tend to avoid non-white areas for a host of reasons including increased costs of practice as well as perceptions of ethnic groups and the attractiveness of non-white areas. If similar considerations apply to the location of lawyers, the north-south Auckland dichotomy fits the role.

Mention must also be made of identifiable groups within the community who are or may be subject to laws peculiar to their circumstances. Two such groups are handicapped people and prisoners. One can see that they may also have special problems with access to the special legal advice.

CONCLUSION

To a limited extent the legal needs of New Zealanders can be gauged from the use made of private legal services, official legal aid and other legal assistance schemes. However this is really only an indication of legal demand, i.e. satisfied need, and still begs the question of what needs remain unsatisfied within the community. Experience overseas and in New Zealand has shown that it is a difficult and probably unsound exercise to attempt to

catalogue the nature and incidence of specific legal needs of the community. The main reason for this conclusion is that such exercises are overly constrained by traditional perceptions and definitions of "legal problem" and consequently are not particularly revealing about the whys and wherefores of unattended needs in the community. We also suggest that such an approach produces restrained and unimaginative strategies for meeting the need. An important shift in the thinking as regards provision of legal services has been away from this "demand-led" approach to one that recognizes that need is a relative concept that varies according to local circumstances and perceptions.

Overseas and New Zealand investigations, research and commentaries have found it more useful at the practical level to broach the subject from the point of view of access to legal services. Once we have discovered why people do not use the services that exist, we can propose remedies and alternatives more wide-ranging than those which assist people to the courts. We must not underestimate the effect of financial, physical and organizational barriers, but an important message from this work is the recognition of less tangible, cultural inhibitors and that traditional private practice is not geared towards proliferating its services into what are currently and will probably remain uneconomic areas of work.

7

Overseas Examples of Alternative Methods of Providing Legal Assistance and Indemnity

Legal aid takes many forms in different parts of the world, reflecting various stages in the development of the access to justice movement. Vittorio Denti has traced the development of legal aid services in three directions, trends which exist side by side. (Denti, 1979: 346 ff.)

First, legal assistance became a duty related to the professional status of lawyers who were expected to offer their services free of charge to the poor. These can be found in countries in which legal assistance schemes have remained unchanged since the second half of the nineteenth century. Denti cites Italy, Spain and Belgium as examples. Recent additions to this type of legal aid include the payment of lawyers' fees by public funds and the introduction of a system of prepaid legal services as a form of public or private insurance.

The second trend recognises that services rendered by private lawyers are of public and social interest and are to be delivered within the framework of a wide assistance programme directed or controlled by public bodies. This view does not necessarily preclude assistance on a private basis. The underlying concept is that the provision of legal assistance is the task of the state. Although not completely developed, Denti puts Quebec and Sweden into this category.

In the third trend, legal assistance is part of a broad range of social services with the goal of social advancement. The third trend is illustrated by the United States Legal Services Program (which Denti describes as the most advanced legal aid programme in a capitalist country). This programme was devised in the belief that to really provide assistance to the underprivileged calls for a modification in the traditional lawyer-client relationship. Law offices were set up in poor neighbourhoods staffed by lawyers whose salaries were paid by public funds. Lawyers took on a wider role, taking test cases and class actions particularly on civil rights issues, lobbying for law reform on, for example, housing and welfare issues, and organising citizens into pressure groups. There was direct participation by the community in the administration of the legal assistance centres. This scheme came under attack by politicians, mainly because of its political aspects. The Nixon administration withdrew its funding and therefore the programme was dismantled. In 1974 it was replaced by the Legal Services Corporation, a private organisation supported by public funds. Disputes involving overt political issues are excluded from legal assistance.

The difference between the English system of legal aid and the American one has become a classic distinction: aid provided through the private profession which gives part of its time for publicly funded remuneration on a case by case basis versus specialist aid provided by salaried lawyers funded by public grant. Denti (p. 355) concludes that the choice between these two types of assistance is often presented as a technical choice based on efficiency and cost criteria. But as he adds, the choice is also a political one between the individualist approach of traditional systems and the concept that legal assistance is a social right.

New Zealand's legal aid system and its English prototype fall squarely into the extension of Denti's first type. They need no further explanation here. To put us in a frame of mind for considering alternatives for New Zealand, we could benefit from a broader perspective and some examples have been selected to illustrate the other trends. What follows is necessarily selective and fairly superficial, but serves as a useful introduction. The literature is copious, some more of which is summarized on a country by country basis in appendix 2.

Although we are familiar with the fee for service basis of legal aid, there have been some alternative strategies developed overseas which fall within Denti's first trend. These have been developed particularly in response to the needs of people of moderate means who do not qualify for legal aid but cannot afford the substantial costs of litigation. Without necessarily reaching any conclusions as to their appropriateness for New Zealand, some systems are described here.

CONTINGENCY FEES[1]

The "contingency fee" indicates an arrangement by which a lawyer agrees to act for a client on the basis that, if damages are recovered, the lawyer will receive an agreed proportion of them while if the case is lost he will receive nothing. Some states in U.S.A. use this arrangement. The New Zealand Law Society's position is given in rule 6.18 of the Code of Ethics:

> A contract for a contingent fee, where sanctioned by the law or by professional rules and practice, should be reasonable under all circumstances of the case, including the risk and uncertainty of the compensation and subject to supervision of a court as to its reasonableness. NOTE: Contracts for contingency fees are not sanctioned in New Zealand.

The three main arguments advanced in favour of contingency fees are:

1. Such fees would enable plaintiffs, who would not otherwise be able to afford litigation, to take their claims to court.

2. Lawyers accepting cases on a contingency basis would have a stake in winning them and would therefore be more committed and more diligent in their preparation and presentation.

3. Contingency fees would benefit lawyers by simplifying the administrative procedures.

1. As described in the Report of the Royal Commission on Legal Services, 1979.

The arguments against contingency fees are:

1. They encourage lawyers to concentrate only on strong cases.

2. Because the lawyer has a direct personal interest, it may lead to undesirable practices such as construction of evidence, the improper coaching of witnesses, the use of partisan expert witnesses, improper examination and cross-examination, groundless legal arguments, competitive touting.

3. As the lawyers pay all the costs of the case in return for his proportion of damages, he is exposed to the temptation to settle before incurring trial expenses which may not be of benefit to the client.

If a system (such as ours) where in general the loser pays some of his opponent's expenses were to co-exist with contingency fees, some of the advantage of contingency fees is annulled. The plaintiff may have to pay his opponents costs, if not his own, or the lawyer would undertake to pay them in which case his contingent fee would have to be accordingly higher, giving an excessively high reward if the claim succeeded.

Paterson (1979, p.238) reports that in the United States wealthy clients are not always given the option to pay on an hourly basis as their lawyer insists on charging on a contingency basis. Equally, poorer clients are vulnerable to their lawyers insisting on very high percentages. He concludes that contingency fees need restriction and supervision, either by statute or by the courts.

An extension of this concept is the contingency legal aid fund. The fund provides financial guarantees to pursuers who would otherwise be unable to afford to bring their cases to court. In the event of success, the pursuer contributes to the fund a proportion of the money recovered. In the event of losing, the fund guarantees the expenses of both parties. New Zealand's civil legal aid scheme has similar potential in its power to order statutory charges over property recovered. By more flexible use of contributions, this could be extended to encompass people of moderate means.

One advantage attached to civil legal aid but not contingency fees is that, theoretically, it is not restricted to cases involving substantial damages. In both, however, aid is restricted to litigation.

GROUP LEGAL SERVICES AND LEGAL INSURANCE

Another U.S. development in legal services is group legal services, which in simplest terms is groups of people bonding together to obtain access to legal services for particular purposes or at reduced rates. Armstrong (1980 (b), p. 216 ff) outlines their history and describes how they work. As she says they vary enormously from simple informal arrangements between unions and particular solicitors to highly structured plans. She isolates the following as the most useful classifications:

1. Closed or open panels : closed panels involve arrangements between the group and particular lawyers or legal firms. Recently unions have preferred this arrangement as it gives them greater control over the cost and quality because of their control over volume of work. It can also build up expertise in particular problems. Open panel plans guarantee group members access to the lawyer of their choice but they also rely too much on individuals recognizing when legal action is desirable. The U.S. Bar prefers this course.

2. Prepaid plans or other arrangements: pre-paid plans are organized on the basis that payment of a regular premium entitles group members to certain services. Alternative forms of payment are widely used and range from informal "arrangements" with particular firms to discounts for group members on a highly structured fixed fee system for particular services.

Armstrong argues that the real value of group schemes is that they are based on a community of interest approach, thus making access to private practitioners more economically feasible for many moderate earners. She argues that pre-paid schemes focus on the method of payment and emphasise the individualization of legal conflict rather than the aggregation of similar interests into groups with the benefits of accumulated experience, expertise, tactical planning and funds. She therefore prefers other methods of payment. Group services have more potential for preventive service.

Legal insurance is a version of these pre-paid shcemes but not one that need have a group basis. The English and Scottish Royal Commissions on Legal Services (1979, p.179 and 1980, p.114) both comment non-committally on its existence, the English going so far as to recommend that public funds should not support such a system.

Armstrong argues that legal insurance is unlikely to be attractive to Australian consumers. First it does not foster competition within the profession and so is unlikely to lead to reduced costs or to have an impact on value-for-money ratio which will persuade moderate income earners that it is a viable service. Second, insurance schemes will probably remain poor value for money because legal services are not generally actuarially calculable which may well lead to strict limitations on services included under the scheme, and certainly would not encourage purposeful legal activity and education (Cappelletti and Garth, 1978, p.114). The same difficulties would probably prevail in New Zealand. Although there is no reason to discourage legal insurance, it is not a positive activity for maximising access to the law and probably not one readily available to those that most need it - those with less than moderate means.

CLASS ACTIONS

One further method for making litigation more affordable is the class action/group interest litigation, i.e. procedures whereby all those with a similar grievance can unite to bring a single court action. The Australian Law Reform Commission discusses thoroughly the arguments for and against class actions, the issues surrounding the scope of such procedures and alternatives in a discussion paper (no. 11, 1979). It concludes that a need for such a legal procedure exists. In Scotland the Royal Commission on Legal Services (1980, p.115) said that class actions are an important issue and deserve thorough treatment. They were awaiting the report of the Scottish Consumer Council who were studying the issue. The Royal Commission on Legal Services [U.K.] (1979, p.128-30) concluded that legal advice and assistance should be available for groups but that legal aid should be confined to individuals save in representative actions.

Class actions have been most extensively developed in the United States. The Australian Law Reform Commission (p.5) summarizes their use there:

> Class actions in the United States serve businessmen and consumers alike. Laws in the areas of consumer protection, welfare, environment, anti-trust and securities, and civil rights legislation are all enforced in class actions. In some cases, the claim is brought by consumer associations or environmental groups; in others, by a commercial group or trading association. The very capacity of the action to enable litigation in so many fields prevents definition of a typical class action. Class actions have enabled redress to be obtained from courts where parties seek equitable relief or damages.

It is also acknowledged that abuses have arisen in the States (p.35).

Particular traits of the class action as highlighted by Cappelletti & Garth (1978, p.44) are:

> First, the class action, by allowing a litigant to represent an entire class of persons in a particular lawsuit, saves the costs of creating an ongoing organization. Economies of scale from the aggregation of small claims are thus available, and clearly the bargaining power of the class members is greatly enhanced by the threat of a huge damage liability for the other party. With the device of the contingent fee, where available, the work of organizing is financially encouraged for attorneys who may obtain substantial remuneration. The class action device, therefore, helps give the advantages of organizational litigants to group and public interest claims.

Alternative procedures considered by the Australian Law Reform Commission were consolidation and joinder and test cases. It concluded that consolidation and joinder were not intended nor are they suitable for large numbers of claimants. In New Zealand using these procedures each party would be eligible to apply for legal aid in his individual capacity. Test cases are not the answer either as they proceed on the consent of the parties and subsequent cases are not bound to act according to the test case. The test case parties are liable for their costs as in ordinary circumstances and may or may not be eligible for legal aid. Plaintiffs in future cases may benefit from the substantial costs of the test plaintiff without incurring or contributing to the costs themselves.

The Legal Aid Act 1969 explicitly excludes a "body of persons corporate or unincorporate" (except a trustee corporation) as being eligible for legal aid.

SUITORS' FUND

In 1978 the Royal Commission on the Courts recommended that a suitors' fund be established in New Zealand. Once again this is a type of legal assistance not necessarily directed at the poor but one which also encompasses those of moderate means and even people with handsome resources. It is however directed towards legal costs related to court proceedings.

The idea of a suitors' fund is to compensate litigants who incur exceptional costs through no fault of their own. The scope of such a scheme is variable but the one suggested for New Zealand would cover litigants whose judgment is reversed on appeal and proceedings rendered abortive by the death or illness of the judge, or because the jury cannot agree, or a hearing discontinued or new trial ordered through no fault of the litigants. Questions also arise as to how the scheme will be funded and the appropriate limits on the type of claimant and on the amount of claims.

Suitors' funds have been established in at least five Australian states, incorporating various operating criteria and funding mechanisms. Only a very small proportion of litigants ultimately make a claim on the funds and the funds were all in a sound financial position when we enquired in early 1979.

The [U.K.] Royal Commission on Legal Services recommended that public funds should finance additional expenses arising because a judge becomes ill or dies or cases that involve points of law of public importance but not for appeals where a decision is reversed as this is a risk inherent in all litigation (1979, p.179-180). The Royal Commission on Legal Services in Scotland recommended that no suitors' fund be established, believing insurance can be obtained for such risks (1980, p.114). We know such insurance has occurred in New Zealand. On some occasions an ex gratia payment has been made to parties on the death of a judge before judgment was delivered.

LEGAL AID PRACTICES AND THE LEGAL CLINIC

We are aware of a couple of attempts in New Zealand and a few in Britain by conscientious and dedicated lawyers of setting up what has become known as a "legal aid practice". This is not really an alternative form of legal aid, but an attempt to use legal aid of Dentis first type more consciously to attack the gaps in legal services. As described by a solicitor in LAG Bulletin, September 1978:

> The philosophy behind the setting up of our practice was not particularly new: to work in an area which was ill served, if served at all, by solicitors, where the majority of people had legal problems which could loosely be called community problems rather than the type of problem traditionally dealt with by solicitors, to provide a service equal to if not better than that provided by the firms in the more affluent or traditional areas; and to endeavour to finance the practice largely if not wholly by legal aid.

Such practices necessarily aim for accessible, usually storefront, offices. This is not only for the convenience and confidence of the public, but also because advertising restrictions prevent direct publicity even when the potential clientele may be wary of approaching lawyers. By all accounts their office equipment and furniture is unpretentious and as cheap as efficiency allows.

The literature and examination of such practices show that their motivating ideal is unattainable and that the practice cannot survive on an income from legal aid alone, but must be subsidized or even supplanted by "economic" and fee-paying work. (Rosenberg, G. (1980); Soar, P. (1979); LAG Bulletin, September 1978, p.205; Law Society, 1981, p.14). George Rosenberg, a Wellington solicitor, describes his eventual practice thus:

> In general I now do very little work for nothing (even where I see a need, often a desperate one), and, although I have not made any formal comparisons, I doubt whether my fee structure is significantly lower than that charged by many firms doing similar work in town. In short the only ways in which my firm differs from a conventional law firm is that it is perhaps a little more accessible (although Wellington has an excellent bus service), it probably provides a more homely and friendly atmosphere, and I am prepared to take on some types of cases which other lawyers cannot or will not, but I still have to be paid.

Rosenberg's own words seem a fit conclusion for all these attempts: "despite all my initial hopes, there is just as great an unmet need for legal services here as there was before I began".

The accessible and low cost elements of the legal aid practice have been extensively developed in the United States in the form of the legal clinic. This is a law office which operates at maximum efficiency and minimum cost in highly urbanized areas, and consequently restricts work to basic areas of legal advice or litigation which can be standardized (Commonwealth Legal Aid Commission, 1981 b, p.28). Legal clinics usually charge lower fees than traditional law firms and rely on extensive advertising to attract the large clientele they require (The Yale Law Journal, vol.90, p.152, 1980). Doubtlessly the philosophy behind clinics differs from one to another, but even if it is to make the law more affordable for the poor, the above description implies that they are not in a good position to move into "uneconomic" areas of activity.

PUBLIC DEFENDERS

Public defender schemes are an example of Denti's second trend. Although there is no instance of a public defender in New Zealand, the concept has certainly been debated. The 1978 Royal Commission on the Courts recommended that a public defender scheme was neither necessary nor desirable in New Zealand. This was not however really a matter for the Commission's consideration within its terms of reference. It cannot be said that the question was then fully debated. Since then, however, the concept has gathered a following. Indeed a public defender scheme or similar was the explicit preference of the majority of a number of the groups in the Link survey e.g. judiciary, court staff, social welfare officers, community groups, and to a lesser extent the police. The lawyers however had reservations about such a scheme.

What then is the current position and knowledge about such schemes?

A public defender is a salaried state lawyer who acts for accused persons. The state supplies the service directly, rather than paying for the cost of private practitioners through legal aid. At present there are public defenders in several jurisdictions, including some states of the United States (but not in the federal criminal courts) and some Australian States.

There are arguments for and against the use of public defenders. Foremost among the disadvantages which some people see in public defender schemes is a lack of independence in that lawyers are employed by one government agency to defend citizens against accusations made by another government agency. Although this is a real concern, it is argued that there are mechanisms to minimise this lack of independence.

The quality of representation provided by public defenders has also been the subject of criticism. It is argued that public defenders render less than ideal services because they are not well paid, have too many cases to handle, and lack access to the office facilities, library resources, and supplementary services that lawyers for the affluent can afford. The result, say some, is a "two-track" system of justice in which people who have money obtain good representation while the poor get inferior representation. Another disadvantage which some people see in public defender schemes is a tendency for the defenders to work too closely with the prosecutor and appear to become part of the court's personnel. On reflection it is evident that these criticisms as regards quality are not inherent aspects of a public defender scheme. Some attach equally to other legal aid schemes, others can be minimized by proper organization.

Supporters of public defenders maintain that in a welfare state, it is just as much the state's duty to provide defence lawyers for its citizens as it is to supply education, housing and health services for them.

Those who favour a public defender system point out that such a system makes representation by a legally qualified and experienced person readily accessible to a defendant.

Insofar as the quality of the service provided by public defenders is concerned, they emphasise that defender offices have certain advantages over systems of case-by-case assignment of individual lawyers including intensive experience of the staff; opportunities for consultation among lawyers working in the same office; and greater ability to train, observe, supervise, and, if necessary, weed out lawyers.

Another advantage that is claimed for public defender schemes is that they are less expensive than providing legal assistance by means of legal aid. Two recent Australian studies confirm this claim. The first is calculations made by the N.S.W. Public Solicitor which indicates that a duty solicitor service by salaried staff costs at least half of that when using private practitioners paid at sessional rates (c. 1978, p. 3). The second study hails from South Australia which concluded that in all areas of law including criminal, it was cheaper to use staff salaried lawyers rather than assigning cases to private practitioners. There is no evidence that the staff services are inferior in quality to the private, but it is pointed out that these cost comparisons do not take into account the quality, which is ultimately a more important question (S. Armstrong, 1980(a), and Nagy and Verlato, n.d.). The fact that cost and quality may be interrelated was also discussed in relation to the Washington D.C. scheme where it was concluded that "Ultimately, the defender deals in values - the value to the public at large of a judicial system which operates fairly for all and the value of justice to every accused individual. These values cannot be reduced to dollars and, therefore, effectiveness and efficiency analyses have their clear limits when it comes to formulating basic policy" (U.S. Department of Justice, 1975, p.45).

The Washington D.C. Public Defender Service (PDS) is an example of a very successful public defender. Indeed it has been designated an "exemplary project" by the U.S. National Institute of Law Enforcement and Criminal Justice. The primary purpose of PDS is to provide effective legal representation to those unable to afford counsel in criminal, juvenile and mental health commitment proceedings. Sixty percent of these cases are dealt with by PDS while the other forty percent is assigned to private lawyers through the PDS office. (U.S. Department of Justice, 1975).

The success of the Washington and other public defender schemes was substantiated in a piece of independent research (Hermann, Single, Boston, 1977) which compared the quality of the service provided by privately retained lawyers, by assigned lawyers and by public defenders. The main conclusions were that the likelihood of being convicted or of receiving a custodial penalty was the same regardless of type of representation, even when the severity of the offence, pre-trial detention situation and previous criminal record were taken into account. Generally, judges,

prosecutors, public defenders and even private lawyers thought that public defender representation is as good as if not better than private lawyers. Contrary to these professional opinions and the statistical evidence, defendants generally preferred privately retained lawyers over publicly provided ones. The authors suggest this may be because public defenders may provide less satisfactory court room experience in terms of degree of consultation, investigation, and because of distrust of their connection with the system. Also that there is a social assumption that one gets what one pays for, regardless of the reality.

The significant features of the Washington D.C. scheme to which its success is attributed is outlined in the following quotation from the National Institute of Law Enforcement and Criminal Justice's publication (U.S. Department of Justice, 1975, p.5-7):

> (1) Limited workload standards. In establishing standards for the number of cases handled by a single staff attorney, PDS utilizes workload as its touchstone, viewing caseload as only one of several factors involved in setting standards. Rather than limiting caseloads on the basis of court or funding agency interests, PDS has attempted to define the components of a workload, to relate them to its objectives, and to constantly re-evaluate both. The number of cases is the end result of this process, not the beginning point. Workload standards are dependent on many variables and should vary from agency to agency and attorney to attorney. The PDS standards allow for this individual variation. Since these standards have evolved in an almost ideal defender context (high funding and salary, efficient court system, good training programs, centralized, unified court and jurisdictional structure and adequate supportive resources), their caseload could be considered a maximum for other defender service agencies.
>
> (2) Individualized and continuous client representation. Few defender services provide continuous representation by one attorney to each client. Rather, defendants may be transferred from one attorney to another as they pass through successive stages of criminal proceedings. In contrast, PDS attorneys remain with a given client for the duration of his or her case. The only exception to this policy occurs at the appellate level where PDS feels it is critically important to assign a new lawyer to re-examine the case. The impact of these procedures, in terms of client perception alone, may be immeasurable. Moreover, such individualized representation substantially increases the attorney's sense of accountability and responsibility.
>
> (3) Comprehensive training program. A high priority within PDS is the allocation of sufficient time and resources for training staff attorneys. As a result, PDS has developed a systematic and comprehensive program which includes an intensive entry-level curriculum and continuing in-service educational and supervisory efforts.

(4) Utilization of supportive, non-legal resources in service delivery. Through its Offender Rehabilitation Division, PDS has sought to experiment with the development and utilization of non-legal resources. Social work assistance is available to assist attorneys in developing information for sentencing and preparing long range rehabilitative plans.

(5) Effective management and administrative systems. PDS provides a clear example of the benefits to be gained by operating under an independent Board of Trustees which can act as a buffer against political pressure and which is willing to accept the responsibility for assuring quality through the regulation of caseload. Moreover, PDS has recognised the need to devote resources to encourage independence, quality performance and internal accountability.

(6) Involvement of the private bar in public defense. PDS administrators are strong advocates of the position tht the private bar should be broadly involved in criminal representation. Under the district's "mixed" system, PDS maintains a panel of private attorneys, and provides training, information, advice and supportive services. For PDS, in turn, the participation of private attorneys is a source for limiting workload.

(7) Law reform as an integral aspect of public defense. Within PDS, law reform efforts are considered a necessary part of workload - another tool of effective, individual representation to be encouraged in appropriate cases. Several years ago the agency's Board of Trustees expressed its view on law reform as follows: "We believe that agency attorneys should provide full and effective representation for their clients and that as a result of the agency's sizeable caseload, inevitably significant issues in the administration of criminal justice will arise that those issues should be litigated in cases where the client's interest is served.

THE SOUTH AUSTRALIA LEGAL SERVICES COMMISSION

The South Australian Legal Services Commission is also an example of Denti's second trend in that the state accepts responsibility for legal services. It does however seem to have the flexibility to venture into alternative methods if appropriate and could therefore encroach into the third trend.

In its first annual report the South Australia Legal Services Commission explains one of its reasons for being:

> In addition, bodies such as the Law and Poverty Commission expressed the view that it was undesirable for legal aid schemes to be controlled either by Government (as was the ALAO) or by private legal practitioners (as were the Law Society legal aid schemes). It was felt that Government control threatened the ability of legal aid to protect its clients' interests in ways or in issues which might be distasteful to Governments, and that private legal practitioners had vested interests in the delivery of legal services which made it inappropriate that they should control the expenditure of public funds in this field. The Poverty Commission took the view that the work of legal aid should be controlled by a statutory commission as independent as possible of control both by Government and by private legal practitioners. (1978-1979, p. 2)

Similar commissions have been or are to be established in all Australian states and the principles have been recognized in the United States Legal Services Corporation established in 1974. Some Canadian states have similar commissions. The recommendations of the Royal Commission on Legal Services in Scotland (1980), and to a limited extent the Royal Commission on Legal Services in England (1979) recognized the benefits of an independent organization.

Although the existence of a commission in no way determines the nature of the assistance, it is a novel concept as far as New Zealand is concerned for organizing legal aid. Its possibilities are illustrated using the South Australia example.

The Legal Services Commission is constituted by statute which sets out the terms of membership, the functions of the commission, the principles on which it operates, the type and manner of legal assistance, its financial provisions and its relationship with the legal profession.

The Commission is appointed by the Governor following nominations of the Commonwealth and State Attorneys-General, (one nomination after consultation with the Council for Social Services) and of the Law Society.

One of the features of the South Australian Legal Services Commission is the mixture of assistance given by salaried staff and cases assigned to private practice. In 1979 the proportions were 26% to 74%. The Commission has several sources of income. The major one is a Commonwealth grant, with the next being a State grant and statutory interest on trust accounts. Client contributions and recovered costs also contribute to the fund.

The following extract from its Act indicates the very wide brief of the Commission and the flexibility and discretion involved in its operation:

10. (1) The Commission shall -

(a) establish an office to be called the "Legal Services Office";

(b) provide, or arrange for the provision of, legal assistance in accordance with this Act;

(c) determine the criteria upon which legal assistance is to be granted in pursuance of this Act;

(d) conduct research with a view to ascertaining the needs of the community for legal assistance, and the most effective means of meeting those needs;

(e) establish such local offices and other facilities as the Commission considers necessary or desirable;

(f) initiate and carry out educational programmes to promote an understanding by the public (and especially those sections of the public who may have special needs) of their rights, powers, privileges and duties under the laws of the Commonwealth or the State;

(g) inform the public by advertisement or other means of the services provided by the Commission, and the conditions upon which those services are provided;

(h) co-operate and make reciprocal arrangements with persons administering schemes of legal assistance in other States of the Commonwealth or elsewhere;

(i) encourage and permit law students to participate, so far as the Commission considers practicable and proper to do so, on a voluntary basis and under professional supervision, in the provision of legal assistance by the Commission;

(j) make grants to any person or body of persons carrying out work that will in the opinion of the Commission advance the objects of this Act;

and

(k) perform such other functions as the Attorney-General may direct.

(2) In determining the criteria upon which legal assistance is to be granted in pursuance of this Act, the Commission shall have regard to the principles -

(a) that legal assistance should be granted in pursuance of this Act where the public interest or the interests of justice so require;

and

(b) that, subject to paragraph (a) of this subsection, legal assistance should not be granted where the applicant could afford to pay in full for that legal assistance without undue financial hardship.

(3) For the purpose of this Act the Commission may acquire, deal with, and dispose of, real and personal property.

11. In the exercise of its powers and functions the Commission shall -

(a) seek to insure legal assistance is provided in the most efficient and economical manner;

(b) use its best endeavours to make legal assistance available to persons throughout the State;

(c) take into account the recommendations of any body established by the Commonwealth for the purpose of advising on matters pertaining to the provision of legal assistance;

(d) have regard to the following factors:-

(i) the need for legal assistance to be readily available and easily accessible to disadvantaged persons;

(ii) the desirability of enabling all assisted persons to obtain the services of legal practitioners of their choice;

(iii) the importance of maintaining the independence of the legal profession;

(iv) the desirability of enabling legal practitioners employed by the Commission to engage in practice of the law as comprehensively as reasonably practicable.

One of the advantages of such a commission is its responsibility for all legal assistance in its area and not just some aspects of it. The advantage is, that in times of scarce resources, duplications can be avoided and the total legal aid programme can be co-ordinated, acting with a common policy objective in order to make the most of available resources. And this in reality has been the real task for the South Australia Legal Services Commission. Given its limited resources and consequently limited coverage, the Commission has adopted a number of alternative strategies in order to concentrate on cases of most need. The strategies advocated and adopted by the Director of the Commission are (S. Armstrong, 1980, p. 202 ff):

1. Conscious reallocation of resources and allocating priorities to needs. E.g. legal representation is necessary to protect the rights of people charged with criminal offences whereas it is not necessary in seeking simple divorces. Alternatives for assistance in divorce cases are to abolish the need for court appearances or in the meantime assist people by giving classes in "do-your-own divorce".

2. Increased use of paraprofessional staff whose time is cheaper than expensive legal professionals. The Commission stresses the preventive role and encourages people to seek advice before complex legal problems arise. It offers therefore initial advice free to any person seeking it regardless of means. Intensive use of trained and experienced interviewers who have professional backing when necessary makes this possible.

3. Increased use of alternative agencies by referral or fostering the development of services or by helping to train personnel in other agencies.

4. Increased specialization and technological advances.

5. Increase the general level of legal competence within the community, to ensure both that the number of minor and routine matters which must be dealt with by legal aid is minimized and also that people who are unable to obtain access to assistance are better equipped to protect their own interests.

These conscious strategies are considered fairer than the three arbitrary techniques that steal their way in when there are insufficient funds (ibid, p. 201-202):

1. Failure to advertise, so that potential clients are unaware of the aid. This effects those who most need it - the illiterate, migrants, the uninformed and those who lack skills to find their way around the system.

2. The imposition of harsh means tests, thus excluding those on moderate incomes who cannot afford private fees.

3. The use of "commitment levels", i.e. the level of work permitted to go to private practitioners within a given period, leading to stockpiling or first in first served procedures.

UNITED STATES LEGAL SERVICES CORPORATION

The United States Legal Services Corporation is another publicly funded legal assistance scheme which protects its independence by means of statute. However it functions in a different manner from the Australian commissions and has a concept of legal services that fits more neatly Dentl's third category which redefines the traditional lawyer-client relationship. This has been essentially an American development. Rather than provide direct services it distributes grants to legal services programs developed locally. In order to illustrate the concept and its services the following extracts have been taken from the Corporation's 1979 Annual Report and a 1980 background release from the Corporation.

The discipline of "poverty law" is growing and is being reflected in legal literature and law schools...

These developments have taken place in a larger historical context. The civil rights movement, the awareness of individual rights, and the growing complexity of the law itself have all contributed to the provision of legal services. But when Congress passed the Legal Services Corporation Act in 1974 it took a major step in the development of this country's justice system. It established a foundation of service to poor people in communities throughout the nation, and it provided a new stability to legal services.

The Legal Services Corporation is a private, nonprofit organization established by Congress in 1974 to provide financial support for legal assistance to the poor in civil matters...

The Corporation began operations in October 1975. It is governed by an 11 member Board of Directors, appointed by the President of the United States, with the advice and consent of the Senate. No more than six members may be of one political party and at least two members must be eligible clients.

With funds provided through congressional appropriations, the Corporation ... distributes grants to some 319 legal services programs operating in about 1,200 neighborhood offices throughout the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Micronesia. Approximately 5,000 lawyers and 2,500 paralegals work in these offices.

The Corporation is responsible for ensuring that its grantees provide services efficiently and effectively ...

Through field evaluation and monitoring visits, the Corporation's Office of Field Services has detailed knowledge about each program, how it operates, and whether it needs technical assistance.

The role of the Corporation also is to support - through training, research, clearing house activities, and technical assistance - the lawyers, paralegals, and other staff who work for local legal services programs so that they can provide the highest quality legal services to the poor ...

Local legal service programs are not designed in Washington. The vital decisions about each program are made by people from the program's community who understand their own local problems...

The methods of providing service are almost as varied as the areas the programs serve. Many programs use a core of full-time staff attorneys and paralegals located in branch offices throughout the service area. Other programs modify that approach by "circuit riding" to the outlying parts of their service areas, or by using mobile vans to bring the services to clients in sparsely populated locations. Staff members visit homes, hospitals, nursing homes, housing projects, and other places eligible clients live and congregate ...

Most of the 319 Corporation-funded programs are staffed by full-time attorneys and paralegals. Others utilize private attorneys in delivering service ...

Within maximum income levels prescribed ... each program sets its own financial eligiblity standards, taking local living costs into account.

Individual eligibility is determined primarily by family income, but other factors affecting a person's ability to pay for legal services are considered, such as fixed debts and obligations, medical bills, child care expenses, and seasonal income variations.

Because most programs to not have sufficient resources to meet all the needs of the eligible population, a program must establish priorities that reflect community needs and by considering, among other factors, the availability of other sources of legal assistance.

Therefore, within the general authority of limitations of the Legal Services Corporation Act, each program has broad authority to determine how it will conduct its operations.

Although programs provide legal representation and counselling in most civil matters, some specialize in problems relating to consumer affairs, senior citizens, administrative benefits, housing, and family law.

Once again not having a strict adherence to either staff lawyers or private assignments seems to be a successful strategy. The feature to be noted is the flexibility and emphasis on local responsiveness and autonomy. A recent study by the Corporation (1980 b) concluded that judicare (similar to New Zealand's civil legal aid) was not as successful as services provided by staff lawyers or mixtures of staff and judicare. They concluded that "clearly, the emphasis on local flexibility .... has been a key to the success of this nationwide effort" (p.ii) and urge that efforts "concentrate on finding and developing creative local delivery systems" (p.iii).

8

Proposals for Legal Assistance in New Zealand

PRINCIPLES AND OBJECTIVES OF LEGAL ASSISTANCE

The main deficiencies of the present government funded legal aid schemes as demonstrated in the previous discussion are first the circumscribed application of civil legal aid and secondly, the quality of the service provided. The latter is particularly evident in criminal legal aid. The ramifications of the former are more pressing and we concentrate at this stage on broadening the scope of legal aid. We contend that the potential for improved quality is implicit in many of our suggestions.

The first reason for the restricted scope of legal aid is that it does not, except incidentally, apply to non-court proceedings. The consequent need for aid for legal advice is taken up by LawHelp and community law services, which given their limited coverage and resources can claim to serve but a small proportion of the need for advice and assistance.

Another important reason for civil legal aid's limited reach is that, philosophically, structurally, and administratively, it is but an extension of private practice. This is manifest in a number of ways - the traditional client-lawyer relationship is maintained; the legal aid client is attended by a lawyer in private practice; the lawyer is reimbursed basically on a fee-for-service basis; the work done is generally the same as lawyers do for their private clients and in circumstances where the legal aid client has no alternative but get involved in litigation - crime and domestic proceedings. In this connection it is interesting to report the English commentary

on the legal aid injunction that an applicant must show "reasonable grounds for taking or defending the proceedings or being a party thereto". It is argued this can discourage a wider use of legal aid. In interpretation, there are two parts to this test. The first, showing that there is a good case in law or fact, is not argued with. The second part is whether the hypothetical private client with adequate means would pursue the litigation. LAG (1980, p.26) argues that this prevents legal aid being available in cases where injury has been to reputation or civil rights but probable compensation is small. In other words it restricts legal aid to "economic" claims or traditional causes. The Royal Commission on Legal Services (1979, p.140) believes "the man of adequate means" test is inappropriate, and the decision ought to take account of factors peculiar to the applicant or his case, thus acknowledging that the type of problem poor people have may be qualitatively different from those of people with adequate means, e.g. the need for a benefit, small though it may be. The Royal Commission saw this more relevant criterion extending aid to cases involved with injury to reputation, status, civil rights or personal dignity. They also saw the change enabling aid to be granted in a case which, if successful, would benefit a large number of people in similar situations, that is, a test case, e.g. a consumer, social security or employment case of wide application albeit involving small claims. New Zealand interpretations of our comparable provision (s.23(1) Legal Aid Act 1969) and related sections (s.23(2)(e)(i),(ii),(iii)) do not appear to rely on such a test, but the implications of the English arguments are equally relevant to New Zealand.

Over and above these two limiting influences on the application of legal aid, is a more general proscription, that is, the narrow definition of need. In both offenders and civil legal aid, the critical criterion of need is lack of financial means. We do not suggest that people who can afford their legal services should receive aid, but that this emphasis obscures real issues about why people do not enjoy the protection of the law.

The principle upon which our present legal aid schemes were originally based is still valid today. That the law should provide equal protection for all citizens is established in the Universal Declaration of Human Rights and needs no justification. To prevent this principle becoming little more than cant and to ensure it has the opportunity of being achieved, most commentaries and discussions

on the provision of legal services translate it into operational terms. The main objective of a legal assistance programme in New Zealand becomes, therefore, to ensure that all citizens have equal access to the law. It is necessary to recognize the two faces of "access". As well as being a procedural focus, it is increasingly being recognized as a fundamental social right (Cappelletti & Garth, 1978, p.9).

Equal access is not merely a matter of money. The many barriers and inhibitors in obtaining legal services when required were discussed in chapter 5. Briefly, social and cultural factors that affect perceptions of needs and remedies, knowledge, confidence and situational difficulties appear to be equally prohibitive as well as the limitations brought about through adherence to a traditional legal field of reference.

No final statement can be made about the extent of legal need in New Zealand, but circumstantial evidence suggests needs do exist. In particular, the response to the recent community legal services has been substantial, a large proportion of which has been with regard to services not offered by legal aid. Other factors identified by research are the different patterns of lawyer use by blue-collar workers and by managerial and professional people; the uneven distribution of law firms, particularly between north and south Auckland; the lack of knowledge about civil legal aid as reported to Link Consultants.

Where access to the law is not readily available through existing systems, it behoves government to consider alternative means of providing legal services. The argument about government's role was developed by the Royal Commission on Legal Services in Scotland thus (p.9): "In creating this plethora of rights and obligations the government has a moral responsibility to ensure that, where necessary, people can exercise these rights and are aware of their obligations". The English Royal Commission (p.50) accepted the financial aspects of this as a principle for the provision of legal services: "financial assistance out of public funds should be available for every individual who, without it, would suffer undue financial burden in properly pursuing or defending his legal rights".

The role of government in New Zealand's legal aid system is established to the tune of an estimated $5.149 million dollars in 1981/82. Given our recent appreciation of how legal needs and legal services interact, government's role needs reconsidering to

ensure that public money is spent to greatest advantage in meeting the objectives of legal assistance. The conclusions of the Scottish Royal Commission (p.11) as regards overall government participation reflect our own position - that public funds should be provided, that a publicly responsible body administer legal assistance, and the state not take a particularly prominent role in the actual delivery of legal services:

> Our own work, and the absence of relevant research studies, indicated a need for some kind of body to keep continuous watch in order to ensure that the State is getting the best possible value for the substantial sums of money it spends. Such a body would need to monitor legal service provision as it develops to meet existing and emerging needs in a changing society. We were struck by the static nature of legal services as at present provided and the slow response to changing public needs. We were also aware of fears that a possible risk to the independence of the legal profession might be threatened by over-supervision, and we were concerned to ensure that this should be prevented. It also seemed to us desirable to look at the way central government legal functions were organised to ensure that someone had a proper overview of the delivery of legal services. To ensure that this overview was well informed we also had to consider the advice available to government, and whether it was adequate" (emphasis added).

Overseas aspirations and experiments, both the successes and failures, as well as our experience with and empirical appreciation of legal assistance in New Zealand, offer another principle which seems an indispensable ingredient for future legal assistance in New Zealand, that is, flexibility. We believe that the New Zealand experience is not substantially different from that identified by the Scottish Royal Commission. Our schemes have been static in nature and operation. Our strategy must be flexible for now and for the future, and for different localities, both as regards the content of legal services and the means of delivering them. This does not mean we should not demand a high standard of service from the various programmes/schemes. We should have some means of monitoring this. Flexibility is a constant benchmark in our following plan.

Bearing this in mind, and if we wish to progress towards our objective of equal access, we need more than an extension of legal aid to the outstanding aspects of traditional practice, e.g. advice, and we need more than an extension of the traditional legal services to non-traditional areas through monetary assistance. As well as the essential reactive services of the law, we should encourage it as a proactive facility. With the growing awareness that conflict is best served if identified early, we need to be willing to use the law positively to help prevent

problems or grievances. This is where flexibility in the use of available resources will be important and could well involve acceptance of new features for legal services: problems not previously considered appropriate to legal skills or analysis ; an extension to the type of relationship between the law and the client or the law and the public e.g. group claims, self-help, legal education ; additions to the providers of legal aid, e.g. trained lay advisers. Can the private legal profession accommodate such changes or indeed is it reasonable to expect it to when it is fully committed to the services it provides now? Experience to date, such as the concentration on property and financial business, the way legal aid has developed according to traditional practice, the uneconomic nature of some potential legal needs, suggests other avenues should be explored. This was recognized by the Lord Chancellor's Advisory Committee on Legal Aid in 1977 (1976/77, p.84-5) and acknowledged by the Council of the English Law Society in its practice note for law centres (Law Society Gazette, 31 August 1977): "The Council recognize the great importance of a full and adequate range of legal services being available to the public. They also recognize that, although the traditional mode of providing such service has, in the main, been through the work of solicitors in private practice, there is now, and may well be for some time to come, a need to supplement the legal services supplied by traditional methods". The systematic way to approach this is to evaluate legal aid schemes with reference to their objectives, which may or may not suggest traditional private practice as the most appropriate vehicle in the given resource circumstances.

LEGAL ASSISTANCE FUNDING

It is necessary to mention the financial constraints on the future provision of legal assistance. Nearly all funds for legal aid come from the consolidated account, plus the contributions from clients and from the legal profession through reduced rates. Funds for community law efforts come from government, local government, the Law Society, individual lawyers, donations, charities and members of associations. The current level of government funding in this area is about $5 million gross.

The Government has made it clear that public funds are limited and that legal aid's

proportion cannot be increased. The development of schemes dependent in full or in part on government allocation must be based realistically on the assumption that this position will obtain for some considerable time yet.

A major alternative source of funding which has been mooted from time to time and which is currently being reconsidered is interest earned on solicitors' trust accounts. The New Zealand Law Society is a keen advocate of this. The issues to be considered are briefly summarized here. It should be noted as background that these accounts attract no interest at present and that accountants, real estate agents, motor vehicle dealers, stock brokers and auctioneers all operate trust accounts along similar lines.

First, it is technically feasible to calculate and make payments today but it is questioned whether it is cost effective for small amounts. This depends on how the interest is eventually used. In England and Scotland interest is calculated and paid to the client for amounts over $500 which are in trust for at least two months. In other cases, interest may be paid on an aggregate account, the interest going to the solicitor, or no interest paid at all. In Australia interest is paid on 60% of the lowest daily balance, thus eliminating the question of the feasibility of payment for small amounts, and is paid into a fund for legal aid and other legal services.

The New Zealand Law Society suggests that 66.7% of the lowest aggregate balance of all solicitors non-interest bearing accounts could be paid interest at the rate of 6% on a monthly basis. If the aggregate figure was, say, $150m then the interest payable would be $6m. It is still unclear, what effect a sum of that nature would have on the banking system and consequently on the economy as it passed on its costs.

If paying interest is a viable proposition, the critical question is to whom should the interest be paid. The two main options are to the individual clients or to a public fund to finance schemes associated with the legal system.

The former is compelling in principle, but it is debatable whether it is practicable technically and in cost terms, witness England and Scotland, though an Australian source considers it is (Commonwealth Legal Aid Commission, 1981b, p.35). It can be argued that the benefit to the community as a whole of the latter option outweights the former. The usual response to this is that, if it is for the public

good, it should be paid through the public purse and not subsidized by one sector of the community. It is also necessary to recognize that the trust fund may not remain as substantial in the future as it now is, either because solicitors will invest clients' money where benefit does accrue to the client or because any future deregulation in the banking system may offer more scope for solicitors and their clients' money.

If interest from these accounts is available for legal services, to what purposes should they be put and who should administer them? The New Zealand Law Society suggests money from this source be used to fund civil and offenders legal aid, the duty solicitor scheme, neighbourhood law offices, legal education and the Solicitors' Fidelity Guarantee Fund. Without commenting on the merit of these propositions, we add community legal activities such as law related education and legal information to the list of possibilities. In deciding what priority should be given any of these categories, it may assist to highlight those that have direct as opposed to indirect benefits for the general public. In this context we are particularly concerned with funding of an extended legal assistance plan which we claim is obviously of direct benefit to the public. The countering arguments are that an expanded legal aid scheme benefits solicitors pockets as well as clients affairs; that one section of the public is paying unfairly for another section and that if there is real need in one area then it should be paid from the general public purse. Funding of the other categories would assist the general public in a more indirect manner.

The Law Society submits that the funds for these purposes should be administered through their proposed Law Foundation. In the event, we argue that the legal assistance portion of this fund should be granted to the Legal Services Commission (which we propose in detail shortly) to allocate according to their overall strategy and priorities.

Finally we note overseas developments as regards use of interest on solicitors' trust accounts. The legal aid programmes of most Australian states receive income from this source. It accounts for 15% of Australia's total legal aid income and there is a strong lobby for interest to be paid on daily balances rather than on 60% of the lowest daily balance as it now is (Commonwealth Legal Aid Commission, 1981, pp46-47). Canada has a similar scheme.

The Royal Commission on Legal Services in Scotland recommended that interest from clients' funds should wherever possible be paid to the clients. Where this is not possible, the interest funds should be used for public purposes, but legal aid was not one of their examples. They saw the fund as contributing to preparation of text books, the establishment of a computerized law retrieval system, the provision of scholarships, the support of socio-legal research (1980, p.346).

The English Royal Commission on Legal Services did not agree with the proposal that interest should be used for public purposes. If separate interest cannot be computed, the aggregate interest should be paid to solicitors to offset their outgoings on behalf of clients (1979, p.3255-6).

Very briefly we summarize other sources of legal aid funding considered by the Australian Conference on Legal Aid Funding (Commonwealth Legal Aid Commission, 1981 b). Legal aid clients' contributions, payments of costs if successful, and charges on property are familiar to New Zealand. It was suggested that charges could be extended to property not involved in the proceedings. Taxation offered a few possibilities : tax deduction for donors to legal centres ; income received from legal aid be exempt from tax so that the proportion of fees payable could be reduced below present level; free and voluntary work by lawyers be treated as a donation and as such be tax deductible. Another proposal was that a fee be charged on all writs or other processes filed in court. It was noted the costs would fall only on those involved in litigation and would only serve to make litigation more expensive.

SETTING PRIORITIES

Whatever the future funding situation is, it will always be stringent and consequently it will be necessary first to consciously evaluate and set priorities of needs and secondly to pursue cost-effective ways of spreading resources around these priorities.

Susan Armstrong (1980, p.199) Director of the South Australia Legal Services Commission, discusses the need for priorities :

> The unfortunate consequence of this is that, where funds are limited, legal aid must make difficult decisions on priorities in the allocation of resources. The question of whether legal services should be provided in any specific case should depend not just on whether the applicant is disadvantaged and deserves assistance, but also on whether or not legal services are an appropriate means of achieving the end sought, whether or not some alternative approach might not be as effective, and whether or not the money needed to fund any particular case might not be more efficiently used for some entirely different purpose. These are not pleasant decisions for legal aid to make.

That Commission's priorities are expressed in terms of problems that will not be granted aid except in special circumstances:

(1) Proceedings for divorce, unless the applicant would be unable to obtain a divorce by any other means within a reasonable time, or unless circumstances exist which, in the opinion of the Director, render it imperative that the marriage be dissolved and the applicant is in a position of special hardship.

(2) Applications for or disputes over custody and access (other than emergency situations or applications by children) unless a genuine attempt to settle the matter by agreement has failed.

(3) Traffic Offences, unless there is a real risk of imprisonment or unless the applicant is in particular need of his or her licence and there is a real risk that a period of disqualification may be imposed.

(4) Conveyancing or simple probate matters.

(5) Complaints against lawyers. These will initially be referred to the Law Society of South Australia for investigation. Assistance may be granted where the available evidence justifies the institution of legal proceedings.

(6) Matters in respect of which adequate assistance can be obtained elsewhere. These include maintenance (Department for Community Welfare), simple consumer complaints (Consumer Affairs Branch, Department of Public and Consumer Affairs), and wills (Public Trustee).

(Annual Report, 1978-79, p.10).

The Legal Action Group (LAG) in their response to the Report of English Royal Commission on Legal Services list what they consider to be "essential legal services" (1980, p.30-31):

(1) the regulation of disputes about the occupation of residential accommodation;
(2) the settlement of disputes about custody or care of children;
(3) the compensation of those suffering bodily injury;
(4) the protection of persons in fear of attack or assault;

(5) protection against dismissal or exclusion from employment or occupation;
(6) the defence of persons accused of any crime punishable by imprisonment;
(7) protection against wrongful imprisonment.

Stating the specific priorities for legal assistance in New Zealand is a task for our proposed Legal Services Commission with the benefit of a total legal aid strategy. Speaking generally, however, priorities should revolve around matters of liberty, livelihood, shelter, and custody of family. One comment that must be made is that, in accordance with our view that legal assistance schemes must be responsive to the changing needs in the community, the Legal Services Commission should be prepared to modify priorities as circumstances and resources change in order to pursue the major objective of promoting access to legal services.

A LEGAL SERVICES COMMISSION

It is evident from what we have said so far that we favour a planned and integrated legal assistance system with in-built adaptability. This is particularly so where public funds are involved, though we do not see why privately funded schemes should not be consciously directed towards gaps in coverage and they should certainly be integrated as far as standards of service are concerned. At the moment all government funded schemes operate independently of each other and there is no conscious adherence to an ultimate objective. An integrated system as we envisage it does not prevent the flexibility necessary in providing services appropriate to local needs. In fact we believe it enhances the objective of flexibility.

We propose that there be an independent body, which we call the Legal Services Commission in the meantime, whose role would be to exercise strategic responsibility for the oversight and development of legal assistance services and for the funding of publicly-funded legal services. We see the Commission's functions as:

- to promote equal access to legal services.
- to oversee the development and co-ordination of legal assistance.
- to administer publicly funded legal aid including the distribution of public funds.

- to research and evaluate the needs for legal services in the community and the most effective ways of meeting those needs.
- to advise government on reforms relevant to the above functions.

These are general functions, more specific examples will be mentioned as they occur in the following discussion. We would like to reinforce here that, as well as being directly responsible for government funded schemes, we see the Commission also having responsibilities in overseeing the proper constitution of community law services, in advising such initiatives and in co-ordinating other activities related to improving access to the law.

Lack of independence has not been a major concern of the "official" legal aid schemes. Balance has no doubt been provided through the partnership between government and the legal profession. This partnership has been mainly administrative on the government's part and professional on the lawyers' and has not concerned itself particularly with the overall objective of improving access to legal services. The lack of structural independence, although not particularly stimulating, has not wrought any harm to date. However, we argue that the extended functions of the Commission demand independence.

Up till now the main legal aid funding has been in the hands of a government department. This and the limited functions of legal aid have not posed any problems as all schemes are discrete and nationally available. Likely future developments, however, should be independent of political pressure and therefore not be seated in a government department. For example, if certain strategies are appropriate for only some areas or if local or regional schemes are competing for funds, these should be allocated according to established priorities and not be open to political pressure. One of the stronger arguments against a public defender scheme is that it lacks the independence necessary for a judicial system, i.e. a person is both prosecuted and defended by the state. The Commission, as proposed, could be responsible for employing public defenders and so structurally they would be independent of government. Other activities which the Commission might promote could also be in conflict with a department's functions e.g. emphasis on social welfare law may involve actions against government departments, alternative approaches to the law such as test cases, promotion or opposition of law reform initiatives.

Nor is administration in the hands of the Law Society or a Law Society appointed body sufficiently independent. It is not inconceivable that the Law Society's function to protect the interest of the legal profession could come into conflict with its functions to protect the interest of the public in relation to legal matters. This possible conflict is particularly relevant at this time when new and alternative means of providing legal assistance which diverge from traditional practice are being mooted and experimented with. This conflict has been evident in England (LAG, 1980, p.10) and Australia (Disney, 1975, p.193) and there have been suggestions of it in New Zealand in respect to the question of who shall direct what work a neighbourhood law office shall or shall not do.

Our surveys lead us to conclude that a major weakness of the current legal aid schemes is that they are, in effect, but a small extension to the existing services provided by private practice. This is an essential service but we would also like to explore alternative and cheaper methods of delivery in non-traditional areas and to encourage prevention or diversion away from strictly legal remedies if equally successful and cheaper. It is, we believe, an unreasonable and unrealistic expectation for the Law Society to energetically pursue these alternatives which may run counter to the interest or desires of its members, especially as the Law Society has made it clear that some members do not welcome the advent of neighbourhood law offices. We do not believe the legal profession need feel threatened by these developments. If legal assistance is administered by a body with an overview plan, according to set objectives and priorities, there will be no interest in duplicating or substituting work done satisfactorily by the profession. Limited resources and the dedication required for community alternatives will ensure that the bulk of the effort goes to areas of unmet need, as already demonstrated by the Grey Lynn Neighbourhood Law Office and the Wellington Community Law Centre. It is now accepted in England that community law centres, rather than competing with private practice, actually generate work for it (Report of the Lord Chancellor's Advisory Committee on Legal Aid, 1978/79, p.80 and 1979/8, p.102; Royal Commission on Legal Services, 1979, p.79). What has become termed the "mixed delivery" system, i.e. using private, salaried and community sources of legal services, has proved very successful in some U.S. schemes and in Australia and this is what we envisage for New Zealand. A mixed

system is advocated by the Lord Chancellor's Advisory Committee on Legal Aid (1965/77, p.85) and a recent Australian Commonwealth Legal Aid Commission Conference on providing and funding legal aid concluded (1981, p.13):

> The concept of a "delivery mix" in Australian legal aid was endorsed by the Conference participants. Implicit in this endorsement, was that each type of delivery has a role to play in legal aid in Australia. However, the Conference did not deal with the more difficult question of what is the optimum mix. There was consensus by the participants at the Conference that the private profession, salaried lawyers and voluntary legal aid agencies all had a part to play in providing legal services to poor Australians.

Local bodies have not been involved in the provision of "official" legal aid in New Zealand, but some have been active in general advice services through CABx and in specific legal advice through LABx. Auckland City Council has also been a consistent and generous contributor to the Grey Lynn Neighbourhood Law Office. There are probably other examples of which we are not aware. Although local initiatives should be encouraged, we do not see local bodies having a central role in the funding or administration of traditional legal assistance in the near future. There is no history of this in New Zealand and being a small country, a central body is considered better equipped for ensuring an integrated system. We note the difficulties in Britian through local body funding of community law services, which on several occassions has been revoked because of conflict of interest: the law service with its emphasis on welfare law being involved in cases contrary to the interest of the local council. This is less likely to happen in New Zealand as local bodies are not involved in social services to the same extent (though they are becoming more so), but the analogy can be drawn with government department funding and administration.

An independent body seems the best strategy for pursuing the goal of equal access to the law. As chapter 7 discussed, this concept of an independent commission has been adopted or recommended in one form or another in a number of jurisdictions - Australia, some Canadian States, U.S.A, Scotland.

THE CONSTITUTION OF A LEGAL SERVICES COMMISSION

We present here, for the purposes of discussion, some suggestions as to how a legal services commission might be constituted in New Zealand.

If the Commission is to have the ability to achieve what we propose, it would need to be an independent agency created by statute with real executive powers and not just advisory ones. The membership should be a mixture of lay, legal and government appointments, with the lay contingent being in the majority. The functions of the Commission would be stipulated in its Act, along the lines set out previously, though some of its more specific functions would probably need to be expressly provided for, e.g. power to approve the constitutions of community law services, responsibility to promote public awareness of and competence in the law. The present functions of the Legal Aid Board would be transferred to the Commission. Explicit reference to principles in the Act would probably ease its operation e.g. to promote equal access to the law, to maintain the independence of the legal profession. Government's annual legal aid appropriation should be given to the Commission to allocate to various legal aid and assistance activities. Government's contribution should remain at least at its current level, as we maintain legal assistance is primarily a responsibility of the state. The Commission should investigate and advise government on alternative sources of legal aid income. The Commission should be accountable to parliament by means of annual report and also through self-evaluation and evaluation of its funded activities in terms of its objectives and functions. The Commission should also be subject to audit under the provisions of the Public Finance Act 1977. The Commission would require minimal permanent administrative staff - a director, a research/evaluation assistant and clerical support. Whether the bulk of administering current legal aid programmes would continue to be handled by court staff is a matter for discussion, but it seems a sensible solution. If public defender offices are ever instituted it might be appropriate for them to undertake the administrative functions relating to criminal legal aid. Whatever the eventual support systems, we do not expect that any significant increase in resources will be needed.

Finding the most appropriate and most effective system for delivering legal assistance is a large concern of most countries today. Witness to this are the two Royal Commissions on Legal Services in England and in Scotland, to which we refer often; the conferences and research emanating from the Australian Commonwealth Legal Aid Commission (Hanks, P, Evaluating the Effectiveness of Legal Aid Programs: A Discussion of Issues, Options and Problems, 1980; Chamberlain, E.R, Legal Services for Low Income Persons in the United States and Britain: Trends for

Consideration in Australia, 1981; Accountability Through Self-Evaluation, 1981; Report of Providing and Funding Legal Aid Conference, 1981); the considerable research sponsored by the American Legal Services Corporation.

An example of the last is The Delivery Systems Study, (1980). Because of the similarity between "pure judicare" and New Zealand's civil legal aid, the study and conclusions are summarized here.

> The Legal Services Corporation funded 38 demonstration projects to test a variety of approaches to the delivery of legal services to the poor. The demonstrations -- all of which utilized attorneys in private practice -- included three types of judicare (pure judicare, judicare with a staff attorney component and judicare as a supplement to a staff attorney program) as well as five other delivery models: contracts with law firms as supplements to the staff attorney program, prepaid legal insurance, organized pro bono projects, legal clinics and voucher. A sample of existing staff attorney programs was included in the study to provide a standard of performance on cost, client satisfaction, quality of service and impact on a broader client population against which the alternatives and supplements were measured. The study concluded that a model was viable for consideration for local use if the model demonstrated its feasibility[1] and if all or most of the projects did as well or better than the staff attorney programs on the four performance measures in the study. (p.i).
>
> None of the alternative or supplemental models tested exceeded the standard set by the staff attorney model. Of the eight private bar models in the study, three met all of the tests to be judged viable for use by Corporation grantees. The models were: judicare with a staff component, contracts with private law firms as supplements to staff sttorney programs, and organized pro bono projects. Two models, pure judicare[2] and prepaid, were judged not to be viable delivery models. The judicare supplement to a staff attorney program failed the impact standard, but could be a viable delivery model in situations where the parent staff attorney organization would do the necessary impact work. The two remaining models -- voucher and legal clinic -- were not fully tested for different reasons. Neither model met the feasibility criteria. Because the voucher model operated only briefly, it could not be tested on the performance criteria. The performance of the legal clinics was measured; however, because only two clinics were funded and they operated in very different ways, no conclusions were drawn about the clinic model.

1 The feasibility criteria were: the capability of the model to operate in compliance with the Legal Services Corporation Act and regulations, and its ability to address the legal services needs of eligible clients and to gain the support of the local legal community.

2 Pure judicare failed in that it did not meet the impact criteria. Also demonstration projects that paid "usual and customary fees" had notably higher costs.

> While this policy analysis addresses the broad question of viability of the delivery models tested, it does not address the question of which approach to service delivery is most appropriate for a particular community situation. The answer to that question depends on local circumstances. Further analysis of the study data, now underway, will provide information to assist in local program development. (p.ii).

Given what we know of New Zealand's situation and overseas experiences and bearing in mind our principles for the delivery of legal assistance, the next sections discuss some likely responses to the inadequacies of the present civil and offenders legal aid schemes and the duty solicitor scheme. One further point, if a Legal Services Commission or similar body is not instituted in the near future, we believe the essence of most proposals could be put into effect, though an independent body with clearly defined functions would certainly assist the task of widening the reach of the law to New Zealanders.

CIVIL LEGAL ASSISTANCE

The two major weaknesses in civil legal aid as it now operates are, first, the domination of domestic proceedings cases and the implications of this for the scope of the scheme, and secondly, the absence of aid for advice.

In 1980/81 92% of civil legal aid costs were spent on domestic proceedings cases, yet in most of these cases, matters were not in dispute between the parties. Why then are expensive court proceedings or appearances involved?

We see one of major and first tasks of the Commission being to rationalize this situation so that court proceedings are unnecessary thus freeing legal aid money for redeployment. However this supply of aid should not be cut off without alternatives being provided. The Commission should investigate the real role the Department of Social Welfare has in court proceedings and hence legal aid. There are indications that Social Welfare's liable parent scheme may well be having the desired effect and this should be properly evaluated as its impact becomes discernible, and avenues for continuing the trend should be followed up.

Another option particularly endorsed in South Australia in the analogous situation of divorce (Report of the Legal Services Commission, 1978-1979, p.12), is, if court proceedings cannot be avoided, and no dispute exists, to teach people to present their own case to the court without recourse to expensive legal representation. That Commission conducts classes to that end. The impact that the new family legislation and family courts may have on preventing court proceedings and consequently legal aid is another area to be watched. The Lord Chancellor's Advisory Committee on Legal Aid reported that results of experimental divorce conciliation schemes in Britain are encouraging as regards the effect of conciliation on legal aid savings (1979/80, p.99, para. 64).

Legal Aid for Divorce

Legal aid for divorce should be discussed in this context. As the surveys demonstrated, there is quite a calling for aid to be extended to divorce. We discount the arguments that legal aid may act as an encouragement to divorce as being socially unrealistic and as an abuse of the purpose of legal aid. Why should the poor face this discouragement but not the rich? Prior to the Matrimonial Proceedings Act 1963, legal aid in forma pauperis was explicitly available for divorce proceedings (s.53 Divorce and Matrimonial Causes Act 1928). A most compelling reason advanced as to why divorce proceedings should attract legal aid is that court proceedings are inevitable, that the individual cannot pursue a divorce without going to court. Despite this very strong contention, the same comments apply to divorce as were made in connection with domestic proceedings. Given limited legal aid funds available, a more effective approach, in the long run, is to divert uncontested divorces away from the court system. The joint application for dissolution of marriage in the new Family Proceedings Act 1980 is a move in this direction, though a formal court hearing is still required. We note that in England in some circumstances an undefended divorce may proceed on an affidavit from the petitioner without either party or their lawyer attending court. In the short term, rather than extend precious legal aid funds to divorce, we recommend that the Commission be responsible for investigating alternative methods of aid. Once again the South Australia Legal Services Commission provides the example with their do-it-yourself divorce classes (Report of the Legal Services Commission, 1978-79, p.12; Armstrong, 5, 1980a, p.203).

Within the priorities of subject matter set for civil legal aid by the Commission, we believe civil legal aid should remain basically as we now know it but we do suggest some financial, legal and administrative improvements. This will probably mean that civil legal aid still operates as an extension to private practice. Basically we think it is unrealistic to expect civil legal aid to overcome the limitations of private practice and that this matter should be tackled by alternative means of legal assistance. If a complaint finds its way to a lawyer, this orthodoxy could be partially overcome by a non-economic interpretation of the "reasonableness" provisions. Particularly in respect of section 23(2)(e)(ii) Legal Aid Act, which says aid may be refused if the nature of the proceedings and the applicant's interest in them (financially or otherwise) does not justify the likely cost, do we urge that the circumstances and resources of the applicant and not the normal litigant with means be the prime consideration. There will be occasions when a person requires full professional legal services to pursue a claim which is uneconomic albeit important to the individual. To keep this in perspective, we note that only 6% of refusals are on the grounds of unreasonableness or because the prospects of success or likely cost do not justify aid.

Financial Eligibility

As to financial eligibility we consider it important, in order that everyone, and not just the poor and the rich, have access to the law, that the eroded financial criteria be restored to include people of moderate means and that these be indexed to keep up with inflation. The income allowances have been indexed, but the same should apply to all capital allowances and to the disposable income and capital limits. Indeed we favour much extended, if not open, upper limits with increased contributions being required as disposable income increases.

Both the English and Scottish Royal Commissions on Legal Services reached similar conclusions (1979, pp.120-128; 1980, pp.93-96) that there be no upper eligibility limit of disposable income and that there be a sliding scale of contributions (Scotland's scale rises more sharply than England's). They gave two main arguments for this. First, to restore aid to those of moderate means. The second is the demonstrable unfairness in the actual costs of litigation between the persons who falls just within the eligibility limits and the one who just misses. In England's case the

recommended contribution scale ranges from 10% to 25% of the excess disposable income over the recommended 3,000 pound free limit. They argue that evidence shows that anything more than 25% gives rise to hardship. Scotland's recommended scale seems more realistic with contributions ranging from none to 100% of disposable income over and above the 1,700 pounds free limit. In effect those with higher incomes could well be required to contribute the actual costs of litigation.

These two Commissions also discussed the difficulties associated with the assessment of capital, capital contributions and the criticism that thrifty applicants are deprived of their life savings. To remedy this the English recommended once again no upper limit and a sliding scale of contributions. They concluded from their survey that most disposable capital is actually savings. Once again the recommended scale ranged from 10% to 25% of disposable income and they noted that the effect would be for all those with a substantial fund of capital, other than in exceptional cases, to bear the whole of any legal costs for which they might become liable.

The Scottish recommended on the basis that assessment of capital can be extremely difficult to do quickly and accurately, that no account be taken of capital in assessing eligibility for civil legal aid or in computing the contribution payable. They assumed that capital holdings would be reflected in income.

The Profession's Role

As we wish to keep the costs of adminstering legal aid to the minimum, so that maximum funds can be devoted to actual legal service, we wish to see the legal profession continuing its contribution to the scheme in the form of 15% reduction of fees and by participating in district legal aid committees. Continuing the trend for public accountability we suggest greater lay participation in these committees. Professional legal advice is obviously required in assessing the legal merits of an application, but lay contribution could help in broadening the definition of "reasonable grounds" and the type of problem that could benefit from legal aid. As to the 15% deduction, we note that if this did not apply, civil legal aid would have cost government another $567,000 in 1980/81.

Aid for Advice

It is our contention that any funds diverted from domestic proceedings legal aid should be used to provide legal aid for advice and other forms of legal assistance. If equal access to legal services is to be achieved this is an area needing urgent attention. Court proceedings are but one aspect of legal services, and an expensive one in terms of finances, relationships, emotions and goodwill. It is foolish of us to encourage this in as far as we do not assist the preceding and potentially more constructive services of information and advice. The need for aid for advice is endorsed by the Link respondents and by the Legal Aid Board. The reason legal aid has not been extended to advice in the past is the expense. In our view it is imperative that funds be found for this service.

Aid for legal advice was first provided for in England by the Legal Aid and Advice Act 1949 and improved upon in the Legal Advice and Assistance Act 1972 which introduced the "green form" scheme. It operates in civil and criminal matters. New Zealand could well contemplate adapting this sort of scheme for occasions when specialist lawyer advice is required. The Royal Commission on Legal Services (1979, p.105) describes the scheme:

The Green Form Scheme

11.2 This scheme, which is administered by the Law Society, provides the quickest and simplest means of obtaining legal aid for limited purposes. The scheme covers legal advice and assistance of a solicitor (and of counsel if needed) in writing letters and negotiating on a client's behalf, or in preparing legal documents such as contracts, will or transfers of property. The scheme does not at present provide for representation in court or before a tribunal; however the Legal Aid Act 1979 empowers the Lord Chancellor to prescribe types of proceedings in respect of which representation may be provided under the green form scheme[1].

11.3 To obtain assistance under the green form scheme, the applicant goes direct to a solicitor. He provides details of his means, from which the solicitor himself determines whether the applicant comes within the financial limits of the scheme and, if so, whether any contrbution is required from him.

1 In 1980 Regulations extended this to civil proceedings in magistrates' courts for which legal aid was already available.

11.4 When a solicitor has assessed his client as eligible for legal advice and assistance subject to a given maximum contribution, he presents his bill to the client in the normal way unless the amount exceeds the client's maximum contribution. When this occurs the solicitor bills the client for his maximum contribution and claims the balance from the Law Society's legal aid area committee on the green form from which the scheme takes its name. When the maximum contibution is small, many solicitors forgo it.

11.5 Contrary to popular belief, there is no limit to the amount of work which a solicitor may do under the green form scheme. It is, however, necessary for him to obtain authority from the legal aid area office before incurring costs in excess of 45 pounds[2] in matrimonial cases when these include the work necessary to file a divorce petition and 25 pounds in other cases.

In 1979/80 438,519 bills were paid under this scheme with a net cost of 11,862,411 pounds.

Compared with this there were 140,450 civil legal aid bills and a net cost to the scheme of 25,334,685 pounds. The average cost of a legal advice and assistance case in 1979/80 was 27 pounds compared with 354 pounds for a matrimonial proceedings cased on legal aid and 85 pounds for a magistrates' court civil legal aid case (Law Society's Legal Aid Report, 1979-80). If similar proportions of cases and costs prevailed in New Zealand, the money we hope to save from domestic proceedings legal aid should cover the cost of aid for legal advice if it was available.

The Royal Commission on Legal Services (1980, p.106) reported that in 1977/78 some 26% of legal advice and assistance cases took steps to apply for legal aid to cover representation in court proceedings. Since then, 1980 regulations have come into effect which extend this assistance to representation in civil proceedings in the magistrates' courts. The English experience demonstrates that court proceedings are by no means the only legal service requiring the support of legal assistance or aid.

The administrative simplicity, flexibility and cheapness of this scheme is its great asset, though the English Law Society warns that this is only appropriate for relatively cheap proceedings (Legal Aid Annual Reports, 1978/79, p.10). We think we should consider adapting this scheme to the New Zealand context, with overall supervision and funding in the hands of the Legal Services Commission and local

2 Increased to 55 pounds on 1 August 1979. As far as we are aware there have been no further increases to this nor to the 25 pounds limit.

administration with the district legal aid committees. How such a scheme would coexist or conflict with the Law Society's LawHelp scheme would need to be considered. We note that the Royal Commission on Legal Services (p.134 ff) recommends reorganizing their legal advice and assistance and legal aid in civil proceedings into one scheme with three stages : initial half-hour provided free by the lawyer; four hours of advice and assistance provided on the authority of the solicitor; legal aid to cover representation.

The English Lord Chancellor's Advisory Committee on Legal Aid and the English Law Society are both concerned about the lack of use of legal advice and assistance beyond family and matrimonial concerns. (Legal Aid Annual Reports, 1977/78, p.83, para 14; 1978/79, p.10, para 36; 1979/80, p.6, para 11). This echoes our own misgivings about the lack of breadth of civil legal aid in New Zealand though more exaggerated in our case, and confirms our believe that we must attack this matter of legal advice from a number of angles in order to extend aid beyond problems that traditionally find their way to a lawyer.

Other Strategies for Access to the Law in Civil Matters

We do not wish to develop the idea here, but we see one of the Commission's functions being to help establish and develop proper education and information systems about peoples' rights and obligations in law. This education should cover theoretical and practical aspects of law and could range from activities in school curricula to information leaflets to readily intelligible legislation to specific action programmes in areas of special need.

One reason for problems not reaching lawyers is their uneconomic nature - it is not worth buying expensive legal time to recover relatively small amounts or for claims not involving money, albeit important to the wellbeing of the aggrieved. Nine small claims tribunals have been established in New Zealand to redress this imbalance and have proved successful. It is important that the limit of claims in these tribunals be kept up with increasing costs, so that the effectiveness of this relatively cheap source of justice not be lessened. The exclusion of legal representation has been an important aspect of their cheapness and we believe their success. The concept and role of lay advisers crops up now and again in our proposals, and a general discussion about their advantages and disadvantages is given

later. Although small claims tribunals represent no direct savings in civil legal aid expenditure we believe they are an important mechanism for bringing the benefits of the law to the people and we endorse the policy that they be introduced wherever needed in New Zealand as funds permit. They present an alternative to legal aid that has positive benefits to the individuals who use them and enables legal aid funds to be directed towards more substantial matters in terms of both law and cost. It is also important that the application fee remain within the reach of all people.

Another concept that the Department has been investigating and promoting recently is the "neighbourhood dispute resolution scheme". A departmental monograph (no.4, n.d, p.i) summarizes some United States schemes and describes the concept which is philosophically distinct from small claims tribunals:

> The essence of the idea of neighbourhood dispute resolution is to bring parties together in a neutral place within the neighbourhood, in the presence of an impartial but concerned person, whose task it is to help them look behind the immediate incident to its root causes. The parties are then encouraged to attempt to resolve the issue between them in a way that is meaningful and provides an environment that should minimise a repetition of the form of behaviour that gave rise to the incident.
>
> The weight of the criminal justice system, so it is argued, is an inappropriate and expensive mechanism for dealing with a number of situations that now, really by default, fall within its purview. The alternative schemes, some of which are outlined in this paper, present an opportunity to those who are involved to speak out fully about the whole situation and to play a significant part in shaping the resolution of their own problem. This contrasts vividly with the limited, possibly humiliating and often passive role of the victim, and the negative situation of the offender, in the normal criminal justice process.
>
> A notable feature of the schemes operating in the United States is that their structure and style of operation is determined by the nature of the community in which they function. It is said that no two schemes are identical. There seems to be real advantage in utilising community resources and allowing institutions to be sufficiently adaptive to ensure that the community identifies with them and gives them its support.

The Minister of Justice and the Department have been encouraging the development of such centres but unfortunately cannot commit funds to them at this time. We are pleased to report that a group in Wellington is planning to set up a mediation centre in central Wellington.

We would also like to encourage the use of the many resources and agencies within the community, such as those commented on in chapter 5, which offer help and have the potential for preventing problems becoming legal ones.

We do not see small claims tribunals, dispute resolution schemes and general advice services coming under the direct administration or surveillance of the Legal Services Commission. It should however take all these into account in its integrated legal access plan and in setting its priorities. Promoting these alternatives by financial or other support should be within the Commission's power if it thought it appropriate.

In contrast to this, we think the Commission should be more actively involved in assessing, in the light of its total approach, the relative merits of schemes specifically designed to combat access problems. We have in mind here such schemes as legal insurance, group and pre-paid legal schemes, contingency fees etc.

Community legal services are another important option that has emerged recently in New Zealand. One of the Commission's important functions as we see it would be to supervise the estalishment of and give advice to such law services. Funding of such services would be a matter for the Commission to decide according to its overall strategy. This is an important and topical development in New Zealand and a later section is devoted to the discussion of the proper administration of such services.

CRIMINAL LEGAL ASSISTANCE

Criminal proceedings are high on our list of legal assistance priorities if an imprisonable offence is involved. The principles of liberty and innocence until proven guilty are important ones to be maintained, even if at some cost. There is an assumption behind criminal legal aid that legal representation is useful in safeguarding these principles in individual cases. There are suggestions that lawyers make no difference to the outcome of most cases in the district court (Ayer, 1979; Legal Studies Department, La Trobe, 1980). There are also strong counterclaims that research on the topic has been methodologically suspect or that research is incapable of fathoming the real story (Cashman, 1981; Tomasic, 1980;

Rees, 1980). We cannot give an unequivocal assessment of this in New Zealand and think it safer to proceed on the basis that if lawyers were not present, the criminal courts would be open to inappropriate and unjust actions and decisions. However as the surveys showed there is ample room for improvement in the advice and service given by offenders legal aid lawyers.

Availability of offenders legal aid does not seem to be a problem. Even though 51% of defendants charged with an imprisonable offence in the survey were not represented, there are no suggestions that they wanted or would have benefited from legal representation for they are qualitatively a less serious group of offenders. They were charged with fewer and less serious offences, had fewer court appearances. If they pleaded not guilty (which they did less often) they were dismissed more and they received custodial and supervisory penalties less often. 17% of those whose applied for offenders legal aid were refused. There is no suggestion from the Link survey or elsewhere that there is a general unawareness of the availability of offenders legal aid. Judges seem to prefer defendants to be represented and will make unrepresented ones aware of legal aid. S.13A Ciminal Justice Act 1954 also behoves the court to consider the question of representation. A Department of Justice pamphlet about offenders legal aid is available in English and six Pacific languages at district courts.

As to the availability of the duty solicitor, we can say that the scheme operates in most courts when needed. However we cannot comment on which defendants use it and in what circumstances. The recent respecification of duty solicitor duties is expected to curb services to some extent.

The quality of the services provided through offenders legal aid or the duty solicitor are often subject to criticism and it is towards improving this that our suggestions are and the Legal Services Commission's efforts must be directed. With reference to the principles behind legal aid, it is important that everyone has access to legal services of quality.

Offenders Legal Aid

The widespread dissatisfaction with and consequent disrespect for offenders legal aid is substantiated by the relative outcomes of legal aid cases as shown in the survey. How can the quality be improved? Improved and realistic remuneration

for lawyers in the obvious response. The analysis in chapter 2 supported the contention that fees have failed to keep pace. We think they must be reinstated to a proper level.

It is worth nothing however the following conclusion from an American Legal Services Corporation study which compared the effectiveness of private bar models of delivering legal aid with staff models. The study was restricted to legal services in civil matters, but the conclusion may well be more generally applicable (1980, p.iii):

> The Need for Reduced Fees Data on cost indicate that a program that pays attorneys in private practice "usual and customary fees" would be too expensive to be practical. Economical utilization of private attorneys requires a willingness on their part to participate at a reduced fee, in order to keep costs reasonable. Most of the demonstration projects were able to find attorneys and law firms willing to do so. Where low-income clients represent only a small percentage of a firm's clientele, this does not seem to create a financial problem for the attorneys. As a matter of economics, however, attorneys in private practice will be limited in the number of clients they can serve at this necessarily reduced rate.

Once a realistic compromise is in force, the system is in a position to demand and monitor the standard of the service provided. Currently the only control is that District Law Societies compile lists of practitioners who are "fit and proper persons to be assigned" and who are "willing". One gains the impression from the Link survey and from the profession's overtures that at the moment it is a matter of grasping those who are "willing" which in practice leaves little space to control for or insist on experience. In comparison to this, we understand that in the high court, the court insists on a more experienced list of lawyers.

As well as remuneration there are other strategies which should be developed to help foster and control the standard of legal aid. We feel more attention to client choice and control, emulating the possibilities which exist when a private lawyer is retained, has much to offer in this regard. Choice of lawyer is the first matter and one that received a predictable but varying response from Link respondents. Lawyers, defendants, probation officers and social welfare officers generally supported the idea; judges, court staff and police generally did not. In 1977 The New Zealand Law Society supported the concept and believed offenders legal aid capable of being administered so defendants could exercise a reasonable choice (Submission to the Royal Commission on the Courts, p.128).

The arguments from Link respondents against choice are that it would lead to further abuse of legal aid and that defendants lack sufficient information to make a sensible choice. The first is not explained nor substantiated by the critics and the second applies equally to those hiring their own lawyer. Specific mechanisms can be arranged to aid defendants, e.g. supplying lists of approved lawyers. Difficulties surrounding acceptance or rejection of legal aid cases by lawyers apply whether choice exists or not. Arguments in favour of choice, apart from it introducing an element of accountability, are that it would prevent the discontinuity that arises in legal aid when a person consults a lawyer only to find he is unable to pay or when both lower and high court hearings are involved, with a different lawyer assigned for each. Defendants would also have less cause for feeling lack of confidence in their legal aid lawyers, a feeling currently evident to lawyers who participate in legal aid. There is precedent in civil legal aid for choosing one's own lawyer and the Royal Commission on the Courts thought properly constituted legal aid should allow for some choice (1978, p289). It is interesting to note that the South Australia Legal Services Commission is enjoined to have regard to "the desirability of enabling all assisted persons to obtain the services of legal practitioners of their choice" (s.11(d)(i) Legal Services Commission Act, 1977) and this is in a system which has a salaried staff component. We believe we should strive and provide for this ideal, indeed we do not believe it would be difficult to attain, but we must also be realistic and acknowledge the American findings that where freedom of choice is available it is not often exercised (Legal Services Corporation, 1980, p.10). Article 14(3)(d) of the International Covenant on Civil and Political Rights, which New Zealand has ratified, states that everyone charged with a criminal offence shall be entitled to defend himself in person or through legal assistance of his own choosing.

The other side of the coin from choice is the ability for the client to fire his lawyer, an idea promoted by Hermann et al. (1977, p.173 ff.). At first one balks at this idea in connection with legal aid, but on reflection it may have merit, and, more importantly, may be practicable. Once again in accordance with private practice this is one way of demanding service, but the danger here is that legal aid clients, unconstrained by financial considerations, could use this frivolously and without reasonable cause. Safeguards can be built in. One suggested by Hermann et al.

(1977, p.174) is that a defendant have only one peremptory dismissal of his lawyer per case and not on the eve of a trial. On further occasions the court could have the power with adequate justification to dismiss the lawyer. It is attractive as an idea for encouraging accountability and one which the Legal Services Commission can consider the advantages and disadvantages of in detail.

A public defender system, which we discuss in detail later, particularly if it is a co-operative venture with assignments to the private bar, has the potential for providing quality control within its own ranks and of its assignments to private practitioners and through healthy competition between the two arms of the legal aid service.

The Duty Solicitor Scheme

Our 1980 survey of administrative aspects of the duty solicitor scheme led us to conclude that the intentions of the scheme needed restating, the rights and obligations of all participants needed clarification and an understanding of the relative roles and functions of the police, courts, legal profession and defendants needed to be fostered. The 1981 changes to the scheme may have caused even more uncertainty in some parts about the purpose of the scheme and the value the Department places on it.

We would like to reaffirm here the importance of pre-trial advice in ensuring defendants have access to proper advice on how to conduct their cases. However, as it is currently constituted it is essentially a "first-aid" service. This does not diminish the need for a high standard of care but it does reinforce the need to encourage defendants to accept reasonable responsibility for the conduct of their case. Granted this, we still acknowledge that defendants can be unfamiliar, confused, lack confidence or defeatist about approaching lawyers or applying for legal aid and that some scheme is necessary to overcome these barriers. Access to this legal advice is not the only issue, the quality of it must also be considered. Given the stringent funding situation, the recent changes are an attempt at optimizing both access and quality by restricting the services to those who need them most (i.e. those liable to imprisonment who have had less opportunity to consult a solicitor or apply for legal aid) thus releasing funds to pay for improved quality of service.

Remuneration is not the only factor in the standard of service. Operational features also hinder the standard of the eventual advice, e.g. time and privacy to interview defendants, proper and private access to cells, supervised rostering of lawyers, back-up support by court staff, co-operation of police in transporting and in access to arrested persons. It is disturbing that administrative matters, some of them relatively minor, continue to be problems which have such a profound effect on the quality of the service rendered.

The realms of staff training in relation to the purpose of their activities and their role in them, of public relations and public information remain mainly unattended and yet we feel these could boost access and quality of service considerably.

In this regard it is pleasing to report the apparent success of the tu tangata support groups in Henderson and Auckland District Courts. The objective of this pilot project was to seek ways and means to reduce the rate of reoffending of young adult Polynesian people. Some of the functions of the Maori Affairs Community Officer who managed the project and his volunteers complemented the duty solicitor's and/or lawyer's role to a considerable degree. For example:

1. Assist people who do not know what to do when they appear in court.

2. Advise these people to engage a lawyer to represent them in court.

3. Explain the role of a duty solicitor, and their right of access to legal aid.

4. Attend to the needs of a person who has been arrested, or a person who is remanded in custody pending a defended hearing.

5. Explain fully the meaning of non-residential periodic detention, probation, community service and unpaid fines and the serious consequences if they fail to do what is required of them.

In Auckland the Court was regularly assisted through this programme by means of intepreting, suggesting relevant facts as regards the offender who had previously been interviewed, explaining the meaning of the sentence to the offender. These pilot schemes are undergoing formal evaluation at present, but it is reported that some judges found the scheme most useful.

An Integrated Criminal Legal Aid System

We have been stressing the need for an integrated approach to legal services. The duty solicitor scheme and offenders legal aid might well benefit from such consideration.

From its early days the duty solicitor and offenders legal aid schemes have been maintained as two distinct and unconnected schemes. This is achieved formally in that the duty solicitor scheme is an administrative arrangement whilst offenders legal aid has a statutory basis. Administratively they are separate in terms of management, mechanisms of applying for advice and methods of payment. In practice they are kept apart by the well guarded principle that the duty solicitor shall not give continued legal advice proper to his duty solicitor client - he is to be referrred to another solicitor or to apply for offenders legal aid through the usual channels and the roster system. Phenomenologically, as opposed to structurally, the distinction is not so obvious. From the point of view of the defendant's experience, he has one set of charges and one series of court appearances for which he wants legal representation; from the profession's point of view, the same lawyers are involved in both schemes; and even the system has a common thread running through the two schemes - they are both paid from public funds through the Department of Justice. From the point of view of the service required and the service provided, the schemes are continuous rather than discrete.

The main reason advanced for preventing the duty solicitor from taking on his client as a permanent client is to avoid allegations of touting. On the other hand there is a strong argument in favour of the duty solicitor continuing to represent his client - it is important that the defendant have confidence in his solicitor and this may well be diminished when dealing with two different professional people. The New Zealand Law Society discussed the benefits of relaxing the rules in 1977 (p.134). It is worth noting that Wellington District Court deliberately overrides the separation[1] and that it happens de facto in small towns where the pool of solicitors is too small to insist on distinct services. In Wellington's case the fear of touting has proved unfounded.

1 Most offenders legal aid grants on a given day are assigned to the approved duty solicitor of that day.

A Public Defender System

As indicated previously we wish to seriously consider the introduction of a public defender system in New Zealand. The main considerations are whether this would provide legal assistance of a high quality and more cheaply than the present assignment and fee-for-service system. We envisage public defender schemes only in areas that could sustain such a system and not necessarily, indeed probably not, nationwide. Also, though this would depend on careful economic analysis, that assigned criminal work would coexist with the public defender scheme, the office of the latter being responsible for assigning work. As noted previously this mixed system is considered most successful in Washington D.C. (60% staff, 40% private) and South Australia (approximately 24% of criminal work is staff, 76% private). The advantages of mixed delivery are that it prevents the criminal bar from dividing into two separate entities thus helping the public sector to maintain its professional independence, competence, and standing; enhances the active support of the profession for the public system; distributes the workload efficiently. The public defender's office would probably be responsible for both the duty solicitor and representation aspects of criminal legal aid.

From overseas experience a successful public defender scheme depends on careful organization and maintenance of standards. We described the salient features of one successful scheme in chapter 7. We are adamant that there is no point embarking on such a scheme unless the level of commitment, financially and otherwise, is sufficient to sustain a quality service. In particular we think the following elements are essential.

First, reasonable workloads must be established and adhered to. Support staff and assignments to private lawyers are useful in this context. Both Washington D.C. and New South Wales Public Solicitor make extensive use of trained paralegals, particularly in taking statements and chasing up witnesses, a more efficient and cheaper approach than using expensive lawyers. South Australia acknowledges the usefulness of such interviewers, (Armstrong, S, 1980, p.207). The U.S. Department of Justice publication (1975, p.12-15) on the Washington D.C. scheme discusses in detail the components of each public defender's workload.

Secondly, we believe individualized and continuous client representation is necessary if each client's case is to be treated with proper respect and engender the accountability of the lawyer we discussed previously. Most importantly it helps instil clients with confidence in the system. Washington D.C.'s exception to this procedure is at the appellate level where it is thought important to assign a new lawyer to reexamine the case.

Thirdly, staff training. Washington D.C. has very sophisticated staff training, quality control and staff management and they consider it vital to their successful operation. Obviously New Zealand could not sustain the same level of activity, but continuous training would be an important element.

If a mixed delivery system existed, client's choice of lawyer could be built into the system. The South Australian Legal Services Commission's 1978-1979 Report discusses this issue.

In 1977 the New Zealand Law Society made a substantial submission to the Royal Commission on the Courts about the introduction of a public defender system in New Zealand. They concluded that such a system is not warranted or desirable (Second Submission, October 1977, pp. 137-143, 145). Their opposition was based primarily on six reasons which we summarize and discuss here:

1. "There is no concrete evidence that the present defence of persons charged with criminal offences in New Zealand is inadequate or defective to the extent which would require the establishment of a completely new govenment agency or system" (p. 138). The Society agreed there is room for improvement in the present system but considered that offenders legal aid and the duty solicitor scheme could themselves be improved to achieve this. We now have evidence that the quality of offenders legal aid is inadequate, and has probably deteriorated since 1977 and we argue that tinkering with the fragmented systems and bolstering levels of remuneration will not in themselves ensure better service. An overriding consideration is limited funds, and we have overseas evidence that public defender systems are cheaper than fee-for-service ones.

2. "Ultimately, the success of a public defender scheme, as with any proposal, depends on the amount of funds expended on it ... If the appropriation is niggardly the scheme is certain to fail" (p.138). We wholeheartedly agree. The feasibility of the scheme depends on a detailed economic analysis, but prima facie evidence of the relative cheapness of public defender schemes suggests we could get more for the money by this means than through continuing a completely assignment based system.

3. "The Society believes however, that the principle that defendants should have a reasonable choice of counsel should be recognized and preserved" (p.139). As discussed previously we agree with this. If the public defender works in tandem with assigned cases, this allows the opportunity for choice, especially as the American experience is that clients rarely exercise this choice even when the possibility exists.

4. The Society believe that a public defender system would tend to offer the sevices of lawyers with insufficient experience and ability. The Society acknowledged that this problem is present to some extent in offenders legal aid (p.140). We agree that this is not a problem peculiar to public defender schemes and suggest that funding must be at a level which allows the scheme to employ the proper complement of experienced solicitors at competitive rates as well as at a level to provide a reasonable staff training programme and support systems. Overseas experience indicates that this can be achieved.

5. "The Society does not consider that public defender schemes necessarily ensure that legal services are available to those in need in the form in which they are required" (p.140) and cite educational, social, cultural or psychological disadvantages causing the need for aid. We acknowledge these causes and do not see why a public defender system is any less able to attend to them than the duty solicitor or offenders legal aid schemes. Indeed a centralized office with support staff may be in a better position to consciously identify and combat these disadvantages than is possible in the traditionally structured private law office.

6. The independence of the criminal bar must be preserved and a public defender system is incompatible with this (pp. 141-142). This is a very important consideration and we agree that a public defender must actually be and be seen to be independent of government, the police and the courts. We believe the necessary degree of independence can be attained by not having public defenders employed by a government department but by an independent but public commission. Other strategies can also be employed. For example, the need for independence can be built into the enabling legislation as in South Australia, and by the contacts and co-operation between the private and public bars through the mixed delivery system.

Which New Zealand centres would sustain a public defender scheme? Probably only the busier ones. The following table shows the number of offenders legal aid (o.l.a.) applications in 1980 and the expenditure on offenders legal aid and duty solicitor scheme in 1980/81 and an estimated expenditure in 1981/82 for the major courts. We do not have figures for the duty solicitor caseload.

		O.L.A. Applications	Expenditure 1980/81 o.l.a $	d.s. $	total $	Estimated expenditure 1981/82* $
Auck.	Dist Ct	2,437	115,098	59,129)	286,226	304,825
	High Ct	192	111,999	)		
Wgtn.	Dist Ct	1,131	43,151	21,426)	123,234	126,409
	High Ct	98	58,657	)		
Chch.	Dist Ct	2,078	109,471	25,069)	169,351	179,504
	High Ct	130	35,311	)		

* Estimated by applying 1980/81 proportions of o.l.a. expenditure to 1981/82 estimates, plus increasing 1980/81 d.s. expenditure by 43%.

Two Australian studies (N.S.W. Public Solicitor, n.d.; South Australian Legal Services Commission, 1980) show that at their current level of activity, the salaried service was considerably cheaper than assigning cases to private practitioners. Given that the New Zealand scene is smaller, we need to determine whether a similar system remains economically viable, and whether the available money as shown in the above table can support the setting up and maintenance of schemes in some New Zealand cities. If the available funds do not cover the initial costs, it may be that eventual savings will justify the extra capital cost.

Other Issues

There are a few remaining issues to be discussed in relation to an integrated legal aid plan for criminal proceedings. The first is complaints in the children and young persons court. Civil legal aid is obviously cumbersome in the circumstances. Despite the philosophical intent that the adversary elements of our judicial system prevail less in the children and young persons court, observations and reports lead us to conclude that the parents and/or child are still in need of independent and sound advice as they are confronted by strong opposition from the prosecution and sometimes from Social Welfare because of its institutionalized nature. Johnston (1981, p.213 and 266) reports that the majority of parents who admit complaints have not had legal advice or adequate legal advice and may not fully appreciate the possible long-term consequences of the proceedings. He quotes a Christchurch survey where only 15% of parents had legal advice other than from the duty solicitor. We suggest duty solicitors (specialist where possible) are equally essential in the childrens and young persons court as in the district court, whether for offences or complaints. The hearing of complaints take place amongst criminal prosecutions with similar hearings and the need for similar legal advice as far as the subject of the complaint is concerned. We suggest, if these circumstances continue to prevail that it is more appropriate to have the quicker, more accessible and more easily administered offenders legal aid than civil legal aid.

The call for the rationalization of our legal aid schemes has been heard from time to time over the last decade. It mostly takes the form of bringing the administration of civil legal aid, offenders legal aid and the duty solicitor scheme under one administration, and the only explicit suggestion has been from the New Zealand Law Society that the granting of criminal legal aid be administered by a body similar to the district legal aid committees which control civil legal aid (1977, p.128). The Royal Commission on the courts commented on this proposal saying there may be difficulties because of the urgency over assigning counsel in criminal cases, but thought it might be practicable to combine civil and legal aid procedures. They suggested a legal aid office in all major courts or that the "masters" they suggested for Auckland and Wellington could investigate, grant and assess contributions for legal aid. The Legal Aid Board first referred to this fragmentation in its 1973 Annual Report and raised the possibilit y of one body then. It has been a

recurring theme of theirs. Many of the lawyers in the Link survey (p.46) suggested that thought be given to integrating the criminal scheme with the civil scheme so that questions of remuneration in the criminal cases could be the responsibility of committees.

The whole rationale of this disussion paper has been the rationalization of legal aid into an integrated system. Our motives however are more wide-ranging than the above suggestions in that we see this integration necessary in order to provide more access by New Zealanders to the law and to make maximum use of the funds available for the purpose of legal aid. It is evident from what we have written we do not think a simple amalgamation of offenders legal aid into civil legal aid will achieve this. An independent body with explicit and comprehensive functions is essential. Some of our suggestions will reduce the separateness of the distinct schemes, but we feel it would be up to the Commission to decide which administrative aspects of the scheme could be combined for optimum efficiency.

One such detail is who should make the offenders legal aid decision - the judge, the registrar or some other person. Link respondents were divided on this issue. If a public defender system is instituted, this issue takes on a new complexion. Should the decision remain independent of the providers of legal aid or should it, as in Washington D.C. and South Australia, be a function of the public defender's office to determine the criteria for eligibility and to make the individual decisions? In a mixed delivery system, does the public defender make decisions in respect of assigned cases and what system operates in centres which do not have a public defender scheme to offer?

Generally, lawyers do not appreciate the scale method of payment currently applied to offenders legal aid assignments. It is considered inappropriate because it cannot accommodate the variables of time and complexity associated with individual cases. The principles inherent in the scale, however, are not dissimilar to some of the circumstances to be taken into account when solicitors charge clients in accordance with Schedule I of the New Zealand Law Society's Scale of Professional Charges e.g. the time and labour expended, the complexity of the matter or the difficulty or novelty of the questions involved, the skill, special knowledge and the responsibility required.

Where limited funds from direct government allocation are involved, a scale system is one means of budget and control of expenditure, a paramount consideration today. However, we are not wedded to this system and, in theory, approve of a fee for service basis of payment, providing there are means to ensure the legal aid rendered is of an acceptable standard and commensurate with the fees. There would also need to be sufficient funds to support such a system and this is where funds derived from a source such as interest on solicitors' trust accounts would probably be required.

In South Australia the Legal Services Commission determines the level of remuneration for assigned cases according to guidelines laid down after consultation with the Law Society. An adaptation of this system could apply if a mixed public defender and assignment service operated in New Zealand. A side benefit of competitive rates would be the healthy competition between the two arms of the service.

Finally there is the question of contributions from recipients of offenders legal aid. All respondents to the Link survey except defendants saw merit in the suggestion for two main reasons. First, it is argued that it would discourage abuse of legal aid and secondly it would allow for more flexible eligibility criteria so that deserving people with lower-middle incomes could qualify for aid. Defendants objected to the suggestion because of the standard of the legal aid service, saying they would pay for better representation if they could afford it. The revenue benefits are obvious and must be acknowledged.

In 1980 the Minister of Justice and the Department were in favour of instituting contributions on a formal basis and considered the following alternatives:

(a) a mandatory fixed payment from all recipients with the Court being empowered to waive or to make an order for additional payment in light of the known circumstances should the offender be convicted or dealt with in some other way which may be accompanied by a monetary order.

(b) a means tested contribution using support services such as the Department of Social Welfare to assess the level of contribution payable.

(c) the vesting of a discretion in the Court to order contributions of such amount as it thinks fit.

(d) the payment of all expenses over and above $10 by the State with the first $10 being payable directly to the counsel assigned.

The following points were raised in evaluation of the options, leading to a preference for option (a). Option (b) would involve the establishment of similar machinery to that used in assessing contributions under the civil legal aid scheme and a level of scrutiny generally inconsonant with the time available in criminal proceedings. A simplified version however would be necessary to allow for the eligibility flexibility as mentioned earlier. Option (a) does not provide this.

Options (c) and (d) would be the most difficult to apply equitably and (d) in particular would undoubtedly invoke criticism from the Law Society. There has been expressed judicial opposition to any proposal requiring a judge to assess an appropriate initial contribution.

It is therefore apparent that any scheme which involves an assessment of an applicant's means by the Court may prove unworkable, and indeed untenable to the judiciary, unless adequate support facilities exist to provide verification of the applicant's statements and a prescribed formula to allow administrative assessment. For this reason it was considered that the most equitable proposal would be the fixing of a mandatory contribution of say $10 to be paid by all recipients, save those who are able to show that such payment could result in substantial hardship.

Consideration must be given to the effect of any fixed contribution procedure on s.13A of the Criminal Justice Act which provides that no person may be sentenced to imprisonment unless he has been represented by counsel or been offered the opportunity of counsel or legal aid and refused or failed to apply for counsel or aid. Unless the point is clarified a refusal to pay the $10 contribution may be interpreted as not being a refusal of aid itself and therefore any resulting sanction involving incarceration could be seen as being in conflict with s.13A.

In 1980 the suggested contribution was $10. In determining this one must consider the unemployed status of most legal aid applicants and the fact that currently most offenders legal aid bills are for $19.65. Contributions make more sense in the event of increased and reasonable rates of remuneration for lawyers, so that legal aid recipients would not in fact be contributing a large proportion of the 'aid". For the sake of argument, a $10 contribution from all offenders legal aid recipients in 1980 would have netted $143,480, i.e. 15% of the expenditure.

Before contributions are introduced as normal practice, the detrimental impact this may have on the defendants in terms of access to proper legal advice and the eventual outcome of the prosecution needs to be thoroughly investigated. We repeat in this context that the possibility of imprisonment is high on the provisional list of priorities for receiving legal aid. If contributions are introduced, it is imperative that the effects as regards access to needed legal services as well as efficiency be monitored.

COMMUNITY LAW SERVICES

We believe that in the foreseeable future, community law services have an important role to play in extending legal services to New Zealanders. Our recent and only experiences in community law services were described in chapter 5. The Grey Lynn Neighbourhood Law Office is of course the major example, as it is the only fully-fledged full-time legal office catering for the current needs of a specific community. The history of the Grey Lynn Neighbourhood Law Office, as discussed previously, is an essential preliminary to understanding the development of community law services in New Zealand to date and our recommendations for future directions.

Lessons Learnt from the Grey Lynn Neighbourhood Law Office

The development of the neighbourhood law office movement in England was fraught with conceptual, political, funding and practical difficulties. Grey Lynn Neighbourhood Law Office has been no exception and has weathered many problems. We must learn from this and from the English experience. The short lesson is that such organizations must be of the community and the community must be prepared to take the idea on board and assist in both management and funding. Vested interests will inhibit community law services to the point of destruction.

The precarious funding situation and internal staffing problems of the Grey Lynn Neighbourhood Law Office brought its existence to crisis point in 1980. The New Zealand Law Society set up a special committee to investigate and make recommendations on the future of the Grey Lynn Neighbourhood Law Office and generally on the neighbourhood law office concept or any alternative. We refer to the report of this committee as the Nicholson Report.

The Nicholson Report (p.6, para. 2.7) says of lessons learned from Grey Lynn:

> Views as to the nature and extent of the lessons vary but it seems to be generally accepted that:
>
> (i) There should be more control with lay people from the community the office serves and less with the lawyers.
>
> (ii) Management should be exercised on a direct and autonomous basis by the staff members and a trust board on which the legal profession would be represented, but without a controlling interest. While defining goals and policies, however, such trust board must not be permitted to intervene in the handling of particular cases by the lawyers in their clients.
>
> (iii) The policies and objectives of the office should be subject to regular re-assessment.
>
> (iv) The staff must work as a team and maintain constant liaison and co-ordination.

Following its very thorough discussion of the Grey Lynn Neighbourhood Law Office in particular and issues related to neighbourhood law offices in general, the Nicholson Report (p.23) makes a number of recommendations, the more relevant of which are quoted here and discussed below as the matter arises:

4.1 That the Council supports the neighbourhood law office concept as one means of providing communtiy legal services in New Zealand.

4.2 The creation and operation of a neighbourhood law office within a particular area depend upon the extent and nature of unmet legal needs within that area and the desire and support for a neighbourhood law office within that area.

4.3 A body be established by the New Zealand Law Society with urgency to act in a co-ordinating role for the creation, financial assistance and general organisation and support of community legal services. If the New Zealand Law Society establishes a New Zealand Law Foundation

then such body should be part of the Foundation on a basis to be decided by the New Zealand Law Society. The body could be appropriately called the "Community Legal Services Division". If however a New Zealand Law Foundation is not established before June 1981 then the Community Legal Services Division (or Community Legal Services Foundation, as it might then appropriately be named) should be established independently as a charitable trust but with the intention of being incorporated as a division of the New Zealand Law Foundation when and if such is created.

4.4 Membership of the Community Legal Services Divison (or Foundation) be on the lines stated in para. 3.8.5. hereof, with lawyers not to constitute a majority.

4.5 Amendment be sought to the provisions of Sections 17, 19 and 23 of the Law Practitioners' Act 1955 to enable the New Zealand Law Society to grant and withdraw exemptions from those provisions.

4.6 A guidance note be issued by the New Zealand Law Society stating the basis upon which applications for exemption from the provisions of Section 17, 19 and 23 of the Law Practitioners' Act 1955 and waiver of Rules 1.3.3. and 1.2.2. will be dealt with, the conditions relating to any such exemptions and waiver and the termination of any exemptions and waiver.

4.8 A neighbourhood law office be managed by a Trust Board. This should not have a majority of lawyer members. Typically it might be composed of members appointed by the local District Law Society, the Government, the local Municipal Authority and community supporters.

4.9 A Trust Board for Grey Lynn Neighbourhood Law Office be constituted forthwith, after discussions with the existing Supervisory and Community Advisory committees as to membership and trust terms, and the effective management of the Grey Lynn Neighbourhood Law Office be transferred to that Trust Board upon its appointment, while recognising that, pending amendment to the Law Practitioners' Act as outlined above, responsibility as employer must remain with the New Zealand Law Society. The committee does not envisage however, that this temporary situation will create any new difficulties, but believes that it will go some considerable distance towards solving existing problems. The New Zealand Law Society in any event retains the ultimate sanction of being able to withdraw the waivers granted to staff employed in that office should such a serious step appear necessary and unavoidable.

4.11 The New Zealand Law Society support the continuation of the Grey Lynn Neighbourhood Law Office and continue to employ staff for that office while there are funds to do so or until the office is authorised by amendment to the Law Practitioners' Act 1955 and consequent exemption and waiver to conduct a limited practice and share costs earned by solicitors.

Since this Report, the New Zealand Law Society has created a Community Legal Services Foundation in accordance with recommendations 4.3 and 4.4. The Law Society has given $10,000 to its Law Foundation which we understand will be used for community legal services. The Law Society has sponsored the Law Practitioners Amendment Act 1981 which puts into effect recommendation 4.5. Before this Act a local law office could only operate if its solicitor was employed by the New Zealand Law Society or by other practitioners, as the Law Practitioners Act prohibits an unqualified person (which includes a community or community trust) from acting through a qualified person. The 1981 Amendment gives the New Zealand Law Society if it so desires the power to waive this prohibition if an unmet need exists (as defined by the Act) and to impose any condition to the exemption it thinks fit. The amending act is annexed to this paper.

The Department of Justice agrees that it was necessary to move away from community law offices operating via solicitor employment only. However we think a wider perspective than that offered under the 1981 legislation is necessary if community law services are to fulfil their potential in satisfying the legal needs of New Zealand.

The Need for Community Law Services

The basic notion behind community law services is to cater for the legal needs of citizens which are not otherwise being adequately dealt with, either in terms of quantity or quality. We discussed the concept and incidence of need in chapter 6 which we briefly recapitulate here. It is most important to recognize that 'unmet legal need" is a variable concept that must be defined in a local context and by the local community. The causes of unmet legal needs must also be appreciated. Experience has shown overseas and in New Zealand that it is a difficult and probably unsound exercise to make a catalogue of specific legal needs.[1] A more valuable exercise has been to discover the reasons why people do not use the legal services available and to proceed inferentially from there. It is certainly a far more complex phenomenon than lack of money to pay lawyers' fees. The part financial, physical, psychological, social & cultural factors play in preventing an individual asserting or defending a legal right is acknowledged by numerous commissions, committees, lawyers and academics.[2] A brief list of recognized factors are:

1. Nicholson, 1980, p.8; LAG, 1980, p.6, p.24-26; Lord Chancellor's Advisory Committee on Legal Aid, 1976/77, p.81.

2. Royal Commission on Legal Services, 1979, p.45; Royal Commission on Legal Services in Scotland, 1980, p.20; Commission of Inquiry into Poverty, 1975, p.145ff; Davies, PAD and Ludbrooke, R, 1978; Nicholson, 1980, p.8; Zemans, 1979, p.5ff; Lord Chancellors' Advisory Committee on Legal Aid, 1976/77, p.81.

(i) cannot afford to pay lawyers' fees;

(ii) lawyers located in inconvenient places - either concentrated in commercial centres where clients neither work nor live or difficulties encountered in rural area;

(iii) inconvenience of ordinary office hours;

(iv) unavailability of lawyers because work is uneconomic or lack of expertise;

(v) lack of knowledge how to find appropriate lawyer;

(vi) language, cultural barriers;

(vii) lack of confidence, inhibitions in approaching professional people, discomfort with the trappings of professional offices;

(viii) all the above presuppose the person realizes he has a problem with legal content or potential legal remedy and that pursuing these will be of benefit.

Civil legal aid and offenders legal aid are directed towards remedying (i) above, though there is still considerable doubt as to whether they can achieve this adequately. Community law services are an invaluable potential source of assistance in overcoming the remaining obstacles and the Department of Justice welcomes them as an addition to the strategies for overcoming unmet legal needs. Given the limited government resources available for legal aid we wish to encourage community enterprises.

Although we would like to see a formal evaluation of the Grey Lynn Neighbourhood Law Office to see how effectively it caters for local legal needs, there is no doubt on the prima facie evidence of its popularity that it is providing a needed service. It is fair to say that the need for and benefits of such services have been established and are accepted by government and by the Law Society though some of the profession still find the concept unacceptable (Nicholson, 1980, p.7). The Legal Aid Board (1980, p.4) also acknowledges the need for services beyond traditional legal services and recognized legal aid. Their existence has certainly been vindicated in Britain as indicated in the following quotes:

> "The impact of law centres has been out of all proprotion to their size, to the number of lawyers who work in them and to the amount of work it is possible for them to undertake. The volume of work they have attracted has shown how deep is the need they are attempting to meet" (Royal Commission on Legal Services, 1979, p.81).
>
> "Law Centres are now seen as an essential part of legal services" (Lord Chancellor's Advisory Committee on Legal Aid, 19979-80, p.104).

Finally, a compelling reason for encouraging alternative community law services from government's point of view is that public funds for legal aid are relatively small and definitely limited and cannot be relied upon to finance all the strategies designed to combat the growing incidence and/or, awareness of unmet legal needs.

Principles for the Organization of Community Law Services

There are three principles on which we base our plan for ensuring community law services are best organized to meet the need:

(i) local responsiveness to need

(ii) local control

(iii) flexibility

Obviously the three notions are very much interrelated.

Local Need & Local Response

We endorse the view of the Nicholson Report:

> "In our view appropriate community legal services should reflect the varying needs of different communities and the desire and support within a community for a particular community legal service or services".
> (Nicholson, 1980, p.15)

Given the variable nature of unmet needs, in time and place, any scheme or legislation would defeat its purpose if unmet legal needs was given specific or restrictive definition. We are, therefore, pleased that s.2(6) of the Law Practitioners Amendment Act 1981 was altered after Statutes Revision Committee consideration so that "unmet legal need" is not defined exclusively in terms of uneconomic work or the absence of solicitors in the area. In the eventuality of our later suggestions about the establishment of community law services, which would

probably supercede this legislation, not being adopted, we note here that we think the Act should acknowledge unmet legal needs, but we wonder if s.2(6) serves any useful purpose and hope it does not have a limiting effect on the scope of the legislation.

We note briefly that trends overseas have been to keep the definition of unmet legal need sufficiently flexible so it can adapt to local circumstances. For example, in its Practice Note, the Law Society (England) does not mention unmet needs but recognizes the importance of full and adequate legal services for the public and that the traditional mode of providing legal services therefore needs supplementing. However it does stipulate some prohibited classes of work (Law Society Gazette, 1977); the Royal Commission on Legal Services considers the purpose of a community law centre is "to bring legal advice and assistance within reach of all those in its area who otherwise would not receive them" (1979, p.83); the Royal Commission on Legal Services in Scotland says law centres should concentrate "on whatever areas of law are not adequately catered for locally by solicitors" (1980, p.74,); the Legal Services Commission Act 1977 of South Australia states that legal assistance should be available to "disadvantaged persons".

Local Control

If a community law office is to have real effect in, first, appreciating and secondly responding to local needs, then it is necessary that the real control of the office be in local hands. The Department of Justice has argued strongly for this from the very earliest discussions. Its view has been justified by the Nicholson Report which came unequivocally to this conclusion after its examination of Grey Lynn Neighbourhood Law Office (1980, p.17):

> With hindsight and in the light of experience of the pilot scheme it seems clear that ... management of the Grey Lynn NLO should have proceeded upon the basis that the Law Society should not have the majority say in management.

This has been accepted by the New Zealand Law Society who put it into effect when they disbanded the Law Society dominated supervisory committee and established an interim committee which does not have a majority of lawyers.

On examination it is evident that there are two levels of control :

(a) control as regards by whom and how a neighbourhood law office is established.

(b) control as regards the administration and management of an neighbourhood law office.

If community control is to be a reality, it must be at both levels. There is no point in ensuring local control of administration, if the legal profession has an overruling power to determine the existence and continuance of an office at a prior and higher level.

Flexibility

Although we wish community law services to be as flexible as possible in order to encourage imaginative use of resources to meet local needs, we must also consider what controls are necessary for such enterprises to ensure that the public is receiving advice and performance of an acceptable standard. Controls in relation to professional standards, establishment of community law services and operation of such services are discussed in turn.

Professional Standards

Legal services rendered by a community law service must maintain the same professional standards required of any legal practice in accordance with the Law Practitioners Act 1955. The solicitor's independence in relation to his client must be safeguarded. We doubt if anyone quarrels with this. The New Zealand Law Society feels this is essential and it is endorsed by Nicholson (1980, p.7 and p.15) and the Royal Commission on Legal Services (1979, p.88).

Certain provisions of the Act, designed to ensure standards are maintained, exclude the special character of community law services. The 1981 Amendment is but one way of circumventing the prohibitions of ss. 17, 19 and 20 while keeping community law offices within acceptable professional standards and without them gaining undue advantages over private practice. Similar considerations also attach to rule 1.2.2 of the Code of Ethics which restricts advertising.

The Establishment of Community Law Services

The relevant questions are who shall say a specific community law service can be established and under what conditions.

Four options are discussed here:

(i) individual Law Society exemptions and waiver

(ii) standard Law Society waiver

(iii) explicit statutory authority to operate such services

(iv) approval by some other body.

(i) This is the Law Society's position and is embodied in the Law Practitioners Amendment Act 1981. In effect the Law Society may exempt an intended law office in an area with unmet needs from ss 17, 19 and 20 of the principal Act and attach any conditions to the exemption that it thinks fit. We have already commented on the doubtful usefulness of the definition of "unmet legal need" in s.2(6) and suggest that the specific examples cited in the legislation do not recognize the complexity of unmet needs.

The Law Society is adamant (letter to Minister of Justice, 28 May 1981) that it have the ability to stipulate which areas of work law offices will or will not do and this has been provided for in s.2(4). Conditions as in s.2(4) could also relate to administrative structure, the role and identity of trustees, the identity of staff, fees from clients, the role of educative, preventive and groups causes, use of paralegals and any other aspect of operating an office. It should be noted that the Nicholson Report (1980, p.24) and the Law Society (Letter to Minister of Justice, 31 March 1981) also think they should have the right to revoke exemptions if conditions are not fulfilled.

We do not favour this means of control of establishment as it does not guarantee local responsiveness or control. In fact it merely moves the element of Law Society control back one step from the immediate operational level. This option was originally the position in England, but proved to be so fraught with difficulties [1] that it gave rise to the second.

(ii) The Royal Commission on Legal Services [England] (1979, p.89) recommended that individual waivers should not be necessary and that a general waiver should be agreed upon which would apply to all lawyers working in community law centres.

The current situation in England is a compromise between this and the previous alternative. After lengthy discussions, the English Law Society issued in 1977 an elaborate practice note which has the effect of a standard waiver. Amongst other things it recommends preliminary discussion between all interested parties; stipulates prohibited classes of work for salaried lawyers (with excepting circumstances) in order to avoid duplication of private practice; can attach conditions in certain circumstances; can revoke a waiver if the classes of work restriction is breached; provides that an aggrieved applicant can refer the matter to the Lord Chancellor to see if agreement can be reached. The note is protective of the private profession but also recognizes that traditional methods of legal services are inadequate and need supplementing by law centres. Although this is less arbitrary than the proposed individual waiver system, it still does not satisfy the principles of local responsiveness and control.

1 "The Law Society has often found itself with conflicting roles. It is the professional body, one of whose jobs is to promote what it sees to be the interests of its members. But it is also responsible for the maintenance of professional rules - a relaxation of which (in respect of advertising and the sharing of fees with non-solicitors) is necessary to set up a law centre. This conflict has taken a number of forms: e.g. a refusal to grant the necesaary waivers from the professional Practice Rules to enable a law centre to be set up (as in Hillingdon 1976), the blocking of attempts to try experimental legal aid lists (July 1978), refusal to grant a specific waiver of advertising rules to an experimental self-help scheme in Bristol (1977-1980) and the continued resistance by the Law Society to a general relaxation of the advertising rules, pressure for which has been exerted in the main by legal aid practitioners who want to tell the public that lawyers are available to help with problems other than divorce, crime and property. It is a conflict which has been resolved in various ways - in the examples we have given, usually in what the Society sees as the interests of the majority of the profession". (LAG, 1980, p.10).

(iii) In Australia the centralized but independent responsibility for legal assistance has been formalized in the Commonwealth Legal Services Commission and state Legal Services Commissions. South Australia provides an example. Its Legal Services Commission Act deems the Commission to be responsible for all legal assistance in very flexible terms. In fact, most assistance is provided through their own employed solicitors in their own offices or by referring work to private practitioners. It does however, at its own discretion, grant funds and assistance to other agencies offering legal services. In the New Zealand context it is considered that this option denies the opportunities for local responsiveness. It does however have the important attribute of being independent of the political pressures of government and of the vested interests of the Law Society.

(iv) The Royal Commission on Legal Services in Scotland recommended that a Legal Services Commission be established, one of whose function would be to experiment with the best use of Law Centres in Scotland (1980, p.74). After considering central government, local government and the Law Society they agreed that "a central authority could best exercise strategic responsibility for the funding, oversight and development of publicly-funded advice services" (p.78). It would not provide direct services itself. The Law Society was rejected as the authority because it would be put "in an invidious position in so far as their responsibilities towards their members and their duties towards the public interest could come into conflict" (p.77). This seems an honest appraisal of the elaborate practice note of the English Law Society. The Lord Chancellor's Advisory Committee on Legal Aid endorsed these views about conflicts (citing, for example, questions as to the level of remuneration from public funds and whether services should be provided by private practitioners or salaried lawyers in law centres) and suggested at that time that the Lord Chancellor provide the needed supervision (1976-77, p.100-101).

Our concern is to foster a wide yet integrated legal assistance plan and this must lead us to recognize that the Law Society does have the interests of its members to protect and that this may not be consistent with the widest and most imaginative development of alternative legal services. We are aware that within the Law

Society the Grey Lynn NLO "has provoked sharp differences of opinion as to the scope, worth and future of such offices" and "that the general membership of [the Law] Society has not been wholeheartedly in favour of the NLO experiment" (NZLS to Minister of Justice, 9 December 1980 and 28 May 1981). Therefore control at this level must be independent of the profession, as it should be from the political pressures of government. For these reasons options (i) and (ii) above are not supported.

Given our principles of local control and responsiveness, we fear the Australian situation, if transplanted to New Zealand, would lose the local flavour we wish to see grow, especially if management is not devolved back to local organizations. We therefore reject option (iii).

We endorse the fourth model as being appropriate for New Zealand. It allows for local response, control and flexibility, allowing community services to adapt from place to place and from time to time. It is evident that our proposed Legal Services Commission fits the bill. It would be the Commission's responsibility to ensure that each enterprise is properly consitituted before being given the authority to operate. Although independent of government and the legal profession, it can be charged with consulting with all interested parties. It would also have the wider function of integrating community law services with other legal aid programmes into a total strategy. The Law Society should of course retain its rights in respect of the professional conduct of lawyers who are employed by any community law office and have rights of access for audit of trust accounts.

In the event that the proposed Legal Services Commission or similar body is not instituted in the near future, it is our view that consideration should be given to transferring the powers conferred on the Law Society in the Legal Practitioners Amendment Act 1981 to a more independent caretaker body.

Four suggestion are:

(i) The Solicitor-General after consultation with the Law Society has been suggested by the Law Society. We do not see this administrative function as appropriate to the office of Solicitor-General. He would be accountable to the Attorney-General, and therefore independence could not be guaranteed.

(ii) The District or High Court - although these are obvious seats of independence, such administrative decisions are not really appropriate to a court;

(iii) The Law Society's Law Foundation - the proposed functions of this Foundation seem appropriate, but it is essentially a Law Society institution and therefore does not dispel the major disadvantage of the Law Society's potential conflict of interest. The same arguments apply to the Law Society's Foundation as to the Law Society itself.

(iv) The Legal Aid Board - the disadvantage of this option is that its relatively narrow terms of reference may not be conducive to the philosophy of community law services. However, in the interim, we support this option over the previous two, the main reason being that if an independent legal services commission is established, the Legal Aid Board would probably be absorbed into it. The procedure requires more detailed consideration but we envisage that the Law Society would have a right of appearance when any application was being considered. The decision of the Board would be final. The Board would have the power of revocation.

<u>The Management of Community Law Services</u>

There is no disagreement that the management of a community law office or service should be in the hands of the local community. The Department of Justice has always maintained this and the Law Society and Nicholson Report came to this conclusion following their experience in Grey Lynn. In Britain the Scottish Royal Commission also recommended this. The English one however suggested that the real power be removed from local organizations to a central agency. This recommendation has caused an avalanche of reaction, including the Lord Chancellor's Advisory Committee on Legal Aid who said:

> There is however, one major matter affecting law centres on which we feel obliged to record our dissent from the conclusions of the Benson Commission. The Commission recommended that law centres should be managed by a central body and that the present local management committees should have only an advisory role. We believe that that would be a retrograde step. In our view one of the main reasons for the success of law centres has been their responsiveness to the needs of the areas they serve. That responsiveness is secured by the fact that their work is directed by management committees composed largely of members of the local community. We doubt whether members of those committees would be prepared to give up so much of their time, or if the close links between law centres and the communities they serve could be preserved, if central control replaced local control. (1979/80, p.103)

In New Zealand the Law Society would like to have a representative on the local trust board. We see no objection to this, but if there is an independent commission, it should be left to its discretion to approve a trust which may be properly and acceptably constituted without a Law Society representative or a lawyer in his/her personal capacity.

The Nicholson Report recommended that:

> Management should be exercised on a direct and autonomous basis by the staff members and a trust board on which the legal profession would be represented, but without a controlling interest. While defining goals and policies, however, such trust board must not be permitted to intervene in the handling of particular cases by the lawyers for their clients. (1980, p.6)

One of the great assets of this local administration is their position for responding to changing needs in the community and also for capitalizing on resources (funds, accommodation, personnel, volunteers, associated social services, etc) within the community.

Once a community law service is properly constituted and depending on the detail of that constitution, the sorts of things that should be left to the controlling body are selection of staff, use of paralegals, parameters of service in terms of defining eligibility of client or areas of work or type of approach (case vs group), role of preventive and educational services, charging fees or not, control of offices. All these matters should quite properly be left to the controlling body, but within these policy parameters, the professional independence of the lawyer in respect to clients must be preserved.

Promotion of community law services is a necessary part of their operation, and this matter needs negotiation with the Law Society in relation to its Code of Ethics Rule 1.2.2 so that community law services can carry out proper advertising.

Paralegals and Lay Advisers

Lay advisers have been introduced in the preceding discussion, particularly in relation to public defender schemes. The real forte of paralegals, however, is with community legal services. The issue is not so much whether lay advisers should exist, but in which circumstances and with what controls. New Zealand already has some examples in CABx advisers and in law students operating community law centres.

The role of non-lawyers is accepted overseas as an inexpensive supplement to professional services, particularly in systems which stress the preventive role of legal aid and so encourage people to obtain advice before legal problems arise. (Royal Commission on Legal Services in Scotland, 1980, p.74; Armstrong S, 1980a, p.205).

The South Australian Legal Services Commission has developed the role of interviewer and this is considered an important aspect of their service. An interviewer will see everyone who seeks advice free. The interviewer either gives advice, counsels, refers to another agency or refers the case to their own staff lawyer. Isolating the particular legal point for the legal staff is one of their skills and they can afford to spend more time with clients who require sympathetic advice. On top of the advantages in respect of time and cost savings, they can be an invaluable contact with and source of information about the community.

Other roles for paralegals are the investigating role mentioned in relation to public defenders and the more controversial one of representation in tribunal cases (Lord Chancellor's Advisory Committee on Legal Aid, 1973-74, p.50; Royal Commission on Legal Services, 1979, p.16ff; Royal Commission on Legal Services in Scotland, 1980, p.72).

Adequate training of lay advisers is essential if they are to contribute to legal services in a reliable and useful manner. Susan Armstrong (1980a, p.206-7) is of the opinion that more than on-the-job training is required and the South Australian Legal Services Commission has instituted a training programme.

In the case of community law services, it should be the responsibility of the controlling board with input from the legally qualified staff to monitor the advice given by its lay advisers. In advice services that are more general rather than legal, such as CABx, the best avenue of control is through training programmes, and by provision of convenient and relevant resource materials.

One of the functions of the Legal Services Commission could well be to co-ordinate or advise on training of lay advisers.

Funding

At the moment funds for community law services are not readily available from government nor the Law Society. Grey Lynn Neighbourhood Law Office has been surviving on donations - notably from Auckland City Council and private practitioners, sundry foundations, missions, trusts and businesses - and legal aid payments. To see it through to full community funding, Government gave it a once only transitional grant of $6,500 in October 1981.

The trend in Britain has been towards central government funding of law centres. The Lord Chancellor's Advisory Committee on Legal Aid recommended to the Royal Commission on Legal Services that law centres should be funded primarily by central government. Their reason for this conclusion was the difficulties which might arise, and have since occurred, from local authority initiation of, and participation in, the funding of law centres (1977, p.94-103; 1979/80, p.103). The Royal Commission reached a similar conclusion (1979, p.90,91). The Royal Commission on Legal Services in Scotland also recommended that central government funds be allotted to law centres (1980, p.78). In 1979 the Lord Chancellor announced that existing funds would be made available both to support existing law centres and to establish new ones (Royal Commission on Legal Services, 1979, p.90).

In 1979/80 the English government contributed funds to 20 law centres to the tune of 800,804 pounds. This was 18% increase over 1978/79. Central government funding in England derives from two sources: directly from the Lord Chancellor's Department and through the Urban Programme of the Deparment of the Environment. Under the latter, the local authority which sponsors the project recovers 75% of the cost from the Department.

As regards public funding of community legal services in New Zealand, we see this as a responsibility of the Legal Services Commission. It would be left to the Commission's discretion what proportion of its total funds should be allocated to these community services, in the light of its stated priorities and strategy for achieving optimum legal assistance. The funds would be protected from political pressures and from vested interests of the profession.

If funds are available to specific services from specific donors, then this is surely an agreement between the two as regards conditions as long as they abide by the constitution (having been approved by the Commission) and the Law Practitioners Act. The Law Society could well come into this category if it contributes funds.

CONCLUSION

The purpose of this paper has been to demonstrate how New Zealand's legal aid performs in practice and to identify its shortcomings. In summary it can be said that legal aid is too narrowly drawn and does not have a sufficiently positive approach to making the law available to citizens. Unfortunately we also have to conclude that the quality of criminal legal aid leaves room for improvement.

Having demonstrated this we make proposals which we think will provide a basis for a long-term and flexible legal access strategy. Our intention is to approach legal aid in a positive and imaginative way, one that stresses that the law should be available for all to enjoy. Three waves have been diagnosed in legal aid's history. The first was the "legal aid for the poor" wave; the second was to represent group and collective interests. Both have been successful in their time and continue to benefit society, however there is growing recognition that the broader concept of "access to justice" has greater potential. "Access to justice" introduces new procedures and questions time honoured institutions. There is a risk that less formal procedures and inexpensive personnel will produce an inferior product. We are not prepared to countenance this possibility and any changes to the system must guard against it. We want more accessible law, not poorer law.

Some of our proposals we have asserted strongly; others are presented as alternatives to stimulate alternative ideas; we certainly hope to promote discussion.

Annexure

LAW PRACTITIONERS AMENDMENT

ANALYSIS

An Act to amend the Law Practitioners Act 1955 in respect of the powers of the New Zealand Law Society in relation to law offices and legal advice bureaux in certain localities

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Law Practitioners Amendment Act 1981, and shall be read together with and deemed part of the Law Practitioners Act 1955 (hereinafter referred to as the principal Act).

2. Functions and powers of Society—Section 114 of the principal Act (as amended by section 7 of the Law Practitioners Amendment Act 1975) is hereby amended by adding the following subsections:

"(3) The Council may from time to time, in writing, grant to any body of persons operating or intending to operate a law office or legal advice bureau in any locality in which there is or (but for the office or bureau) would be an unmet

legal need, or to any solicitor employed by any such body in any such office or bureau, exemption from all or any of the provisions of sections 17, 19, and 20 of this Act; and every such exemption shall have effect according to its tenor.

"(4) The Society may, after consultation with the body of persons concerned, impose in respect of any such exemption such conditions as the Society thinks fit, including any condition designed to ensure that, in general, the law office or legal advice bureau does not undertake any class of legal work in respect of which there is no unmet legal need in that locality.

"(5) Part VI of this Act (which relates to the Solicitors' Fidelity Guarantee Fund) shall apply, with all necessary modifications, to any office or bureau to which this section applies as if the operation of the office or bureau were the carrying on by a solicitor of the practice of his profession on his own account without partners; and for the purposes of that Part, as applied by this subsection, all fees and levies shall be payable in the same manner and at the same times as they are payable by solicitors.

"(6) In this section the expression 'unmet legal need', in relation to any locality, includes legal work required by residents of the locality which, because of the uneconomic nature of the work or the unavailability of practitioners willing to undertake the work, is not being adequately undertaken by practitioners in the ordinary course of their practice."

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